United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Falconridge, LLC

Bankruptcy No. 07-bk-19200

Date of Issuance: November 8, 2007

Judge: Jacqueline P. Cox

Appearance of Counsel:

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	Case Number: 07-bk-19200
Falconridge, LLC	Chapter: 11
Debtor(s).	Judge: Jacqueline P. Cox

ORDER ON FIRST MIDWEST BANK'S EMERGENCY MOTION TO EXCUSE COMPLIANCE WITH SECTION 543(B)

Before the court is First Midwest Bank's emergency motion to excuse compliance with § 543(b) of the Bankruptcy Code (the "Code") and to permit High Ridge Partners, receiver appointed by a state court, to remain in place. See 07-bk-19200, Doc. 6. A hearing on the motion was held on October 24, 2007 before the emergency bankruptcy judge. An order, signed on October 24, 2007, temporarily granted First Midwest Bank's motion through and including November 1, 2007. See 07-bk-19200, Doc. 19. The Debtor, Falconridge, LLC ("Falconridge" or the "Debtor"), filed its response to the motion on October 26, 2007. First Midwest Bank filed a reply to the Debtor's response on October 30, 2007.

A final hearing on the motion was held on November 1, 2007.[1] During the hearing, each Party presented oral and document evidence in support of their respective positions. After considering the record produced by the Parties, the court granted the motion from the bench. The court's reasons are stated herein.

JURISDICTION

This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334, 157(a) and Internal Operating Procedure 15(a) of the United States District Court for the Northern District

[1]First Midwest Bank's "Motion to Dismiss Pursuant to § 305 and § 1112, or in the Alternative, Motion for Relief from Automatic Stay", see 07-bk-19200, Doc. 9, was also scheduled for hearing on November 1, 2007. This motion was continued to December 4, 2007. See 07-bk-19200, Doc. 24.

of Illinois. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (E). Venue in this district is proper under 28 U.S.C. § 1409.[2]

BACKGROUND

The facts, as established during the November 1, 2007 hearing and pleadings filed by the Parties related to this motion, are as follows:

The Falconridge is an Illinois limited liability company located in Kane County, Illinois in the city of Elgin. See 07-bk-19200, Doc. 6 at ¶ 3 & Doc. 21 ¶ 3; First Midwest Bank Exhs. B & J. Paul Brown is the Debtor's sole member. Mr. Brown has worked in the real estate business since 1993; first as a real estate broker and more recently as an investor in real estate properties.

On April 24, 2006, Falconridge obtained a mortgage from First Midwest Bank in the principal amount of $1,460,000.00. See First Midwest Bank Exh. B. The mortgage was executed on the Debtor's behalf by Mr. Brown. See id. The money was used to purchase a 60-unit apartment building located at 929-935 North Main Street, Rockford, Illinois 61103 (the "Property"). The Property is located in Winnebago County, Illinois. The mortgage granted First Midwest Bank a first lien against the Property. See 07-bk-19200, Doc. 6 at ¶ 5 & Doc. 21 at ¶ 5. The mortgage note was also secured by an Assignment of Rents, dated April 24, 2006, through which the Debtor assigned all rights, title and interest in and to the rents from the Property to First Midwest Bank. See 07-bk-19200, Doc. 6 at ¶ 6 & Doc. 21 at ¶ 6. The assignment was recorded with the Winnebago County Recorder's Office on May 5, 2006. See id.

[2]On October 22, 2007, the Debtor filed a "Motion to Transfer Venue to the United States Bankruptcy Court for the Northern District of Illinois, Western Division" pursuant to Local Rule 1014-1A. See 07-bk-19200, Doc. 8. Although fashioned as a motion to transfer venue, the Debtor requested this court to immediately transfer its voluntarily filed case, which was filed by the Debtor's counsel in the Eastern Division of the Northern District of Illinois, to the Western Division. The Western Division in located in the *same* district as the Eastern Division. Despite the Debtor's arguments to the contrary, "venue" of the Debtor's bankruptcy case is proper pursuant to § 1408 of title 28 of the United States Code and the pending motion is properly before this court in accordance with § 1409 of title 28 of the United States Code. See generally, Local Rule 1073-3. For reasons announced by the court during the hearing held on November 1, 2007, an order denying the Debtor's motion to transfer was signed on November 2, 2007. See 07-bk-19200, Doc. 25.

According to Mr. Brown, the asking price for the Property by the previous owner was $1,900,000.00, although it had been appraised at $1,825,000.00. The previous owner accepted the Debtor's offered price of $1,825,000.00. Prior to submitting this offer, Mr. Brown personally inspected the Property and reviewed the Property's rent rolls and historical data. Mr. Brown testified that this information indicated that the Property's occupancy rate was at 97% and that there were only 3 vacancies in the building. At the time, tenants were paying rent ranging from $360 to $420 per month. Third parties, such as The Janet Wattles Foundation, the Winnebago County Health Department and the Rockford Housing Authority, were also paying rent, either in full or in part, as subsidies for an undisclosed number of tenants in the building.

At the closing meeting, Mr. Brown testified that he discovered that there were 13 vacancies in the building, instead of 3. He also learned that 6-8 tenants were behind on their rent. Although this information caused him some concern, he followed through with the Debtor's purchase of the Property because he believed that he was under a contractual obligation to proceed with the transaction.[3] According to Mr. Brown, issues he may have had with the previous owner regarding whether the occupancy rate has been misrepresented, was something that could be addressed after the purchase was completed and not before.

After the Debtor took possession of the Property, Mr. Brown testified that he discovered a number of cosmetic and mechanical problems with the building. He hired Oxford Falconridge Pensby, a property management company controlled by him, to manage the Property. He also hired John Cobb to address many of the Property's repairs and maintenance issues. In exchange for his services, Mr. Cobb received $400 per week and free use of a unit in the building.

According to Mr. Brown, he made over $100,000.00 in improvements to the Property over a 9-month period. These improvements included: (1) painting all 5 hallways; (2) lawn maintenance; (3) purchasing new washers and dryers; (4) cleaning up the parking lot;

[3]The court notes that several times throughout his testimony, Mr. Brown referred to a number of activities that "he" had personally undertook when he may (or may not) have meant to refer to actions undertaken by Falconridge.

(5) replacing 20 refrigerators and stoves and (6) purchasing new carpet for approximately 15 apartments. Mr. Brown testified that he has receipts attesting to these expenses and improvement. However, he did not bring any of these receipts to court. Mr. Brown also acknowledged that while there were some mechanical issues with 1 of the 2 elevators in the building and a boiler, these were minor issues that were easily fixed from time to time. According to Mr. Brown, his improvements added value to the Property.

In addition to discovering cosmetic and mechanical issues with the Property, Mr. Brown noticed that a number of tenants were engaged in activities, (*i.e.*, gang members loitering on the Property and "drinking" in the parking lot), that he found objectionable. This observation was made *after* the Debtor took possession of the building. At some point thereafter, Mr. Brown took action by filing at least 20 eviction actions against these tenants. Mr. Brown testified that he filed 70% of these actions *pro se* and utilized an attorney to file suit against tenants he deemed to be threatening. Monthly rent also increased at some point after the Debtor took possession and ranged from $425 to $475. A sign was displayed on the premises advertising vacancies in the building.

Beginning on October 24, 2006, the Debtor stopped making its monthly mortgage payments to First Midwest Bank.

Sometime in December 2006, the Debtor obtained a second mortgage against the Property from Kornerstone Realty Group ("Kornerstone") for $300,000.00.[4] This mortgage was recorded against the Property. Mr. Brown testified that Kornerstone is owned by one of his friends. He also testified that he recently entered into a new arrangement with Kornerstone and obtained a release a couple of months ago from Kornerstone of the second mortgage. This release has not been recorded. Mr. Brown testified that it came to his attention in early 2007 that Kornerstone's lien for $300,000.00 was recorded against the Property in error. He maintains that the lien was suppose to be recorded against a different piece of real estate owned by a different

[4]Later in his testimony, Mr. Brown testified that this transaction netted $375,000.00.

company that he operates. According to Mr. Brown, the $300,000.00 is currently being used to develop 4 parcels of real estate located in Burr Ridge, Illinois. However, the Debtor still owes Kornerstone the balance due under the original loan. Kornerstone is listed as an unsecured creditor on the Debtor's Schedule F with a claim of $375,000.00. See First Midwest Bank Exh. J at Sch. F, p. 1 of 3.

