

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/07/09

DEPT. 85

HONORABLE JAMES C. CHALFANT

JUDGE N. RIZO

DEPUTY CLERK

HONORABLE
#2

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

J. DE LUNA, C.A.

Deputy Sheriff

J. CAMPBELL, CSR #11859

Reporter

9:30 am	BC417467	Plaintiff Counsel	CAMILLA N. ANDREWS	(X)
	PACIFIC MERCANTILE BANK			
	VS	Defendant Counsel	NORMAN J. KREISMAN	(X)
	PROGRESS MACHINE & TOOL CORP ET AL			

NATURE OF PROCEEDINGS:

ORDER TO SHOW CAUSE RE: APPOINTMENT OF RECEIVER

The matter is called for hearing.

Counsel read the Court's tentative ruling.

After argument, the Court rules in accordance with its tentative which is adopted and filed as the final ruling of the Court.

The above stated matter is GRANTED.

Parties stipulate to the bond amount of \$50,000. Bond shall be posted within 10 court days.

A Status Conference Re: Progress of Receivership is set for February 3, 2010 at 9:30 a.m., in this department.

The case is now returned to Department 49 for further proceedings.

Notice is waived.

Pacific Mercantile Bank v. Progress
Machine & Tool Corp., et al.
BC 417467

Tentative decision on application for
appointment of receiver and preliminary
injunction: granted

49
FILED

LOS ANGELES SUPERIOR COURT

AUG 07 2009

JOHN A. CLARKE, CLERK

[Signature]
ARIZO, DEPUTY

Plaintiff Pacific Mercantile Bank ("Bank") applies for appointment of a receiver and preliminary injunction in aid of receiver over Defendant Progress Machine & Tool Corp. ("PMT"), and the operation of its business at 1420-1422 S. Main Street, Los Angeles, as well as 648 S. Olive Street, Los Angeles. The court has read and considered the moving papers (no opposition or reply was filed), and renders the following tentative decision.

A. Statement of the Case

Plaintiff Bank commenced this lawsuit on July 8, 2009, and filed a First Amended Complaint ("FAC") on July 22, 2009, alleging claims for breach of promissory note, claim and delivery, breach of personal guaranty and judicial foreclosure against Defendants PMT, Vasken Piliguian, and Zarouhi Piliguian.

The claims arise from PMT's default on three promissory notes, and the individual Defendants' breach of personal guaranties on the loans. The cumulative outstanding principal balance on the notes is \$2.9 million, plus accrued and accruing interest and late charges.

PMT sells a line of jewelry tools, jewelers supplies, and tools for silversmiths and for use in jewelry making and for hobbyists. It borrowed the funds between December 2004 and November 2005. The loans all matured in April 2009. PMT has failed to pay the balances due, and the Individual Defendants have not honored their personal guaranties.

B. Applicable Law

CCP §564(b) provides in pertinent part: A receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, in the following cases: (1) In an action between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

CCP §564(b)(1) states that a receiver may be appointed by the court "[i]n an action between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or any party whose right to or interest in the property of fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured." CCP §564(b)(9) also provides for the appointment of a receiver, "in all other cases where necessary to preserve the property or rights of any party."

CCP §564(b) provides that the court has authority to appoint a receiver in any of the following circumstances: (1) in an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to the creditor's claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured; (2) in an action by a secured lender for the foreclosure of a deed of trust or mortgage and sale of property upon which there is a lien under a deed of trust or mortgage, where it appears that the property is in danger of being lost, removed, or materially

injured, or that the condition of the deed of trust or mortgage has not been performed, and that the property is probably insufficient to discharge the deed of trust or mortgage debt; (3) after judgment, to carry the judgment into effect; (4) after judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or pursuant to the Enforcement of Judgments Law Title 9 (commencing with CCP §680.010), or after sale of real property pursuant to a decree of foreclosure, during the redemption period, to collect, expend, and disburse rents as directed by the court or otherwise provided by law; (5) where a corporation has been dissolved, as provided in Section 565; (6) where a corporation is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; (7) in an action of unlawful detainer; (8) at the request of the Public Utilities Commission pursuant to Section 855 or 5259.5 of the Public Utilities Code; (9) in all other cases where necessary to preserve the property or rights of any party; (10) at the request of the Office of Statewide Health Planning and Development, or the Attorney General, pursuant to Section 129173 of the Health and Safety Code; (11) in an action by a secured lender for specific performance of an assignment of rents provision in a deed of trust, mortgage, or separate assignment document. The appointment may be continued after entry of a judgment for specific performance if appropriate to protect, operate, or maintain real property encumbered by a deed of trust or mortgage or to collect rents therefrom while a pending nonjudicial foreclosure under power of sale in a deed of trust or mortgage is being completed; (12) in a case brought by an assignee under an assignment of leases, rents, issues, or profits pursuant to subdivision (g) of Section 2938 of the Civil Code.

