STATE OF MICHIGAN

COURT OF APPEALS

Estate of DARRYL HOUSTON PRICE.

NASTASSIA PRICE and ERIN DUFFY-PRICE, Personal Representatives of the Estate of DARRYL HOUSTON PRICE,

Plaintiffs,

v

LORI JEAN KOSMALSKI and TRADE DEVELOPMENT COMPANY, a/k/a TRADE WORLD CORPORATION, INC.,

Defendants,

and

The Estate of RUDAFORD R. STERRETT, JR.,

Defendant-Appellee,

and

THOMAS WOODS, Receiver,

Appellee,

and

DART BANK,

Intervening Defendant-Appellant.

FOR PUBLICATION
April 12, 2011
9:05 a.m.

No. 295212
Ingham Circuit Court
LC No. 06-000228-NZ

Before: O'CONNELL, P.J., and K.F. KELLY and RONAYNE KRAUSE, JJ.

O'CONNELL, P.J.

Intervening defendant-appellant appeals as of right the trial court's order granting receiver-appellee a lien over certain property. The issue on appeal is whether the trial court erred by imposing the costs of the receivership on appellant by granting the lien, when appellant neither consented to nor objected to the receivership. We affirm.

I. FACTS AND PROCEDURAL HISTORY

The original parties in this case stipulated to the appointment of appellee as receiver over certain property in DeWitt.[1] The receivership order authorized appellee to take immediate possession of the property in order to sell it and to make any expenditure necessary for the upkeep and repair of the property. The property required substantial repairs, totaling approximately $20,000, which appellee borrowed by authority granted in the receivership order. Market conditions rendered appellee unable to sell the property.

The receivership order also prohibited anyone with actual notice of the order from interfering with appellee's possession and management of the property. Appellant was not a party to this case at the time of the order and thus did not stipulate to it. Appellant foreclosed on the property on June 5, 2008. Appellant was not aware of the receivership order before beginning the foreclosure process, but learned of the order before the foreclosure sale. Specifically, appellant received a copy of the original receivership order on April 18, 2008, and does not dispute that appellee served it with a copy of the amended order on April 28, 2008. Appellant was the only bidder at the foreclosure sale and purchased the property for $169,312.50. Appellant subsequently appraised the property at $245,000. Appellee eventually filed a motion to void the foreclosure and hold appellant in contempt for violating the receivership order's prohibition on interfering with appellee's possession of the property. The trial court denied the motion but extended the redemption period to give appellee additional time to sell the property at a better price than that paid by appellant.

After determining that he could not find a buyer for any amount close to $245,000, appellee moved to dissolve the receivership and to have the trial court order appellant to pay the costs of the receivership. The trial court essentially granted this motion by placing a lien on the property to be paid whenever the property is sold. The court noted that it had ordered appellee to sell the property and that appellant did not ask the court to set that order aside. Further, the court stated that it would not be able to find receivers in the future if it did not pay them.

II. AUTHORITY TO IMPOSE RECEIVERSHIP COSTS

Whether the trial court had authority to place a lien on the property to collect the costs of receivership is a question of law, which we review de novo on appeal. See *Attica Hydraulic Exch v Seslar*, 264 Mich App 577, 588; 691 NW2d 802 (2004).

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[1] The original stipulated order appointing appellee was entered April 10, 2008. An amended order was entered on April 28, 2008.

Appellant first argues that a receiver has no greater rights than the original owner of the property,[2] citing *Gray v Lincoln Housing Trust*, 229 Mich 441, 446-447; 201 NW 489 (1924). Appellant contends that allowing appellee to recover his costs essentially grants him greater rights than the original owner would have had. However, the cited case stands for the proposition that appellee cannot destroy the bank's right to payment under the mortgage. The case does not resolve the issue at hand.[3]

Both parties cite *Bailey v Bailey*, 262 Mich 215; 247 NW 160 (1933), in which our Supreme Court ruled that a mortgagee was liable for receivership expenses where the mortgagee consented to appointment of the receiver and "availed themselves of any possible advantage of the receivership." *Id.* at 219. Appellant attempts to distinguish *Bailey* because it did not consent to the receivership in the present case. However, the *Bailey* Court also acknowledged that "[a]dministration expenses are incurred on the theory that they benefit the parties ultimately entitled to the property," and that "'the property becomes chargeable with the necessary expenses incurred in taking care of and saving it, including the allowance to the receiver for his services.'" *Id.* at 220 (citation omitted). Therefore, the *Bailey* Court based its decision not only on the mortgagee's consent, but also on the fact that the mortgagee benefited from the receivership.

Our Supreme Court addressed a similar issue in *Fisk v Fisk*, 333 Mich 513; 53 NW2d 356 (1952). In that case, the Court held:

> In a case such as this, the primary purpose of a receivership is to preserve and protect the property involved in the controversy. This being so it logically follows that he who ultimately establishes his right to the property thus held is the one who benefits from the property having been protected and preserved. For this reason the general rule followed by the courts is that a receiver's compensation and the expenses necessarily incurred by him in preserving and caring for the property under the order of a court of competent jurisdiction are primarily a charge on and should be paid out of the fund or property in his hands, regardless of the ultimate outcome of the principle suit . . . . [*Id.* at 516 (internal citations and quotation marks omitted).]

The Court remarked that exceptions include cases where the trial court does not have proper jurisdiction or where it was improper to appoint a receiver. *Id.* The defendant in *Fisk* agreed to the appointment of the receiver, and therefore, the Court concluded, could not object to the receiver being paid by a charge against the property held by the receiver. *Id.* at 516-517.

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[2] Appellant does not contest the validity of appellee's expenses. Rather, appellant contests only whether the trial court could properly place a lien for those costs.

[3] *Gray* involved an attempt by a receiver to prevent a plaintiff from recovering on a breach of contract claim. *Gray*, 229 Mich at 444-446.

This Court discussed a trial court's authority to order an intervening party to pay the costs of a receivership in *Attica*, 264 Mich App at 588-594. The Court first discussed MCR 2.622(D), which allows the trial court to direct that the party who moved for appointment of the receiver pay the receiver's costs. That rule is inapplicable in this case, as it was in *Attica*, because appellant did not move for appointment of the receiver, and in fact, did not become a party until after the receiver was appointed. See *id.* at 591.

The Court then considered *Fisk*, stating:

> Although *Fisk* does hold that the party who benefited from the receivership is responsible for the receivership expenses, *Fisk* defines a party who benefits as one who "ultimately establishes his right to the property . . . having been protected and preserved." [*Id.* at 592, quoting *Fisk*, 333 Mich at 516.]

The *Attica* Court found that *Bailey* similarly held that mortgagees could not contest the receivership expenses where they benefited "as the parties ultimately entitled to the property." *Id.* at 593.

Appellant would read these cases such that any party who does not seek a receivership is not required to pay for it. It is true that the parties who were forced to pay in *Bailey* and *Fisk* each consented to receiverships, but the Courts did not focus on that fact alone, as explained in *Attica*. It was also important that those parties ended up in possession of the property that had been preserved by the efforts of the receivers. Indeed, in *Attica* the key point that allowed the Department of Environmental Quality (DEQ) to avoid paying the receiver's costs was that the DEQ's interest was purely regulatory—that is, it would never take possession of the property that had been preserved by the receivership. *Id.* at 592-593. The *Attica* Court held based on that fact that the DEQ did not fit *Fisk*'s definition of a party who benefits from a receivership. *Id.* at 593.

Appellant in the present case is similarly situated to the DEQ in *Attica* to the extent that it became a party only after the receiver was appointed and did not consent to the receivership. Unlike the DEQ, though, appellant ultimately established its right to the property. Therefore, under *Fisk* and *Attica*, because appellant benefited from the receivership, it may be held responsible for the receivership expenses.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause