ID_483 RN 77, Spring 23

Partition Referees and Receivers Have Quasi-judicial Immunity

By Peter A. Davidson*

A number of articles previously published in Receivership News have pointed out that while it is clear that receivers appointed by federal courts have quasi-judicial immunity (See, New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298 (9th Cir. 1989); Trinh v. Fineman, 9 F. 4th 235 (3rd. Cir. 2021) [collecting cases]) up to now it has been unclear whether that is true for receivers appointed by state courts in California, although there have been a number of unreported decisions that have held receivers do have such immunity (See, Haider v. Speiser, 2012 WL 41019411 (2012); Gruntz v. Wiley, 2009 WL 4264343 (2009)). Now, in Holt v. Brock, 85 Cal.App. 5th 611 (2022), the court of appeal not only held that partition referees have quasi-judicial immunity, but reaffirmed prior dicta that receivers likewise have such immunity.

The facts in Holt v. Brock were customary for a partition case. A sister and brother each inherited a 50 percent share in a property. They could not agree on a sale, so the sister filed an action to partition the property. The court ordered the property be sold and the proceeds divided equally. When the sister and brother could not agree on a broker to list the property, the court appointed a broker to list the property "as is" with a minimum list price of $882,500, but with the actual price to be determined by the broker's assessment of the market value. The court also ordered the broker to provide a summary of the listing and monthly marketing activity to the court and the parties and that any sale was subject to court confirmation. While the opinion does not explicitly say the broker was a partition referee, he was such because the partition statute (C.C.P. §872.010 et seq.) states in a partition action: "The court shall appoint a referee to divide or sell the property as ordered by the court." C.C.P. §873.010.

The parties and the broker signed a listing agreement with a list price of $925,000. The brother then offered to purchase the property for $1 million and to represent himself in the sale, if the broker agreed to reduce the commission to three percent or not charge him the three percent. (Although not stated in the opinion, it is likely a six percent commission had been established. It is the court that generally determines the referee's compensation. C.C.P. § 873.010 (b)(3).) The broker initially agreed, but then informed the brother he could not or would not change the listing agreement. The brother then moved to have the broker removed. The court denied the motion and reconfirmed the broker was authorized and ordered to market and sell the property "in accordance with the terms and for the price he deems appropriate." Subsequently, however, because the dispute with the brother put the broker "in a difficult situation", the court appointed a receiver to assume management of the property with the sole authority for approval of a sale. The brother then offered $462,500 for the sister's one half interest, $100 down with the remainder to be financed. The sister countered, offering $475,000 for the brother's interest, $10,000 down, all cash at closing. The receiver accepted the sister's offer and the property was sold to her.

The brother then sued the broker, contending he breached his agreement to sell the property to him at a discounted commission, undervalued the property and sold it for less than he offered. The broker filed a motion for summary judgment, which was granted. The trial court

found the broker was entitled to quasi-judicial immunity because the broker was "[a]cting under court appointment…was fulfilling quasi-judicial functions integral to the judicial process in the underlying partition action and as an arm of the court." Holt v. Brock, supra. at 617. The brother then appealed.

The court of appeal affirmed, relying in great part on Howard v. Drapkin, 222 Cal. App. 3d 843 (1990) where the court stated, concerning quasi-judicial immunity, that it was persuaded by the approach taken by federal courts on the issue. "Thus, we believe it is appropriate that these 'nonjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process should be given absolute quasi-judicial immunity for damage claims arising from their performance of duties in connection with the judicial process. Without such immunity, such persons will be reluctant to accept court appointments …Additionally, the threat of civil liability may affect the manner in which they perform their jobs." Id. at 901(citations omitted).

The court of appeal, again relying on Howard v. Drapkin, stated there are three classes of persons entitled to quasi-judicial immunity. The first are persons who perform functions normally performed by a judge, such as court commissioners, hearing officers or arbitrators. The second class are persons who function apart from the court but are engaged in neutral dispute resolution, such as referees and party-selected mediators. The third class are persons connected to the judicial process who "serve functions integral to the judicial process and act as arms of the court. This class includes (1) persons appointed by the courts for their expertise, such as mediators, guardians ad litem , therapists, receivers, …and bankruptcy trustees." Holt v. Brock, supra. at 622. (citations omitted, emphasis added).

With regard to the broker, the court found he was appointed for his expertise to carry out the court's order to sell the property and had discretionary authority to assist the court in resolving the dispute between the parties, specifically the value of the property and the listing price. "By determining the sales price,… [the broker] resolved the principal dispute between the sellers. In a sense, [he] also served as an agent of the court with limited authority. The court not the sellers set…[the] commission rate…And final approval of any sale…rested with the court, not the sellers. In short,…[the broker] was appointed by the court to exercise discretionary judgment in serving a
function integral to the partition action and as an arm of the court. As a result, he was entitled to quasi-judicial immunity. Id. at 624.

A recent bankruptcy case has gone further. It held that if a court fiduciary's actions were specifically approved by a court or were required to be taken by court order, the fiduciary has "absolute" immunity. In re Voyager Digital Holdings, Inc. 2023 WL 2470938 (Bankr. S.D.N.Y., 2023) deals with the court's proposed approval of a disclosure statement and confirmation of the debtor's plan of reorganization, which proposed the sale of the debtor's cryptocurrency business and the distribution of cryptocurrencies, rather than cash, to account holders. The Securities and Exchange Commission ("SEC") objected, suggesting that a specific cryptocurrency might be a security and that the purchaser might need to resister as a securities broker. As the court noted, however, the SEC produced no evidence on these issues, because the Commission itself had not taken a position on these issues. "Regulators themselves cannot seem to agree as to whether cryptocurrencies are commodities that may be subject to the CFTC, or whether they are securities that are subject to securities laws, or neither, or even on what criteria should be applied in making the decision." Voyager Digital at *2.

The SEC and other government agencies specifically objected to exculpation provisions in the plan, that provided that fiduciaries and other parties would not have liability for actions that the court approved or that the court directed them to take pursuant to the plan. They asserted the parties would "have to take their chances" on whether the government might contend their conduct was illegal and seek to punish them for doing what the court was authorizing and directing them to do under the plan.

After stating: "I think the Government's position is absurd." The court stated the proposed exculpation provisions should provide more than "qualified immunity". Relying on a number of receivership and bankruptcy cases, it stated: " 'Qualified immunity is a doctrine that is applied to people who have discretion to perform specific functions in quasi-judicial roles but without having obtained specific court approval or acting pursuant to an explicit court direction. Many of the same decisions that discuss such 'qualified' immunity, however, also make clear that there is a broader immunity for actions that are specifically approved by a court and/or that have been explicitly required to be taken by court order, particularly where government officials or other parties had the opportunity to object to the court's approval of an action and did not do so. See, e.g. Bradford Audio Corp.v. Pious, 392 F.2d 67,72-73 (2d Cir. 1968) (receiver was immune from liability for having done what a court order approved and directed the receiver to do)***Phoenician Mediterranean Villa,LLC v. Swope (In re J&S Props. LLC) 545 BR. 91,103 (Bank. W.D. Pa. 2015)(where a bankruptcy trustee acts pursuant to an order of the court, a bankruptcy trustee is generally given absolute immunity)…" Voyager Digital at *15. See also, Kermit Const. Corp. v. Banco Credito Y Ahorro Ponceno, 547 F.2d 1,3 (1st Cir. 1976) ("At the least, a receiver who faithfully and carefully carries out the orders of his appointing judge must share the judge's absolute immunity. To deny him this immunity would seriously encroach on the judicial immunity already recognized by the Supreme Court. Pierson v. Ray, supra. It would make the receiver a lightning rod for harassing litigation aimed at judicial orders."); T&S Investment Company, Inc. 588 F.2d 801,802 (10th Cir. 1978)(same).

The distinction between quasi-judicial immunity and absolute immunity is not really significant for liability purposes, but can make a difference procedurally. In both cases, the receiver is not liable for damages. Quasi-judicial immunity, however, is generally raised as a defense and, hence, might be waived if not plead. It can be raised in an anti-SLAPP motion. Absolute immunity can be used to attack and dispose of a case early, because one with absolute immunity cannot be sued. See, Fisher v. Pickens, 225 Cal. App. 3d 708 (1990) (judgment on the pleadings).

Partition referees and receivers can now breathe a little easier. So long as they act within the scope of their appointment, they should have quasi-judicial immunity for their actions and if they are carrying out a specific court order they may have absolute immunity.

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