[Cite as *Yidi, L.L.C. v. JHB Hotel, L.L.C.*, 2016-Ohio-6955.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103872

YIDI, L.L.C.

PLAINTIFF

vs.

JHB HOTEL, L.L.C., ET AL.

DEFENDANTS-APPELLEES

[Appeal by Historic Preservation Fund 2012, L.L.C.]

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-850496

BEFORE: S. Gallagher, J., Keough, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: September 15, 2016

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SEAN C. GALLAGHER, J.:

{¶1} Historic Preservation Fund 2012, L.L.C. ("Historic"), appeals the granting of a motion to compel Chicago Title Insurance Company ("Chicago Title") to produce Historic's confidential and privileged information, which pertained to an escrow agreement between Historic and Investor IV 2010, L.L.C. ("Investor"). We reverse the order compelling Chicago Title to produce any material related to Historic's escrow agreement and remand for further proceedings.

{¶2} Yidi, L.L.C., initiated a foreclosure and breach of contract action against JHB Hotel, L.L.C., 3M Realty, L.L.C., 3M Development, L.L.C., and Hickory Court, L.L.C. (collectively "JHB" for the ease of reference), seeking repayment for a series of loans guaranteed by three properties located on Euclid Avenue in Cleveland ("the properties"). The trial court, upon Yidi's request, appointed a receiver to manage the properties. It is undisputed that neither Historic nor Investor owns the disputed properties or were otherwise involved with the loan agreements between Yidi and JHB. Historic's relationship to JHB is based on Historic's ownership of a 99 percent share of Investor, which in turn is the sole shareholder of JHB; however, the entities are otherwise independent of each other under Ohio law. Based on its indirect ownership of JHB, Historic unsuccessfully attempted to intervene in the foreclosure action, although Yidi had not advanced allegations to pierce JHB's corporate veil, which might have made Historic's indirect ownership of JHB's shares relevant.[1] Both Yidi and the receiver

[1] We acknowledge that Historic's appeal of the denial of its motion to intervene was sua

objected to the intervention, claiming that Historic's presence in the action was unnecessary.

{¶3} Before the foreclosure action, Historic entered into an escrow agreement for the purpose of providing a $4,500,000 capital contribution to Investor. Chicago Title acted as the escrow agent, managing the disbursement of the funds. The terms of the agreement, with the stated intent that Investor anticipated undertaking a business venture at JHB's property, were completed and the funds entirely disbursed before the foreclosure action was initiated. Despite the stated intent, none of the disbursements involved JHB or its loans with Yidi. After filing the foreclosure action, Yidi subpoenaed any and all documents possessed by Chicago Title in connection to the funds deposited by Historic with Chicago Title. This subpoena and associated motion to compel were withdrawn, and the trial court's order only addressed the receiver's motion to show cause. Accordingly, we need not discuss Yidi's withdrawn subpoena or motion in this appeal.

{¶4} At about the same time Yidi issued its subpoena, the receiver sent an email to Chicago Title requesting material under the auspices of the receiver's powers to obtain receivership property. The email, however, did not specifically indicate that the receiver believed Chicago Title to be in possession of any receivership property, which is defined to include books, records, documents, or other accounting. The email, attached as an

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sponte dismissed because Historic was not a party in the trial court proceedings. The dismissal of the original appeal, however, does not preclude any claims raised in the current appeal. Generally speaking, the denial of intervention does not preclude litigation in future actions. *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, 861 N.E.2d 519, ¶ 31.

exhibit to the receiver's motion to show cause, in its entirety stated: "per [the receiver], please see attached receiver order. [The receiver] is requesting all information you have regarding the escrow account from *[Investor] and JHB*, or any other information regarding this case." (Emphasis added.) Nothing in the request indicated that the receiver believed Chicago Title to be in possession of receivership property or even identified the proper parties to the escrow agreement that placed Chicago Title into this fray.

{¶5} The receiver filed a motion to show cause, seeking to hold Chicago Title in contempt for failing to obey the receiver's emailed request. Chicago Title immediately objected, claiming that the receiver was not requesting any material that could be considered receivership property. According to Chicago Title, the only relevant escrow agreement in its possession was between Historic and Investor. Historic also filed a brief in opposition to the receiver's motion to show cause, which included a motion to quash the discovery of its privileged and confidential information. At the hearing on the receiver's motion to show cause, the receiver and Yidi both claimed that receivership property was being sought because the escrow agreement between Historic and Investor indicated that Investor "plans to undertake the construction, development and operation of a Le Meridian hotel project" at the properties. According to Yidi and the receiver's theory, because Historic and Investor's agreement contemplated an association with JHB, the material was somehow relevant to the foreclosure action. We acknowledge the possibility that Yidi and the receiver could demonstrate the relevance of the nonparty's

confidential documentation through Investor's status as a shareholder of JHB under the right circumstances, but at this stage of the proceedings, Yidi and the receiver failed to allege, let alone demonstrate,[2] that Historic's capital contribution into Investor is relevant to the underlying action in which Yidi seeks to enforce the loan agreement entered between Yidi and JHB. As a result, the issue is not ripe for review in the scope of the current appeal.

