



NO. 21-CV-550

DISTRICT OF COLUMBIA COURT OF APPEALS

Clerk of the Court

Received 11/29/2021 06:21 PM

Resubmitted 11/29/2021 06:21 PM

Resubmitted 11/30/2021 11:00 AM

Resubmitted 11/30/2021 11:44 AM

ROBERTO DE CARVALHO, *et al.*,

Appellants,

v.

LAPIS MUNICIPAL OPPORTUNITIES FUND III, LP, *et al.*,

Appellees.

Appeal from the Superior Court of the District of Columbia
The Honorable ROBERT R. RIGSBY, Associate Judge
Superior Court No. 2018 CA 007937 B

BRIEF OF APPELLEE LONG GATE ASSOCIATES, LLC

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D.C. APP. R. 28(A)(2) STATEMENT

Proposed Intervenor-Appellants Roberto de Carvalho, Vania de Carvalho, Celina Ochoa, Moises Nunez, and Dora Martinez were represented in the proceedings below by Eleni P. Christidis and Jamie Long of the Legal Aid Society of the District of Columbia. The Movants are represented by Eleni P. Christidis, Jamie Long, Amanda Korber, and Jonathan H. Levy of the Legal Aid Society of the District of Columbia on appeal.

Plaintiff-Appellee Lapis Municipal Opportunities Fund III, LP (“Lapis”) was represented in the proceedings below by Michael A. Brown, Michael E. Blumenfeld, and Timothy M. Hurley of the firm Nelson Mullins Riley & Scarborough LLP and by Alison H. Graham and Matthew M. Moore of the firm Shulman, Rogers, Gandal, Pordy & Ecker, P.A.

While the proceedings below were pending, Lapis transferred its interest in the case to Plaintiff-Appellee OSPWEST, LLC (“OSPWEST”). OSPWEST was represented in the proceedings below and is represented on appeal by Alison H. Graham and Matthew M. Moore of the firm Shulman, Rogers, Gandal, Pordy & Ecker, P.A.

Receiver-Appellee Long Gate Associates, LLC (the “Receiver”) was represented in the proceedings below and is represented on appeal by Constantinos G. Panagopoulos and Matthew D. Lamb of the firm Ballard Spahr LLP.

Defendant Randolph Towers Cooperative, Inc. was represented in the proceedings below by Eric M. Rome of the firm Eisen & Rome, PC.

Proposed Intervenor Randolph Towers Condominium Association, Inc. was represented in the proceedings below by Andrew J. Terrell and Michael C. Gartner of the firm Whiteford, Taylor & Preston LLP.

Pursuant to D.C. App. R. 26.1, Receiver-Appellee Long Gate Associates, LLC certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: November 30, 2021.

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By: /s/ Matthew D. Lamb

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INTRODUCTION

This matter arises from the failure of Randolph Towers Cooperative, Inc. (the “Cooperative”), a failed housing cooperative in the District of Columbia. The Cooperative borrowed two commercial loans to finance development and later defaulted on both. In response, the holder of the loans, Lapis Municipal Opportunities Fund III, LP (“Lapis”), filed the breach of contract action below and moved to appoint a receiver over the units securing the loans. The Superior Court granted the motion and appointed Long Gate Associates, LLC (the “Receiver”). In the order appointing the Receiver, the Superior Court recognized the Receiver’s authority to bring litigation on behalf of the Cooperative. Relatedly, the Superior Court recognized the Receiver’s authority to terminate and evict Cooperative members who failed to pay “carrying charges” to the Cooperative. That power is essential—without carrying charges, the Cooperative cannot fund its obligations or otherwise function as a legal entity.

The Receiver then began filing eviction proceedings against delinquent members in landlord-tenant court. In one of those proceedings, the court held that the language of the receivership order did not confer standing on the Receiver to file the case. Relatedly, in two of the landlord-tenant proceedings, the relevant courts held that the receivership order required a majority vote of the Cooperative’s membership before the Receiver could terminate and evict a delinquent member.

The problem with this holding is that every single member of the Cooperative is delinquent, which in turn renders every single member ineligible to vote and thus prevents the formation of a quorum. The same exact conduct that entitles the Receiver to terminate and evict the members—their default on carrying charges—prevents the formation for a quorum for purposes of carrying out termination and eviction. If left in place, this procedural Gordian knot would empower the members to occupy the relevant units rent-free so long as they continue their en masse default.

As a result, Lapis filed a motion with the court below (the “Motion to Amend”) seeking to amend the receivership order to cure the alleged defects identified by the landlord-tenant courts. Lapis sought express authority for the Receiver to sue delinquent members without the need to join the cooperative as a separate party, as well as express authority for the Receiver to terminate and evict delinquent members without holding a vote of the Cooperative’s membership. In response, five members of the Cooperative (the “Movants”) filed a motion to intervene in the proceedings below as of right (the “Motion to Intervene”). The Movants sought to intervene not only to oppose the amendments to the receivership order, but also to terminate the receivership and to bring a raft of affirmative claims against Lapis, the Receiver, and the Cooperative. The Superior Court denied the Motion to Intervene and granted the Motion to Amend.

On appeal, Movants have abandoned their request to intervene for the purposes of filing affirmative claims and terminating the receivership. However, Movants argue the Superior Court abused its discretion when it denied intervention for the purposes of opposing the Receiver's expanded power to file litigation and the Receiver's expanded power to terminate and evict defaulted members. Given that all the members of the Cooperative—including Movants—have defaulted on carrying charges, Movants have the same exact interest in avoiding termination and eviction as the other members. Therefore, the Cooperative—which is already a party—adequately represents their interests.

In any event, Movants' interests are not implicated by the part of the Motion to Amend that seeks to clarify the Receiver's standing to sue. Merely allowing the Receiver to bring claims that the Cooperative already holds does not change the nature, scope, or validity of those claims. The mere fact that an entity under receivership has a claim against a non-party, or that the receiver may ultimately bring the claim, does not entitle the non-party to intervene as of right in the receivership action. The proper avenue for opposing such a claim is to defend against the claim on the merits in the event that the receiver brings it.

Finally, because Movants were fixated on bringing affirmative claims and on terminating the receivership, they did not submit a proposed answer to Lapis's complaint or a proposed opposition to the Motion to Amend. Further, none of

Movants' filings, including the Motion to Intervene, meaningfully asserted or explained their substantive basis for opposing the Motion to Amend. Because they did not comply with either the letter or the spirit of Rule 24(c), Movants forfeited any right to intervene for the purpose of opposing the Motion to Amend. Further, to the extent they actually invoked substantive arguments against the Motion to Amend, those arguments were futile, which is an independent basis to deny intervention.

Accordingly, the Court should affirm the Superior Court's denial of the Motion to Intervene. Alternatively, if the Court allows Movants to intervene, the Court should limit them to the specific arguments they raised or presaged in the proceedings below.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal because “[d]enial of leave to intervene as of right is appealable to this court as a final order.” Vale Props., Ltd. v. Canterbury Tales, Inc., 431 A.2d 11, 14 (D.C. 1981) (citing Calvin-Humphrey v. District of Columbia, 340 A.2d 795, 798 n.9 (D.C. 1975)).

STATEMENT OF THE ISSUES

1. Did the Superior Court act within its discretion by denying the Motion to Intervene for the purpose of opposing the Receiver's clarified and expanded standing to sue?

2. Did the Superior Court act within its discretion by denying the Motion to Intervene for the purpose of opposing the Receiver's clarified and expanded power to terminate and evict delinquent Cooperative members?

STATEMENT OF THE CASE

I. Lender sued the Cooperative and successfully moved to appoint the Receiver.

This case relates to Randolph Towers, a residential property at 3900-3902 14th Street, NW, Washington, DC 20011. Joint Appendix (“JA”) 516. Randolph Towers was previously owned by the Cooperative, with individual members of the Cooperative paying “carrying charges” to the Cooperative in exchange for the right to occupy individual units. *Id.* The property has since been converted into a condominium governed by the Randolph Towers Condominium Association. *Id.* In connection with the conversion, the Cooperative has sold some of the units and parking spaces located in the property to individual owners. JA 516-17. As explained below, however, the Cooperative continues to own certain units and parking spaces. JA 517. The occupants of these units remain obligated to pay carrying charges to the Cooperative. JA 517.

In 2007, the Cooperative borrowed two loans secured by deeds of trust against the units and parking spaces that it then owned. JA 584. Lapis Municipal Opportunities Fund III LP (“Lapis”) acquired the loans on August 28, 2018. JA 584-585. Due to the Cooperative’s default on the loans, Lapis filed this action for breach of contract on November 9, 2018. JA 11. Lapis’s complaint includes claims for breach of contract and for the appointment of a receiver over the units and parking spaces encumbered by the deeds of trust. JA 30-34.

On December 4, 2018, Lapis filed a motion to appoint a receiver. JA 3. The Superior Court granted the motion in an order filed May 2, 2019 (the “Receivership Order”). JA 302. The Receivership Order appointed Long Gate Associates, LLC (the “Receiver”) to manage a total of 23 units and 40 parking spaces (collectively, the “Receivership Properties”). JA 307-15. The Receivership Order specifically authorized the Receiver to file litigation on behalf of the Cooperative:

[I]t is further

ORDERED that Long Gate Associates, LLC, is authorized to engage legal counsel for the purpose of bringing actions in the Landlord & Tenant Branch of the D.C. Superior Court; and it is further

ORDERED that Long Gate Associates, LLC, is authorized to retain legal counsel to bring actions for non-payment of rent or carrying charges in the name of the Co-op; to exercise remedies, as provided by law, for breaches of lease or breaches of Occupancy Agreement(s), including bringing legal action in the name of the Co-op; and to bring all other causes of actions as permitted by this Order, the Bylaws, an [sic] applicable law as may be necessary; and it is further

ORDERED that legal counsel retained by Long Gates [sic] Associates, LLC is authorized to pursue settlement of any legal action brought, to enter into settlement agreements, and to fully litigate matters that are not resolved via settlement as it sees fit...

JA 310.

The Receivership Order also empowered the Receiver to levy additional carrying charges against the Cooperative members’ interests and to terminate their interests if they did not pay the charges:

[I]t is further

ORDERED that Long Gate Associates, LLC is authorized to raise carrying charges in excess of 10% to allow the Co-op to operate at a break-even cash flow by increasing carrying charges to cover actual expenses. The carrying charge levels will be determined by the Receiver rather than the Co-op's Board without approval of a majority of the Co-op's members; and it is further

ORDERED that Long Gate Associates, LLC, is authorized to raise rent levels as permitted by applicable law; and it is further

ORDERED that Long Gate Associates, LLC is authorized to terminate any member's right to occupancy pursuant to the terms and procedures set forth in the Bylaws and Occupancy Agreement(s)...

JA 311.

II. Pursuant to the Receivership Order, the Receiver brought eviction proceedings against several members.

Pursuant to these provisions, the Receiver brought eviction proceedings against several members. Relevant here, the Receiver sued for possession of a unit occupied by Roberto and Vania Roacha de Carvalho in September 2019. See Long Gate Assocs., LLC, as Receiver for Randolph Towers v. de Carvalho, No. 2019 LTB 020177. The court in the de Carvalho case held that the Receiver lacked standing to bring the suit, despite the clear language of the Receivership Order. See id., Order Granting Defendants' Motion for Summary Judgment at 4-9 (Feb. 18, 2021). However, the de Carvalho court did not purport to restrict the authority of the Superior Court in this case to modify the Receivership Order going forward. The de

Carvalho court also held, among other things, that the Cooperative had to hold a vote to terminate the de Carvalhos' membership interest before the Receiver could evict them. Id. at 10-14.

In January 2020, the Receiver sued for possession of a unit occupied by Celina Ochoa and Moises Nunez. See Long Gate Assocs., LLC as Receiver in the Name of Randolph Towers Cooperative v. Ochoa, No. 2020 LTB 001453. The Ochoa/Nunez court rejected the argument adopted by the de Carvalho court that the Receiver lacked standing to sue. See id., Minutes of Aug. 4, 2020 hearing. However, the Ochoa/Nunez court agreed with the de Carvalho court that the Cooperative must terminate a member's interest by a majority vote before the Receiver may evict. See id., Order at 5-6 (Mar. 15, 2021).

In February 2020, the Receiver sued for possession of the unit occupied by Dora Martinez. See Long Gate Associates, LLC as Receiver in the Name of Randolph Towers Cooperative v. Diaz, No. 2020 LTB 004041. That case remains pending.

III. Movants sought to intervene in the receivership action in order to bring affirmative claims, terminate the receivership, and oppose the Lender's Motion to Amend.

At the time of the above-referenced eviction proceedings, all of the Cooperative's members had defaulted on their carrying charges. JA 585. All of the members remain in default at this time. Therefore, none of the members is eligible

to vote at meetings of the Cooperative. JA 323-24. In turn, this precludes the Cooperative from forming a quorum or taking a vote to terminate the interests of delinquent members. Id.

For these reasons, among other, Lapis filed a motion on May 5, 2021, to amend the Receivership Order (the “Motion to Amend”). JA 316. Relevant here, the Motion to Amend sought to modify the Receivership Order to (1) strengthen and clarify the language giving the Receiver standing to sue; and (2) permit the Receiver to terminate the interests of delinquent Cooperative members without the consent of the Cooperative’s board or a majority of the Cooperative’s Members. JA 322-24. The Cooperative did not file a response and did not indicate whether it consented or opposed.

On May 19, 2021, the de Carvalhos, Ochoa, Nunez, and Martinez (collectively, “Movants”) filed a Motion to Intervene as of right under Super. Ct. Civ. R. 24(a)(2) (the “Motion to Intervene”). JA 402.¹ Movants argued, among other things, that they were entitled to intervene for the purpose of opposing the Motion to Amend. JA 402-03. However, they did not seek to intervene as defendants, nor did they submit any proposed answer to Lapis’ complaint or any

¹ Movants did not argue that they were entitled to permissive intervention under Super. Ct. Civ. R. 24(b).

proposed opposition to the Motion to Amend. Instead, they submitted a proposed complaint in which they sought to intervene as plaintiffs and to bring eight separate claims against the Cooperative, Lapis, and the Receiver. JA 415-26. These claims included a “claim” for termination of the receivership. JA 424.

In the Motion to Intervene, Movants argued that amending the Receivership Order to strengthen the Receiver’s power to sue would “overrule final judgments” in the de Carvalho and Ochoa/Nunez eviction proceedings. JA 402. However, they provided no authority for the position that the de Carvalho and Ochoa/Nunez decisions limited the prospective authority of the Superior Court below to modify its own Receivership Order. With respect to the Receiver’s proposed termination rights, the Members referred to “due process requirements” and generally argued that the proposed termination rights would be unfair. JA 407-08. However, they did not provide specific common-law or statutory authority for the position that the Superior Court could not authorize the Receiver to terminate delinquent members’ interests where holding a vote of the Cooperative was impossible.

Both Lapis and the Receiver filed oppositions to the Motion to Intervene. JA 501 & 515. Lapis argued that its existing claims against the Cooperative did not implicate the Movants’ rights or interests; that the Cooperative could represent Movants’ interests in either event; that there were no changed circumstances that justified terminating the receivership; and that the proposed complaint-in-

intervention was baseless and unrelated to the existing claims. JA 520-26. The Receiver argued that Movants' proposed complaint-in-intervention was untimely; that the existing claims between Lapis and the Cooperative would not affect the claims in the complaint-in-intervention; and that Movants could bring those claims in a separate lawsuit. JA 507-11. With respect to the Motion to Amend, the Receiver argued that Movants had failed to present a proposed answer or opposition; that the Motion to Amend did not sufficiently implicate Movants' interests; that the Motion to Amend was not a collateral attack on the decisions in the eviction proceedings; and that the Cooperative adequately represented Movants' interests. JA 511-13.

IV. The Superior Court denied the Motion to Intervene.

The Superior Court issued an order on July 14, 2021 denying the Motion to Intervene and granting the Motion to Amend. JA 626. The Superior Court held that Movants failed to demonstrate that the Motion to Intervene was timely. JA 636-37. Based on the prior litigation between the Receiver and the Movants, the Court concluded that the Movants had been aware of the receivership action since 2019. JA 636. The Superior Court further held that the Movants had not provided a satisfactory reason for why they did not file the Motion to Intervene when they

became aware of the receivership case. JA 637.² The Superior Court also inadvertently stated in dicta that “the impetus of this intervention is to challenge expanded powers the Receiver seeks but which this Court has denied for reasons stated above.” Id.

In granting the Motion to Amend, the Superior Court agreed with Lapis that the Cooperative’s inability to function, together with the underlying purposes of the receivership, justified expanding the Receiver’s powers. JA 633-35. The Superior Court noted Lapis’s argument that the Cooperative “is largely defunct, failing to comply with its bylaws, and essentially exists in name only.” JA 634. It further noted Lapis’s argument that “all Cooperative members are delinquent and, pursuant to the bylaws, no meeting can achieve a quorum and no votes can be held to enforce the bylaws in actions against defaulted members.” JA at 634-35 (quotation marks omitted).

The Superior Court ultimately concluded:

The spirit of this Court’s May 2, 2019 Receivership Order was to preserve and maintain Plaintiff’s interest in the Property. [Plaintiff] represents that the Court’s Order is effectively nullified due to “[t]he COVID-19 pandemic, the Public Health Emergency (“PHE”) and related restrictive legislation” and that

² Given that Movants sought to intervene for a hodgepodge of reasons, including to bring affirmative claims against Lapis, the Receiver, and the Cooperative, the Superior Court did specify which particular aspect of the Motion to Intervene was untimely.

Plaintiff's interest is at imminent risk of deterioration without the Receiver being granted expanded powers. Receiver states that the "unforeseeable impact of the PHE prevented Receiver from taking further legal action to enforce the increase in carrying charges through Landlord & Tenant actions." Mot. at 7. Receiver demonstrates good reason to expand the Receivership Order and, the Motion being unopposed, the Court finds good cause to grant the Motion. However, the Court notes that the modified Receivership Order will still be subject to the COVID-19 legislation and that this Court's Order will not supersede the legislation in any way nor give Receiver additional powers otherwise stayed during the pendency of the PHE and related legislation.

JA 635.

The Superior Court then amended the relevant provisions of the Receivership Order. The amended order preserves the Receiver's original powers to bring litigation, to levy additional carrying charges, and to terminate delinquent members. JA 637-44. However, the amended order further clarifies that the Receiver does not need the Cooperative's approval to file and settle litigation and does not need to formally join the Cooperative as a party. JA 639-40. It also clarifies that the Receiver's authority to bring litigation encompasses all

actions to exercise remedies, as provided by law, for [breaches] of lease, breaches of Occupancy Agreement(s), or based on a member and/or former member's status as a tenant at sufferance, and...all other causes of actions as permitted by this Order, the Bylaws, and applicable law as may be necessary.

Id. Finally, the amended order empowers the Receiver to issue default notices to delinquent members, to expel delinquent members without the need for a vote of the

defunct Cooperative, and to bring eviction proceedings against terminated members who fail to vacate. JA 640-41.

Movants filed a notice of appeal on August 6, 2021 and a praecipe amending the notice of appeal on August 12, 2021. JA 9. On September 28, 2021, OSPWEST, LLC (“OSPWEST”) filed a consent motion in the Superior Court to substitute itself in the place of Lapis. Id. As noted in the consent motion, Lapis assigned the underlying loans to OSPWEST in July 2021. The Superior Court granted the consent motion on October 26, 2021. JA 10. As used herein, the term “Lender” refers to Lapis or OSPWEST, as appropriate.

SUMMARY OF ARGUMENT

The Movants sought to intervene in the receivership action for four reasons: (1) to bring offensive claims against the Lender, Receiver, and Cooperative; (2) to terminate the receivership; (3) to oppose the Lender's request to clarify and expand the Receiver's standing to bring litigation; and (4) to oppose the Lender's request to clarify and expand the Receiver's power to terminate delinquent Cooperative members. In their opening brief, Movants abandon the first two purported grounds for intervention. As for the third and fourth grounds, the Superior Court acted within its discretion in denying intervention.

The Lender's request to expand and clarify the Receiver's standing to sue did not impair or impede the Movants' interests. Rather, it merely empowered the Receiver to exercise the Cooperative's preexisting rights. Standing alone, this aspect of the Motion to Amend does not empower the Receiver or the Cooperative to terminate or evict any particular member or members. Even if it did, the Movants' purported interest would be adequately represented by the Cooperative, which is already a party. Given that every member of the Cooperative has defaulted on carrying charges, the Movants' interest in avoiding termination and eviction is identical to the interests of the other Cooperative members and the Cooperative as a whole. Finally, the Movants did not submit a proposed answer to the Lender's complaint or a proposed opposition to the Motion to Amend—and the only

substantive defense that the Movants invoked in response to the proposed expansion of the Receiver's standing to sue was futile. For any of these three reasons, the Court should affirm the Superior Court's denial of intervention with respect to the Receiver's standing to sue.

The Superior Court also properly denied intervention on the issue of the Receiver's termination rights. As noted above, every member of the Cooperative has defaulted on carrying charges, meaning that Movants and the other Cooperative members have an identical interest in avoiding termination and eviction. Given this identity of interest, the Cooperative adequately represents the Movants' purported right to occupy the relevant units, which precludes intervention. Further, the Movants did not submit a proposed pleading or a proposed opposition identifying their defenses to the Receiver's expanded termination rights. The other materials they filed with the Superior Court also did not explain their defenses, if any, in sufficient detail to allow the court or the parties to evaluate them. For either of these two reasons, the Court should affirm the Superior Court's denial of intervention with respect to the Receiver's termination and eviction rights.

Alternatively, if the Court permits the Movants to intervene on any of these issues, the Court should preclude Movants from raising any new arguments that they did not raise in the proceedings below.

STANDARD OF REVIEW

To the extent a trial court's ruling on a motion to intervene as of right is based on questions of law, it is reviewed de novo; to the extent it is based on questions of fact, it is ordinarily reviewed for abuse of discretion. McPherson v. D.C. Hous. Auth., 833 A.2d 991, 994 (D.C. 2003) (citation omitted). "The appellate court role in reviewing the exercise of discretion is supervisory in nature and deferential in attitude." Johnson v. United States, 398 A.2d 354, 362 (D.C. 1979) (quotation marks omitted). "Consequently, when the primary focus of the trial court's role shifts from the facts and law to the sound exercise of judgment, the appellate court, in its review capacity, does not render its own decision of what judgment is most wise under the circumstances presented." Id. "Rather, it examines the record and the trial court's determination for those indicia of rationality and fairness that will assure it that the trial court's action was proper." Id. "An exercise of discretion may be erroneous but still be legal and free from abuse." Id., 398 A.2d at 363 (quoting Bringhurst v. Harkins, 32 Del. 324, 331, 122 A. 783, 787 (1923)).

"In reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason." Ibn-Tamas v. United States, 407 A.2d 626, 635 (D.C. 1979) (quotation marks and citation omitted). "The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had

already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.” Id.; see also Omstead v. Dell, Inc., 594 F.3d 1081, 1084 (9th Cir. 2010) (where district court does not make explicit findings when entering case-dispositive sanction, appellate court must “independently review the record to determine whether the district court abused its discretion.”). Stated differently, an appellee may “urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court.” Jennings v. Stephens, 574 U.S. 271, 276, 135 S. Ct. 793, 798 (2015) (quotation marks and citation omitted).

ARGUMENT

I. Movants have abandoned their request to intervene for the purposes of bringing affirmative claims and terminating the receivership.

On a timely motion, a nonparty may intervene as of right if it “claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Super. Ct. Civ. R. 24(a)(2). “The Rule thus sets out four factors that a trial court must consider in determining whether to grant or deny a motion to intervene as of right: timeliness, interest, impairment of interest, and adequacy of representation.” HSBC Bank USA, N.A. v. Mendoza, 11 A.3d 229, 233 (D.C. 2010) (quotation marks and citation omitted). “[T]he movant...has the burden of demonstrating its entitlement to intervene.” United States v. Tex. E. Transmission Corp., 923 F.2d 410, 414 (5th Cir. 1991). “[E]ven where intervention of right is sought...the court must exercise its discretion in determining whether the application is timely made and whether the proposed intervenor’s interest is adequately represented by existing parties.” McPherson, 833 A.2d at 994 (quotation marks and citation omitted).

In its discretion, a court may allow intervention for some purposes but deny it for others. See Siskiyou Reg’l Educ. Project v. United States Forest Serv., 565 F.3d 545, 559-60 (9th Cir. 2009) (court limited intervention to remedial phase of litigation

and did not abuse its discretion in striking answer that sought to raise issues on merits); United States v. S. Fla. Water Mgmt. Dist., 922 F.2d 704, 707 (11th Cir. 1991) (“A nonparty may have a sufficient interest for some issues in a case but not others, and the court may limit intervention accordingly.”); see also Vale Props., 431 A.2d at 13 n.3 (D.C. 1981) (Because Super. Ct. Civ. R. 24 “is identical in all relevant respects” to Fed. R. Civ. P. 24, this Court “look[s] to federal court decisions as persuasive authority in interpreting it.”).

Here, Movants sought to intervene in order to (1) bring offensive claims against the Lender, Receiver, and Cooperative; (2) terminate the receivership; (3) oppose the Lender’s request to clarify and expand the Receiver’s authority to bring eviction proceedings; and (4) oppose the Lender’s request to clarify and expand the Receiver’s authority to terminate delinquent Cooperative members. On appeal, Movants have abandoned the first two of these four grounds for intervention. Even though the proposed claims and the proposed termination of the receivership were central features of the Motion to Intervene, Movants’ opening brief never mentions either issue. Therefore, at the very least, the Court should affirm the Superior Court’s denial of intervention for these two purposes. See Braxton v. United States, 852 A.2d 941, 949 n.10 (D.C. 2004) (“A claim not argued in the appellant’s brief is

waived.”); In re Shearin, 764 A.2d 774, 778 (D.C. 2000) (“Points not urged in a party’s initial brief are treated as abandoned.”).³

II. The Superior Court acted within its discretion by denying Movants’ request to intervene to oppose the expansion and clarification of the Receiver’s standing to sue.

Movants also sought to intervene to oppose the Motion to Amend. In turn, the Motion to Amend requested two amendments to the Receivership Order: (i) an expansion and clarification of the Receiver’s authority to sue, and (ii) an expansion and clarification of the Receiver’s authority to terminate the interests of delinquent Cooperative members.

As noted above, the Lender sought an expansion and clarification of the Receiver’s authority to sue partly because the de Carvalho landlord-tenant court had held that the Receiver lacked standing. Thereafter, the Receiver moved the Superior Court below to expand and clarify the Receiver’s standing to sue for purposes of subsequent landlord-tenant proceedings. This amended language would remedy the alleged defects identified in the de Carvalho case. For purposes of this appeal, the

³ Further, and as explained in the proceedings below, Movants’ requests to intervene for the purposes of bringing affirmative claims and terminating the receivership were untimely. JA 507-09. In addition, Movants are capable of bringing the affirmative claims in a separate lawsuit. JA 509-11.

Court need not decide if the ruling in the landlord-tenant case was correct.⁴ The relevant issue here is whether Movants were entitled to intervene as of right to contest the Lender's proposed amendments to the Receivership Order to clarify and expand the Receiver's standing to sue. Movants' request to intervene on this issue fails for three independent reasons.

A. The Superior Court did not impair or impede the Movants' interests by allowing the Receiver to pursue preexisting claims.

First, to the extent that a receivership proceeding merely transfers an entity's preexisting rights to the receiver, the proceeding does not alter the substantive rights of third parties such as the Movants. See McCandless v. Furlaud, 296 U.S. 140, 149, 56 S. Ct. 41, 42 (1935) (“[T]he plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have.”); S. W. Rawls, Inc. v.

⁴ As noted above, the Receivership Order authorized the landlord-tenant proceedings even before it was amended. Further, even in the absence of specific authorization, the Receiver would have had the inherent authority to bring claims belonging to the Cooperative. See Scholes v. Lehmann, 56 F.3d 750, 753 (7th Cir. 1995) (“Like a trustee in bankruptcy or for that matter the plaintiff in a derivative suit, an equity receiver may sue...to redress injuries to the entity in receivership...”); Commodity Futures Trading Com. v. Chilcott Portfolio Mgmt., Inc., 713 F.2d 1477, 1482 (10th Cir. 1983) (receiver appointed over fund could sue to enforce fund's rights under Securities Exchange Act and Commodities Exchange Act); Stenger v. World Harvest Church, Inc., No. 1:04-CV-00151-RWS, 2006 U.S. Dist. LEXIS 15108, at *19 (N.D. Ga. Mar. 31, 2006) (receiver may “stand[] in the shoes” of “person and entities in receivership” for purposes of bringing litigation); 65 Am. Jur. 2d Receivers § 233 (authority to assert claims belonging to entity in receivership “is a necessary incident of the power to manage or dispose of that entity's property.”).

Forrest, 224 Va. 264, 267, 295 S.E.2d 791, 793 (1982) (“Appointment of a receiver does not affect vested rights...”); Homer v. Balt. Refrigerating & Heating Co., 117 Md. 411, 421, 84 A. 176, 180 (1912) (“[T]he appointment of a receiver does not affect vested rights or interests of third persons in property which is the subject of receivership...”).

Further, the fact that a receiver might exercise an entity’s preexisting rights against third parties more aggressively than the entity itself would does not confer standing on third parties to intervene. If that were the case, then any non-party against whom the entity had potential claims would be entitled to intervene in a receivership action. The proper remedy for such a non-party is to defend on the merits against any claims or litigation the receiver might bring. Disputes over whether to transfer an entity’s preexisting rights to an equity receiver are ultimately disputes between the party seeking the receivership (here, the Lender) and the party over whom the receivership is sought (here, the Cooperative).

The portion of the Motion to Amend that seeks to expand and clarify the Receiver’s authority to sue is limited to the procedural question of whether the Receiver can file claims that the Cooperative already holds. This aspect of the Motion to Amend does not address whether any potential exercise of that power is legally permissible, e.g., it does not address whether the Cooperative is substantively entitled to evict any of the Movants. The proper venues for litigating such issues are

the appeals from the prior eviction proceedings and/or any new eviction actions the Receiver might bring. Regardless of whether eviction proceedings are styled as proceedings by the Receiver or by the Cooperative, Movants' substantive defenses will remain the same. Therefore, the transfer of the Cooperative's preexisting rights to the Receiver does not impair or impede the Movants' purported occupancy rights in a manner that entitles them to intervene.

B. The Cooperative adequately represents Movants' interests, which are identical to the other members' interests.

Even if the expansion and clarification of the Receiver's standing to sue affect the Movants' interests, those interests are adequately represented by the Cooperative. Movants bear the burden of showing inadequate representation. See Edwards v. City of Hous., 78 F.3d 983, 1005 (5th Cir. 1996) ("The burden of establishing inadequate representation is on the applicant for intervention."); Dimond v. District of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986) ("The original burden of showing inadequate representation rests on the applicant for intervention.") (citation omitted). Further, "[a] presumption of adequate representation will arise" when "an existing party seeks the same ultimate objective as the applicant." Vale Props., 431 A.2d at 15 (quotation marks and citation omitted); accord Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003) ("The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties.") (citation omitted); Wash.

Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co., 922 F.2d 92, 98 (2d Cir. 1990) (“Where there is an identity of interest between a putative intervenor and a party, adequate representation is assured.”). “A slight difference in interests between the applicant and the supposed representative will not suffice to show inadequacy of representation.” Vale Props., 431 A.2d at 15 (quotation marks and citation omitted).

Here, to the extent that expanding and clarifying the Receiver’s standing to sue would affect the Movants, it would affect the other members of the Cooperative in the same way. As explained above, the Movants—along with all the other members—have defaulted on carrying charges. Therefore, if the Movants have an interest in preventing the Receiver from bringing eviction proceedings, the other members have the same exact interest.

The record below demonstrates that the Cooperative can defend the interests of its members, including the Movants. The Cooperative actively opposed the Lender’s motion to appoint the Receiver and even moved to dismiss the Lender’s complaint. The fact that Movants disagree with the Cooperative’s decision not to oppose the Motion to Amend or disagree with the overall pace of the litigation does not entitle them to intervene. See League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1306 (9th Cir. 1997) (“When a proposed intervenor has not alleged any substantive disagreement between it and the existing parties to the suit, and instead has rested its claim for intervention entirely upon a disagreement over

litigation strategy or legal tactics, courts have been hesitant to accord the applicant full-party status.”); Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7C Federal Practice and Procedure: Civil 2d § 1909, at 344 (1986) (“A mere difference concerning the tactics with which litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party....”). Accordingly, the Cooperative adequately represents Movants’ interests.

C. To the extent that Movants raised or presaged any substantive arguments against the Receiver’s standing to sue, those arguments were futile.

Even if the expansion and clarification of the Receiver’s authority to sue impacts Movants, and even if the Cooperative does not represent Movants’ interests, Movants’ request to intervene on this issue still fails because their substantive arguments are futile. A motion to intervene “must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.” Super. Ct. Civ. R. 24(c). Compliance with this rule is “mandatory” and “[t]here is no ambiguity concerning [its] requirements.” 6 Moore’s Federal Practice - Civil § 24.20. Further, the proposed pleading “must give fair notice of the material elements of a plaintiff’s claim or a defendant’s defense.” Rothberg v. Quadrangle Dev. Corp., 646 A.2d 309, 314 (D.C. 1994). That is because the court “will be unable to evaluate a motion to intervene, and the existing parties

will be unable to make a meaningful response to the motion, unless they know exactly what claims or defenses the movant proposes to bring to the lawsuit.” 6 Moore’s Federal Practice - Civil § 24.20; accord Shevlin v. Schewe, 809 F.2d 447, 450 (7th Cir. 1987) (denying intervention where movant “not only failed to file any pleading on a timely basis as required by the rule,” but did not “at any time offer[] the requisite pleading.”).

Here, although Movants filed a proposed complaint in which they sought to intervene as plaintiffs and to terminate the receivership, they did not file a proposed answer to the Complaint or a proposed opposition to the Motion to Amend. Thus, Movants’ proposed pleading focused solely on the two grounds for intervention that they have now abandoned on appeal. Given this fact, the Superior Court and the parties could not fully evaluate Movants’ request to intervene for the purpose of opposing the Motion to Amend.

While courts sometimes excuse an intervenor’s failure to file a proposed pleading, they do so when the intervenor’s claims or defenses are clearly stated elsewhere in the record. See Spring Constr. Co. v. Harris, 614 F.2d 374, 377 (4th Cir. 1980) (failure to file proposed pleading with motion was cured “shortly thereafter” when movant filed amended complaint); United States ex rel. Frank M. Sheesley Co. v. St. Paul Fire & Marine Ins. Co., 239 F.R.D. 404, 411-412 (W.D. Pa. 2006) (court had discretion to consider motion to intervene that contained no

pleading but did include motion to compel arbitration and stay proceedings); Vale Props., 431 A.2d 11, 15 n.7 (D.C. 1981) (noting, in dicta, that “[a]ppellant’s arguments about the interests it sought to protect and the potential harm to those interests arising from the underlying lawsuit fairly appeared before the trial court from the pleadings and the proceedings”).

Here, the only substantive legal argument the Members raised or presaged in opposition to the Receiver’s expanded standing to sue was their contention that the Lender’s proposal would “effectively overrule” the de Carvalho court’s decision. JA 407. This argument is so weak as to be futile, which is an independent ground for denying intervention. See Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1130 n.5 (5th Cir. 1983) (upholding denial of motion to intervene on futility grounds where proposed claims were barred by statute of limitations); In re Fine Paper Antitrust Litig., 695 F.2d 494, 501 (3d Cir. 1982) (upholding denial of motion to intervene where intervention would have been futile); Charles Alan Wright, Arthur R. Miller, and Mary Kay Wright, 7C Federal Practice & Procedure § 1914 (3d ed.) at p. 523-24 (“The proposed pleading must state a good claim for relief or a good defense.”).

There is no colorable argument that the prior landlord-tenant decisions limited the authority of the Superior Court below to modify its own Receivership Order. As noted above, the Ochoa/Nunez court actually rejected Movants’ argument that the Receivership Order, as originally written, did not confer standing to sue on the

Receiver. Further, the de Carvalho court only held that the Receivership Order, as then written, did not authorize the Receiver to sue for eviction. The Superior Court below did not attack or reverse the de Carvalho court's holding, nor did the Lender ask it to. Rather, the Superior Court remedied the alleged defect identified by the de Carvalho court by expanding and clarifying the Receiver's authority to sue. The de Carvalho court did not hold, nor could it hold, that the Superior Court in this case was barred from amending its own Receivership Order on a prospective basis. See Farmer v. Miller, 496 S.W.3d 485, 491 (Ky. Ct. App. 2016) ("As a receiver is appointed by and thereafter becomes an officer of the trial court, only the appointing court may grant, expand or contract the duties and responsibilities attendant to the position."); State ex rel. Celebrezze, 60 Ohio St. 3d 69, 74, 573 N.E.2d 62, 67-68 (1991) (appointing court may "exercise its sound judicial discretion to limit or expand a receiver's powers as it deems appropriate."); 65 Am. Jur. 2d Receivers § 85 ("[T]he court that appoints a receiver has exclusive jurisdiction to direct the receiver and determine any controversy related to the receivership or receivership property.").

Alternatively, if the Court permits Movants to intervene to oppose the Receiver's standing to sue, the Court should limit Movants to the one substantive argument they raised below—that the proposed amendment is a collateral attack on the landlord-tenant decisions. Since Movants did not raise or presage any other

arguments with regard to this issue, they should not be allowed to raise any other arguments on remand.

III. The Superior Court acted within its discretion by denying Movants' request to intervene to oppose the expansion and clarification of the Receiver's power to terminate delinquent members.

Movants also sought to intervene to oppose the Receiver's expanded and clarified authority to terminate delinquent Cooperative members. The Superior Court also acted within its discretion in denying this request. As noted above, every member of the Cooperative is delinquent on his or her carrying charges. Therefore, Movants and the other members of the Cooperative have an identical interest in avoiding termination and eviction, which in turn means that the Cooperative adequately represents the Movants' interests. Movants' failure to submit a proposed answer or opposition provides an independent basis for denying intervention, or at the very least limits the arguments that Movants can raise in the event of a remand. Therefore, the Court should also affirm this aspect of the Superior Court's decision.

A. The Cooperative adequately represents Movants' interests, which are identical to the other members' interests.

As noted above, each of the Movants—along with all the other Cooperative members—have defaulted on the carrying charges they owe the Cooperative. This would ordinarily provide grounds for terminating the members' interests and evicting them from the premises. However, since all of the members are in default, the Cooperative cannot form a quorum to hold meetings to terminate the delinquent

members' interests. This allows the Movants—along with the other members—to avoid eviction by collectively defaulting on carrying charges. Given these facts, the Lender moved to empower the Receiver to terminate delinquent members without the need for the Cooperative to hold a (legally impossible) meeting.

Because all of the members are in default, Movants' interests fully align with those of the other members and the Cooperative as a whole. The Movants and the other members have an identical interest in defaulting on carrying charges, preventing the formation of a quorum, and preventing the Cooperative or the Receiver from taking remedial action. If there is any good-faith justification for the Cooperative members' tactical, *en masse* default, that justification can be pressed by the Cooperative itself.

Hypothetically, if a majority of the members were not in default, then the Cooperative might have an incentive to protect dues-paying members at the expense of defaulting members such as the Movants. In that scenario, the Cooperative might also have an incentive to evict defaulted members in order to protect dues-paying members from paying increased dues. However, given that every member is in default, every member has an equal incentive to resist the termination of his or her membership interest.

Given these realities, and contrary to Movants' position, the Cooperative does not stand to "profit" from the eviction of delinquent members. Further, the

Cooperative's interests do not "closely align" with the Lender's interests as opposed to the Cooperative's. The debt that the Cooperative owes the Lender must ultimately be satisfied by the Cooperative's members—either through carrying charges, through the sale of members' units, or through some other means. Therefore, when payments are made on the Loan and the outstanding balance is reduced, the effect on the Cooperative as a whole is not meaningfully different from the effect on Movants in particular. The Cooperative does not "profit" from paying off this debt any more than Movants or any other individual members do. The Cooperative is no more "aligned" with the Lender than the Movants, the other members of the Cooperative, or the Cooperative as a whole.

As noted above, the record below demonstrates that the Cooperative is capable of defending the interests of its members, including Movants. The Cooperative actively opposed the Lender's motion to appoint the Receiver and even moved to dismiss the Lender's complaint. The fact that Movants disagree with the Cooperative's decision not to oppose this aspect the Receiver's expanded authority, or disagree with the overall pace of the litigation, does not entitle them to intervene. See League of United Latin Am. Citizens, 131 F.3d at 1306; Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7C Federal Practice and Procedure: Civil 2d § 1909, at 344 (1986).

B. Movants offered few, if any, substantive arguments against the Receiver's termination rights.

As noted in Section II(C) above, a motion to intervene must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought. Here, Movants did not file a proposed answer to Lender's breach of contract complaint or a proposed opposition to Lender's Motion to Amend. Further, the Motion to Intervene did not identify or explain the substantive basis for Movants' opposition to the Receiver's expanded and clarified termination rights. Movants obliquely referred to "due process requirements" and generally argued that the proposed termination rights would be unfair, JA 408, but they did not provide any specific common-law or statutory basis for denying Lender's request. Therefore, there are no grounds to excuse their failure to file a proposed pleading or opposition. Cf. Spring Constr. Co., 614 F.2d at 377; Frank M. Sheesley Co., 239 F.R.D. at 411-412; Vale Props., 431 A.2d at 15 n.7. For this additional reason, the Superior Court acted within its discretion in denying this aspect of the Motion to Intervene.

Alternatively, if the Court believes that the Members sufficiently presaged or explained any substantive defenses to the Motion to Amend, then the Court should limit the Members to those particular defenses during any proceedings on remand.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court affirm the Superior Court's judgment. Alternatively, if the Court permits Movants to intervene for the purpose of opposing the Receiver's expanded authority to sue and/or the Receiver's expanded termination powers, the Receiver requests that the Court limit Movants to the specific arguments, if any, they raised in the proceedings below.

Dated: November 30, 2021.

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CERTIFICATE OF SERVICE

I certify that on November 30, 2021, I electronically filed the foregoing **Brief of Appellee Long Gate Associates, LLC.** Counsel who have appeared in this matter will be served electronically.

/s/ Matthew D. Lamb

An employee of BALLARD SPAHR LLP

District of Columbia Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a “CV” docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

- An individual’s social-security number
- Taxpayer-identification number
- Driver’s license or non-driver’s’ license identification card number
- Birth date
- The name of an individual known to be a minor
- Financial account numbers, except that a party or nonparty making the filing may include the following:

- (1) the acronym “SS#” where the individual’s social-security number would have been included;
- (2) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
- (3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
- (4) the year of the individual’s birth;
- (5) the minor’s initials; and
- (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Matthew D. Lamb

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21-CV-550

Case Number(s)

11-30-21

Date