On May 18, 2007, First Midwest Bank filed a foreclosure complaint in the state court located in Winnebago County, Illinois against the Debtor, Mr. Brown, Kornerstone, and unknown owners, tenants, heirs and nonrecorded claimants. See 07-bk-19200, Doc. 6 at ¶ 9 & Doc. 21 at ¶ 9; First Midwest Bank Exh. E. While the foreclosure complaint was pending, First Midwest Bank filed an emergency petition in the foreclosure action seeking the appointment of a receiver. On July 19, 2007, an order was filed in the state court appointing High Ridge Partners to act as receiver for the Property. See First Midwest Bank Exh. G. The July 19, 2007 order provides, in part, that High Ridge Partners "may collect rents, pay taxes for the Property, insure the [P]roperty, and take any and all actions allowed pursuant to 735 ILCS 5/15-1704." See id. at ¶ C. The order further permits High Ridge Partners access to the Property for the purposes of accomplishing the acts set forth in the order. See id. at ¶ F. Thereafter, the receiver had signs posted in the building directing tenants to send their rent payments to High Ridge Partners.

A couple of days after High Ridge Partners' appointment, one of its consultants, Tina Hughes, toured the Property. Ms. Hughes testified that she observed evidence of deferred maintenance—one of the elevators was not functioning; a boiler did not function; carpets needed to be cleaned; common areas needed to be painted; light bulbs needed to be replaced; and the parking lot needed to be repaired. When she toured vacant units, she noticed that most of them needed new appliances. She has not toured any of the occupied units and does not know what condition they are in or whether they contain new appliances. Ms. Hughes admitted during her testimony that she has no knowledge of the Property's condition in April 2006 nor knowledge of any repairs that the Debtor may have made after it acquired the property in April 2006.

It is Ms. Hughes's position that High Ridge Partners' duty is to maintain the

property—not improve it. At the beginning of its appointment, it hired Mr. Cobb to manage the Property and to perform many of the necessary repairs since he was familiar with the tenants and had lists of the repairs that needed to be made and the repairs that had already been completed.

Ms Hughes testified that High Ridge Partners has maintained the Property by: (1) cleaning the parking lot; (2) securing a waste disposal company to remove waste; (3) purchasing tools and supplies; (4) cleaning the carpets; (5) performing lawn maintenance; (6) replacing light bulbs; (7) repairing the malfunctioning elevator and boiler; (8) painting some areas of the Property; (9) verifying the insurance for the Property and (10) installing an additional fire extinguisher near the laundry room. She also instructed Mr. Cobb to remove the vacancy sign that was posted on the Property. According to Ms. Hughes, she was notified by the City of Rockford that it violated a city ordinance.

Aside from issues related to maintenance, the Debtor owed significant balances to utility companies that serviced the Property at the time that the receiver was appointed. Ms. Hughes testified that the Debtor owed approximately $9,000.00 to $10,000.00 for electric service and $63,000.00 to $68,000.00 (minus a $25,000.00 deposit) for natural gas service. The Receiver frequently received shut-off notices from the utility companies. According to Ms. Hughes, First Midwest Bank worked out an arrangement with the utility companies that has forestalled service from being disconnected. Additionally, information from the Winnebago County Treasurer reveals that First Midwest Bank paid the Property's first and second real estate tax installments, $17,919.38 and $17,397.46 respectively, on August 18, 2007. See Debtor's Exhibit 1.

On September 13, 2007, a Judgment of Foreclosure in the amount of $1,714,430.17 was entered in favor of First Midwest Bank and against the Debtor. See First Midwest Bank Exh. E. A Sheriff Sale for the Property was scheduled for October 18, 2007. See 07-bk-19200, Doc. 6 at ¶ 14 & Doc. 21 at ¶ 14. Falconridge filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on October 17, 2007 in the Eastern Division of the Northern District of Illinois.

Approximately 2 months prior to Ms. Hughes's testimony before this court, High Ridge Partners hired Mark Southwood of Century 21 North Country, to manage the Property. Ms. Hughes testified that Mr. Southwood's employment was pursuant to the approval of the state court. As the property manager, Mr Southwood's firm collects 7% of all collected rents. High Ridge Partners also relies on Mr. Southwood's judgment as far as the creditworthiness of prospective tenants. Since Mr. Southwood's employment, High Ridge Partners has turned away prospective tenants. Additionally, High Ridge Partners turned down an offer from Carpenter's Place, a not-for-profit organization that provides housing for homeless individuals, to rent 6-12 units for a minimum 2-year period at the direction of Bob Caskela, a senior vice-president of First Midwest Bank. At the time, it was Mr. Caskela's belief that the Property's marketability to potential buyers at the Sheriff Sale would diminish if 25% of the Property's units were subject to long-term leases. Since High Ridge Partners' appointment as receiver, no new tenants have moved into the building.

Although Century 21 signs advertising vacancies in the building had been posted on the Property, they were taken down during the week of October 21 and locked in a shed located on the premises. Ms. Hughes does not know who removed the signs but suspects that it was Mr. Cobb. She also noticed during a visit to the Property during the week of October 21, 2007 that signs had been posted in the building directing tenants to remit their rental payments to Falconridge, instead of the High Ridge Partners. Ms. Hughes does not know who posted these signs nor how long they may have been posted in the building but suspects that it was Mr. Cobb. High Ridge Partners terminated Mr. Cobb's employment sometime on October 24 or October 25, 2007. In fact, Mr. Brown testified that after the bankruptcy petition was filed, he told the tenants to forward rent payments to him.

Since High Ridge Partners' appointment as receiver, Ms. Hughes does not believe that all of the monthly rent payments have been remitted to High Ridge Partners. High Ridge Partners has collected rent totaling $10,000 for August, $10,000 for September and less than $9,000 for October. Included in this amount are 2 payments forwarded by Mr. Brown that he received from the Janet Wattle Foundation and the Rockford Housing Authority. Ms. Hughes recently learned

that the Rockford Housing Authority recently transferred 2 rent payments electronically into an account that is not controlled by the receiver. She also discovered that deposits of $1,300 and $1,400 were made into another Falconridge bank account in the months of September and October, respectively. She suspects that these deposits may be rent payments that were collected by Mr. Brown. However she has no evidence to support this contention. Mr. Brown testified that these were deposits of his own personal money and not rent payments that he may have received.

Ms. Hughes testified that she is not certain of how many tenants the Property has. She said that she can only guess that 34 tenants occupied the building at the time of High Ridge Partners' appointment. And while she still has not determined how many units are presently occupied, she estimates that the building has 29 tenants. According to Ms. Hughes, Mr. Brown has not provided the receiver with financial records showing what rent had been collected in prior months despite her requests. Of the leasing agreements that he has provided, many are missing the signature of either the tenant or the Debtor. In addition, Mr. Brown has not forwarded any of the tenants' security deposits to the receiver.

During the hearing, William E. Montana, an independent contractor and senior investment advisor with Hendricks & Partners, testified on the Property's value. First Midwest Bank's had originally hired Hendricks & Partners to market the Property. Mr. Montana is familiar with the building because he had previously marketed an apartment building located next door. Mr. Montana knew from a conversation he had 2 years ago with the Property's previous janitor that the Property had, at the time, only 6 vacancies. Based on his tour of the Property with Mr. Cobb, Mr. Montana said he would described the building as "tired" and that he saw evidence of deferred maintenance. He noted that he could only speculate as to how long the Property had been in this condition but that certain problems such as dirty carpet and an out of service elevator take time to occur. At the time of his visit, only 23 of the 60 units were occupied. Although it was hard for him to say who would want to purchase the building, he testified that the Property's anticipated value in a stable market would range from $1,400,000,00 to $1,500,000.00. This value, however, is dependent upon certain improvements being made to

the Property. He estimated, based on his observations, that the Property's "as is" value is between $1,100,000.00 and $1,200,000.00. It is also his professional opinion that the monthly rent can increase to a range of $450 to $550. See First Midwest Bank Exh. H.

11 U.S.C. § 543

> Section 543(b) of the Bankruptcy Code mandates, in part, that a custodian is to:
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> deliver to the trustee any property of the debtor held or transferred to such custodian, or proceeds, product, offspring, rents or profits of such property, that is in such custodian's possession, custody or control on the date that such custodian acquires knowledge of the commencement of the case . . . .

A state court-appointed receiver is a "custodian" subject to § 543(b). See 11 U.S.C. § 101(11).[5] In its motion, First Midwest Bank requests under § 543(d) of the Code that this court excuse High Ridge Partners from complying with § 543(b). Section 543(d) states:

> (d) After notice and hearing, the bankruptcy court—
> (1) may excuse compliance with subsection (a), (b), or (c) of this section if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property, and
>
> (2) shall excuse compliance with subsections (a) and (b)(1) of this section if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance with such subsections is necessary to prevent fraud or injustice.

[5]Section 101(11):

The term "custodian" means—

(A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;

(B) assignee under a general assignment for the benefit of the debtor's creditors; or

(C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

11 U.S.C. § 543(d). This section reinforces the general abstention policy found in § 305[6] of the Bankruptcy Code by permitting the bankruptcy court to authorize the custodianship to proceed pursuant to the order of the state court notwithstanding the mandate in § 543(b) that the debtor's property is to be turned over. See In re WPAS, Inc., 6 B.R. 40, 43 (Bankr. M.D. Fla. 1980), Comment to 11 U.S.C. § 543(citing S. Rep. No. 95-989). Generally, basic equities would favor a debtor in possession having access to all its assets while attempting to reorganize. See In re Northgate Terrace Apartments, Ltd., 117 B.R. 328, 333 (Bankr. S.D. Ohio 1990)(citing In re KCC-Fund V., Ltd., 96 B.R. 237, 239-40 (Bankr. W.D. Mo. 1989)). However, evidence of mismanagement or questionable business practices by the Debtor may negate the statutory obligation of a custodian to turnover assets to a debtor in bankruptcy.

First Midwest Bank argues that compliance under § 543(b) should the excused based on the Property's state of disrepair, the Property's low occupancy rate and the Debtor's mismanagement in renting out and caring for the Property's units. First Midwest Bank also points out that there is no equity in the Property. In order to maintain and preserve the Property, and insure that rents from the Property are properly used, High Ridge Partners should be left in place as the Property's receiver.

The Debtor disagrees with the bank's position. The Debtor maintains that since its appointment, the receiver has injured the distribution prospects for unsecured creditors, harmed the condition of the Property and decreased the Property's occupancy rate. The Debtor alleges that High Ridge Partners has mismanaged the Property by: (1) failing to clean and prepare vacant apartments for lease; (2) failing to maintain the exterior of the building and landscaping; (3) failing to accommodate prospective tenants interested in leasing units in the building; and (4) by reducing the maintenance hours required for proper management of the Property. According

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[6]11 U.S.C. § 305. Abstention:
The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if--
(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or
(2)(A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and
(B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension.

to Mr. Brown, he estimates that the Debtor has about 25 good and solid tenants currently residing in the Property. He believes that if Carpenter's Place's offer to rent 12 units had been accepted, the Debtor would have been able to make its mortgage payments to the bank. Nonetheless, Mr. Brown is confident that the Debtor he can make interest payments to the bank, satisfy the tax payments and reorganize.

First Midwest Bank bears the burden of establishing, by a preponderance of the evidence, that compliance under § 543(b) should be waived pursuant to § 543(d). See See In re Lizeric Realty Corp., 188 B.R. 499, 506 (Bankr. S.D.N.Y. 1995); Donato, 170 B.R. 247, 257 (Bankr. D.N.J. 1994); Matter of Willows of Coventry, Ltd. P'ship, 154 B.R. 959, 967 (Bankr. N.D. Ind. 1993); Northgate Terrace Apartments, Ltd., 117 B.R. at 332. Evidence in this matter indicates that the Debtor is insolvent. See First Midwest Bank Exh. J. This court's inquiry will instead focus on whether the interests of creditors would be better served if High Ridge Partners is excused from complying with § 543(b) of the Bankruptcy Code.

When analyzing whether the interests of creditors would be better served by permitting a receiver to continue in possession, custody, or control of the debtor's property, courts have weighed a number of factors based on the specific facts of each case. These factors have evolved to include, in varying degrees:

> (1) The likelihood of a reorganization;
> (2) The probability that funds required for reorganization will be available;
> (3) Whether there are instances of mismanagement by the debtor;
> (4) Whether turnover would be injurious to creditors;
> (5) Whether the debtor will use the turned over property for the benefit of its creditors;
> (6) Whether or not there are avoidance issues raised with respect to property retained by a receiver, because a receiver does not possess avoiding powers for the benefit of the estate; and
> (7) The fact that the bankruptcy automatic stay has deactivated the state court receivership action.

See Dill v. Dime Sav. Bank (In re Dill), 163 B.R. 221, 226 (E.D.N.Y. 1994); Lizeric Realty, 188 B.R. at 506-507; Northgate Terrace Apartments, 117 B.R. at 332; In re Poplar Springs Apartments, 103 B.R. 146, 150 (Bankr. S.D. Ohio 1989); WPAS, 6 B.R. at 43-44 (Bankr. M.D.

