

STATE OF MICHIGAN
COURT OF APPEALS

CAN IV PACKARD SQUARE LLC,
Plaintiff-Appellee,

UNPUBLISHED
January 23, 2018

v

PACKARD SQUARE LLC,
Defendant-Appellant,

No. 335512
Washtenaw Circuit Court
LC No. 16-000990-CB

and

JERMOR PLUMBING & HEATING, INC., and
GAYLOR ELECTRIC, INC.,
Defendants,

and

MCKINLEY, INC., Receiver
Appellee.

Before: MARKEY, P.J., and SHAPIRO AND GADOLA, JJ.

PER CURIAM.

Defendant, Packard Square, LLC, appeals as of right the trial court's order appointing a receiver. We affirm.

Plaintiff commenced this action to foreclose a mortgage defendant granted on a mixed-use commercial development construction project after defendant failed to substantially complete the project, despite having been given several extensions of construction deadlines. Plaintiff moved ex parte for the appointment of McKinley, Inc. (McKinley), and its CEO, Matthew Mason, as a receiver at the outset of this case under both MCL 600.2926, MCL 570.1122, and the mortgage, in which defendant had consented to the appointment of a receiver in the event of a default. Plaintiff submitted evidence to the trial court that McKinley served as a receiver for real estate assets for state and federal courts throughout the country and that Mason had no contract, agreement, arrangement, or understanding between himself and plaintiff or any lenders

associated with the construction project. The trial court declined to grant the motion ex parte but held an expedited hearing.

The parties do not dispute that on October 1, 2014, plaintiff loaned defendant \$53,783,184 for the development located in Ann Arbor, Michigan. Among other transaction documents, defendant executed a Mortgage and Loan Agreement. Section 10.1 of the Loan Agreement defined numerous “Events of Default,” including defendant’s failure to complete the construction Milestones by specified Milestone Dates, defendant’s failure to cure any breach or default, and defendant’s failure to pay or discharge any lien claims on the property. If defendant defaulted, plaintiff could accelerate the debt, cease any further disbursements, and demand payment. Similarly, under the Mortgage, plaintiff had several available remedies including accelerating the debt, taking possession of the property and completing the construction, commencing a judicial foreclosure, or selling the property under the power of sale granted by the Mortgage. In addition to all the other remedies, under § 9.3 of the Mortgage defendant consented to the appointment of a receiver.

Defendant had to substantially complete the project by October 25, 2016. To substantially complete the project, among other things, defendant had to deliver all permits and approvals, obtain a temporary certificate of occupancy respecting all improvements, substantially complete the project according to the plans and specifications, furnish plaintiff all lien waivers and a certificate from the architect that the construction was substantially completed. The parties set the final completion date as November 18, 2016. By the final completion date, defendant had to complete all construction and occupancy requirements.

The Loan Agreement defined strikes or the inability to obtain an adequate labor force as force majeure events. If a force majeure event delayed defendant’s performance, defendant had the obligation to notify plaintiff within two business days of the event, explain the expected delay, and detail defendant’s intended plan to respond to it. If defendant had not already defaulted, such an event could not cause a default, breach, or violation of the parties’ agreement, and plaintiff had to extend the completion date to accommodate the delay caused by the force majeure.

Article 9 of the Loan Agreement governed disbursement of loan proceeds. Plaintiff agreed that once per month it would disburse money to defendant (or at plaintiff’s option, directly to the general contractor, subcontractors, or the architects and engineers involved in the project) following defendant’s submission of draw requests to plaintiff if the specified conditions precedent were satisfied or waived, unless an event of default existed.

In support of its motion for appointment of a receiver, plaintiff asserted that defendant fell short of achieving its obligations to meet construction deadlines and maintain the property in good and safe condition. Plaintiff listed several incomplete features of the construction project that a construction consultant found during a recent construction site inspection. Defendant failed to complete the roof and its drains, the building façade, the terraces, mechanical openings, the parking lot, site concrete installation, failed to install doors, windows, landscaping, utility and mechanical systems, and resolve structural issues. Further, defendant stored certain building materials in the open exposed to the elements. Defendant allowed the recording of two

construction liens and failed to discharge them as required under the Loan Agreement. Plaintiff contended all deficiencies constituted defaults of the terms of the parties' loan documents.