{¶6} The only issue before this court is whether the trial court's order was appropriate given the procedural posture of the case. However practical it was to resolve the discovery dispute quickly, the trial court issued an order referencing the receiver's motion to show cause, mistakenly presuming that a subpoena had been issued by the receiver, and further that under the general rules of discovery, the information or material sought was relevant inasmuch as it could lead to admissible evidence. The trial court ordered Chicago Title to execute a protective order and produce the requested

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[2]The receiver's motion to show cause included the bland statement that the escrow agreement is "clearly relevant" because Historic and Investor own shares of JHB, although there is no allegation in the complaint advancing a cause of action to pierce JHB's corporate veil or that JHB is an alter ego of either Historic or Investor. Yidi's motion to compel used the same language as the receiver, but failed to further elaborate on that statement. At the hearing, the receiver claimed to need the documentation from Chicago Title to determine whether any disbursements were owed to JHB. The escrow agreement itself, however, provided only five disbursements, none of which involved JHB. The receiver had possession of the escrow agreement, which was attached to the motion to show cause, and could have simply reviewed the document to determine whether JHB's interests were implicated by the agreement. The basis, therefore, for establishing the relevancy of documents pertaining solely to nonparties has thus far been elusive. The receiver did indicate at the hearing that he wanted to make sure there were no disbursements made contrary to the terms of the agreement. JHB had no standing to ensure compliance with the terms of the escrow agreement between two separate entities, and by implication, the receiver lacked standing as well.

information. Chicago Title, however, maintained throughout the proceedings that it could not be a valid signatory to the protective order because it was not Chicago Title's privileged and confidential material being sought, it was Investor and Historic who had the right to object and protect the disclosure of the discovery material. Neither Yidi nor the receiver opposed Chicago Title's position, and this issue was not raised by any party to this appeal.

{¶7} Historic timely appealed the trial court's order compelling the production of Historic's privileged and confidential information. Before addressing the merits of the appeal, we note that the receiver filed a motion to dismiss, claiming that an order denying a motion to quash a subpoena is not a final, appealable order under R.C. 2505.02. The motion was denied in reliance on *Tisco Trading USA, Inc. v. Cleveland Metal Exchange, Ltd.*, 8th Dist. Cuyahoga No. 97114, 2012-Ohio-493, ¶ 5, which held to the contrary. Further, neither Yidi nor the receiver raised any arguments or objections to the fact that Historic filed the appeal instead of Chicago Title, against whom the motion to compel was directed. Although Historic is not a party in the underlying action, in certain situations nonparties have standing to appeal decisions affecting their interests or rights. *Southside Community Dev. Corp. v. Levin*, 116 Ohio St.3d 1209, 2007-Ohio-6665, 878 N.E.2d 1048 (proposed intervenor had right to appeal denial of motion to intervene because it affected a substantial right in a special proceeding); *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, 861 N.E.2d 519 (denial of motion to intervene, when the purpose for the intervention may be litigated in another action, is not

a final, appealable order; however, the proposed intervenor by implication had standing to pursue the appeal despite not being a party to the underlying litigation).

{¶8} Historic's standing is predicated on its challenges to both the subpoena and the receiver's attempt to access privileged and confidential material. *See, e.g., Garsite/Progress, L.L.C. v. Paul*, D.Kan. No. 13-2200-CM, 2014 U.S. Dist. LEXIS 160540, *11 (Nov. 13, 2014) (a nonparty may challenge the production of documents sought under a subpoena if that nonparty seeks to protect a personal right or privilege in the information requested under subpoena); *In re Rule 45 Subpoena Issued to Cablevision Sys. Corp.*, E.D.N.Y. No. MISC 08-347, 2010 U.S. Dist. LEXIS 40653, *15 (Feb. 5, 2010) (nonparty may have standing to oppose a subpoena issued to another nonparty if the movant demonstrates a sufficient interest in the confidentiality of the records sought); *Hoerig v. Tiffin Scenic Studios, Inc.*, 3d Dist. Seneca No. 13-11-18, 2011-Ohio-6103, ¶ 24 (employer has standing to quash a subpoena issued to employee acting in the course and scope of employment); *Donahoo v. Ohio Dept. of Youth Servs.*, 211 F.R.D. 303, 306 (N.D.Ohio 2002) (absent a claim to protect privileged or confidential information, a person lacks standing to challenge a subpoena issued to nonparty). Unlike Civ.R. 26(C), which limits those who can challenge discovery to the party from whom discovery was sought, Civ.R. 45 places no such limitation on who can challenge a subpoena. *See* Civ.R. 45(C)(3) (providing no limitation on the person entitled to oppose the subpoena, unless under Civ.R. 45(C)(4) the challenge to the subpoena is based on a claim for undue burden); *SEC v. Dowdell*, 144 Fed.Appx. 716, 722 (10th Cir.2005) (distinguishing