Fla. 1980). Regardless of what factors are used to aid the court in its decision, the paramount and sole concern is the interests of *all* creditors. See generally KC-Fund V., Ltd., 96 B.R. at 239 (on the issue of who should be in charge of funds held by the receiver, the court stated that "[o]f necessity, this must be on a case by case analysis and no generic rule can be proclaimed."). The interests of the debtor are not to be considered in the court's decision. See Dill, 163 B.R. at 225; Foundry of Barrington P'ship v. Barrett (In re Foundry of Barrington P'ship), 129 B.R. 550, 557 (Bankr. N.D. Ill. 1991). Compare 11 U.S.C. §§ 523(d) & 305. Having considered the evidence, the court concludes that the interests of creditors would be better served if High Ridge Partners is excused from complying with § 543(b) of the Bankruptcy Code.

It is too early in this case to evaluate the Debtor's likelihood or potential to reorganize itself successfully. Although Mr. Brown testified that he is confident that the Debtor can reorganize. The court's decision to excuse compliance is based on the overwhelming presence of evidence that causes this court to seriously question the manner in which the Property has been managed in the past by the Debtor—specifically Mr. Brown. While in some instances there may be a fine line between a business owner exercising poor judgment in making business decisions and instances of a business being mismanagement, a line exists nonetheless. Compare Donato, 170 B.R. at 257 (court concluded that debtor's choice to be flexible in collecting rent was an exercise of business judgment and not evidence of mis-management); In re Plantation Inn Partners, 142 B.R. 561, 564 (Bankr. S.D. Ga. 1992)(court concluded that "clear evidence of mismanagement" existed to excuse the receiver from the duty to turnover property); WPAS, 6 B.R. at 44 (court concluded that mismanagement was indicated by the debtor's total disregard to the Internal Revenue Code and the cavalier manner that the Debtor's financial affairs were handled). The only question is where that line should be drawn.

Mr. Brown testified that he learned at the closing meeting that there were 13 vacancies in the building. And of the 47 units that were rented, a maximum of 8 had not paid rent. Despite his concerns, he executed the mortgage note for a building with a 78% occupancy rate, versus 97%. Mr. Brown indicated in his testimony that any issue he may have had with the previous owner concerning this representation could be addressed after the closing. It also bears noting

that Mr. Brown inspected the Property *before* he made an offer. Yet for some reason, he discovered a number of additional problems with the building *after* the Debtor took possession of the Property. He also noticed *after* the Debtor took possession that a number of activities that he found objectionable were occurring on the Property's premises. Despite these discoveries, there is no indication on the record that Mr. Brown sought any form of relief from the prior owner due to any misstatement that may have been made about the occupancy rate or any other problems with the building. As for the unsavory element loitering on the premises, Mr. Brown elected to evict at least 20 of the 47 tenants of the Property. While these decisions, over all, might hint at a lack of due diligence on the Debtor's part in entering into this transaction and amount to poor business judgment, there are other instances that a indicate that the Debtor has mismanaged the Property in the past.

Based on the record, it is hard to determine whether the Debtor collected any rent from tenants from the time it missed its mortgage payment in October 2006 to the time that the receiver started collecting the rent. Either the Property remained vacant during this period or the Debtor collected rent payments from tenants but elected not to tendered them to the bank. The second is more believable than the first based on the witnesses' testimonies, including the testimony of Mr. Brown. As it stands, Mr. Brown cannot provide an accounting of how much income the Debtor has received, nor how much money may have been expended while it had possession of the Property. What is known is that payments were not being made to First Midwest Bank. While in general, a failure to turn over rents to a mortgagee pursuant to a contractual obligation should not automatically bar returning the Property to the Debtor, see Poplar Springs Apartments, 103 B.R. at 150, here, rent from 29 units (the current occupancy level) at approximately $475 a month would generate $13,775 a month, enough to pay the monthly $10,000 mortgage payment. However, it is the evidence of continued mismanagement and questionable business practices that warrant High Ridge Partners' being excused from complying with § 543(b). See id. Included in this is the unknown whereabouts of the tenants' security deposits. Despite a pre-petition request from the receiver, Mr. Brown never turned them over. The Debtor's schedules fail to list any reference to security deposits it may be holding. This leads to 2 possible conclusions: Either the Debtor never collected security deposits from

tenants or security deposits that may have been collected by the Debtor have disappeared.

