

STATE OF VERMONT

SUPERIOR COURT
Windham Unit

CIVIL DIVISION
Docket No. 63-2-18 Wmcv

BERKSHIRE BANK,
Plaintiff

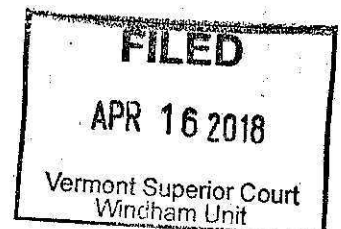
vs.

HERMITAGE INN REAL ESTATE
HOLDING COMPANY, LLC;
HERMITAGE CLUB LLC, F/K/A
HCOC, LLC (f/k/a Haystack Club
Operating Company LLC, f/k/a
Hermitage Inn Operating Company LLC);
JAMES R. BARNES; 309 RTE 100 DOVER LLC; ET AL
Defendants

**PLAINTIFFS' EMERGENCY MOTION
FOR APPOINTMENT OF RECEIVER
WITH SUPPORTING AFFIDAVIT**

Plaintiff, Berkshire Bank, through its counsel, Ryan Smith & Carbine, Ltd., moves under Rule 66 for the emergency appointment of a receiver to take possession and control of the real and personal property that is the subject of this foreclosure action.

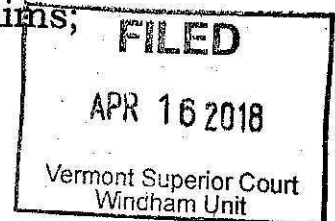
Plaintiff requests that Alan Tantleff of FTI Consulting, 3 Times Square, 9th Floor, New York, NY 10036 be appointed as receiver. An excerpt of Mr. Tantleff's resume is attached as Exhibit A.



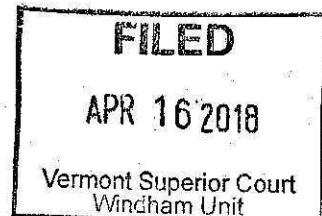
The purpose of the Receivership is to preserve, protect and maintain the subject property pending the foreclosure, judicial sale at public auction, and confirmation of the sale by the Court.

Plaintiff requests the Court authorize the Receiver to do all things necessary in that regard, including but not limited to:

- 1) taking possession and control of all Hermitage real and personal property both tangible and intangible mortgaged and pledged to Berkshire Bank as collateral (the "Subject Properties");
- 2) taking possession and control of all Hermitage business records necessary in the reasonable determination of the receiver for the Receiver to perform his powers and duties;
- 3) accounting to the Court on a quarterly basis for its administration of the Receivership;
- 4) having access to and review all mail and email of the Hermitage defendants except personal mail and privileged attorney client communications which shall be turned over to the addressee;
- 5) paying any municipal assessments that would take priority over the Plaintiff's mortgages whether accrued before or after the filing of this foreclosure;
- 6) paying all lease payments to the municipal entities that are required to maintain the lease on the ski area;
- 7) paying all premiums required to keep the Subject Properties insured against casualty loss and liability claims;



- 8) engaging and paying for all heat and utilities required to protect and maintain the Subject Properties;
- 9) engaging and paying for all maintenance required to protect and maintain the Subject Properties;
- 10) engaging and paying for all security services required to keep the Subject Properties secure;
- 11) engaging and paying for all personnel required to maintain the Subject Properties buildings, grounds, and equipment;
- 12) cooperating and coordinating with the auction company that conducts the judicial sale to prepare the Subject Properties for the public auction;
- 13) cooperating and coordinating with the Plaintiff to facilitate the foreclosure process;
- 14) subject to prior court order, dealing with reclamation claims by owners of property located on the Subject Properties that are not subject to Plaintiff's mortgages and security interests;
- 15) any other action that is reasonable and necessary to protect and preserve the Subject Properties and prepare it for public action and delivery to the court confirmed high bidder;
- 16) that the Receiver be allowed to employ the law firm of Ryan Smith & Carbine, Ltd. to represent the Receiver in this action; and
- 17) that the Receiver and its counsel be entitled to reasonable compensation payable by Plaintiff monthly and subject to approval by the Court on a quarterly basis for inclusion in the secured debt that is payable from the proceeds of the judicial sale.

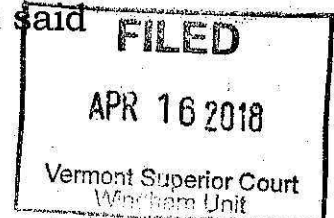


Memorandum

This case arises from a material payment default of promissory notes that are secured by mortgages and security agreements. This foreclosure/replevin action ensued.

There are three provisions in the mortgages that authorize the Court to appoint a receiver after a default. Those provisions are attached as Exhibit B. They all say substantially the same thing so for the sake of brevity, only one will be quoted:

Mortgage Deed dated September 30, 2013 encumbering the Hermitage Inn Real Estate Holding Company, LLC property, Page 24, §9.2.3 Mortgagee shall have the right to seek the immediate appointment by any court of competent jurisdiction of a receiver for the Mortgaged Property and the business of Mortgagor in connection therewith and of the Rents and profits arising therefrom, which receiver shall be entitled to immediate possession of the entire Mortgaged Property, whether or not occupied by Mortgagor. Mortgagee shall be entitled to the appointment of such a receiver as a matter of right without consideration of the value of the Mortgaged Property or other security for the Obligations or the solvency of any person or corporation liable for the payment thereof. If Mortgagor is then in possession of the Mortgaged Property or any part thereof, Mortgagor shall immediately, upon the appointment of such receiver, vacate the Mortgaged Property or such part thereof, as the case may be, or pay a reasonable rental for the use thereof during such receivership, the amount of such rental to be agreed upon between said receiver and Mortgagor or to be fixed by the court in which said

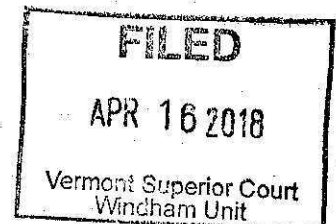


receiver shall have been appointed; and the relationship between said receiver and Mortgagor shall be that of landlord and tenant.

**Facts that support the
appointment of a Receiver**

1. Hermitage Inn Real Estate Holding Company, LLC; Hermitage Club LLC, f/k/a HCOC, LLC (f/k/a Haystack Club Operating Company LLC, f/k/a Hermitage Inn Operating Company LLC); and 309 Rte 100 Dover LLC are the Defendant mortgagors in this foreclosure and replevin action that owe Plaintiff over Seventeen Million Dollars (\$17,000,000.00). (Hereinafter "Hermitage")

2. The Hermitage property subject to Plaintiff's mortgages and security agreements consists of an alpine ski area with lifts and trails, together with a private club resort community that includes a large luxury base lodge, mid mountain lodge, the Hermitage Golf Club course, four (4) inns, Hermitage Inn, Horizon Inn, Snow Goose Inn, and Doveberry Inn, second homes in various stages of construction, together with other buildings, roads utilities, water rights, and related infrastructure and operations for the ski area.



The total area subject to Plaintiff's mortgages exceeds 838 acres¹ and is located in both the Town of Wilmington and the Town of Dover, VT. A portion of the ski area is on leased land from the Town of Wilmington also mortgaged to Plaintiff.

The Town of Wilmington has assessed the portion subject to Berkshire Bank's mortgages at about \$28,440,400. The Town of Dover has assessed its piece of the Subject Properties at about \$4,676,480.

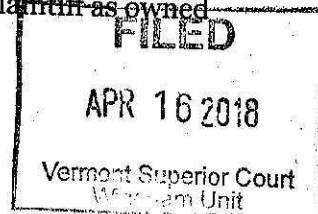
There is also the personal property, including, without limitation, ski lifts, ski operation equipment.

3. Collateral of this size, complexity and value requires a Receiver to manage and preserve during the foreclosure and replevin process.

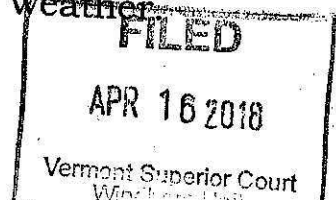
Hermitage is no longer a going concern able to pay its bills as they come due

4. The Hermitage Club operation was shut by the Vermont Department of Taxes for a third time in March on March 30, 2018. The company was ordered not to conduct any business.

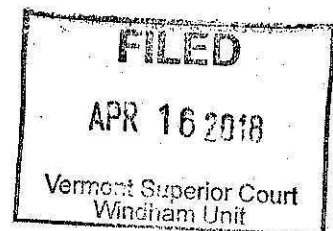
¹ Based on what is stated in the town tax bills for the properties mortgaged to Plaintiff as owned real estate.



5. The annual lease payment due to the Town of Wilmington for the leased ski area as of February 1, 2018 was not made.
6. Hermitage Inn Real Estate Holding Company, LLC tendered the Town of Wilmington a check drawn against insufficient funds and then told the Town not to cash it.
7. Berkshire Bank paid the rent for the Ski Area Lease to the Town of Wilmington in March 2018 for the period February 1, 2018 – January 31, 2019 in the amount of \$83,851.00 to cure the Ski Area Lease default and preserve the ski area lease.
8. Berkshire Bank paid the Town of Dover about \$74,000 of delinquent real estate taxes in March 2018 to avoid a tax sale.
9. The Town of Wilmington has filed some 34 tax liens totaling about \$814,000 against Hermitage Inn Real Estate Holding Company, LLC. By law, a tax sale must be scheduled if the delinquency is not paid.
10. Berkshire Bank has just paid the Town of Wilmington \$660,321.58 to forestall a tax sale.
11. Berkshire Bank has just paid Suburban Propane \$48,259.19 for an emergency fuel delivery to keep the resort's heat on during this unseasonably cold spring with its freezing weather.



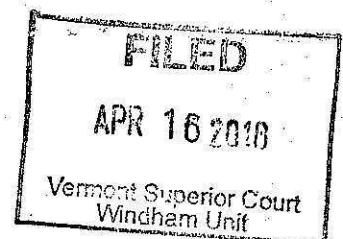
12. Berkshire Bank has just paid Green Mountain Power \$82,554.01 to keep power on in response to a disconnect notice, which will keep the power on until May 6, 2018.
13. Upon information and belief Hermitage Inn Real Estate Holding Company, LLC owes employees payroll. Most have been laid off.
14. A skeleton crew of a few employees remain onsite.
15. The Hermitage Club Website shows last updated on March 24, 2018, which is consistent with a lack of commercial activity at the Club resort.
16. There is also personal property pledged to Berkshire Bank as collateral. The property needs to be protected from theft and vandalism.
17. The foreclosure complaint lists 35 liens for bills and claims that Hermitage Inn Real Estate Holding Company, LLC cannot pay as they come due.
18. Hermitage has insufficient funds to preserve and protect the Subject Properties.
19. There are allegations of fraud in lawsuits that have been filed outside of the Berkshire Bank foreclosure.



20. There are many lawsuits filed against Hermitage in this Court that the Court can take judicial notice of.

Law

A receiver is “a ministerial officer appointed by the court to take possession of and preserve the fund or property in litigation.” *O'Rourke v. Lunde*, 2014 VT 88, ¶ 23, 104 A.3d 92, 98–99 (2014) citing *Underhill v. Rutland R.R.*, 90 Vt. 462, 472, 98 A. 1017, 1020 (1916). ‘As part of its inherent powers, the superior court has equitable jurisdiction to appoint a receiver to hold the property of a business. *In re Dawley*, 99 Vt. 306, 319, 131 A. 847, 851 (1926). ([W]hen a court exercising a jurisdiction in equity appoints a receiver to hold the property of a corporation, it [i.e. the court] assumes the administration of the estate)’”. When the court appoints a receiver to hold the property of a corporation, the court itself assumes the administration of the estate. The possession of the receiver is the possession of the court, and the court holds and administers the estate through the receiver. *Clifford v. W. Hartford Creamery Co.*, 103 Vt. 229, 153 A. 205, 210 (1931).



Rule 66 states the Vermont Rules of Civil Procedure apply to receivership proceedings.

Analysis

The Vermont Department of Taxes shut Hermitage down for non payment of taxes. Hermitage cannot pay its bills as they come due, nor can it afford employees to maintain and repair its infrastructure and provide security for the property. This is an ultra-high end private club resort. A receiver is needed to manage and preserve the Subject Properties during the foreclosure process. The mortgages and controlling law allow for that appointment.

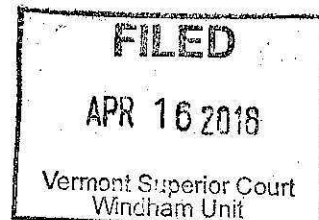
Alan Tantleff of FTI Consulting, 3 Times Square, 9th Floor, New York, NY 10036 has demonstrated the ability to manage high end private club resorts like the Hermitage in receivership. According to his resume, Mr. Tantleff's and FTI Consulting's accomplishments include managing over 53 major resort and hospitality properties in receivership or debt restructuring. Most notably, FTI Consulting handled the Talisker Club Receivership, the Yellowstone Club Restructuring, and the restructuring of the Sea Island Club debt. See attached summary.



CONCLUSION

Plaintiff requests the Court appoint Alan Tantleff of FTI Consulting as Receiver to preserve the Subject Properties during the foreclosure process with the following powers and duties, including but not limited to:

- 1) taking possession and control of all Hermitage real and personal property both tangible and intangible mortgaged and pledged to Berkshire Bank as collateral (the "Subject Properties");
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