Defendant opposed plaintiff's motion by arguing that it had not defaulted. Defendant contended that the project stood in satisfactory condition and could be winterized in two to four weeks and completed in four to five months. Defendant excused its failure to meet construction deadlines by asserting that two force majeure events occurred, an electrician strike and a labor shortage. Defendant also blamed its former construction manager's negligence for deficiencies and delays but assured the trial court that its new construction manager would get the project completed. Defendant argued that plaintiff lacked entitlement to the equitable appointment of a receiver because plaintiff caused the two subcontractors' liens by failing to pay them after approving their work. Defendant argued that the appointment of a receiver would cause more harm than good because it would disrupt the ongoing progress, delay completion, and increase costs without adding value.

The trial court heard plaintiff's motion on October 27, 2016, two days after the substantial completion deadline. The trial court inquired regarding the two liens on the property. Defendant relied on an e-mail exchange between defendant's owner and a representative of one of plaintiff's affiliates in which plaintiff proposed paying subcontractors directly through an escrow arrangement contingent upon the subcontractors' successful completion of work with plaintiff's and its consultant's approval. The representative, however, indicated that the proposed arrangement needed approval from additional persons on plaintiff's side. Defendant also relied on a later e-mail exchange between defendant's owner and another representative of plaintiff's affiliate regarding the pay application for payment to an electrical subcontractor. Plaintiff's representative made clear in his response e-mail that although plaintiff and its consultant approved the payment application, plaintiff still needed unconditional lien waivers from the subcontractor before processing the payment. The representative told defendant that plaintiff would not pay unless and until it got the lien waiver issue resolved.

The trial court also asked defendant to explain the status of the incomplete items listed by plaintiff's construction consultant. Defendant stated that it nearly completed the roof, siding was being installed, the site was being stabilized, soil had been removed, sidewalks and curbs installation were in process. Plaintiff responded that although windows were installed, they were never properly flashed and caulked to prevent water penetration, no evidence established that the roof had been made watertight, and no concrete floors had been poured. Plaintiff argued that defendant kept making promises but failed to fulfill them. Significantly, during the hearing, defendant conceded several times that the project was only about 60% or even less completed.

The trial court also inquired regarding the force majeure events that defendant claimed entitled it to a further extension. Defendant initially gave a vague explanation and stated that its construction manager gave plaintiff notice of labor shortages it had experienced. The trial court asked defendant if and when it gave plaintiff notice of force majeure events. Defendant responded that it provided plaintiff notice in its owner's October 18, 2016 letter to plaintiff.

Plaintiff responded that the owner's letter was sent just a couple days before plaintiff filed its complaint. Plaintiff explained that the Loan Agreement § 6.11 required that defendant to provide plaintiff notice of force majeure events within two days of their happening. Plaintiff

asserted that defendant's force majeure notice came late, and its lateness called into question the veracity of that excuse. Further, plaintiff stated that an electrician strike could not have delayed the project because the electrical, plumbing, and mechanicals had not even been roughed in yet.

Plaintiff advised the trial court that two additional liens had been recently recorded and stated that it learned that defendant's former construction manager intended to assert a "giant lien on this property that's going to create more problems." Plaintiff explained that it stopped funding the project because of defendant's mismanagement and the incomplete status of the project. Plaintiff contended that under the guidance of a receiver and the trial court, completion of the project would achieve a far higher value than if plaintiff foreclosed immediately.

Defendant also argued that the entity that plaintiff proposed to serve as the receiver, McKinley, lacked the ability to serve impartially because it competed with defendant by managing commercial properties in the Ann Arbor area and had no experience handling a construction project. McKinley's counsel explained to the trial court that McKinley served as a receiver successfully across the country and had experience building commercial properties from the ground up. He advised the trial court that McKinley had a reputation as a turn-around expert and represented that Mason stood ready to start on the project immediately.