There is a strong indication from the record that the Property has been mismanaged to such an extent that its value in the market has significantly diminished since the Debtor's purchase. According to Mr. Brown, the property was appraised at $1,825,000.00 at the time of the Debtor's purchase in April 2006. Based on Mr. Montana's testimony, the maximum anticipated value for the Property in a *stable* market is $1,500,000.00. This value, however, is based on improvements being made. "As is", Mr. Montana estimated the Property's value at $1,100,000.00 to $1,200,000.00. Since April 2006, the Property's value has decreased by *at least* $325,000.00, though more than likely by *at least* $625,000.00. First Midwest Bank's interest in the Property is presently under-secured no matter what valuation figure is utilized. While there may be a number of environmental factors present in the marketplace that may have attributed to the decrease in value, none have been cited by the Debtor, First Midwest Bank, High Ridge Partners or Mr. Montana. Instead, allegation of mis-management have been alleged. Mr. Brown points his finger at the receiver and First Midwest Bank points its finger at Mr. Brown.

Mr. Brown testified that "he" has spent a least $ 100,000.00 on improvements to the Property that have added to the Property's value. However there is no evidence that improvements were made or that $100,000.00 was ever spent. Although Mr. Brown testified that he had receipts of his purchases, they were not offered into evidence. And if at least $100,000.00 of improvements were made, it is not reflected in the Property's value. If true, it means that not only has the Property's value decreased by *at least* $325,000.00 but that Mr. Brown's added value of $100,000.00 has also disappeared. Mr. Brown maintains that High Ridge Partners is the guilty party on the issue of mismanagement. The court finds the probability that the receiver has mismanaged the Property in such a negligent fashion since its appointment on July 19, 2007 to be highly unlikely when weighed against Mr. Brown's behavior.

Under Illinois law, a receiver appointed for mortgaged real estate holds a statutory duty

to "manage the mortgaged real estate as would a prudent person, taking into account the effect of the receiver's management on the interest of the mortgagor." See 735 ILCS 5/15-1704(c). In addition to having possession of the mortgaged real estate and other property subject to the mortgage during the foreclosure, the receiver "shall have full power and authority to operate, manage and conserve such property." See 735 ILCS 5/15-1704(b). While a business owner has the luxury of making risky or even unwise business decisions for the sake of increasing its profit margin or facilitate the business's long-range goals, a state appointed receiver cannot engage in these types of activities. Especially if doing so would be contrary to the conservation and management of the property. Such behavior on the part of a receiver would not be prudent. High Ridge Partners has nothing to gain from the Property being mismanaged on its watch.

This court's decision is further supported by Mr. Brown's testimony regarding the $300,000.00 mortgage from Kornerstone. Mr. Brown testified that the mortgage never should have been recorded against the Property and that it should have been recorded against a different property owned by one of his other companies. Interestingly, the Debtor stills owes at least $375,000.00 to Kornerstone despite the fact that this money is being used to develop real estate not owned by the Debtor. In light of this testimony, the court is not convinced that the Debtor, will use the turned over Property for the benefit of the *Debtor's* creditors, especially since there may be some issue surrounding who legally controls how the "300,000.00" is spent. The money was not spent on the real estate that generated it, nor was it used to pay the Property's mortgage. This may very well amount to a valid charge of fraudulent transfer. A turnover of the Property back into the hands of the Debtor, *e.g.*, Mr. Brown, at this point, would not be in the best interest of creditors.

The court will, for these reasons, excuse the receiver High Ridge Partners from complying with § 543(b) of the Bankruptcy Code. High Ridge Partners does not have to turnover the Property to the Debtor. In order to facilitate the purpose of § 543(d) of the Bankruptcy Code, the automatic stay will be modified to the extent necessary to permit the receiver to exercise its powers under 735 ILCS 5/15-1704, as referenced in the state court's July 19, 2007 order, and to take control of the Property. The Debtor is ordered to cooperate with this

process by promptly delivering to the receiver such books, records and other property as are necessary to facilitate the receiver's control over the Property. See generally 11 U.S.C. § 105(a); Foundry of Barrington P'ship, 129 B.R. at 558. The receiver shall manage the Property in accordance with its duties and obligations under Illinois state law and the Bankruptcy Code.

It is further ordered that neither Paul Brown nor any other employee or affiliates of Falconridge, LLC shall interfere with the duties of the receiver, High Ridge Partners, including, but not limited to, collection of rents or management of the property, unless otherwise ordered by this court.

Dated: November 8, 2007 **ENTERED:**

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Jacqueline P. Cox
United States Bankruptcy Judge