



**RECEIVERS**

*Selling*

**REAL ESTATE**

**WITHOUT REDEMPTION**

By Russell Long

I have completed a substantial number of receiverships involving real estate over the last several years and have been asked on more than one occasion “under what authority does a Receiver have the power to sell real estate without redemption?” It’s an excellent question without a perfect answer. However, the Michigan Court of Appeals addressed one aspect of receivership authority in its recent, published opinion of *Stock Bldg Supply, LLC v Crosswinds Cmty, Inc*, \_\_\_NW2d\_\_\_; 2016 Mich App LEXIS 1685 (Ct App, Sep. 13, 2016).

At issue in the *Stock Building Supply* case was whether a Court appointed Receiver in fact had authority to sell real estate “free and clear of all claims, liens and encumbrances” -- authority that, over the past several years, has become common place for Receivers in Michigan. The case began in July 2008 when *Stock Building Supply, LLC* (“*Stock*”) sued the developer and its guarantor to foreclose on its construction liens for failure to pay for materials provided. *Church & Church, Inc.* (“*Church*”) filed a counterclaim shortly thereafter seeking payment for its liens and mortgages that also arose from supplying materials to certain units. In response, the senior mortgage holder *Citizens Bank* (“*Citizens*”) filed a cross-complaint seeking foreclosure on all mortgages, including *Church’s*, and also successfully requested the appointment of O’Keefe as Receiver.

Central to *Church’s*, the Third-Party Plaintiff-Appellant, claims were the sale of four specific units, each of which had a \$20,000 mortgage. In July 2009, O’Keefe requested the authority to sell one of these encumbered units, “free and clear of all claims, liens and encumbrances without redemption periods, with the proceeds received therefrom to be distributed in accordance with the same priorities as held prior to consummation of such sales.” *Church’s* attorney not only received notice, but signed the stipulated order without objection. Thereafter additional sales, including the remaining units encumbered by *Church* mortgages, were sold and the proceeds distributed to *Citizens* pursuant to further Court order. In each instance, *Church* was provided notice and challenged neither the sales nor the distribution until nearly three years elapsed and the case was long closed.

On September 11, 2013, *Church* moved to have the case reopened alleging it still maintained valid mortgages on the original four units. *Church* argued the mortgages were not discharged and the trial court did not have the authority to grant the sale without a foreclosure. On January 9, 2015, the Oakland County Circuit Court denied *Church’s* motion, holding that the clear language of its orders and the declaration of O’Keefe that the intent of the language “free and clear of all claims, liens and encumbrances” included *Church’s* mortgages. *Church* appealed the ruling to the Michigan Court of Appeals. The 2016 opinion addresses a variety of topics relevant for Metro Detroit Receivers and is highly recommended for an indepth review. However, in upholding the trial court, the Court of Appeals specifically noted that while there is neither a rule nor statute that grants Receivers the authority to sell properties free of any encumbrances, “evidence was submitted in the trial court that it was common practice for Receivers in Metro Detroit to request and be granted authority to sell distressed properties free and clear of all encumbrances.” Moreover, the Court reviewed law from other jurisdictions and concluded that as long as proceeds from any such sale are applied to a senior lien holder (in this case *Church’s* mortgages were junior to those of *Citizen’s*) that the Trial Court properly exercised their authority.

While the scope of Receivers remains less than easily answered, the *Stock* ruling sheds some light on the view of Michigan courts.