

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO Court Address: 7325 South Potomac Street, Englewood, CO 80112-4053	COURT USE ONLY
MERCHANTS MORTGAGE & TRUST CORPORATION, LLC, a Colorado limited liability company doing business as MERCHANTS MORTGAGE & TRUST CORPORATION, Plaintiff, v. D & G GOLF, LLC, a Colorado limited liability company and THE ESTATE OF RICHARD JORGENSEN, Defendants.	
	Case Number: <i>08cv1672</i> Division <i>302</i> Courtroom
ORDER FOR APPOINTMENT OF RECEIVER	

THIS MATTER having come before the Court on Plaintiff's Verified *Ex Parte* Motion for Immediate Appointment of Receiver ("**Motion**"), and the Court having considered said Motion, the Plaintiff's Verified Complaint for Appointment of Receiver ("**Complaint**"), and being otherwise fully informed in the premises, HEREBY FINDS:

1. This Court has jurisdiction over the subject matter of this action and venue is proper in this county.

2. Plaintiff (hereinafter "**Merchants**") is the holder of a Promissory Note executed by Defendant D&G Golf, LLC ("**D&G**") and Richard Jorgensen ("**Jorgensen**") as evidenced by that certain Promissory Note dated October 12, 2005, in the original principal amount of \$2,855,000.00 ("**Note**"), which Note was modified by that certain First Modification of Note dated as of October 6, 2006 and which Note was further modified by that certain Second Modification of Note dated as of October 31, 2007 and pursuant to which modification the face amount of the Note was increased to be \$3,275,000. The loan was further extended by a letter agreement dated May 9, 2008. Copies of the Note and the modifications thereto are attached to the Complaint as and are incorporated herein by reference as Exhibit 2.

3. The Note is secured by a Deed of Trust from D&G as evidenced by that certain Deed of Trust ("**Deed of Trust**") dated as of October 12, 2005 and recorded on October 13, 2005

as Reception No. B5154212 in the records of the Arapahoe County, Colorado Clerk and Recorder, which Deed of Trust was modified by that certain First Modification of Deed of Trust dated as of October 6, 2006 and recorded October 20, 2006 as Reception No. B6150924 in the records of the Arapahoe County, Colorado Clerk and Recorder, and which Deed of Trust was further modified by that certain Second Modification of Deed of Trust dated as of October 31, 2007 and recorded December 5, 2007 as Reception No. B7152825 in the records of the Arapahoe County, Colorado Clerk and Recorder. Copies of the Deed of Trust and modifications thereto are attached to the Complaint as and are incorporated herein by reference as Exhibit 3.

4. The Deed of Trust encumbers certain real property located in Arapahoe County, Colorado commonly known as 13521-13693 East Iliff Avenue, Aurora, CO 80014 and more fully described as set forth in Exhibit A-1 of the Deed of Trust ("**Real Property**").

5. The Note is further secured by a blanket lien on all personal property located on or used at or in connection with the Real Property ("**Personal Property**") as evidenced by a Security Agreement from D&G and Jorgensen ("**Security Agreement**"), which security interest was perfected by that certain UCC-1 Financing Statement filed with the Colorado Secretary of State on October 13, 2005 as File No. 20052105211 ("**UCC Financing Statement**"). Copies of the Security Agreement and UCC Financing Statement are attached to the Complaint as and are incorporated herein by reference as Exhibit 4. The Real Property and the Personal Property shall be collectively referred to hereafter as the "**Property**".

6. Merchants previously agreed to forbear from exercising any rights or remedies to which it may be entitled pursuant to several Forbearance Agreements dated respectively as of: January 31, 2007, March 1, 2007, May 1, 2007, June 19, 2007, June 1, 2008, and July 1, 2008. Copies of each of the forbearance agreements are attached to the Complaint as and are incorporated herein by reference as Exhibit 5.

7. The Note became due and payable in full on June 1, 2008. Pursuant to the July 2008 Forbearance Agreement, Merchants agreed not to take any action as a result of the failure to pay the Note in full at its maturity provided certain conditions were met. To date, those conditions had been met, but on July 30, 2008, Jorgensen committed suicide and it appears the Property is in imminent danger, particularly given the extraordinarily hot weather currently affecting the Denver metropolitan area. It appears the Property has been abandoned by Defendants, as set forth in paragraph 4 of the Motion, above. In addition, Jorgensen's death is a basis for Merchants to accelerate the Note pursuant to paragraph 18 of the Deed of Trust and Merchants has given notice of its acceleration of the Note and demand for payment of all amounts due it in its Complaint in this matter.

8. The Deed of Trust assigns to Merchants the rents of the Property, subject to the right of the owner thereof to collect same prior to such time as Merchants accelerates the amounts owed to Merchants by declaring same to be immediately due and payable in full or upon abandonment of the Property.

9. Merchants is entitled to appointment of a receiver as a matter of right without regard to the solvency or insolvency of Defendants and without regard to the value of the

Property, which receiver may be appointed by this Court upon *ex parte* application and without notice, notice having been expressly waived, as provided in paragraph 20 of the Deed of Trust.

10. Merchants is entitled to appointment of a receiver as a matter of right without regard to the solvency or insolvency of Defendants and without regard to the value of the Property, which receiver may be appointed by this Court upon *ex parte* application and without notice, notice having been expressly waived, as provided in paragraph 20 of the Deed of Trust, which states:

Lender ... shall be entitled to a receiver for the Property after [a]cceleration ... and shall also be so entitled during the time covered by foreclosure proceedings and the period of redemption, if any; and shall be entitled thereto as a matter of right without regard to the solvency or insolvency of [Defendant] ... and without regard to the value thereof. *Such receiver may be appointed by any Court of competent jurisdiction upon ex parte application and without notice – notice being hereby expressly waived.*

(Emphasis added)

11. Colorado law permits the appointment of a receiver based on the agreement of the parties. C.R.S. § 38-38-602(3); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Denver Hotel Ass'n*, 830 P.2d 1138 (Colo.App.1992)(trial court did not abuse its discretion in appointing a receiver *ex parte* where based on contract, bank was entitled to such appointment in the event of default).

12. The parties' agreement, as evidenced by the terms of the Deed of Trust is that Merchants is contractually entitled to the appointment of a receiver without notice.

13. Merchants is, therefore entitled to immediate *ex parte* appointment of a receiver.

14. Cordes. & Co is qualified to act as receiver in this action.

15. A bond not greater than \$25,000 is sufficient and Edward B. Cordes, principal of Cordes & Co. shall be permitted to act as surety in providing such bond.

THEREFORE, IT IS HEREBY ORDERED that the Motion is GRANTED. Cordes & Co. is qualified to serve as receiver and is hereby APPOINTED as receiver for the Property and all related collateral described in the Deed of Trust ("**Receiver**").

IT IS FURTHER ORDERED that:

A. The Receiver shall file with the Court an Oath of Receiver and post with the Court a Surety Bond ("**Bond**") from such surety as the Court may approve, in the amount of \$25,000 to insure proper and faithful performance of his duties and Edward B. Cordes, principal of Cordes & Co. shall be permitted to act as surety in providing such bond;

B. Pursuant to C.R.C.P. 66(d)(3), Receiver shall promptly provide written notice of this action and this Order to the Defendants and others in possession of the Property;

C. Receiver shall forthwith file its Oath and post the Bond.

D. The Receiver is directed and empowered to do the following:

i. Take possession and control of the Property;

ii. Obtain all records concerning the Property, regardless of where such records are located, from Defendants or their agents;

iii. Operate, manage and protect the Property, including the leasing of the Property, in the ordinary course of business;

iv. Collect and receive any and all rents, issues, profits, income, deposits and revenues due and owing and to become due and owing of and from the Property, and to take charge of all bank accounts, accounts, records, contracts and leases, regardless of where such are located, including, among other things, cash deposits received in association with the rental of any space of the buildings and the collateral thereon;

v. Perform ordinary and necessary maintenance and maintain normal operation of the Property, including deferred maintenance during the term of the Receivership and to enter into necessary contracts for such maintenance, provided however that for any single expense greater than \$1,000 Receiver shall obtain Merchants' prior approval;

vi. With prior approval of the Court upon ten (10) days notice to all parties of record in this case, such approval to be deemed granted without further Court order if no notice of objection is filed with the Court and served on all parties entering an appearance in this action within such ten-day period, to enter into, ratify, confirm, or renegotiate leases, contracts, or other agreements relating to the operation and management of the Property and to terminate such leases, contracts, or other agreements;

vii. To notify any and all insurers under insurance policies affecting the Property of the pendency of these proceedings, and that any proceeds paid under any such insurance policies shall be paid to the Receiver until such time as the said insurance carriers are advised to the contrary by this Court or until they receive a certificate issued by the Clerk of this Court evidencing dismissal of this action;

viii. To apply for, obtain, and renew as necessary all licenses and permits required for the operation of the Property;

ix. With the prior approval of the Court upon ten (10) days notice to all parties of record in this case, such approval to be deemed granted without further Court order if no notice of objection is filed with the Court and served on all parties entering an appearance in this action within such ten-day period, to file and maintain legal

proceedings to protect the Property, pursue claims relating to the operation of the Property and enforcement of this Court's Order Appointing Receiver, including, without limitation, actions to collect amounts due to D&G or Heather Ridge Country Club, and if Receiver does so elect and, in its sole discretion, be added or substituted in any legal proceedings already commenced which affect the Property, *provided, however*, that if the need to file or maintain legal proceedings arises under exigent circumstances, notice shall be given only as required by the Court and the request to determine the appropriate notice may be made by the Receiver *ex parte*;

x. Employ and pay fees, salaries and wages of personnel, consultants, attorneys (who shall enter an appearance in the matter forthwith), accountants and other full or part-time employees as may be reasonably necessary for the efficient operation and management of the Property in accordance with Paragraph (xiii) below;

xi. To the extent of funds available, establish reserve funds for maintenance and insurance or other purposes reasonably necessary for the operation of the Property as directed by this Court and in accordance with Paragraph (xiii) below;

xii. To incur indebtedness to the extent required to operate and maintain the Property, perform deferred maintenance and repair, and secure such indebtedness by granting a lien on the Property which is prior and superior to any lien other than the liens set forth in the Deed of Trust in favor of Merchants and government tax liens having priority by law over all consensual liens and pay the same in accordance with Paragraph (xiii) below. Any debts or liabilities or borrowings, other than debts or liabilities incurred in the ordinary course of business and on ordinary and customary trade credit terms for similar properties as the Property in the Denver metropolitan area, incurred by the Receiver in the course of his operation and management of the Property shall be evidenced by a Receiver's Certificate, which shall bear interest at the same rate as is presently accruing on the Deed of Trust and which shall be a lien of the same priority as the Deed of Trust on the Property and a preference claim upon the Property. Any such debts and liabilities, whether in the Receiver's name or in the name of the Property, shall be the debts and obligations of the Receivership estate only and not of the Receiver in his proprietary capacity provided however that Merchants shall be permitted to advance funds to the Receiver as provided in the Deed of Trust which funds shall be added to the debt evidenced by the Note and Deed of Trust;

xiii. Apply the revenues and income collected by the Receiver from the Property in connection with its operation and management of the Property to the following:

(a) **FIRST**, to the fees of the Receiver and of any property manager company as set forth in this Order;

(b) **SECOND**, to the out-of-pocket expenses of the Receiver;

(c) **THIRD**, to the necessary and reasonable costs of maintaining and preserving the Property, including costs of deferred maintenance on the Property to the extent permitted by the Court;

(d) **FOURTH**, to the payment of the indebtedness secured by the loan documents; and

(e) **FIFTH**, to a fund to be held by the Receiver in a federally insured, interest-bearing account pending further order of this Court.

The Receiver's payment to Merchants on account of the loan documents shall not constitute a cure of defaults thereunder.

xiv. To account to this Court for all sums received and expenditures made with regard to the Property under this Order, and file monthly reports to this Court and to serve a copy of such monthly reports on any person entering an appearance in this action.

IT IS FURTHER ORDERED that the Receiver's compensation for services under this Order shall be for (a) a monthly fee for the first month of \$12,000 and (b) a monthly fee thereafter of \$4,000 and (c) reimbursement of out of pocket expenses. Extra-ordinary court time (and the time related thereto) is not included, but ordinary reporting services are included in such fees. Fees related to any on-site manager are not included in the Cordes & Co. monthly fees ordered above. The Receiver's compensation and expenses shall be payable monthly. When the Receiver files his final report and motion for discharge as set forth below, the Receiver shall file with this Court a fee application for final approval of the fees paid to the Receiver during the pendency of the receivership.

IT IS FURTHER ORDERED that the Defendants, and all persons in active concert and participation with Defendants, including representatives, employees, agents, attorneys, managers, partners, accountants and banks, immediately surrender the Property to the Receiver, together with any and all rental payments, lease payments, accounts receivable, security deposits, trust accounts, bank accounts, financial records, payroll records, contracts for outside services and consultants, certificates and licenses, records, contracts, leases, rent rolls, fixtures, inventory, supplies, furniture and equipment used or associated therewith presently in their possession or control, and to continue to deliver the same immediately to the Receiver, to explain to the Receiver all books, rent rolls, and other records relating to the operation, maintenance and management of the Property, and to permit the Receiver to carry out his duties hereunder without interference of any kind.

IT IS FURTHER ORDERED that the Sheriff of Arapahoe County is authorized to enter upon the Property and place such force as is necessary to insure that Defendants surrender the Property and that Receiver is able to take possession of the Property.

IT IS FURTHER ORDERED that the Defendants and all persons in active concert and participation with Defendants, including representatives, employees, agents, attorneys, managers, partners, accountants and banks are hereby enjoined from:

a. Collecting any revenue and income from the Property, or withdrawing funds from any bank or other depository institution relating to the Property;

b. Disbursing or otherwise disposing of any funds in their possession which are revenue or income from the Property;

c. Terminating, or causing to be terminated, any license, permit, lease, contract, or agreement relating to the Property or the operation of any of the businesses on such Property; and

d. Otherwise interfering with the operation and management of the Property or the Receiver's discharge of his duties.

DONE AND SIGNED IN OPEN COURT this 1ST day of AUGUST, 2008.

BY THE COURT:



District Court Judge

DIST. CT. JUDGE, Div. 204