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State Court of Fulton County Judge

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**IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA**

2018CV312517

Todd A. Brown and Michael S. Brown, Petitioners,)	Civil Action 2017CV285740
v.)	
)	
William Brown, Respondent.)	

Todd A. Brown and Michael S. Brown, Petitioners,)	Civil Action 2017CV285743
v.)	
)	
William Brown, Respondent.)	

Todd A. Brown and Michael S. Brown, Petitioners,)	Civil Action 2018CV307340
v.)	
)	
William Brown and Mark Deutsch, Respondents.)	

Scott B. Brown, as Trustee for the Solomon Brown a/k/a Sol Brown Revocable Trust, u/a/d July 17, 1991 and as amended and restated u/a/d October 25, 2016, Petitioner,)	Civil Action 2018CV312517
v.)	
)	
William Brown, as Trustee of the MSB Flyer Trust; SBB Flyer Trust; and TAB Flyer Trust (collectively the "Brown 2003 Trusts"), all u/a/d November 3, 2003, Respondent.)	

Todd A. Brown and Michael S. Brown,)	Civil Action 2019CV315005
Petitioners,)	
v.)	
)	
The MSB Trust, The TAB Trust, and)	
William "Bill" Brown, as Co-Trustee of the)	
MSB Trust, and William "Bill" Brown, as)	
Co-Trustee of the TAB Trust,)	
Respondents.)	

The Meadows Commerce Center, LLC,)	Civil Action 2020CV333682
Plaintiff,)	
v.)	
)	
Michael S. Brown, Todd A. Brown, Keystone)	
Construction Company, LLC, Brogdon Place)	
II, LLC, and National Copack, LLC,)	
Defendants.)	

Michael S. Brown,)
Third-Party Plaintiff,)
v.)
)
Scott Brown,)
Third-Party Defendant.)

ORDER ON PENDING MATTERS

This matter comes before the court on (1) the motion filed by Todd Brown and Michael Brown to (a) appoint a receiver over, and remove Bill Brown as trustee of, the trusts here at issue and (b) appoint a receiver over, and remove Scott Brown as manager of, Meadows Commerce Center, LLC and Flyer Ventures Limited Partnership; (2) Scott Brown's objection to consolidation of Case No. 2018CV312517 with the other Brown Trust cases; and (3) the recommendation of the special master to require the parties to engage in mediation. The court held a hearing on this matter on June 10, 2020. Having considered the entire record and oral argument of the parties, the court finds as follows:

These related cases involve disputes regarding certain trusts established by Solomon Brown and his wife Joann Brown for the benefit of their three sons, Todd Brown, Michael Brown, and Scott Brown, and their respective descendants.

In 2003, Solomon and Joann Brown conveyed the Flyer Building, a commercial property in Miami, Florida, to Flyer Ventures Limited Partnership. The limited partnership interests were conveyed to three trusts established under the Sol Brown 2003 Trusts. The three trusts – the TAB Flyer Trust, the MSB Flyer Trust, and the SSB Flyer Trust (hereinafter, collectively referred to as the “Flyer Trusts”) – each own one-third of the 99% limited partner interest. The remaining 1% general partner interest in the Flyer Ventures Limited Partnership is held by Flyer Management, LLC. Scott Brown manages the Flyer Building through Flyer Management, LLC. Todd Brown, Joann Brown, and Todd’s descendants are the beneficiaries of the TAB Flyer Trust. Michael Brown, Joann Brown, and Michael’s descendants are the beneficiaries of the MSB Flyer Trust. Scott Brown, Joann Brown, and Scott’s descendants are the beneficiaries of the SSB Flyer Trust. Solomon Brown’s brother, Bill Brown, is the trustee of the trusts.

The other set of trusts here in issue are the TAB Trust, the MSB Trust, and the SSB Trust (hereinafter, collectively referred to as the “Meadows Trusts”), each of which owns a one-third interest in the Meadows Commerce Center, LLC, which owns a commercial development in Alpharetta, Georgia. The Meadows trusts were established for the benefit of Todd Brown, Michael Brown, and Scott Brown, and their respective descendants. In 2013, Solomon Brown designated Scott Brown as the managing member of Meadows Commerce Center, LLC. In 2013, Bill Brown became the trustee for the Meadows trusts. In September 2018, Solomon Brown died.

The lawsuits, among other things, seek an accounting as to the Flyer Trusts and the Meadows Trusts and assert claims for mismanagement of the trusts.

I. Motion to Appoint Receiver.

“When any fund or property is in litigation and the rights of either or both parties cannot otherwise be fully protected or when there is a fund or property having no one to manage it, a receiver of the same may be appointed by the judge of the superior court having jurisdiction thereof.” O.C.G.A. § 9-8-1. “Appointing a receiver under O.C.G.A. § 9-8-1 is justified where there is a danger that the assets at issue will be depleted or impaired if they remain in one party’s control.” *Nayyar v. Bhatia*, 348 Ga. App. 789, 791 (2019); *see also* O.C.G.A. § 9-8-2 (“Equity may appoint receivers to take possession of and protect trust or joint property and funds whenever the danger of destruction and loss shall require such interference.”); O.C.G.A. § 9-8-3 (“Equity may appoint a receiver to take possession of and hold, subject to the direction of the court, any assets charged with the payment of debts where there is manifest danger of loss, destruction, or material injury to those interested.”).

This is an equitable remedy, similar to an interlocutory injunction. As such, it is appropriate only where there is no available adequate and complete remedy at law. *See generally* O.C.G.A. § 23-1-3 (“Equity jurisdiction is established and allowed for the protection and relief of parties where, from any peculiar circumstances, the operation of the general rules of law would be deficient in protecting from anticipated wrong or relieving for injuries done.”). “The power of appointing receivers should be prudently and cautiously exercised and except in clear

and urgent cases should not be resorted to.” O.C.G.A. § 9-8-4. Nevertheless, the decision as to whether the circumstances are sufficiently clear and urgent enough to warrant a receiver is committed to the trial court’s discretion, which will not be interfered with on appeal unless it was manifestly abused. The trial court has broad discretion to make this determination even though, as here, the facts relevant to the determination are in conflict.

Nayyar, 348 Ga. App. at 789-90 (select citations and punctuation omitted); *see also Fulp v. Holt*, 284 Ga. 751, 753 (2008) (noting that “if corporate assets were dissipated because no receiver was appointed, any remedy at law would be meaningless”). “The terms on which a receiver is appointed shall be in the discretion of the court.” O.C.G.A. § 9-8-3.

For the reasons addressed by the court at the hearing on Petitioners Todd Brown and Michael Brown’s motion, the court finds, on the record before it, that Petitioners have not carried their burden of demonstrating the need or desirability of appointing a receiver over the trusts or their assets. For similar reasons, the court finds that Petitioner’s motion to remove Bill Brown as trustee is due to be denied at this time. *See* O.C.G.A. § 53-12-221; *see also Davis v. Walker*, 288 Ga. App. 820, 821 (2007); *Citizens & So. Nat’l Bank v. Haskins*, 254 Ga. 131, 141 (1985). Accordingly, Petitioner’s motion is hereby **DENIED**.

However, as stated at the hearing, the court does find that the appointment of an auditor is warranted. *See* O.C.G.A. § 9-7-1 *et seq.*

Georgia law distinguishes between the role played by a receiver and an auditor. A trial court may appoint an auditor in all cases “involving matters of account, if the case shall require it,” “to investigate the matters of account and report the result to the court.” O.C.G.A. § 9-7-3. Thus, “unless modified by the order of appointment,” an auditor generally is granted the authority “to hear motions, allow amendments, and pass upon all questions of law and fact,” including the “power to subpoena and swear witnesses and compel the production of papers.” O.C.G.A. § 9-7-6....

In contrast, a receiver is generally appointed “[w]hen any fund or property is in litigation and the rights of either or both parties cannot otherwise be fully protected or when there is a fund or property having no one to manage it.” O.C.G.A. § 9-8-1.

A&M Hospitalities, LLC v. Alimchandani, 351 Ga. App. 310, 313-14 (2019). “Thus, auditors and special masters primarily assist the trial court in resolving issues in the litigation, while a receiver acts as a guardian over funds or property at issue in the litigation and should be appointed only in clear and urgent cases.” *Id.* at 314.

Upon application of either party, after notice to the opposite party, the judge of the superior court, in equitable proceedings if the case shall require it, may refer any part of the facts to an auditor to investigate and

report the result to the court. Furthermore, the judge may, upon his own motion, when in his judgment the facts and circumstances of any such case require it, refer the same to an auditor.

O.C.G.A. § 9-7-2; *see also* O.C.G.A. § 9-7-3 (“In all cases in the superior, state, or city courts involving matters of account, if the case shall require it, the judge may appoint an auditor to investigate the matters of account and report the result to the court upon the application of either party and after notice to the opposite party, or upon his own motion when in his judgment the facts and circumstances of any such case require it.”).

“In all cases where the parties agree upon the person to be appointed as auditor, the court shall appoint such person.” O.C.G.A. § 9-7-4. Accordingly, it is hereby **ORDERED** that, within ten (10) days after the date of entry of this Order, the parties shall confer and report to the court whether they agree on the person to be appointed as auditor. Should the parties fail to agree, the court will appoint an auditor of its choosing.

II. Scott Brown’s Objection to Consolidation.

Scott Brown filed his objection to consolidation of case no. 2018CV312517 on May 18, 2020. No party has responded to that objection. At this juncture, the court finds that it would be premature to rule upon Scott Brown’s motion insofar as the trial of this case is concerned. With respect to the appointment of an auditor and the mediation and additional financial review rulings set out below, the court hereby **OVERRULES** Scott Brown’s objection.

III. Mediation.

The special master appointed in this case, Nisbet S. “Ken” Kendrick, III, has recommended that the parties be required to participate in mediation at this time. The court agrees that mediation is warranted at this stage of the litigation and prior to the commencement of work by the auditor.

Accordingly, it is hereby **ORDERED** that, within ten (10) days after the date of entry of this Order, the parties shall confer and report to the court whether they agree on the person to conduct the mediation. Should the parties fail to agree, the court will appoint a mediator of its choosing. The mediation shall take place within sixty (60) days after the retention of the mediator. The mediation may be conducted either in person or by Zoom or some other videoconferencing application. All parties and their counsel, and to the extent appropriate all insurance adjusters, shall be present at the mediation and participate in good faith. As specified by the court at the status conference held on June 11, 2020 in case no. 2020CV333682, all counsel and parties in that case shall participate in the mediation.

IV. Additional Financial Documentation and Review.

The Court further **ORDERS** that the special master, with the assistance of accountants at CliftonLarsonAllen, review and report on financial results of operations of the TAB Trust, MSB Trust, TAB Flyer Trust, MSB Flyer Trust, Meadows Commerce Center, LLC, and Flyer

Ventures Limited Partnership for the 2019 calendar year and the first two quarters of 2020, with reports to be provided to the court and counsel for the parties at least five (5) business days prior to the mediation. The parties shall fully and expeditiously cooperate in this process.

V. Scheduling.

The court will hold a hearing on all pending motions in these cases on September 16, 2020, at 9:30 a.m. These cases will appear on the court's January 2021 jury trial docket.

SO ORDERED, this 11th day of June, 2020.

/s/ Wesley B. Taylor
Wesley B. Taylor, Judge
State Court of Fulton County