STATE OF MICHIGAN

COURT OF APPEALS

CSB BANK,

Plaintiff-Appellee,

v

NECOLAOS G. CHRISTY,

Defendant-Appellant,

and

PATRICIA L. CHRISTY, RONALD J. ROMINE, and DIANA ROMINE,

Defendants.

UNPUBLISHED
October 18, 2012

No. 305869
Lapeer Circuit Court
LC No. 11-043793-PR

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant, Necolaos Christy, appeals as of right from the trial court's order approving the sale of certain real property by a receiver. We affirm.

Necolaos Christy and his wife Patricia Christy,[1] owned commercial property located in Imlay City, Michigan ("the property"). In November 2006, the Christys, who lived in Michigan at the time, leased the property to Ronald Romine and Diana Romine for a term of four years. Under the terms of the lease, the Romines were responsible for paying taxes and insurance on the property. In March 2008, the Christys obtained a loan from plaintiff for $322,160.87, which was secured by a first mortgage on the property. However, the Christys failed to make any payments on the loan to plaintiff.

In July 2010, the Christys filed for Chapter 13 bankruptcy in United States District Court. In their Chapter 13 Plan, the Christys listed the market value of the property at $275,000. The

[1] While the Christys and the Romines were all defendants in the action below, only Necolaos Christy has appealed.

Christys also proposed in their plan to sell the property in an attempt to satisfy their debt to plaintiff.

While the Christys' plan was pending before the bankruptcy court, plaintiff moved for relief from the automatic stay.[2] On November 2, 2010, the bankruptcy court granted plaintiff's motion and terminated the automatic stay for the benefit of plaintiff. Further, the court stated that plaintiff was "authorized to exercise any and all state law remedies it may have to enforce its security interest" in the property.

On February 28, 2011, the Christys served a notice to quit against the Romines, terminating the tenancy because the "tenancy has ended"[3] and requiring the Romines to vacate the premises by March 28, 2011.

On March 8, 2011, plaintiff filed a complaint in Lapeer Circuit Court to protect its security interest by asking the trial court to appoint a receiver. While the Christys were not personally served with the complaint, their attorney was. Also on that same day, plaintiff filed an ex parte motion to appoint a receiver. In the ex parte motion, plaintiff noted its displeasure with the Christys' decision to seek to force the Romines to vacate the premises and alleged that such an action would constitute waste in that it would detrimentally and substantially alter the nature of the occupancy and use of the property.

At an ex parte hearing held on March 21, 2011, the trial court appointed a receiver and authorized the receiver to "perform all acts necessary to preserve the value of the Receivership Property." Additionally, the trial court "authorized and directed" the receiver to sell the property for cash to a bona fide third-party purchaser, subject to plaintiff's approval. The trial court further specified that plaintiff, the receiver, or the Christys were allowed to petition the trial court for the approval of any contract for sale of the property. The trial court's order appointing the receiver was served upon the Christys' counsel by first-class mail on March 21, 2011.

On April 9, 2011, the Christys removed the case to federal court. However, on June 24, 2011, the federal district court granted plaintiff's motion to have the case remanded back to state court because there was not complete diversity.[4]

After the matter was remanded to state court, the Romines agreed to purchase the property through the receiver for $307,236.28. Plaintiff then moved for an order approving the

---

[2] 11 USC 362 governs automatic stays in bankruptcy. "The purpose of the automatic stay is to protect both debtors and creditors. Debtors are insulated from further collection efforts, harassment, and foreclosure actions while formulating a repayment plan. Creditors are ensured orderly liquidation proceedings and equality of treatment." *Lopez v Lopez*, 191 Mich App 427, 428; 478 NW2d 706 (1991).

[3] The four-year lease expired November 17, 2010.

[4] Although the Christys had moved to Florida and were citizens of Florida at the time, plaintiff and the Romines were still citizens of Michigan, thereby destroying complete diversity.

sale. The Christys opposed the motion by filing a brief on August 18, 2011. At a hearing conducted on August 29, 2011, the receiver testified that the price was reasonable based on comparable sales in the surrounding area. The Christys argued that the proposed sale was improperly circumventing the foreclosure process and, moreover, that the proposed selling price was approximately $70,000 too low.

