

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 1648

IN RE SOUTHEASTERN EYE
CENTER-PENDING MATTERS

**AMENDED ORDER ON THE
RECEIVER'S MOTION FOR AN
ORDER AUTHORIZING EXERCISE
OF POWER OF SALE
(OLD BATTLEGROUND V. CCSEA)**

GUILFORD COUNTY

12 CVS 11322

IN RE SOUTHEASTERN EYE
CENTER-JUDGMENTS

1. **THIS MATTER** is before the Court on the Receiver's Motion for an Order Authorizing the Receiver to Exercise Power of Sale in Castle McCulloch Deed of Trust (the "Motion") filed 21 March 2022 in the above-captioned case.¹

2. The Motion has been fully briefed, and a hearing was held on the Motion on 29 June 2022 (the "Hearing"), at which the Receiver; Central Carolina Surgical Eye Associates, P.A. ("CCSEA"); Old Battleground Properties, Inc.; and Nivison Family Investments, LLC (together, the "Nivison Parties"); and Richard Harris; Castle McCulloch, Inc.; and Historic Castle McCulloch, LLC (together, the "Castle McCulloch Defendants") were represented by counsel. Douglas S. Harris ("Harris") and James Mark McDaniel, Jr. ("McDaniel") appeared at the Hearing *pro se*. The Motion is now ripe for resolution.

¹ (Mot. for Order Authorizing Receiver to Exercise Power of Sale in Castle McCulloch Deed of Trust (Old Battleground v. CCSEA) [hereinafter "Mot."], ECF No. 1467.) All ECF Nos. in this Order refer to the 2015 CVS 1648 Pending Matters case file.

3. By way of relevant background, JDPW Trust (“JDPW”) was established on 8 June 2007 and placed in receivership on 28 April 2016, at which time the Court appointed Jeutter to serve as the receiver for JDPW.² Prior to Jeutter’s appointment, Harris served as JDPW’s trustee from 8 June 2007 through 28 April 2016.³

4. In the Court’s order appointing Jeutter as Receiver, the Court authorized the Receiver “[t]o . . . sell, convey, or transfer the assets of JDPW Trust U/T/A Dated June 8, 2007 in whole or in part as may be in the best interests of the receivership estate provided that such sale, conveyance or transfer, if any, is approved and confirmed by this Court after notice to all parties in interest.”⁴

5. As the Court has found as a matter of law, JDPW was assigned and therefore now owns a deed of trust dated 30 September 2004 (the “Deed of Trust”)⁵ granted by Historic Castle McCulloch, LLC that included a power of sale and secured a promissory note in the amount of “\$2,145,000.00 in the name of Historic Castle McCulloch, LLC” (the “Castle McCulloch Note” or the “Note”),⁶ on which the Court has found that the amount due and owing as of 21 September 2012 was

² (Order Approving Pls.’ Mot. for Appointment of Receiver for JDPW Trust (Old Battleground v. CCSEA – Consol.) (All Matters) at 2 ¶ 3, at 7 ¶ 2 [hereinafter “28 April 2016 Order”], ECF No. 472.)

³ (28 April 2016 Order at 2 ¶ 3.)

⁴ (28 April 2016 Order at 9 ¶ 3c.)

⁵ (Ex. UU, ECF No. 191 (showing that the Deed of Trust was assigned to JDPW on 21 September 2012).)

⁶ (Ex. VV, ECF No. 192 (showing that the Castle McCulloch Note was assigned to JDPW on 21 September 2012).)

\$1,692,430.39.⁷ The Receiver asserts that timely demand for full payment on the Note has been made to Historic Castle McCulloch, LLC, that adequate time to pay on the Note has been provided, and that no payments have been made.⁸ As a result, the Receiver represents that he has determined that it is in the best interest of JDPW to seek to initiate the process to exercise the power of sale in the Deed of Trust and seeks through the Motion to obtain Court approval pursuant to N.C.G.S. § 1-507.4, as effective prior to 1 January 2021, for the initiation of that process.⁹

6. The Nivison Parties filed a brief in support of the Motion, and Harris, McDaniel, and the Castle McCulloch Defendants filed briefs and offered argument at the Hearing in opposition to the Motion.

7. As an initial matter, the parties dispute whether sections 1-501.1 through 1-507.11—the statutes that governed receiverships as of 28 April 2016—continue to govern the receivership or whether the North Carolina Commercial Receivership Act (the “Act”), N.C.G.S. §§ 1-507.20–1-507.54, which became effective on 1 January 2021, now controls. The Castle McCulloch Defendants contend that the provisions on which the Receiver relies were repealed by the Act on 1 January 2021 and thus

⁷ (Order and Op. on Mot. for Summ. J. (Old Battleground v. CCSEA) ¶ 280 n.25 [hereinafter “7 May 2019 Order and Op.”], ECF No. 1148.)

⁸ (Mot. ¶¶ 5, 7.)

⁹ (Mot. ¶¶ 4–9; Reply Br. in Supp. Mot. for Order Authorizing Receiver to Exercise Power of Sale in Castle McCulloch Deed of Trust (Old Battleground v. CCSEA) 5 [hereinafter “Reply”], ECF No. 1493.)

that the Receiver is without authority to pursue the remedy he seeks.¹⁰ The Receiver argues to the contrary, contending that these sections continue to apply to the receivership despite the passage of the Act.¹¹

8. After careful review, the Court agrees with the Receiver and concludes that the versions of sections 1-501.1 through 1-507.11 that were in effect at the commencement of the receivership continue to govern the receivership. The session law enacting the Act states that “[t]his act becomes effective January 1, 2021, and applies to receiverships *commenced on or after that date.*” 2020 N.C. Sess. Laws 75, sec. 4 (emphasis added). The JDPW receivership was commenced by an order entered 28 April 2016,¹² so, by the Act’s plain terms, it does not apply. *See Wake Cnty. v. Hotels.Com, L.P.*, 2012 NCBC LEXIS 63, at **9 (N.C. Super. Ct. Dec. 19, 2012) (“If the language of a statute is free from ambiguity and expresses a single, definite, and sensible meaning, judicial interpretation is unnecessary and the plain meaning of the statute controls.” (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361 (1979))).

9. In addition, while the Castle McCulloch Defendants rely on section 2(b) of the session law, which states that “Part 2 of Article 38 of Chapter 1 of the General

¹⁰ (Castle McCulloch Defs.’ Mem. of Law in Opp’n to Mot. to Exercise Power of Sale 3–4 [hereinafter “Castle McCulloch Defs.’ Opp’n”], ECF No. 1485.)

¹¹ (Reply 1–2.)

¹² (*See generally* 28 April 2016 Order.)

Statutes [1-507.1 through 1-507.19¹³] is repealed[,]”¹⁴ the Court cannot conclude that this language “clearly expresses” a legislative intent to apply retroactively to receiverships created before 1 January 2021. *Speck v. Speck*, 5 N.C. App. 296, 301 (1969) (citation omitted). Nor does a retroactive effect “arise[] by necessary implication from its terms.” *Id.* (citation omitted); *see also Hopkins v. Hopkins*, 8 N.C. App. 162, 168 (1970) (“Since this action was begun on 28 August 1967, G.S. 50-13 applies, even though it was repealed and replaced by G.S. 50-13.1 through 50-13.8, which became effective from and after 1 October 1967. This statute as amended does not apply retroactively.”).

10. Based on the above, the Court concludes that the versions of sections 1-507.1 through 1-507.11 that were in effect at the commencement of the receivership¹⁵ on 28 April 2016 continue to apply to the JDPW receivership, *see* N.C.G.S. §§ 1-507.1–1-507.11 (2016), and therefore that the Receiver is entitled to seek relief under those provisions.

¹³ Sections 1-507.12 through 1-507.19 are “[r]eserved for future codification purposes” and have lacked substantive content during the entirety of the JDPW receivership. *Compare* N.C.G.S. §§ 1-507.12–1-507.19 (2016) *with* N.C.G.S. §§ 1-507.12–1-507.19 (2022).

¹⁴ 2020 N.C. Sess. Laws 75, sec. 2(b).