CCP §564(c) also provides for appointment of a receiver in an action brought by a secured lender to enforce the rights provided in Section 2929.5 of the Civil Code, to enable the secured lender to enter and inspect the real property security for the purpose of determining the existence, location, nature, and magnitude of any past or present release or threatened release of any hazardous substance into, onto, beneath, or from the real property security. The secured lender shall not abuse the right of entry and inspection or use it to harass the borrower or tenant of the property. Except in case of an emergency, when the borrower or tenant of the property has abandoned the premises, or if it is impracticable to do so, the secured lender shall give the borrower or tenant of the property reasonable notice of the secured lender's intent to enter and shall enter only during the borrower's or tenant's normal business hours. Twenty-four hours' notice shall be presumed to be reasonable notice in the absence of evidence to the contrary.

The appointment of a receiver is a drastic remedy to be utilized only in "exceptional cases." As such, a receiver should not be appointed unless absolutely essential and because no other remedy will serve its purpose. City & County of San Francisco v. Daley, (1993) 16 Cal.App.4th 734, 744. A plaintiff who seeks appointment of a receiver of certain property, under CCP §564(b)(1), has the burden to establish by a preponderance of the evidence that plaintiff has a joint interest with defendant in the property, that the property is in danger of being lost, removed or materially injured and that plaintiff's right to possession is probable.

Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., (1953) 116 Cal.App.2d 869, §73.

California courts have followed the longstanding tradition to appoint receivers over partnership property in cases of partner fraud and misconduct. See Galich v. Brkich, (1951) 103 Cal.App.2d 187; Neider v. Dardi, (1955) 130 Cal.App.2d 646; Moore v. Oberg, (1943) 61 Cal.App.2d 216.

C. Analysis

Bank applies for the appointment of a receiver over the business and assets of Progress Machine.

PMT sells a line of jewelry tools, jewelers supplies, and tools for silversmiths and for use in jewelry making and for hobbyists. PMT is in default on three loans to the Bank with an aggregate outstanding principal balance \$2,900,000, plus accrued and accruing unpaid interest, late charges, attorneys' fees, and costs. Two of the loans matured on April 1, 2009. PMT defaulted on the third loan by failing to make the payment due on March 20, 2009. PMT agreed to the appointment of a receiver, both over its business collateral and the subject property, in the event of default on its loan obligations.

In order to induce the Bank to grant, renew, extend and/or otherwise provide credit to Progress Machine, Defendant Zaroughi Piliguian ("Z. Piliguian") executed and delivered to the Bank her "Commercial Guaranty" dated June 30, 2007, whereby she unconditionally guaranteed the payment and satisfaction of the one of the loans to PMT by the Bank. On or about November 4, 2005, as security for the personal Guaranty, Z. Piliguian executed and delivered to the Bank a "Deed of Trust" on the subject property dated November 4, 2005 and an "Assignment of Rents" dated November 4, 2005 on the subject property. Defendant guarantor Z. Piliguian has defaulted under the terms of the guaranty.

Despite defaults on the three loans, PMT continues to operate and sell its inventory and equipment, which is the Bank's collateral securing the debt. At a site visit on April 30, 2009, Defendant Vasken Piliguian admitted that PMT continues to operate at a loss of \$100,000 plus per month. Between June 30, 2008 through December 31, 2008 PMT's accounts receivable decreased by \$694,397 but its principal loan balances with the Bank remained unchanged. Further, an income statement provided by PMT to the Bank shows a net loss of \$1,212,673 for the six months ended December 31, 2008. No payments are being made to the Bank.

Section 564 of the Code of Civil Procedure authorizes the appointment of a receiver on the application of the plaintiff, or of any party whose right or interest in the property or funds is probable or it is shown that the property or funds is in danger of being lost, removed, or materially injured, and also in all cases where receivers have heretofore been approved by courts of equity. Snidow v. Hill, (1948) 84 Cal.App.2d 702, 704; Barclays Bank of California v. Superior Court, (1977) 69 Cal.App 3d 593.

Plaintiff Bank faces an emergency situation concerning its collateral. PMT has failed to make payments on three loans, two of which have matured, and is currently operating at a monthly deficit in excess of \$100,000. PMT continues to sell its inventory and equipment, but no proceeds from the sale thereof are being turned over to the Bank. Without the appointment of a receiver to protect, manage, preserve the business and liquidate the collateral, the latter is in danger of being lost, transferred, hidden, stolen or vandalized. Bank is therefore entitled to have a receiver appointed to avoid irreparable harm to the its collateral and to secure the business operation of PMT and the business premises.

Plaintiff Bank has nominated Robb Evans & Associates LLC to act as Receiver. Robb Evans & Associates has managed various parcels of real property similar to the one involved in this action, and has served as a receiver in numerous litigation matters.

The application for appointment of a receiver and preliminary injunction in aid of receiver is granted. The Receiver will be ordered to post a fidelity bond in an amount equivalent

to one month's receivables of the business, which is to be determined at hearing.

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ENCLOSURE

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2 Camilla Andrews (State Bar No. 126143)
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8 Attorneys for Plaintiff PACIFIC MERCANTILE
BANK, a California state chartered commercial
9 bank

ORIGINAL FILED
JUL 10 2009
LOS ANGELES
SUPERIOR COURT

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11 **SUPERIOR COURT OF CALIFORNIA**
12 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

13 PACIFIC MERCANTILE BANK, a California
14 state chartered commercial bank,
15 Plaintiff,
16 v.
17 PROGRESS MACHINE & TOOL CORP., a
California corporation; VASKEN M.
18 PILIGUIAN, an individual; ZAROUGH
PILIGUIAN, an individual; and DOES 1
19 through 100, Inclusive,
20 Defendants.
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CASE No. BC 417467
[Assigned to the Honorable Conrad Aragon,
Dept. 49]
**EX PARTE APPLICATION OF
PLAINTIFF PACIFIC MERCANTILE
BANK FOR: (1) AN ORDER
APPOINTING RECEIVER AND
PRELIMINARY INJUNCTION; OR, IN
THE ALTERNATIVE, AN ORDER
APPOINTING RECEIVER AND A
TEMPORARY RESTRAINING ORDER,
IN AID OF RECEIVER, OR,
ALTERNATIVELY, AN ORDER TO
SHOW CAUSE FOR APPOINTMENT OF
RECEIVER AND PRELIMINARY
INJUNCTION; MEMORANDUM OF
POINTS AND AUTHORITIES**
[Declarations of Robert J. Sullivan, Kenton
Johnson and Bob Benjy filed concurrently]
DATE: July 10, 2009
TIME: 8:30 a.m.
DEPT.: 85

Action Filed: July 8, 2009

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FRANZEL ROBINS BLOOM & CSATO, L.C.
6500 WILSHIRE BOULEVARD, 17TH FLOOR
LOS ANGELES, CALIFORNIA 90048-4920
(323) 852-1000

1 APPLICATION

2 Plaintiff Pacific Mercantile Bank (hereinafter "Bank"), applies to this Court *ex parte* for
3 an order appointing a receiver over Defendant Progress Machine & Tool Corp., a California
4 corporation ("Progress Machine" or "Defendant") and the operation of its business at the real
5 property commonly known as 1420-1422 South Main Street, Los Angeles, California 90015 (the
6 "Subject Property") as well as 648 S. Olive Street, Los Angeles, California 90014 and any other
7 location from which Progress Machine does business ("Business Premises") and a temporary
8 restraining order in aid of the receiver ("Application"); or in the alternative, an order to show
9 cause for appointment of a receiver and preliminary injunction. This Application is brought *ex*
10 *parte* on the following grounds:

11 (a) **Progressive Machine is in default on three loans to the Bank with an aggregate**
12 **outstanding principal balance \$2,900,000.00**, plus accrued and accruing unpaid interest, late
13 charges, attorneys' fees and costs. Two of the loans, as set forth below, matured on April 1, 2009;
14 Progress Machine defaulted on the third loan by failing to make the payment due on March 20, 2009.

15 (b) At a site visit on April 30, 2009, Defendant Vasken Piliguian admitted that Progress
16 Machine continues to operate at a loss of \$100,000.00 plus per month. Between June 30, 2008
17 through December 31, 2008 Progress Machine's accounts receivable decreased \$694,397 but the
18 Bank's principal loan balances remained unchanged. Further, an income statement provided to the
19 Bank from Progress Machine shows a net loss for the six months ended December 31, 2008 of
20 \$1,212,673.

21 (c) Despite defaults on these 3 loans, Progress Machine continues to operate and sell its
22 inventory and equipment which is the Bank's collateral. No payments are being made to the Bank and
23 without the *ex parte* appointment of a Receiver the Bank will continue to irreparably lose its collateral
24 as well as proceeds thereof.