The trial court, after confirming that the Christys never provided the receiver with information of any offer, buyer, or other plan for the property, granted plaintiff's motion. The Christys requested a stay, but the trial court stated that it would only grant a stay if the Christys posted a bond for 125 percent the selling price of the property. The Christys were not able to post such a bond, and no stay was entered. This appeal ensued.

I. DUE PROCESS

Defendant first argues that he was denied due process when the trial court approved the sale of the property. We disagree. We review this unpreserved constitutional issue for plain error affecting substantial rights. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006).

Defendant specifically alleges that approving the sale without "allowing discovery, conducting a trial, holding a hearing or entering a judgment of foreclosure" was a deprivation of due process. However, due process does not require all of these items; instead, procedural due process requires (1) notice and (2) a meaningful opportunity to be heard (3) before an impartial decision maker. *In re Beck*, 287 Mich App 400, 401-402; 788 NW2d 697 (2010). Thus, only defendant's assertion of a lack of a hearing implicates a due-process claim, specifically the requirement for a meaningful opportunity to be heard. However, while defendant was not present at the ex parte hearing where the receiver was appointed, it is undisputed that defendant was represented at the hearing where the trial court approved the sale. Thus, any claim that "the trial court approved the sale" without "holding a hearing" is devoid of any merit. Further, not only did defense counsel appear and argue on behalf of defendant, but defense counsel also earlier submitted a brief to the trial court, complete with seven exhibits, arguing that the sale should not be approved. As a result, it is clear that defendant was not denied a meaningful opportunity to be heard before the sale was approved, and his due-process claim fails.

Defendant's reliance on *Fuentes v Shevin*, 407 US 67; 92 S Ct 1983; 32 L Ed 2d 556 (1972), is misplaced. In *Fuentes*, the United States Supreme Court found the Florida and Pennsylvania laws authorizing the summary seizure of goods in a person's possession under a writ of replevin as an unconstitutional deprivation of due process. Both laws failed to provide for notice or an opportunity to be heard *before* the seizure. *Id.* at 80. The Supreme Court noted that if the right to notice and a hearing is to have any meaning, it must be occur "at a time when the deprivation can still be prevented." *Id.* at 81. The Court stressed that no post-deprivation hearing "can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Id.* at 82.

Here, the trial court conducted a hearing *before* it granted plaintiff's motion to approve the sale. Defendant was represented at the August 29, 2011, hearing and also submitted a brief

prior to the hearing. Therefore, the instant case is easily distinguishable from the concerns in *Fuentes*, and defendant's due-process claim fails.

II. APPOINTMENT OF RECEIVER

Defendant next argues that the trial court's order appointing the receiver should be reversed. However, this issue is unpreserved because defendant never filed a motion or argued at the trial court to set aside the appointment. While the Christys' brief in response to plaintiff's motion to approve the sale had a heading that stated, "The Order Appointing Receiver Should Be Modified and/or Set Aside," this portion of the brief merely used the circumstances of the appointment as a reason for why the trial court should *deny plaintiff's motion*, not set the order appointing the receiver aside. This distinction is important because the trial court was never asked to review the propriety of its prior order appointing the receiver. Notably, the Christys never referred to MCR 2.612, which would be the authority for seeking relief from the prior order. Furthermore, in their prayer for relief, the Christys made no mention of setting any order or appointment aside.

Additionally, at the August 29, 2011, motion hearing, the Christys never argued that the appointment was improper. Instead, their oral argument focused on the position that the sale improperly circumvented the foreclosure process and that the price was too low. Thus, irrespective of the single heading the Christys used in their response brief, it is clear that they did not challenge the appointment before the trial court. Therefore, because this Court is not obliged to consider unpreserved issues in civil cases, we decline to address defendant's collateral attack on the trial court's order appointing the receiver. *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007).

III. APPROVAL OF SALE

Defendant also argues that trial court erred when it approved the sale of the property. We disagree. We review the trial court's ultimate decision in this motion, under the "default" standard of review, for an abuse of discretion standard. See *In re King*, 186 Mich App 456, 466; 465 NW2d 1 (1990). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Here, the trial court approved the sale of the property to the Romines under the authority of its prior March 21, 2011, order appointing a receiver. That prior order "authorized and directed" the receiver to sell the property for cash to a bona fide third-party purchaser, subject to plaintiff's approval. The order further specified that plaintiff, the receiver, or the Christys were allowed to petition the trial court for the approval of any contract for sale of the property.

Defendant maintains that such a sale, however, runs afoul of Michigan's foreclosure requirements.[5] But as noted by the trial court, this was not a sale pursuant to foreclosure; it was a receivership sale. The sale was being conducted pursuant to the prior order appointing the receiver – not a judicial foreclosure. Thus, the various requirements for a sale by foreclosure are simply inapplicable in the instant case.

Defendant also argues that the sale was improper because the selling price was too low. Specifically, defendant claims that the $307,236.28 selling price was inadequate because his real-estate agent allegedly thought he could list the property for at least $375,000. But as the receiver aptly noted at the hearing, "It's more common that a broker is going to suggest you market that property at a higher price so there's room for negotiations. It does not mean it's going to sell for [that higher price]." Furthermore, in support of the proposed sale price of $307,236.28 (or approximately $43 per square foot) as being fair, the receiver testified that he pulled "comps" of various industrial, retail, and commercial property in the area. Of those properties, over 90 percent had prices of less than $40 per square foot. Additionally, the receiver noted that many of these "comps" had been on the market for well over a year.

During the August 29, 2011, hearing on the motion, the trial court asked defense counsel whether the Christys had ever provided any offers, names of purchasers, or any plans whatsoever for any possible sale during the last five months that its March 21, 2011, order had been in effect. Defense counsel admitted that they had not provided any such information.

After hearing arguments and taking testimony from the receiver, the trial court approved the sale, concluding that the transaction was an arm's length transaction and that the price was reasonable.

We cannot conclude that the trial court's decision fell outside the range of principled and reasonable outcomes. First, the trial court's prior order outlined the process for selling the property, and that order was still in full effect at the time of the hearing some five months later. Second, the selling price was shown to be in line with, if not favorable to, comparable listings in the area. As the receiver noted, the fact that the Christys believed their real-estate agent could list the property for $70,000 more did not establish that the property would actually sell at or near that price.[6] In fact, the comparables suggest that this was extremely unlikely. As a result, we find that the trial court did not abuse its discretion when it approved the sale to the Romines.

[5] For instance, MCL 600.3115 states that a sale under a judicial foreclosure cannot occur until at least six months lapse from the time the complaint for foreclosure is filed, MCL 600.3125 provides that such a sale must occur at a public sale, and MCL 600.3140 requires a six-month redemption period.

[6] In support of this view, we note that defense counsel also acknowledged that this same real-estate agent had listed the property for sale three years earlier but was unable to complete a sale.

IV. LACK OF SERVICE OF PROCESS

Defendant next argues that the trial court lacked personal jurisdiction over him, thereby entitling him to a dismissal of the complaint. We disagree. Whether a court has personal jurisdiction over a party is a question of law that is reviewed de novo. *Poindexter v Poindexter*, 234 Mich App 316, 319; 594 NW2d (1999).

"A court cannot adjudicate an in personam controversy without first having obtained jurisdiction over the defendant by service of process . . . ." *Lawrence M Clarke, Inc v Richco Const, Inc*, 489 Mich 265, 274; 803 NW2d 151 (2011) (quotations and brackets omitted). MCR 2.105(J)(3) states that "[a]n action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." Furthermore, "if a defendant actually receives a copy of the summons and complaint within the permitted time, he cannot have the action dismissed on the ground that the manner of service contravenes the rules." *Hill v Frawley*, 155 Mich App 611, 613; 400 NW2d 328 (1985).

Here, the record, as evidenced by the March 21, 2011, certificate of service that provided that service was effectuated on March 14, 2011, indicates that while the Christys were never personally served with service of process, their attorney was. The Christys, in turn, attached plaintiff's complaint to the notice of removal to federal court. Therefore, because the Christys received a copy of the summons and complaint within the permitted time, defendant's request on appeal for dismissal fails.

Moreover, even if the service of process was fatally deficient, defendant would still be precluded from any relief. "[A] party who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections." *In re Estate of Gordon*, 222 Mich App 148, 158; 564 NW2d 497 (1997). There is no question that the Christys entered a general appearance when their attorney argued the merits of plaintiff's motion to approve the sale. The Christys' brief opposing the sale did not allege that service of process was deficient, but instead focused solely on disputing the merits of the motion. Therefore, this issue is waived.

Affirmed. Plaintiff, the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder