STATE OF MICHIGAN

COURT OF APPEALS

YPSILANTI FIRE MARSHAL and CITY OF YPSILANTI, Plaintiffs-Appellees, v DAVID KIRCHER, Defendant-Appellant.	UNPUBLISHED April 27, 2004 No. 242697 LC No. 2002-000434-CZ
YPSILANTI FIRE MARSHAL and CITY OF YPSILANTI, Plaintiffs-Appellees, v DAVID KIRCHER, Defendant-Appellant.	 No. 242857 LC No. 01-000560-CH

Before: Kelly, P.J. and Murphy and Neff, JJ.

PER CURIAM.

In docket number 242697, defendant appeals as of right an order appointing a receiver for defendant's property at 400, 408 and 412 North River Street known as "the Thompson Building." In docket number 242857, defendant appeals as of right an order giving plaintiffs the exclusive right to repair defendant's property at 510 West Cross Street (hereinafter "the apartment building"). In docket number 242697, we affirm in part, reverse in part and remand for entry of an order consistent with this opinion. In docket number 242857, we affirm, but remand for entry of an order consistent with this opinion.

I. Basic Facts

A. Docket number 242697—The Thompson Building

Plaintiffs filed a complaint for an order to show cause and for immediate appointment of a receiver for the Thompson Building. Plaintiffs alleged that defendant failed to comply with a July 14, 1997, order entered in two previously filed and consolidated nuisance claims involving the same property. Relying on the fire prevention act, MCL 29.1 *et seq.* and an engineer's report, plaintiffs alleged that specific repairs were required to "bring this building back up to code" and alleviate "hazardous/dangerous conditions." Plaintiffs further alleged that defendant maintained tenants in the Thompson Building without a certificate of occupancy.

The trial court entered an order to show cause why it should not order (1) that a receiver be appointed, (2) that a preliminary injunction and temporary restraining order be entered, and (3) that the receiver take care of the property with costs to defendant and liens against the property. At the show cause hearing, plaintiff Jon Ichesco testified that he procured a survey after receiving complaints about the building. He relied on an engineer's report that listed the repairs needed to make the building safe. Specifically, Ichesco discussed problems with the roof, the need for tuckpointing, and windowpanes falling into the street. Defendant offered only his own testimony about what he thought was required and what he did to repair the building. On cross-examination, defendant asserted that it "would have been impossible" for him to complete the repairs listed in the July 14, 1997, order because he had not received the grant money referred to in a May 22, 1996, order.

The trial court found:

> [D]efendant has not complied with the Court's May 22nd, 1996 order, or the July 14, 1997 order. Furthermore, I'm going to specifically find that the building is in dangerous condition and is a nuisance.

The trial court entered an order appointing Robert Barnes as receiver. The order further provided:

> IT IS FURTHER ORDERED that the Receiver needs to make the building economically viable.
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> * * *
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> IT IS FURTHER ORDERED that the Receiver shall maintain detailed records of the costs for time and material expended in furtherance of his appointed tasks.
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> IT IS FURTHER ORDERED that the Receiver shall send monthly invoices to Defendant Kircher which invoices shall be paid within thirty (30) days of mailing. Invoices which are not paid within thirty (30) days shall be subject to interest at the rate of seven percent (7%) per annum.
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> IT IS FURTHER ORDERED that, upon completion of the repairs, Receiver is hereby granted a lien on the subject property for all fees and cost Invoices which have not been paid by Defendant Kircher. Costs and fees shall include all the labor, materials, permit and inspection costs, administrative costs, and attorneys fees necessary and appropriate to accomplish the appointed task.

> IT IS FURTHER ORDERED that, In the event defendant Kricher fails or refuses to pay the Receiver in full within thirty (30) days of mailing the final invoice, then the Receiver shall be entitled to legal or equitable relief. . . . The Defendant is obligated to pay the Receiver's costs and attorney fees incurred in conjunction with the enforcement and supervision of this order.
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> IT IS FURTHER ORDERED the Defendant is obligated to pay the City of Ypsilanti costs and attorneys fees in conjunction with the enforcement and supervision of this order.

B. Docket number 242857—The Apartment Building

Plaintiffs filed a complaint under MCL 29.23 of the fire prevention act, requesting nuisance abatement. Under MCL 29.13, plaintiffs requested an order to show cause why a receiver should not be appointed to repair the structure in accordance with Ichesco's specifications. Plaintiffs also requested an order requiring defendant to show cause why the building should not be declared a hazard and an injunction and restraining order should not be issued.

