[Cite as *Maynard v. Cerny*, 2004-Ohio-955.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

BLAIR E. MAYNARD

Appellee

v.

DOUGLAS I. CERNY

Appellant
C.A. No. 21652

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 01 05 2334

DECISION AND JOURNAL ENTRY

Dated: March 3, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BATCHELDER, Judge.

{¶1} Appellant, Douglas I. Cerny, appeals from the judgment of the Summit County Court of Common Pleas, which granted Appellee's, Blair Maynard, motion for the appointment of a receiver. We affirm.

I.

{¶2} Mr. Cerny was the principal and president of Cerny & Son, Inc., an Ohio corporation whose charter was cancelled in December, 1998 for failure to pay franchise tax taxes. Through Cerny & Son, Inc. as the holding company, Mr. Cerny operated an investment advisory, and held an Ohio liquor license under which it also operated the Dougout Pub & Grill, L.L.C. located in Richfield, Ohio. In the 1970's, Blair and Patricia Maynard (the "Maynards") entered into a number of investment transactions through Mr. Cerny.

{¶3} On May 18, 2001, the Maynards filed a complaint in the common pleas court against Mr. Cerny and Cerny & Son, Inc. (collectively "Cerny"), alleging fraud, conversion, and breach of contract arising from the claimed mishandling of the Maynards' retirement investment funds. On September 30, 2002, an agreed judgment entry and order was entered in favor of the Maynards and against Cerny.[1] The agreed judgment ordered Cerny to pay the Maynards $83,000.00 by the close of business on October 10, 2002.

{¶4} On January 2, 2003, Cerny & Son, Inc., by and through Mr. Cerny, signed a promissory note in favor of his father, Irwin Cerny ("Irwin"). The same

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[1] *Maynard v. Cerny* (Sept. 30, 2002), Summit C.P. No. CV-2001-05-2334.

day, Cerny & Son, Inc. entered into a security agreement on the promissory note, covering various Cerny & Son, Inc. assets, including the liquor license, used in the operation of the Dougout Pub & Grill. On March 25, 2003, Cerny & Son, Inc. entered into an asset purchase agreement for the sale of these various assets to the Dougout One Pub & Grill, L.L.C., of which Irwin is the sole member.

{¶5} On June 3, 2003, the Maynards filed a motion for the appointment of a receiver to administer the assets of Cerny. In their motion, the Maynards asserted that the judgment entered against Cerny on September 30, 2002, remained fully unsatisfied, that Cerny refused to apply its assets to the satisfaction of the judgment, and that Cerny was attempting to transfer the assets out of the Dougout Pub & Grill to avoid payment on the judgment. An evidentiary hearing was held on the matter.

{¶6} On June 20, 2003, the trial court issued an order granting the Maynards' motion for the appointment of a receiver to proceed with the dissolution of Cerny & Sons, Inc. and the sale of its assets. The court concluded that the Maynards had presented sufficient evidence for the appointment of a receiver pursuant to R.C. 2735.01(C)-(E). The court also found that "the corporation [Cerny & Son, Inc.], by and through its president, [Mr. Cerny], is attempting to transfer all the assets of [Cerny & Son, Inc.], including a D-5 liquor permit, to his father, Irwin G. Cerney [sic.]" The court further concluded that "the judgment debtors refuse to apply their property in satisfaction of the judgment and

that the corporation is in imminent danger of insolvency due to the transfer of assets."

{¶7} While the court stated in this order that it was not making a finding with respect to the enforceability of the security interest claimed, the court did note that "the promissory note evidencing the alleged loan secured is dated January 2, 2003, the security agreement is dated January 2, 2003 and the asset purchase agreement is dated March 25, 2003 – *all after the judgment was entered herein on September 30, 2002*." (Emphasis added).[2] This appeal followed.

{¶8} Mr. Cerny appealed, asserting one assignment of error for review.

II.

Assignment of Error

"THE TRIAL COURT ERRED IN GRANTING THE MOTION OF PLAINTIFF-APPELLEE TO APPOINT A RECEIVER."

{¶9} In his sole assignment of error, Mr. Cerny avers that the trial court erred when it granted the Maynards' motion to appoint a receiver. We disagree.

{¶10} First, we note the appropriate standard of review. "'Because the appointment of a receiver is such an extraordinary remedy, the party requesting

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[2] On July 30, 2003, the Maynards filed another complaint in the Summit County Court of Common Pleas, asserting a fraudulent conveyance claim against Cerny. Civ. No. 2003-07-4408. In this complaint, the Maynards averred that the judgment remained unsatisfied, and that Cerny transferred substantially all of the Cerny assets to Irwin in the form of a security interest, in order to keep the property beyond the reach of the Maynards. The Maynards asserted that Cerny was rendered insolvent by this transfer. This suit remains pending in the common pleas court, and is not the subject of this appeal.

the receivership must show by clear and convincing evidence that the appointment is necessary for the preservation of the complainant's rights.'" *Ferbstein v. Silver* (July 8, 1998), 9th Dist. No. 18684, quoting *Equity Ctrs. Dev. Co. v. S. Coast Ctrs., Inc.* (1992), 83 Ohio App.3d 643, 649. Nonetheless, the decision to appoint a receiver is within the sound discretion of the trial court. *Ferbstein*, supra, citing *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 73. Therefore, the decision to appoint a receiver will not be disturbed absent a clear abuse of discretion. *Ferbstein*, supra, citing *State ex rel. Celebrezze*, 60 Ohio St.3d at 73. Additionally, appellate review of an order appointing a receiver is confined to "the purpose of determining whether there is clear and convincing evidence tending to prove the facts essential to sustain the order." *Ferbstein*, supra, citing *Malloy v. Malloy Color Lab, Inc.* (1989), 63 Ohio App.3d 434, 436.

{¶11} In the instant case, the common pleas court found that the Maynards had presented sufficient evidence for the appointment of a receiver per R.C. 2735.01(C)-(E). R.C. 2735.01, which governs the appointment of receivers, specifically authorizes a common pleas court to appoint a receiver, in certain circumstances. Those circumstances specified in the statute which are relevant in this case are as follows:

> "C. After judgment, to carry the judgment into effect;
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> "D. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply for the property in satisfaction of the judgment;

> "E. When a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights[.]"

{¶12} In this case, the agreed judgment entry and order was already issued at the time that the court appointed a receiver on June 20, 2003. Additionally, the court made an express finding in its order granting the appointment of a receiver that Cerny refused to apply their property in satisfaction of the September, 2003 judgment. The court also noted that Cerny & Son, Inc. faced the imminent danger of insolvency due to this transfer of assets.

{¶13} In light of the foregoing, we conclude that clear and convincing evidence exists to support the court's order appointment of a receiver pursuant to R.C. 2735.01(C)-(E). See *Ferbstein*, supra, citing *Malloy*, 63 Ohio App.3d at 436. Therefore, this Court finds that the common pleas court clearly had the authority to appoint a receiver in light of the status of Cerny's assets. Consequently, we also find that the court did not abuse its discretion when it appointed a receiver to enforce the agreed judgment entry and order. See *Ferbstein*, supra, citing *State ex rel. Celebrezze*, 60 Ohio St.3d at 73.

{¶14} We observe that Mr. Cerny supports his sole assignment of error with a single argument regarding the priority of the security interest which he granted to Irwin. Mr. Cerny asserts that this security interest takes priority over the judgment lien which arose from the agreed judgment entry and order dated September 30, 2002. However, as the Maynards correctly maintain in their brief on appeal, the issues of the existence, validity, and priority of any security interest

governing these assets is wholly independent of, and irrelevant to, the question of the appropriateness of the court's appointment of a receiver. As such, Mr. Cerny's argument in support of his sole assignment of error substantively runs afoul of the appellate rules of procedure, as well as the local rules of this Court. See App.R. 16(A)(7) and Loc.R. 7(A)(6). Furthermore, as we have noted supra, the common pleas court, in its order granting an appointment of a receiver, specifically did not make a finding with respect to the enforceability of the security interest. Thus, we need not address Mr. Cerny's priority argument.

{¶15} Accordingly, Mr. Cerny's sole assignment of error is overruled.

III.

{¶16} Mr. Cerny's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

WILLIAM G. BATCHELDER
FOR THE COURT

WHITMORE, P.J.
BAIRD, J.
CONCUR

APPEARANCES:

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