UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ALYSSON MILLS, in her capacity as the Receiver for Arthur Lamar Adams and Madison Timber Properties, LLC

Plaintiff,

versus

GARY PROPERTY MANAGEMENT, LLC,

Defendant.

CASE NO. 3:22-cv-296-CWR-

Arising out of Case No. 3:18-cv-252
Securities and Exchange Commission v. Arthur Lamar Adams, et al.

HON. CARLTON V. REEVES
DISTRICT JUDGE

HON. F. KEITH BALL
MAGISTRATE JUDGE

REBUTTAL MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Alysson Mills, in her capacity as the court-appointed receiver for Arthur Lamar Adams and Madison Timber Properties, LLC (the "Receiver"), through undersigned counsel, respectfully submits this rebuttal memorandum in further support of her motion for partial summary judgment [Docs. 26, 27] and in response to Gary Property Management, LLC's ("GPM") opposition thereto [Doc. 34].

INTRODUCTION

The Receiver moved for partial summary judgment because the circumstances surrounding the property purchased by Oxford Springs, LLC ("Oxford Springs") from GPM have so radically changed since the time of purchase that enforcing the obligations would be oppressive and inequitable. [*See* Docs. 26, 27]. In response, GPM raises no genuine issue of material fact nor case law precluding or undermining the application of the changed circumstances doctrine. Instead, it claims that the Court should not apply the doctrine because, it alleges, (1) GPM was an innocent seller; (2) the improvements are necessary to any development regardless that Oxford Springs no longer owns the property; and (3) GPM did not need to set forth an expert for damages because it will rely on the Receiver's expert report as to the cost of improvements at issue. Finally, despite only setting forth a section of "undisputed facts" and conceding that GPM accepts the Receiver's expert opinion on the cost of improvements, GPM also contradictorily asserts that "the Receiver has not met her burden to show that there are no genuine issues of material fact as to GPM's claim for damages." [Doc. 34 at 8.]

The Court should enter partial summary judgment in the Receiver's favor. None of GPM's purported bases state a cogent, rational reason as to why the Court should not apply the changed circumstances doctrine as set forth in *In re Midsouth, LLC*[1] and the related cases *Daufuskie I*[2] and *Daufuskie II*.[3] The Receiver has explained in detail how the doctrine applies here—indeed, it is hard to imagine a situation in which the circumstances have more radically changed given the property's development failed as a result of collapse of a Ponzi scheme, which funds were used to fund the project from the start. To that reality, GPM offers no meaningful response.

First, even if GPM's assertion that it was an "innocent seller" is undisputed [*see* Doc. 34 at 2], GPM fails to explain how that would affect the changed circumstances doctrine [*see id.* at 9-13]. Nothing in the cases addressing the doctrine suggests it cannot apply in the case of an innocent seller. Second, GPM offers no support for its argument that the required improvements—as set forth in the Warranty Deed—are "necessary for any development of Parcel 2"[4] and therefore still required regardless of ownership. In contrast, the Receiver offered summary judgment evidence—in the form of a declaration—that she was unable to market the property at issue together with Parcel 1 because the obligations contained in the warranty deed for Parcel 2 were so onerous there

[1] *In re Midsouth, LLC*, 549 B.R. 156, 179 (Bankr. E.D.N.C. 2016).
[2] *In re Daufuskie Island Properties*, LLC, 431 B.R. 626 (Bankr. D.S.C. 2010) (*Daufuskie I*).
[3] *In re Daufuskie Island Properties, LLC*, 431 B.R. 657 (Bankr. D.S.C. 2010) (*Daufuskie II*).
[4] Capitalized terms herein have the meanings set forth in the Receiver's partial summary judgment motiona.

was no reasonable prospect for its sale absent a court order allowing for its sale free and clear of liens, encumbrances, and adverse claims.[5] Indeed, while certain use restrictions still apply, the obligations in the warranty deed—which the Receiver's expert opined would cost over $6.5 million to construct—are no longer in place and would no doubt have deterred any buyer. Finally, GPM has fundamentally failed to support its own damages claim. GPM's damages are not equal to the cost of the improvements as opined by the Receiver's expert. As set forth in the Receiver's motion, GPM's damages, if any, would be the incremental increase in property value of GPM's *retained* property if the improvements were constructed. GPM has no evidence of such damages.

ARGUMENT

I. No disputed facts.

At the outset, GPM has not set forth any genuine issues of material fact sufficient to overcome summary judgment. *See* Fed. R. Civ. P. 56(e) (court may enter summary judgment where a party fails to properly address another party's assertion of fact); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000) (on summary judgment, "the non-movant must respond to the motion for summary judgment by setting forth particular facts indicating that there is a genuine issue for trial."). Indeed, wholly undermining its passing assertions that genuine issues of material fact exist—[*see* Doc. 34 at 8 ("the Receiver has not met her burden to show that there are no genuine issues of material fact as to GPM's claim for damages"); and *id.* at 12 ("[u]ltimately, however, the Receiver is [*sic*] not demonstrated the lack of a genuine issue of material fact in her factor as to the 'radical, fundamental and substantial change in circumstances…'")]—GPM sets forth an entire section spanning four of fourteen pages of "undisputed facts." [*Id.* at 3-7.] GPM has not met its burden to show any genuine issue of material fact because there are none.

[5] *See* Doc. 26-9, Declaration of Alysson Mills, at ¶ 4.

II. No meaningful rebuttal to changed circumstances doctrine.

Nor has GPM set forth any meaningful legal theory undermining this Court's application of the changed circumstance doctrine to this matter, as set forth in *In re Midsouth* and *Daufuskie I* and *Daufuske II*. The Receiver submits the doctrine should be applied given that (1) Parcel 2 was acquired with funds from a Ponzi scheme that has now collapsed; (2) Oxford Springs, the entity intending to develop Parcel 2, no longer exists; (3) Parcel 2 has been transferred to a third party free and clear of liens and encumbrances, including the Obligations; (4) Parcel 2 was intended to be developed in connection with Parcel 1, but the parcels are no longer owned the same entity; (5) Parcel 1 and Parcel 2 remain undeveloped; and (6) the cost of the Obligations outweigh the property's recent market value by *at least* ten-fold. [*See* Doc. 27 at 11-26.]

GPM concedes that the doctrine may be viable in Mississippi. [Doc. 34 at 11.] GPM first argues that the Court nonetheless should not apply the doctrine because GPM is an "innocent seller" [*see* Doc. 34 at 2] but then in its argument wholly fails to offer why that precludes the theory's application. GPM seems to hang its hat on one sentence (which it does not cite but partially quotes) from *Daufuskie I*, stating that "when such a significant change occurs with regard to the servient property so as to render a covenant valueless to the covenantee and oppressive and unreasonable as to the covenantor, it can be annulled, viewed as unenforceable, and determined ineffective and invalid." 431 B.R. at 644. Specifically, GPM states that the value of the improvements are still meaningful to it and not "valueless". [Doc. 34 at 11.] But GPM has no evidence to support such value—indeed it has set forth no evidence of the value of its retained property with the benefit of the improvements at all. It therefore has failed to rebut the Receiver's argument on this point. *See*, *e.g.*, *Nevada v. United States Dep't of Lab.*, 275 F. Supp. 3d 795, 802 (E.D. Tex. 2017) (noting "the Court requires 'significant probative evidence' from the nonmovant to dismiss a request for summary judgment" and citing *In re Mun. Bond Reporting Antitrust Litig.*, 672 F.2d 436, 440 (5th Cir. 1982) (additional citations omitted)).

Further, GPM's argument also defies logic. GPM accepts—indeed, states that it intends to rely on—the Receiver's expert's opinion regarding the cost of implementing the Obligations, totaling over $6.5 million. [Doc. 34 at 12; *see* Doc. 26-10, Koshenina Report, at 3.] GPM nonetheless contends that the covenant is *not* oppressive and unreasonable to the covenantor, because a fence would only cost $120,000. [Doc. 34 at 11.] But GPM is seeking to enforce the entirety of the Obligations—which it *agrees* would cost over $6.5 million. GPM's argument that incurring such cost is not unreasonable or oppressive defies logic—particularly, here, where the enforcement would only be in the form of a claim for damages against the Receivership Estate, established for the purpose of recovering money on behalf of Lamar Adams' defrauded investors—especially given the value of the property itself is less than a tenth of the cost of that investment.[6] GPM's admission of the Receiver's expert damages assessment weighs *in favor* not *against* entering partial summary judgment under the doctrine.

Finally, as set forth above, the Receiver set forth evidence that marketing Parcel 2 with Parcel 1 was not possible due to the onerous restrictions in the Warranty Deed.[7] GPM cannot counter such evidence with its unsupported assertion that the covenants are not oppressive. *See* Fed. R. Civ. P. 56(c), (e); *Byers*, 209 F.3d at 424.

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[6] *See* Doc. 26-8, Byrd Report, at 3.
[7] *See* Doc. 26-9, Declaration of Alysson Mills, at ¶ 4.

III. No proof of GPM's damages.

Critically, GPM cannot prove its damages. The "amount" of its claim is not—as it suggests—the amount of the cost of constructing the improvements. [*See* Doc. 34 at 12.] The deed does not state GPM could be paid in lieu of the improvements, and it certainly would not receive the *cash value* benefit of the improvements if constructed. The only potential damages GPM might claim would be the loss of the purported *increase* to the value of its retained property had the improvements been constructed. No expert has opined on what that value—if any—might be; it might very well be none. The expert disclosure deadlines have passed, and GPM retained no expert. It cannot defeat summary judgment on this point with speculation alone.

CONCLUSION

GPM has no evidence to support its damages claim and offers no meaningful factual dispute or legal theory to undermine the Receiver's motion for partial summary judgment. The Court should enter partial summary judgment in the Receiver's favor.

Date: June 7, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2023, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record registered to receive electronic service by operation of the court's electronic filing system.

/s/ Kaja S. Elmer