The trial court entered an order to show cause why it should not order the property vacated and declared a nuisance and order defendant to immediately comply with all applicable ordinances. It later entered another order providing:

> 1. That parties are to complete a list of repairs to be made to the property and that any dispute with regard to that list will be resolved at an evidentiary hearing scheduled for August 16, 2001 at 2:00 p.m.
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> 2. The property is to be vacated immediately.
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> 3. The Defendant shall have 90 days from the date of the evidentiary hearing to effectuate all of the repairs.

After the show cause hearing, the trial court, entered an order that: "materials, equipment and devices" could not be reused unless approved by the fire marshal, that defendant obtain permits and inspections as repairs are made, that the city can make surprise inspections, that a certificate of occupancy be obtained and that the parties would try to resolve as many items as possible. A "Table of Repairs" was attached identifying 224 repairs.

Plaintiffs filed a motion for immediate vacation of the premises and sought an order for contempt in which they argued that defendant continued to occupy the building, had not yet obtained a certificate of occupancy and violated the court's previous orders. In response, the trial court entered an order to vacate the premises which also required a certificate of occupancy before further occupation and inspections.

At a subsequent evidentiary hearing, plaintiffs' attorney and defendant simply spoke on the record. Plaintiffs asserted that the parties were attempting to resolve the issues, but would litigate anything that was not resolved. Plaintiffs also indicated on the record that the parties

agreed that defendant would make repairs subject to a determination of workmanship by Harry Hutchinson, head of the city's building department. Defendant did not object.

The trial court entered an order stating that defendant had ten days to make repairs. It further provided that city officials could inspect the building twenty-one days from entry of the order and that workmanship would be determined by Hutchinson. Code violations were to be presented to the court for review. On November 27, 2001, the parties stipulated to entry of an order providing that several repairs "shall be undertaken immediately to bring this property into compliance."

At another show cause hearing, plaintiffs' counsel argued that because defendant failed to comply with the trial court's previous orders, a receiver should be appointed to effect the repairs. Defendant asserted that some of the repairs were made and that discussed the particulars of his interaction with plaintiffs. He indicated that he made all the repairs ordered, but that plaintiffs have not given him a certificate of occupancy. The trial court withheld its decision on plaintiffs' motion to appoint a receiver until after an evidentiary hearing.

At that hearing, Hutchinson testified that the November 9, 2001, order indicated that all determinations of workmanship shall be made by him. Since the order was entered, Hutchinson had been to the property and was not pleased with the workmanship of the repairs. Ichesco testified about the repairs that were listed in the complaint and subsequent orders. In particular, he testified that the condition of the chimney posed threats of collapse and carbon monoxide poisoning. Defendant testified about the repairs that he made and discussed his occupancy problems. The trial court entered an order giving the city the exclusive responsibility and right to make the repairs listed in the order.

II. Standard of Review and Preservation

We review for an abuse of discretion the trial court's decision to appoint a receiver. *McBride v Wayne Circuit Judge*, 250 Mich 1, 4; 229 NW2d 493 (1930); *Band v Livonia Associates*, 176 Mich App 95, 104; 439 NW2d 285 (1989); *Wayne County Jail Inmates v Wayne County Chief Executive Officer*, 178 Mich App 634, 658-659; 444 NW2d 549 (1989). "The appointment of a receiver may be appropriate when other approaches have failed to bring about compliance with the court's orders." *Band*, *supra* at 105. We review de novo a trial court's decision to grant equitable relief. *Walker v Farmers Insurance Exchange*, 226 Mich App 75, 79; 572 NW2d 17 (1997).

III. Thompson Building

A. "Self-Actualizing Orders"

Defendant first argues that plaintiffs' complaint erroneously identified the July 14, 1997, orders as "self-actualizing orders." We disagree.

Plaintiffs' complaint actually refers to only one order which was entered in two consolidated cases. The order, dated July 14, 1997, is attached to plaintiffs' complaint. On the basis of an order dated May 22, 1996, defendant argued in the trial court and argues on appeal that he was not required to make the repairs until the grant money was made available. But the

complaint in this case was brought pursuant to defendant's failure to comply with the subsequent July 14, 1997, order which permitted the trial court to appoint a receiver "in the event that any or all of these steps have not been completed." The order empowered the trial court to appoint a receiver upon such a showing. It is irrelevant whether the term "self actualizing" was technically correct.

B. The Trial Court's Jurisdiction

Next, defendant argues that the trial court lacked jurisdiction to appoint a receiver. We disagree.

The trial court has authority to appoint a receiver pursuant to the fire prevention act under which plaintiffs brought their complaint. Specifically, MCL 29.23 provides in relevant part:

> If the state fire marshal considers a fire hazard to be imminently dangerous or menacing to human life so that the public safety requires its immediate abatement, removal, correction, or discontinuance, the state fire marshal may bring, or cause to be brought, in the circuit court of the county in which the fire hazard is located, an action for the purpose of abating, removing, correcting, or discontinuing the fire hazard. . . . The court, in addition to the powers conferred by that act, may make any order or decree as considered necessary or expedient to ensure the safety and security of human life, and may direct that building described in the bill of complaint be razed and removed and all rubbish and debris removed, or that building be repaired and in what manner and to what extent. The court, in the order or decree may direct and command the removal of occupancies of a building, and the discontinuance of any use of the building constituting a fire hazard or menace to human life, and may direct and command the clearing and improvement of premises as defined in this act and described in the bill of complaint.

Further, MCL 600.2926 provides: "Circuit court judges in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law." Therefore, the trial court had jurisdiction to appoint a receiver.

C. Repairs

Defendant also argues that the order allows the receiver to spend and charge to defendant unlimited amounts of money for unspecified repairs. We agree. By giving the receiver the authority to make the Thompson building "economically viable," the order allows the receiver to make repairs beyond removing the hazards of which plaintiffs originally complained. Plaintiffs' reliance on the fire code does not support its argument that the broad scope of the order is appropriate. The quoted portion of the fire code only addresses hazards that endanger human life. It does not address the "economic viability" of the building. Accordingly, we reverse that portion of the June 14, 2002, order providing "that the Receiver needs to make the building economically viable and functional."

On remand, the trial court shall enter an order that more precisely defines the receiver's duties. The listed repairs shall be in keeping with the reasons that the receivership was sought,

i.e., to repair the building so that it is no longer a hazard to human life, and also in keeping with the trial court's finding that:

> [D]efendant has not complied with the Court's May 22nd, 1996 order, or the July 14, 1997 order. Furthermore, I'm going to specifically find that the building is in dangerous condition and is a nuisance.

The trial court's order must also comply with the provisions of MCL 600.2926 which provides: "In all cases in which a receiver is appointed the court shall provide for bond and shall define the receiver's power and duties where they are not otherwise spelled out by law." *Band, supra* at 107.

D. Receiver's Compensation

Defendant also argues that the trial court awarded too much compensation to the receiver. The amount of compensation to be awarded to the receiver is within the trial court's discretion. Receivers have a right to compensation for their services and expenses. *Fisk v Fisk*, 333 Mich 513, 517-518; 53 NW2d 356 (1952); *Band, supra* at 111; *Cohen v Cohen*, 125 Mich App 206, 214-215; 335 NW2d 661 (1983).

The order appealed provides: "That the Receiver shall send monthly invoices to Defendant Kircher which invoices shall be paid within thirty (30) days of mailing. Invoices which are not paid within thirty (30) days shall be subject to interest at the rate of seven percent (7%) per annum." It further provides that defendant's failure to pay will automatically result in a lien against the property and provides for foreclosure on the liens within thirty days of mailing the "final invoice." Although we do not determine that this provision is improper, we do note that the order is silent as to the trial court's approval of the amount charged to defendant for the repairs. We conclude that he trial court's order appointing a receiver must provide that charges to defendant shall be reviewed by the trial court to determine whether they are appropriate and reasonable before defendant is required to pay.[1]

E. Relevance of Engineer's Report

Defendant also argues that the trial court erred in admitting an engineer's report. We disagree.

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[1] Defendant also asserts that Barnes should not have been appointed as the receiver because a receiver must be impartial as he acts for the court and the court must be impartial. But defendant has not provided any factual support for his assertion that Barnes is biased or that he is a competing property owner. Even assuming that these facts are true, this alone does not require the conclusion that appointing Barnes was improper. As plaintiffs point out, Barnes has experience as a property owner improving properties in Ypsilanti. It would make less sense to appoint someone who has no experience with property or someone who is not familiar with the local codes. Therefore, the trial court did not err in this regard.

Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the outcome of the action, more probable than it would be without the evidence. MRE 401. Accordingly, the engineer's report was relevant if it had any tendency to show that the building was in a hazardous condition.

Plaintiffs correctly point out that the fire code provides:

> Upon the filing of the findings and report provided to in Section 8, the state fire marshal, from the findings and report or from an additional report or investigation the state fire marshal considers necessary, may make a determination as to whether, and to what extent the building should be repaired or whether the building should be razed or completely removed . . . . [MCL 29.9.]

Because the engineer's report was directly relevant to whether the building constituted a hazardous condition, the trial court did not err in admitting this evidence.

F. Attorney Fees

Defendant also argues that the trial court erred in awarding attorney fees to plaintiffs. We disagree. A trial court's decision to award attorney fees is ordinarily reviewed for an abuse of discretion, but pertinent question of law are reviewed de novo. *HA Smith Lumber & Hardware Co v Decina*, 258 Mich App 419, 429; 670 NW2d 729 (2003).

Here, the trial court has not yet awarded plaintiffs attorney fees. The order merely provides that in the event plaintiffs incur fees or costs in enforcing the order, defendant will have to pay attorney fees. Based on the facts in this case, the trial court did not abuse its discretion in ordering that defendant is required to pay attorneys fees "incurred in conjunction with the enforcement and supervision of this order." Plaintiffs have been required to institute several actions to obtain defendant's compliance with city and state codes. Defendant has continually violated court orders. As such, the trial court did not err in ordering that defendant must pay attorney fees if he fails to comply with the order.

IV. Apartment Building

A. Hutchinson's Testimony

Defendant first argues that Hutchinson's testimony that he did not approve of the workmanship of defendant's repairs was insufficient to justify entering an order giving plaintiffs exclusive authority to repair the apartment building. However, before the order was entered, plaintiffs indicated on the record that the parties agreed that defendant would make repairs subject to a determination of workmanship by Hutchinson. Defendant, who was present, did not object. Further, the November 9, 2001, order indicated that "All determinations of workmanship shall be made by Harry Hutchinson." Defendant was free to present any evidence to support his defense, but did not obtain any experts to testify or any expert reports to support his position. Additionally, this was not the sole factor relied upon by the trial court. Therefore, this issue is without merit.

B. Chimney Defects

Defendant also argues that the alleged defects in the chimney did not alone justify the order appealed. Again, this was not the sole factor relied upon by the court. As can be seen in the trial court's findings of fact and the order appealed, there were several defects which defendant failed to repair in addition to the chimney. This issue is also without merit.

C. Sufficient Restraints on City

Defendant also argues, as he did in docket number 242697 discussed above, that the order does not put sufficient restraints on the city. But the order appealed in this case is significantly different from that in the case discussed above. First, in this case, neither Barnes nor the city was appointed receiver. Instead, the trial court granted the city the exclusive right to repair the building and fire code violations. The order merely permits the city to employ Barnes or other entities to accomplish this task. Additionally, the order is more specific with respect to the repairs to be completed. It lists the repairs that "shall be undertaken by the Plaintiff to bring this property into compliance." Accordingly, the trial court imposed sufficient restraints on the city.

However, as above, the order does not provide for the trial court's approval of the amount charged to defendant for the repairs. In light of the harsh consequences of defendant's failure to pay, the order must provide that charges to defendant shall be reviewed by the trial court to determine whether they are appropriate and reasonable before defendant is required to pay.

D. Stipulated Order

Defendant also argues that the order appealed goes beyond the stipulation in the November 27, 2001, order. Defendant takes issue with the chimney repairs because he made a notation excepting them from the November 27, 2001, stipulated order. But defendant himself violated the stipulated order. Consequently, an evidentiary hearing was conducted and the trial court entered the order appealed. Despite defendant's notation on the stipulated order, the trial court did not abuse its discretion in ordering that the chimney be repaired because evidence was presented that it was not up to code and required repair.

In docket number 242697, we affirm in part, reverse in part and remand for entry of an order consistent with this opinion. In docket number 242857, we affirm, but remand for entry of an order consistent with this opinion.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Janet T. Neff