25 (d) **Progress Machine Contractually Agreed to the Appointment of a Receiver in the**
26 **Event of a Default under Three Separate Commercial Security Agreements.**

27 (e) A receiver is an appropriate and proper remedy to address the security, preservation,
28 and liquidation of the Bank's collateral, including inventory and accounts receivable.

1 (f) If a Receiver is not appointed to secure the Business Premises and the collateral located
2 therein, the Bank's collateral is at imminent risk of being dissipated, lost or removed.

3 **Application re Appointment of Receiver over the Subject Property**

4 (g) **Defendant Zaroughi Piliguian's Guaranty is secured by a Deed of Trust and**
5 **Assignment of Rents on the Subject Property which Provide for the Appointment of a Receiver**
6 **in the Event of a Default**

7 This Application is made pursuant to Code of Civil Procedure section 564 and Rule 3.1175
8 et seq. of the California Rules of Court.

9 A receiver is an appropriate and proper remedy to address the security, preservation and
10 liquidation of the Bank's collateral, including inventory and accounts receivable located on the
11 Business Premises as well as preserve, maintain and protect the Subject Property. Accordingly, it
12 is imperative that a receiver be appointed immediately to take possession of Progress Machine and
13 the Business Premises and the Subject Property with the power to:

14 1. Enter onto and take possession of the Business Premises of Defendant Progress
15 Machine & Tool Corp., located at 1420-1422 South Main Street, Los Angeles, California 90015
16 (the "Subject Property") as well as 648 S. Olive Street, Los Angeles, California 90014, and any
17 other location from which the Defendant conducts business. The Subject Property is owned by
18 guarantor Defendant Zaroughi Piliguian. The Receiver shall seize and take possession of and
19 control all of the Bank's collateral securing Defendants' obligations to Bank, wherever located,
20 including, but not limited to, all assets, all present and future inventory, equipment, accounts
21 (including but not limited to all health care insurance receivables), chattel paper, instruments
22 (including but not limited to all promissory notes), letter-of-credit rights, letters of credit,
23 documents, deposit accounts, inventory property, money, other rights to payment and
24 performance, and general intangibles (including but not limited to all software and all payment
25 intangibles) (collectively, "Collateral"), and all of the Defendants' books and records relating
26 thereto and all equipment containing said books and records, wherever located, as the Receiver
27 deems necessary for the proper administration and operation of the receivership estate, but the
28 books and records shall be made available to the Defendants as reasonably necessary.

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1 2. Take any and all steps necessary to receive, collect and review all mail addressed to
2 Defendants, including, but not limited to, mail addressed to each and every one of their Business
3 Premises, and any post office boxes held in the name of Defendants, and at the Receiver's
4 discretion, he is authorized to instruct the United States Postmaster to reroute, hold, and/or release
5 said mail to said Receiver. Mail reviewed by the Receiver in the performance of his duties will
6 promptly be made available for inspection to the Defendants after review by the Receiver.

7 3. Demand, collect and receive all monies, funds and payments arising from the
8 business operations of Defendant Progress Machine & Tool Corp. and/or the Bank's Collateral.

9 4. Take possession of all bank accounts of the Defendants wherever located and
10 receive possession of any money on deposit in said bank accounts, and the receipt by the Receiver
11 for said funds shall discharge said bank from further responsibility for accounting to said account
12 holder for funds for which the Receiver shall give his receipt.

13 5. Establish bank accounts at any bank the Receiver deems appropriate for the deposit
14 of monies and funds collected and received in connection with administration of the receivership
15 estate, provided that all funds on deposit are insured by an agency of the United States
16 government.

17 6. Execute and prepare all documents and perform all acts, either in the name of the
18 Defendants, Progress Machine & Tool Corp. and Zaroughi Piliguian, as it is applicable, or in the
19 Receiver's own name, which are necessary or incidental to preserving, protecting, managing,
20 liquidating and controlling the Collateral and preserving, protecting, preserving, managing and
21 maintaining the Subject Property.

22 7. In the Receiver's discretion and business judgment, contact each of the accounts
23 receivable debtor of Defendant Progress Machine & Tool Corp. in order to advise them not to
24 send further accounts receivable payments to Defendant Progress Machine & Tool Corp. and
25 instruct the accounts receivable debtors to send any and all payments directly to the Receiver, and
26 no person shall withhold property or services from the Receiver, or offset or attempt to offset any
27 debts claimed to be owed by Defendant Progress Machine & Tool Corp.

28 8. Compromise debts of the business and to do all things and to incur the risks and

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1 obligations of similar businesses and enterprises and that no risk or obligation incurred by the
2 Receiver shall be at the personal risk or obligation of the Receiver, but shall be the risk or
3 obligation of the receivership estate.

4 9. Employ servants, agents, employees, accountants and attorneys to administer the
5 receivership estate and protect the Collateral and Subject Property as he shall deem it necessary.
6 The Receiver shall pay the reasonable value of said services out of the proceeds of the property of
7 this Receivership estate. No risk or obligation incurred by said Receiver shall be the personal risk
8 or obligation of the Receiver, but shall be the risk or obligation of the Receivership estate.

9 10. To purchase materials, supplies and services and to pay therefore at the usual rate
10 and prices out of funds that shall come into his possession; to pay the reasonable value of said
11 services out of the proceeds of the estate; and that no risk or obligation incurred by said Receiver
12 shall be at personal risk or obligation of the Receiver, but shall be the risk or obligation of the
13 Receivership estate.

14 11. The Receiver is not required to comply with section 568.5 of the California Code of
15 Civil Procedure regarding the Receiver's sale of personal property in the ordinary course of
16 Defendant's business, and may conclude a sale or liquidation of all or any portion of the Collateral
17 out of the ordinary course of business if, unless the parties hereto all agree otherwise, the Receiver
18 has given five (5) days prior written notice of such sale to the parties hereto and no party has
19 objected in writing and demanded a hearing with respect to any such sale.

20 12. If there is insufficient insurance coverage on the Collateral, Business Property or
21 Subject Property it is hereby ordered that the Receiver shall have thirty (30) business days to
22 procure said insurance on the Collateral and the Subject Property, provided the Receiver has funds
23 available to do so, and during said period, said Receiver shall not be personally responsible for
24 claims arising or for the procurement of insurance.

25 13. The Receiver shall institute ancillary proceedings in this State or other States as is
26 necessary to obtain possession and control of the Collateral, and the Receiver may engage the
27 services of counsel if necessary. The Receiver may pay for such services from the funds of the
28 Receivership estate.

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1 14. To the extent feasible, the Receiver shall, within thirty (30) days of his qualification
2 hereunder, file an inventory of all property of which he shall have taken possession pursuant to
3 this Order and shall file periodic accounting(s) thereafter.

4 15. Prepare periodic interim statements reflecting the Receiver's fees and
5 administrative costs and expenses incurred for said period in the operation and administration of
6 the receivership estate. Upon completion of an interim statement, and the mailing of said
7 statement to the parties' respective attorneys of record or any other designated personal agent, the
8 Receiver shall pay from the estate funds, if any, the amount of the Receiver's fees in said
9 statement. Despite the periodic statement of Receiver's fees and administrative expenses, such
10 fees and expenses shall be submitted to the Court for its approval and confirmation, in the form of
11 either a noticed interim request for fees or Receiver's final account and report.

12 16. Execute and prepare all documents and to perform all acts, either in the name of
13 Zaroughi Piliguian, as it is applicable, or in the Receiver's own name, which are necessary or
14 incidental to preserving, protecting, managing, and/or controlling the Subject Property.

15 17. The monies coming into possession of the Receiver and not expended for any of
16 the purposes herein authorized, may be turned over to Plaintiff for the payment of Progress
17 Machine & Tool Corp. and Zaroughi Piliguian's obligations to Plaintiff sued upon in the
18 Complaint, without further order of this Court, at the Receiver's sole discretion, subject to such
19 further orders as this Court may hereinafter issue as to its disposition.

20 18. The Receiver, or any party to this action, may from time to time, and on due notice
21 to all parties, make application to this Court for further orders instructing the Receiver.

22 This Application is based on the verified complaint on file in this action, the attached

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1 memorandum of points and authorities, the concurrently filed declarations of Robert J. Sullivan,
2 Kenton Johnson and Bob Benjy, all other pleadings and files of the Court of which the Bank may
3 request the Court take judicial notice, and upon such other pleadings and oral and documentary
4 evidence as may be presented at or before the time of hearing on this Application.

5 DATED: July 9, 2009

FRANDZEL ROBINS BLOOM & CSATO, L.C.
STEVEN N. BLOOM
CAMILLA ANDREWS

7 By: 
8 CAMILLA ANDREWS
9 Attorneys for Plaintiff PACIFIC MERCANTILE
10 BANK, a California state chartered commercial
11 bank

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