¹⁵ The session law prospectively repealing sections 1-507.1 through 1-507.11 shows an intent to make the controlling law dependent on the date that the receivership (and not the action generally) commenced. 2020 N.C. Sess. Laws 75, sec. 4. This distinction does not impact the substance of the statutes in this instance, however, because sections 1-507.1 through 1-507.11 were identical on 4 February 2015 (when the action commenced) and on 28 April 2016 (when the receivership commenced).

11. Thus, the controlling version of section 1-507.4 for purposes of this Motion—i.e., the version in effect at the commencement of the receivership—provides as follows:

Where real estate has been conveyed by mortgage deed, or deed of trust to any corporation¹⁶ in this State authorized to accept such conveyance for the purpose of securing the notes or bonds of the grantor, and such corporation thereafter shall be placed in the hands of a receiver or trustee in properly instituted court proceedings, then such receiver or trustee under and pursuant to the orders and the decrees of the said court or other court of competent jurisdiction may sell such real property pursuant to the orders and the decrees of the said court or may foreclose and sell such real property as provided in such mortgage deed, or deed of trust, pursuant to the orders and decrees of such court.

All such sales shall be made as directed by the court in the cause in which said receiver is appointed or the said trustee elected, and for the satisfaction and settlement of such notes and bonds secured by such mortgage deed or deed of trust or in such other actions for the sales of the said real property as the said receiver or trustee may institute and all pursuant to the orders and decrees of the court having jurisdiction therein.

All sales of real property made prior to April 10, 1931 by such receiver or trustee of and pursuant to the orders of the courts of competent jurisdiction in such cases, are hereby validated.

¹⁶ Harris and the Castle McCulloch Defendants seize upon this language to argue that sections 1.507.1 through 1-507.11 (2016) apply only to corporate receiverships. (Harris’s Resp. Opp’n Receiver’s Mot. for Order Authorizing Receiver to Authorize Power of Sale in Castle McCulloch Deed of Trust and to Am. Mot. for Order Authorizing Receiver to Exercise Power of Sale 6, ECF No. 1487; Castle McCulloch Defs.’ Opp’n 4.) The version of section 1-502 in effect when the action commenced, however, expressly applied these sections to receiverships of every kind, stating that “[t]he provisions 1-507.1 through 1-507.11 are applicable, as near as may be, to receivers appointed hereunder.” N.C.G.S. § 1-502 (2015). This concluding paragraph of section 1-502 has been amended twice since this action commenced on 4 February 2015. (See Compl., ECF No. 1); see 2020 N.C. Sess. Laws 23, part III, sec. 9; 2021 N.C. Sess. Laws 93, part II, sec. 2. But because neither amendment expresses a clear intent to apply retroactively, the Court concludes that the applicable version of section 1-502 is the one in effect on the date the action commenced: section 1-502 (2015). See *Speck*, 5 N.C. App. at 301; *Hopkins*, 8 N.C. App. at 168. As a result, the Court finds Harris’s and the Castle McCulloch Defendants’ argument without merit.

N.C.G.S. § 1-507.4 (2016) (effective for receiverships commenced prior to 1 January 2021).

12. The Receiver has forecast that he will introduce evidence in seeking authority to exercise the power of sale showing that the Castle McCulloch Note was assigned to JDPW on 21 September 2012, that the amount due and owing on the Note at that time was \$1,692,430.39, and that no payments have been made on the Note despite the Receiver's formal demand for payment.¹⁷ Based on this showing and in light of applicable law, the Receiver avers and contends that it is in the best interest of JDPW to seek to enforce the Deed of Trust by exercising the power of sale contained therein in accordance with procedures to be established by the Court.¹⁸

13. After careful review, the Court concludes that (i) it has exclusive jurisdiction over the Deed of Trust;¹⁹ (ii) the Receiver, the Nivison Parties, Harris, McDaniel, and

¹⁷ (Mot. ¶¶ 4–9.)

¹⁸ (Br. Supp. Mot. for Order Authorizing Receiver to Exercise Power of Sale in Castle McCulloch Deed of Trust (Old Battleground v. CCSEA) 5–6, ECF No. 1468.)