between a nonparty's lack of standing to oppose discovery requests made upon parties under Fed.R.Civ.P. 26(C) from a nonparty's standing to oppose a subpoena under Fed.R.Civ.P. 45(C)); *Riding Films, Inc. v. Doe*, S.D.Ohio No. 2:13-cv-46, 2013 U.S. Dist. LEXIS 92049, *16 (July 1, 2013) (only the entity responding to the subpoena has standing to challenge the subpoena on the basis of undue burden). In light of the fact the trial court's order was premised on Civ.R. 45, Historic possesses standing to oppose and appeal the denial of its motion to quash, which is a final, appealable order.

{¶9} Complicating matters, however, the parties to this appeal all agree that no subpoena was issued to Chicago Title by the receiver. The only subpoena issued to Chicago Title was withdrawn by Yidi and could not form the basis of the trial court's decision to grant a motion to show cause against Chicago Title. Yidi withdrew the subpoena because it was agreed that the only argument that mattered was whether the receiver was entitled to the escrow agreement and all related documents because the material was receivership property. The receiver, however, had only requested documents from Chicago Title relating to a single "escrow account from [Investor] and JHB." Somehow between the receiver's informal request for information and the motion to show cause, the request morphed into one for materials and records surrounding the escrow agreement between Investor and Historic. Chicago Title, or Historic for that matter, did not object to the oral expansion of the receiver's request for discovery material.

{¶10} The trial court compelled the production of any and all documentary material pertaining to the escrow agreement, holding that "the grounds for the subpoena are sufficient to warrant additional investigation" by the receiver and the rules for discovery under Civ.R. 26 allow "for the broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding." We acknowledge the practicality and efficiency of resolving the discovery dispute already before the trial court instead of forcing draconian adherence to procedural rules. Under these circumstances, however, we are only able to conclude that the trial court plainly erred in granting a motion to show cause based on material neither requested by the receiver nor based on a validly issued discovery subpoena. Civ.R. 45(E) specifically contemplates that a person can be held in contempt only for failure to comply with a subpoena "served upon that person" according to the rule. Chicago Title cannot be compelled to produce that which was never sought under the applicable rules.

{¶11} In addition, even if a subpoena had been properly served by the receiver, or if Yidi had not withdrawn the only subpoena served on Chicago Title, Civ.R. 45 provides that a court shall quash or modify any subpoena that requires the disclosure of privileged or other protected matter. Civ.R. 45(C)(3)(b). Historic, as demonstrated by its continuing objection to the subpoena filed on November 16, 2015, maintained that Yidi and the receiver were attempting to obtain Historic's privileged and confidential information, and because of that, the subpoena actually issued to Chicago Title should be quashed. The trial court never addressed Historic's motion, which we consider to have

been implicitly denied based on the order compelling production, much less whether Yidi or the receiver demonstrated a substantial need for the material, which would have been required since neither Yidi nor the receiver objected to Historic's characterization of the requested material as being privileged and confidential. Civ.R. 45(C)(5).

{¶12} Recognizing the inapplicability of Civ.R. 45 and otherwise in defense of the order compelling production of material under App.R. 3(C)(2), Yidi and the receiver both argue that the material sought is receivership property because the funds deposited under the terms of the escrow agreement were to secure a capital contribution from Historic to Investor, with the stated intent that Investor would undertake the construction, development, and operation of a hotel project at the properties owned by JHB. In his appellate briefing, the receiver claims that he is entitled to the material involving the escrow agreement because the money itself or the accounting of the deposited funds is either receivership property or is relevant to discovering receivership property. As to the receiver's latter claim, he unnecessarily blurs the distinction between discovery sought through a subpoena and obtaining receivership property as authorized through the order appointing the receiver. The order appointing the receiver does not authorize the collection of information that may lead to the discovery of receivership property; the order only authorizes the receiver to obtain receivership property. Accordingly, the receiver was not authorized by his appointment order to obtain information that may lead to the discovery of receivership property. For that, a subpoena was necessary in light of the fact that the parties opposed Historic's attempt to intervene. *See Wells v. Wells*, 9th

Dist. Summit No. 25557, 2012-Ohio-1392, ¶ 53 (differentiating between discovery requests propounded on parties from subpoenas issued to nonparties).

{¶13} In regard to the claim that Chicago Title was in possession of receivership property, nothing on the face of the escrow agreement indicates that JHB was a party to, or entitled to receive funds through, that escrow agreement. Investor's (1) intent to develop a project on JHB's property and (2) interrelated ownership of JHB is irrelevant to considering whether the escrow agreement and an accounting of the deposited funds is receivership property. There is nothing in the record to demonstrate that Historic's financial and business information is receivership property. Even though Historic is the shareholder of a shareholder of JHB, that connection does not authorize the receiver to obtain Historic's information as a matter of right because the receiver only has authority over the matters pertaining to the parties to the action.

{¶14} No receiver in a foreclosure action has inherent authority through the appointment to delve into a nonparty's privileged or otherwise confidential information solely because the nonparty contemplated doing business with the distressed defendant. *See Aetna Life Ins. Co. v. Woodhawk Apts. Partnership*, 8th Dist. Cuyahoga No. 68820, 1995 Ohio App. LEXIS 5368, *10 (Dec. 7, 1995) (court erred by authorizing the receiver to seize bank accounts that were not covered by the mortgage and that were acquired before the foreclosure proceeding); *Suttle v. DeCesare*, 8th Dist. Cuyahoga No. 77753, 2001 Ohio App. LEXIS 3030, *18 (July 5, 2001) (discovery of shareholder's personal finances not relevant to aid in collection of judgment against the corporate entity). The

receiver only has inherent authority over matters pertaining to parties to the underlying action, over whom the trial court's jurisdiction has been invoked through the filing of the complaint. A trial court does not have jurisdiction over nonparties solely based upon the filing of a complaint and, thus, cannot order the nonparty to produce documents under threat of contempt absent compliance with all applicable statutory or civil rules. *See, e.g., State ex rel. Ballard v. O'Donnell*, 50 Ohio St.3d 182, 183, 553 N.E.2d 650 (1990) (trial court lacks jurisdiction over nonparty to an action absent compliance with due process requirements); *HRM, L.L.C. v. Shopsmith, Inc.*, 2d Dist. Montgomery No. 25374, 2013-Ohio-3276, ¶ 9 (Civ.R. 69 and R.C. 2333.17 empower trial court to compel discovery in aid of execution from any person); *Tisco Trading USA, Inc.*, 8th Dist. Cuyahoga No. 97114, 2012-Ohio-493, ¶ 9-10 (holding that Civ.R. 69 authorizes discovery over any person and post-judgment discovery in aid of execution can be served upon shareholders to a corporation).

{¶15} For the purposes of pretrial discovery, trial courts possess jurisdiction over nonparties through the issuance of a subpoena. *See State ex rel. Capital One Bank (USA) N.A. v. Karner*, 8th Dist. Cuyahoga No. 96739, 2011-Ohio-6439, ¶ 20 (trial court has jurisdiction over nonparty pursuant to Civ.R. 45); *State v. Dudas*, 11th Dist. Lake No. 2007-L-169, 2008-Ohio-3261, ¶ 19 (trial court lacks jurisdiction over a nonparty for the purpose of ordering that party to undertake any action); *Columbus Homes Ltd. v. S.A.R. Constr. Co.*, 10th Dist. Franklin Nos. 06AP-759 and 06AP-760, 2007-Ohio-1702, ¶ 47 (trial court lacks jurisdiction to impose constructive trust on assets belonging to a

nonparty). As a result, we find no merit to Yidi and the receiver's attempt to support the trial court's order on other grounds. The receiver was required to issue a subpoena as the preliminary step in obtaining a nonparty's personal, financial material through discovery.

{¶16} The trial court's order to compel the production of any and all documents relating to the escrow agreement between Investor and Historic was in error. Our decision does not preclude the parties from taking the appropriate steps on remand to obtain the material from Chicago Title, as long as the requests are in compliance with the applicable rules of procedure. We sustain the sole assignment of error, reverse the granting of the receiver's motion to show cause and to compel the production of documents, and remand for further proceedings.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE
KATHLEEN ANN KEOUGH, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR