

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000438-MR

SANDRA B. HAMMOND IN
HER CAPACITY AS CONSERVATOR
FOR LINDA OWEN MILLER¹

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 16-CI-006053

OWEN FAMILY LIMITED
PARTNERSHIP AND DAVID OWENS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; DIXON, JUDGE; AND HENRY,²
SPECIAL JUDGE.

¹ By order entered January 26, 2018, Sandra B. Hammond in her capacity as conservator for Linda Owen Miller was substituted as appellant in the above-styled appeal.

²Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

HENRY, SPECIAL JUDGE: The sole issue in this appeal is whether the Jefferson Circuit Court erred in denying appellant's motion for the appointment of a receiver for a business she owns in partnership with her brother, appellee David Owens. We affirm.

On December 6, 2016, appellant filed an action against her brother David and the appellee Florida limited partnership seeking money damages and an equitable accounting stemming from an alleged breach of fiduciary duty in the misappropriation of more than \$130,000 of rental income and alleged violations of Florida partnership law. One week after the filing of the complaint, appellant filed a motion for the appointment of a receiver supported by photocopies of the partnership's financial records for the previous two years. On January 10, 2017, David and the partnership filed an answer to the complaint denying the misappropriation claim and asserting that a valid partnership agreement governed the parties' rights. In their response to the motion for a receiver, David and the partnership denied the necessity of appointing a receiver and attached a copy of the partnership agreement.

Despite the existence of an arbitration clause in the partnership agreement, David and the partnership did not assert the arbitration provision at the February 17, 2016 hearing on appellant's motion for appointment of a receiver. Because she had not previously addressed any issues stemming from violation of

the partnership agreement, on February 21, 2017, appellant sought and was granted leave to file an amended complaint. On February 22, 2017, the circuit court entered an order denying the motion for appointment of a receiver without findings. Appellant subsequently filed a Kentucky Rule of Civil Procedure (“CR”) 59.05 motion to alter, amend, or vacate, seeking reconsideration of the denial of her motion and requesting written findings as to why the appointment of a receiver was not justified. After the summary denial of her CR 59 motion on March 9, 2017, appellant filed a notice of appeal on March 10, 2017.

This interlocutory appeal is prosecuted under the authority of Kentucky Revised Statute (KRS) 425.600(1) which provides:

On the motion of any party to an action who shows that he has, or probably has, a right to, a lien upon, or an interest in, any property or fund, the right to which is involved in the action, and that the property or fund is in danger of being lost, removed or materially injured, the court may appoint a receiver, or order the master commissioner to take charge of the property or fund during the pendency of the action, and may order and coerce the delivery of it to him. **The order of a court appointing or refusing to appoint a receiver, shall be deemed a final order for the purpose of an appeal;** Provided, that such order shall not be superseded.

(Emphasis added.) Thus, the appeal from the denial of appellant’s motion is properly before the Court.

In addition to arguing that the denial of her motion constituted an abuse of discretion, appellant insists that the circuit court was required to enter

findings of fact and conclusions of law concerning the denial of her motion for appointment of a receiver. Having reviewed the limited record in this case with particular attention to the February 17, 2017 hearing, we perceive no basis for disturbing the decision of the circuit court and affirm the refusal to appoint a receiver.

We commence our discussion by noting that the appointment of a receiver is a matter within the discretion of the trial court. *Woods v. Consolidated Newspapers*, 275 Ky. 479, 122 S.W.2d 112, 113 (1938). Thus, an appellate court will not disturb a trial court's decision absent a showing that it "was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citation omitted).

Turning now to appellant's contention that CR 52.01 obligated the circuit court to enter findings of fact and conclusions of law supporting its denial of her motion, there was no error. CR 52.01 specifically provides that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02." Because a motion pursuant to KRS 425.600 does not fall within the category of motions which require the entry of written findings and conclusions, the circuit court did not err by failing to make such an entry. *See also Clay v. Clay*, 424 S.W.2d 583,

584 (Ky. 1968) (“CR 52.01 exempts rulings on motions from its mandate for such findings of fact and conclusions of law.” (citations omitted)).

Finally, appellant failed to make the essential showing that the partnership’s property was “in imminent danger of being lost, removed or materially injured, and that only the immediate appointment of a receiver could avert and prevent a harmful result to [her] rights.” *Dulworth & Burress Tobacco Warehouse Co. v. Burress*, 369 S.W.2d 129, 132 (Ky. 1963). At the hearing, the circuit court heard argument of counsel that appellant intended to file an amended complaint; that the parties were litigating at least five cases with a global settlement conference scheduled for late March, 2017; that the appellant had yet to be deposed; that the partnership was not insolvent; and that David had, at least temporarily, stopped making the expenditures to which she was objecting. Aside from the fact that there was no *evidence* adduced at the hearing, absolutely nothing argued by counsel for appellant would allow this Court to conclude that the circuit court’s denial of appellant’s request “was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *English, supra* at 945.

Longstanding caselaw instructs that the appointment of a receiver is a remedy of last resort:

From them and many other authorities that might be cited, it is deducible that the appointment of a receiver is the exercise of an extraordinary, drastic, and sometime harsh power which courts of equity possess and **is only**

to be exercised where the failure to do so will place the complaining party in a position of suffering irreparable loss or injury. There is a clear distinction between its jurisdiction to appoint a receiver where the corporation is a solvent, going concern, and where it is insolvent.

Oscar C. Wright Co. v. Steenman, 254 Ky. 381, 71 S.W.2d 991, 995 (1934)

(emphasis added). Appellant points us to no evidence which would support a conclusion that she is in danger of suffering an irreparable loss. Neither are we satisfied that the appointment of a receiver is the only remedy available to preserve appellant's interests. Because of the intervention of this appeal, appellees have yet to even respond to appellant's amended complaint. On this state of the record, we find no basis upon which we might conclude that the circuit court abused its discretion in denying appellant's request for the appointment of a receiver.

Accordingly, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Gregory Troutman
Danny Kang
Louisville, Kentucky

BRIEF FOR APPELLEE:

Stephen B. Pence
Louisville, Kentucky