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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

WALDTRAUT BETCHART, Plaintiff, Cross-defendant and Respondent, v. LUDWIG BETCHART, INC., Defendant and Cross-complainant; ANTHONY BETCHART, Intervener and Appellant.	A128025 (Alameda County Super. Ct. No. HG08414575)

INTRODUCTION

Intervener Anthony Betchart appeals from an order confirming the appointment of a receiver.[1] Anthony contends the trial court abused its discretion and should have ordered preliminary injunctive relief, instead. We affirm. The trial court did not abuse its discretion given the record that was before it at the time it confirmed the appointment of a receiver.

BACKGROUND

We recite only the facts relevant to the issue on appeal. Respondent Waldtraut Betchart was married to Ludwig Betchart, who passed away in 2003. The Betcharts had six children, one of whom is Anthony. For years, Waldtraut was actively involved in the family business, Ludwig Betchart, Inc. (LBI), which rents out heavy construction

[1] To avoid confusion, we refer to the parties by their first names.

equipment. In 2005, two years after her husband's death and at the age of 75, Waldtraut made Anthony president and a 51 percent shareholder of LBI. Waldtraut retained a 46 percent ownership interest. Another son held a 3 percent ownership interest.

On October 10, 2008, Waldtraut filed a verified complaint seeking dissolution of LBI. Waldtraut alleged Anthony had engaged in a course of self-dealing, consisting of siphoning off hundreds of thousands of dollars in cash and transferring equipment belonging to LBI to his wholly-owned companies. Anthony allegedly made loans to himself on extremely favorable terms, without proper documentation and without any intention of ever repaying LBI. He also allegedly took money out of LBI to pay for repairs to equipment that should have been paid for by the companies he owned. In addition, Anthony allegedly failed to pay LBI its share of revenue generated on the rental of its equipment. All of this allegedly ensured the success of Anthony's wholly-owned companies, to the severe economic detriment of LBI.

LBI answered, denied the material allegations and cross-complained against Waldtraut, alleging she was the one who had misappropriated LBI funds. Waldtraut answered the cross-complaint and denied all material allegations. Ultimately, a total of six lawsuits including this one, were filed by and between Betchart family members and their businesses.

On December 13, 2009, Waldtraut filed an ex parte application for the appointment of a receiver for LBI. The application was supported by declarations of her attorneys and numerous attached documents, including a declaration by Waldtraut that had been filed in opposition to a request for a preliminary injunction in one of the related lawsuits, and a declaration filed by a former certified public accountant for Waldtraut and LBI. The application for a receiver was precipitated by a LBI board meeting on December 8, 2009, described by Waldtraut's attorney as the "straw that broke the camel's back". Waldtraut's attorney attended and, because of the pending litigation, had arranged

for a court reporter to record the meeting. Anthony's attorney also attended, as did Suzanne Betchart, Anthony's wife and the third member of the three-person board.

At the meeting, Anthony moved to pay himself $45 per hour and to pay Suzanne $52,000 annually. On their vote, the motion passed. Anthony next moved to terminate lease agreements LBI had with Anthony's wholly-owned companies. On Anthony's and Suzanne's vote, the motion passed. Anthony then moved to authorize LBI to lease equipment from, not to, Anthony's companies. On Anthony's and Suzanne's vote, the motion passed. Anthony had refused to put on the agenda Waldtraut's demand for (a) itemization of all LBI equipment sold to one of Anthony's companies, (b) an explanation of LBI's financial condition, and (c) selection of a date for a special meeting of LBI to elect new officers and/or directors as a result of the exercise of certain rights by a Survivor's Trust. Instead, Anthony unilaterally denied the demands, except agreed to produce profit and loss statements and an income statement. Throughout the meeting, Waldtraut's attorney was not allowed to speak on her behalf, unlike at previous board meetings.

As a result of the actions taken at the meeting, LBI would allegedly sustain further losses. In addition, a $355,170 promissory note in favor of Waldtraut allegedly remained unpaid. Waldtraut also claimed that despite being a 46 percent shareholder and a director, she had been "locked out of the property" and business records had "been concealed from" her.

Waldtraut asserted if appointment of a receiver was further delayed, "Anthony and Suzanne Betchart will complete their plans for complete liquidation of any remaining LBI assets (including cash) where it will be dispersed and difficult, if not impossible, to trace and recover, and [Waldtraut] will thereby be deprived of any source from which to receive payment of her share of the corporation's profits as subsequently determined by the judgment" of the court.

Counsel for LBI filed a declaration in opposition to the ex parte application, disputing the accusations and denying the need for a receiver. Counsel asserted the application was "another in a series of demands that have been employed solely for the purpose of harassing" LBI.

The trial court (Judge Frank Roesch) granted the ex parte application and set a confirmation hearing for January 5, 2010.

On January 4, 2010, the receiver filed a preliminary status report. The receiver summarized the business of LBI, the change in ownership interests in 2005, the disputes that arose within months of the change, and the current economic status of LBI.[2] The receiver proposed a course of action which would include assisting the parties in resolving a number of the issues concerning LBI.[3] The receiver also believed, based on his review of the transcript of the December 8, 2009, board meeting and his discussion with the parties and LBI's current attorney, that "the corporation would be best served through a representative not directly related to the shareholders, and perhaps through the retention of new, independent legal counsel." It appeared "LBI has footed the bill for legal representation that, in effect, advances the interests of ANTHONY, but does little to protect the interests of the corporation as a separate entity, or [Waldtraut] as significant shareholder, landlord, and individual owner of a volume of equipment used in the day-to-day operations of LBI" and one of Anthony's businesses.

The receiver concluded by observing: "The already difficult and unfortunate circumstances of family members involved in litigation against each other has been

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[2] The receiver had received $102,367 from Suzanne, representing the balance held in the LBI operating account of $25,848.63 and about $81,507.36 held in a "trust account" titled to one of Anthony's wholly-owned businesses, less $2,500 left in each account to keep the accounts open and cover any outstanding checks.

[3] The receiver believed, based on his personal observations, that "a significant factor in the various disputes between the parties is the lack of organization and segregation of the equipment and other personal property in the [equipment] yard . . . ." The receiver intended to take steps to rectify this problem.

escalated by successive lawsuits involving the same parties, now to the point of seeking criminal prosecution and harassment restraining orders. [¶] Receiver believes that, if the receivership is confirmed, he can effectively maintain the status quo pending trial, maintain the business operations of LBI (which are largely ministerial), and perhaps even resolve some of the many controversies at issue in these five related cases. Receiver can also, while this litigation is pending, insure that the interests of LBI, as a separate corporate entity, are represented and that the shareholders of LBI are treated fairly according to their interests."[4]

LBI filed extensive opposition to confirmation of the receiver, including declarations by Anthony and Suzanne and a declaration by another former accountant for LBI. LBI asserted the claims made by Waldtraut and her attorneys were "in total disregard of what they know is the truth." Anthony denied looting the assets of LBI and asserted Waldtraut had written unauthorized checks totaling nearly $65,000 to another son and had conspired with yet a different son to steal and sell materials from LBI worth over $100,000. Anthony claimed he was trying to return the operations of LBI to what they had been prior to the change in ownership and explained the actions taken at the board meeting advanced that objective. He denied there was any risk of destruction or removal of assets. He also argued the proper remedy for any such threat was an injunction, not the appointment of a receiver. Anthony additionally disputed the qualifications of the individual appointed as the temporary receiver, asserting he was approaching the receivership as though Waldtraut was going to prevail and dissolution was a foregone conclusion. The former accountant, in turn, cautioned against the tax consequences of a liquidation and sale of LBI assets.

[4] The receiver had reviewed the transcript of the December 8, 2009, board meeting and believed Waldtraut had not been "given a reasonable opportunity to state her interests through her counsel, or to have those interests fairly considered."

After a continuance, the trial court (Judge George Hernandez, to whom the case had been assigned for all purposes) held a lengthy hearing on the matter on January 14, 2010. At the hearing, counsel for Waldtraut asserted the litigation was really about "eight acres of land immediately adjacent to the Irvington BART station," on which LBI and Anthony's wholly-owned businesses were located and which had dramatically increased in value. He asserted Waldtraut wanted all her children to share in the estate, but believed Anthony felt entitled to and was trying to secure more than 50 percent of it. Counsel for LBI argued none of this was true, pointing out there is, in fact, no such BART station. He acknowledged Anthony had filed a petition against Waldtraut to take her deposition about changes to a will. He further acknowledged that had been "a stupid, stupid thing to do" and was the "flame that ignited all this." But that said, he asserted the accusations of misconduct by Anthony were meritless and a receivership would drain much need resources from LBI.

The court took the matter under submission, and one week later, on January 21, 2009, issued a minute order confirming the appointment of a receiver. The court filed a written order to the same effect on January 27, 2010. On February 25, 2010, the trial court granted Anthony's request to intervene as a defendant, and on March 22, 2010, Anthony filed a timely notice of appeal from the order confirming appointment of the receiver.

DISCUSSION

Standard of Review

Code of Civil Procedure section 564 provides for the appointment of a receiver in specified instances. (Code Civ. Proc., § 564.) In this case, Waldtraut sought the appointment of a receiver under section 564, subdivision (b)(1), (6) and (9).[5]

"The appointment of a receiver pendente lite is a matter for the sound discretion of the trial court. (42 Cal.Jur.2d 341.) Where there is evidence that the plaintiff has at least a probable right or interest in the property sought to be placed in receivership and that the property is in danger of destruction, removal or misappropriation, the appointment of a receiver will not be disturbed on appeal. (*Armbrust v. Armbrust* [(1946)] 75 Cal.App.2d 272, 275 . . . , and cases cited; *Republic of China v. Chang* [(1955)] 134 Cal.App.2d 124, [130-]131 . . . .)" (*Sachs v. Killeen* (1958) 165 Cal.App.2d 205, 213 (*Sachs*).) "The discretion of the trial court is so broad that an order based upon facts concerning which reasonable minds might differ with respect to the necessity for the receiver will not be reversed (*Armbrust v. Armbrust*, [*supra*,] 75 Cal.App.2d 272, 275-276 . . .). To justify our interference, it must clearly appear that the appointment was an arbitrary exercise of power (*Moore v. Oberg* [(1943)] 61 Cal.App.2d 216, 221-222 . . .)." (*Maggiora v. Palo Alto Inn, Inc.* (1967) 249 Cal.App.2d 706, 711 (*Maggiora*).)

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[5] Section 564 provides, in pertinent part: "(b) 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 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. . . .

"[¶] . . . [¶] (6) Where a corporation is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

"[¶] . . . [¶] (9) In all other cases where necessary to preserve the property or rights of any party."

No Abuse of Discretion

Anthony contends the trial court abused its discretion in confirming the appointment of a receiver for two reasons.[6]

He first asserts "compelling evidence" demonstrated Waldtraut's claims that he engaged in self-dealing and looted LBI were not true. To this end, Anthony cites to the declarations—by himself, Suzanne and the former LBI accountant—filed in opposition to confirmation of the receiver. He claims these declarations demonstrated not only that Waldtraut's claims were meritless, but also that Waldtraut was the one who had misused LBI assets. Anthony makes no mention of the contrary showing made by Waldtraut, which included the allegations of her verified complaint and the declarations and exhibits submitted in support of her application for appointment of a receiver.

In short, at the time the trial court considered confirmation of the appointment of the receiver, it had *conflicting* evidence before it. The trial court, of course, had to resolve this conflict. It also acted well within its discretion, given the record before it at the time, in crediting the evidentiary showing made by Waldtraut. "The pertinent question on a motion for a receivership is whether the facts alleged in a petitioner's complaint and affidavits establish at least a probability of a joint or common interest in an enterprise which is in danger of loss, removal, or material injury, as required by the statute." (*Maggiora, supra*, 249 Cal.App.2d at p. 712; see also *Sachs, supra,* 165 Cal.App.2d at pp. 213-214 ["verified complaint and affidavits submitted by plaintiff

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[6] He also contends, incorrectly, that the trial court erroneously shifted the burden of proof to him. What the trial court did was structure the confirmation hearing as one on an "order to show cause" since the order granting Waldtraut's ex parte application for appointment of a receiver specified that: "defendant Ludwig Betchart, Inc. ('LBI') show cause on January 5, 2010, at 2:30 p.m. in Department 607 of this Court, why the appointment of this Receiver should not be confirmed. Failure to do so will result in this Order being confirmed at the hearing." Waldtraut was never relieved, however, of the burden of showing the basis for and propriety of a receiver. On the contrary, in granting her ex parte application, the court determined she had made a sufficient showing "that this is a proper case for the appointment of a receiver." The subsequent confirmation hearing allowed Anthony a full opportunity to challenge that showing; it did not shift or eliminate the burden of proof that Waldtraut had, and had met, as the moving party.

furnished ample evidentiary support for a conclusion that [plaintiff] had at least a probable interest in the property;" denials of plaintiff's evidence offered to support receiver "created merely a conflict in the evidence, which was resolved against appellants"].) Moreover, "[w]e cannot substitute our conclusion for that of the trial court made upon sufficient evidence even if we should be of the opinion that there was no danger of the loss or removal of, or other irreparable injury to the assets" of the company. (*Moore v. Oberg, supra*, 61 Cal.App.2d at pp. 221-222.)

Anthony secondly asserts injunctive relief would have provided sufficient protection for LBI and therefore it was an abuse of discretion to impose the expense of a receiver on the company. He contends "[i]t has long been the law" that "appointment of a receiver is such a drastic remedy that a receiver should not be appointed where a less drastic remedy is available," citing *A.G. Col Co. v. Superior Court* (1925) 196 Cal. 604 (*A.G. Col*) and *Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.* (1953) 116 Cal.App.2d 869 (*Alhambra-Shumway*).

Waldtraut does not take issue with the proposition that appointment of a receiver is a serious matter and inappropriate "where a remedy less drastic in nature and scope is available, and which will insure to the litigants adequate protection." (*A.G. Col, supra,* 196 Cal. at pp. 613-614.) However, the actual holding in *A.G. Col*, as Waldtraut points out, was that allegations based only on information and belief, and conclusory assertions in affidavits countered by specific, admissible evidence, were insufficient to support a finding of imminent harm to the company and thus insufficient to support appointment of a receiver. (*Id.* at pp. 616-617.) The outcome in *Alhambra-Shumway* similarly turned on the particular facts of the case. The plaintiff's conclusory evidence was rebutted by specific, admissible evidence. (*Alhambra-Shumway, supra,* 116 Cal.App.2d at p. 874.) Moreover, the only purpose of the receivership order was to "shut down" mining operations on several properties, a result that could have been achieved with an injunction. (*Ibid.*)

In this case, Waldtraut's evidentiary showing consisted of more than conclusory assertions based on information and belief. For example, in her verified complaint,

Waldtraut alleged Anthony had: engaged in a course of self-dealing, consisting of siphoning off hundreds of thousands of dollars in cash and transferring equipment belonging to LBI to his wholly-owned companies; made loans to himself on extremely favorable terms, without proper documentation and without any intention of ever repaying LBI; took money out of LBI to pay for repairs to equipment that should have been paid for by the companies he owned; and failed to pay LBI its share of revenue generated on the rental of its equipment. She also submitted declarations made on personal knowledge that included a recitation of the events that occurred at the LBI board meeting that occurred on December 8, 2009, at which actions seemingly favoring Anthony were taken and at which Waldtraut was not permitted to participate through her attorney. Waldtraut claimed all of this benefitted Anthony's wholly-owned companies, to the severe economic detriment of LBI. Anthony vigorously disputed all of this. But this made the case one of conflicting evidence, not of a paucity of evidence.

Additionally, in this case, the order appointing a receiver did far more than order a singular act. Indeed, given the claims and counter-claims of the parties, and the fact LBI was an on-going business, we find it difficult to imagine how the trial court could have been sufficiently prescient to have issued an injunction broad and flexible enough to fully protect LBI and to avoid return to trips to the court to settle quarrels over the scope of an injunction.

Accordingly, given the record in this case, the trial court did not abuse its discretion in confirming the appointment of a receiver.[7]

[7] Other than the order granting Anthony leave to intervene, we have not considered any matters occurring in this case after the order confirming appointment of the receiver. As our decision makes clear, whether the trial court acted within in its discretion in confirming appointment of the receiver turns solely on the record that was before the court at *that* time. The fact that the trial court ultimately found against Waldtraut *after a court trial* is irrelevant to the issue presented by this appeal.

DISPOSITION

The order confirming appointment of a receiver is affirmed.

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Banke, J.

We concur:

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Marchiano, Acting P.J.

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Dondero, J.