¹⁹ The Court has previously found as a matter of law that Harris, as JDPW's trustee, acquired by assignment the Deed of Trust and the Castle McCulloch Note. (7 May 2019 Order and Op. ¶¶ 18–19.) The Court has also found as a matter of law that JDPW was insolvent at the time JDPW was placed into receivership on 28 April 2016. (28 April 2016 Order at 4 ¶ 7.) The version of section 1-507.3 in effect at that time expressly provides that “All of the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects, *upon the appointment of a receiver, forthwith vest in him, and the corporation is divested of the title thereto.*” N.C.G.S. 1-507.3 (2016) (effective for pre-1 January 2021 receiverships). Thus, title to all of JDPW's property, including the Deed of Trust and the Castle McCulloch Note, vested in the Receiver as of the Receiver's appointment on 28 April 2016. *See, e.g., Nat'l Sur. Corp. v. Sharpe*, 236 N.C. 35, 50 (1952) (“upon the appointment of a receiver for an insolvent debtor, all of the real and personal property of the insolvent debtor forthwith vests in the receiver”). Under the applicable version of section 1-507.4, the Receiver thus has exclusive ownership and possession of the Deed of Trust and the Castle McCulloch Note and the rights and obligations attendant thereto.

the Castle McCulloch Defendants are properly before the Court and have had a full and fair opportunity to brief and offer argument on the Motion; and (iii) based on the Receiver's forecast of evidence, it is in JDPW's best interest to seek to enforce the Deed of Trust by initiating procedures seeking to authorize the exercise of the power of sale contained therein.

14. Accordingly, the Court concludes, in the exercise of its discretion and for good cause shown, that (i) the Receiver's Motion should be granted; (ii) the Receiver should be permitted to initiate a proceeding seeking to authorize the exercise of the power of sale contained in the Deed of Trust; (iii) the Court should delegate authority to the Clerk of Superior Court of Guilford County, North Carolina to conduct any proceeding the Receiver may initiate to authorize the exercise of the power of sale;²⁰ (iv) any proceeding seeking to authorize the exercise of the power of sale should be conducted consistent with the procedures set forth in Chapter 45, Article 2A of the North Carolina General Statutes; (v) any appeal from any proceeding seeking to authorize the exercise of the power of sale should be timely filed before this Court;²¹ and (vi) all interested parties, including the Receiver, the Nivison Parties, Harris, McDaniel, and the Castle McCulloch Defendants, should be afforded the opportunity

²⁰ See N.C.G.S. § 1-507.4 (2016) ("All such sales shall be made as directed by the court in the cause in which said receiver is appointed or the said trustee elected[.]").

²¹ Pursuant to section 7A-45.4(f), "[a]ll proceedings in the action shall be before the Business Court Judge to whom it has been assigned unless and until an order has been entered under subsection (e)." Accordingly, any appeal from the proceeding seeking to authorize the exercise of the power of sale shall be made before this Court.

to raise all available claims and defenses in connection with any proceeding the Receiver initiates to seek authority to exercise the power of sale.

15. **WHEREFORE**, the Court hereby **GRANTS** the Motion and hereby **ORDERS** as follows:

- a. The Receiver may initiate a proceeding seeking to authorize the exercise of the power of sale contained in the Deed of Trust;
- b. The Court, in its discretion, hereby delegates authority to the Clerk of Superior Court of Guilford County, North Carolina to conduct and preside over any proceeding that the Receiver may initiate to authorize the exercise of the power of sale, such proceeding to be conducted consistent with the procedures set forth in Chapter 45, Article 2A of the North Carolina General Statutes;
- c. All interested parties, including the Receiver, the Nivison Parties, Harris, McDaniel, and the Castle McCulloch Defendants may raise all available claims and defenses in any proceeding initiated by the Receiver to seek authority to exercise the power of sale; and
- d. Any appeal from any proceeding before the Guilford County Clerk of Superior Court initiated by the Receiver pursuant to this Order shall be made to this Court.

SO ORDERED, this the 6th day of September, 2022.²²

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge

²² The Court has entered this Amended Order to correct a typographical error in its original Order filed 10 August 2022, (ECF No. 1504), identifying in paragraphs 14 and 15(b) “Chapter 45, Article 2 of the North Carolina General Statutes” rather than, as now corrected, “Chapter 45, Article 2A of the North Carolina General Statutes.”