The trial court found that the October 25, 2016 substantial completion date passed two days earlier, and the project lacked substantial completion. The trial court also found that the evidence established that at least five extensions were granted related to missed Milestones. The trial court ruled that defendant defaulted and remained in default. The trial court also ruled that no evidence established that a force majeure event excused defendant's performance. Because winter was approaching, an imminent risk of harm existed to the building because it was not substantially completed and not fully enclosed. The trial court concluded that the project could not go forward without appointment of a receiver, and no evidence submitted to it established that McKinley lacked the requisite qualifications or ability to act as a receiver. The trial court, therefore, declared that it would appoint McKinley as the receiver.

The trial court entered its order on November 1, 2016, appointing McKinley as receiver. The order stated the trial court's findings that defendant defaulted under the terms of the loan documents and failed to preserve and protect the subject property which constituted waste jeopardizing plaintiff's security interest and other parties' interests in it. The order stated that MCL 600.2927 and provisions of the loan documents authorized the trial court to appoint a receiver and that the requirements under MCL 570.1122(1) were met by the property's incomplete construction, defendant's default on its debt and terms of the Mortgage, and plaintiff's likely substantial loss if the property was not completed. The order also vested McKinley with the power and authority to carry out numerous specified duties as the receiver upon the trial court's approval, granted it possession of the property, and required it to post a \$20,000 bond. Defendant now appeals.

We review for an abuse of discretion a trial court's decision to appoint a receiver. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 273; 761 NW2d 761 (2008). "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Id.* We also review de novo a trial court's interpretation of unambiguous contract provisions. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005).

“A court of equity has inherent power to appoint a receiver.” *Michigan Minerals, Inc v Williams*, 306 Mich 515, 525, 11 NW2d 224 (1943). Further, trial courts have broad jurisdiction to appoint receivers in appropriate cases. *Reed*, 265 Mich App at 161. A trial court may appoint a receiver when specifically allowed by statute and also when no specific statute applies if the facts and circumstances render the appointment of a receiver an appropriate exercise of the trial court’s equitable jurisdiction. *Id.* 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. This authority may be exercised in vacation, in chambers, and during sessions of the court. 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. Subject to limitations in the law or imposed by the court, the receiver shall be charged with all of the estate, real and personal debts of the debtor as trustee for the benefit of the debtor, creditors and others interested. The court may terminate any receivership and return the property held by the receiver to the debtor whenever it appears to be to the best interest of the debtor, the creditors and others interested.

In *Band v Livonia Assoc*, 176 Mich App 95, 105; 439 NW2d 285 (1989), quoting *Petitpren v Taylor Sch Dist*, 104 Mich App 283, 294, 304 NW2d 553 (1981), this Court explained that the phrase “allowed by law”

does not require the presence of statutory authority, although such exists in certain situations. Rather, this Court has interpreted that phrase to mean “(1) those cases where appointment of a receiver is provided for by statute and (2) those cases where the facts and circumstances render the appointment of a receiver an appropriate exercise of the circuit court’s equitable jurisdiction.”

In the exercise of its discretion, trial courts must recognize that the appointment of a receiver is considered a harsh remedy that ordinarily only should be resorted to in extreme cases. *Michigan Minerals*, 306 Mich at 525; *Reed*, 265 Mich App at 162. “If less intrusive means are available to effectuate the relief granted by the trial court, a receiver should not be used.” *Petitpren*, 104 Mich App at 295. Nevertheless, receiverships serve the primary purpose of preserving and protecting the property involved in a controversy. *Fisk v Fisk*, 333 Mich 513, 516; 53 NW2d 356 (1952). “A receiver is not appointed as the agent of, or for the benefit of, one party or the other; rather he or she is appointed to protect and benefit both parties equally.” *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 528; 730 NW2d 481 (2007), modified in part on other grounds 480 Mich 910 (2007).

Defendant first argues that the trial court should not have appointed a receiver without first holding a full evidentiary hearing. We disagree.

While certain cases may require that trial courts conduct full evidentiary hearings before deciding whether to appoint a receiver, Michigan law does not require that trial courts do so in all cases. In both *Hofmeister v Randall*, 124 Mich App 443; 335 NW2d 65 (1983) and *Band*, 176 Mich App 95, this Court addressed whether the trial courts erred by not holding full

evidentiary hearings. In both cases, the parties opposing the receiver appointments argued that as a matter of law, the trial courts had to conduct full evidentiary hearings, failed to do so, and therefore, committed reversible error. In *Hofmeister*, the trial court appointed a receiver based upon the pleadings and the oral representations made by counsel. *Hofmeister*, 124 Mich App at 447. In *Band*, the trial court initially denied the plaintiff's motion for appointment of a receiver but four months later granted plaintiff's motion. *Band*, 176 Mich App at 102. In both cases, the trial court did not conduct an evidentiary hearing.

In *Hofmeister* and again in *Band*, this Court explained that *Petitpren* suggested an evidentiary hearing may be unnecessary “ ‘if the facts were totally uncontroverted and the actual conditions were established.’ ” *Band*, 176 Mich App at 106, quoting *Hofmeister*, 124 Mich App at 447. In each case, this Court concluded that an evidentiary hearing was unnecessary because no material facts were disputed. *Id.* This Court clarified in *Hofmeister* and *Band* that trial courts considering appointing receivers should focus on whether material factual disputes exist, not merely on whether the parties dispute some facts.

In this case, the record establishes that the material facts were beyond reasonable dispute. Defendant admitted that it failed to do numerous things required under the Loan Agreement including substantially complete the project by the substantial completion date. Plaintiff gave defendant notice of its defaults, and defendant failed to cure them. The property faced imminent harm if not secured and protected from the elements because of the perils of winter and the multitude of unfinished aspects to the building. We believe that the trial court properly analyzed the evidence submitted by the parties and concluded that the undisputed material facts warranted appointing a receiver.

The record supports the factual findings and legal conclusions reached by the trial court. Although defendant argued about the degree of completion of aspects of the project, it admitted that at best the project was only around 60% completed. Moreover, defendant conceded that if it continued managing the construction, it required an additional four months, and that it would never be finished by the November 2016 full completion deadline. Defendant also admitted during the hearing that the construction manager it hired roughly nine days before had not completed tasks necessary to secure the project from the weather. Significantly, the exhibits and the affidavits defendant proffered failed to support defendant's contentions that the project was substantially complete or that force majeure events excused its performance and allowed it further lengthy extensions to the construction deadlines. We believe that the trial court properly focused on the material facts for making its decision. It considered all the evidence but correctly refused to focus solely on nonmaterial factual issues before appointing the receiver. Defendant's default, the condition of the property, defendant's likely inability to secure the property before winter, defendant's inability to complete the project without further delays, defendant's inability to discharge the liens and protect plaintiff's and defendant's interests in the property, all justified the trial court in appointing a receiver. Defendant's admissions and concessions on the record were the material facts pertinent to the trial court's decision. The trial court did not err by not holding a full evidentiary hearing, and it did not abuse its discretion by appointing a receiver.

Defendant's reliance on the doctrine of substantial performance lacks merit because that doctrine does not apply unless the party fulfilled the express contractual conditions and all essential requirements of the contract. See *Gordon v Great Lakes Bowling Corp*, 18 Mich App

358, 361-362; 171 NW2d 225 (1969); see also *Rodgers v JP Morgan Chase Bank NA*, 315 Mich App 301, 310; 890 NW2d 381 (2016). In *Rodgers*, this Court approved the definition stated in Black's Law Dictionary (10th ed) that substantial performance doctrine was the “ ‘rule that if a good-faith attempt to perform does not precisely meet the terms of an agreement or statutory requirements, the performance will still be considered complete if the essential purpose is accomplished.’ ” In this case, although defendant performed work, it admitted that it completed only around 60% of the project and failed to fulfill the essential purpose of the parties' contract. Therefore, we hold that trial court did not abuse its discretion by not conducting a full evidentiary hearing because the material facts justifying the appointment of a receiver were not disputed and the record supported the trial court's decision.

Defendant next argues that plaintiff had unclean hands because it failed to release funds to subcontractors for work that plaintiff approved and thereby failed to honor its loan commitments. Defendant asserts that plaintiff could not hold defendant in default when plaintiff's conduct obstructed defendant's efforts to comply with the contract. Defendant's argument lacks merit.

Trial courts have inherent equitable power to appoint receivers. *Michigan Minerals*, 306 Mich at 525. Under Michigan law, one who petitions a trial court for equitable relief must come to the trial court with clean hands. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 463; 646 NW2d 455 (2002). The clean hands doctrine serves as “a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.” *Id.* (citations, quotation marks and emphasis omitted). The doctrine arises from the historical concept that courts of equity affirmatively enforce the requirements of conscience and good faith and will not aid one who causes iniquity. *Id.*

The record in this case establishes that defendant based its argument on a false premise. Although plaintiff advised defendant that it approved certain subcontractor's pay applications, plaintiff informed defendant that before it would pay those applications, defendant had to provide plaintiff unconditional lien waivers. Under Loan Agreement § 9.2, defendant had the obligation to provide lien waivers before plaintiff's obligation to disburse funds arose. The record contains no evidence that defendant ever obtained full unconditional lien waivers from the subcontractor who recorded liens or presented them to plaintiff. Consequently, plaintiff had no obligation to make such payments merely because it approved the work. Defendant had to fulfill the contractual conditions precedent to payment. Defendant failed to do so. Further, defendant's commission of the other events of default as defined in Loan Agreement § 10.1 triggered operation of Loan Agreement § 9.1(e) which unequivocally provided that plaintiff had no obligation to disburse funds if any default existed. The record reflects that plaintiff complied with the terms of the Loan Agreement and simply exercised its contractual rights. Therefore, we hold that the trial court did not abuse its discretion by appointing a receiver because plaintiff did not come to the trial court with unclean hands.

Defendant next argues that the trial court erred by appointing a receiver under MCL 600.2927 because that statute only applies in instances where a defendant failed to either pay taxes or property insurance, neither of which occurred in this case. We agree that the trial court erred by doing so but the error does not warrant reversal. This Court will affirm a trial court

when it correctly decides an issue, even if for the wrong reason. *Gleason v Dep't Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Statutory interpretation requires ascertaining and giving effect to the Legislature's intent. *Bank v Mich Ed Ass'n-NEA*, 315 Mich App 496, 499; 892 NW2d 1 (2016). To ascertain the Legislature's intent, we begin with the language of the statute, giving words their plain and ordinary meaning. *Klooster v Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). When the statutory language is unambiguous, judicial construction is neither required nor permitted. *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 624; 752 NW2d 37 (2008). Unless defined in the statute, every word or phrase of a statute is accorded its plain and ordinary meaning. MCL 8.3a; *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008).

MCL 600.2927 provides:

(1) The parties to any mortgage, trust mortgage, or deed of trust of real property, or any extension thereof, may, by agreement herein contained to that effect, provide that the failure of the mortgagor or grantor, as the case may be, to pay any taxes assessed against such property or installments thereof, in the event said taxes are being paid under the provisions of Act No. 126 of the Public Acts of 1933, as amended, or any insurance premium upon policies covering any property located upon such premises constitutes waste.

(2) If such mortgagor or grantor in such instrument fails to pay such taxes or insurance premiums upon property subject to the terms of a mortgage, trust mortgage, or deed of trust containing such agreement the circuit court having jurisdiction of such property may, in its discretion upon complaint or motion filed by such mortgagee, grantee, assignee thereof or trustee under such instrument and upon such notice as the court may require, appoint a receiver of the property for the purpose of preventing such waste. Subject to the order of the court, the receiver may collect the rents and income from such property and shall exercise such control over such property as to such court may seem proper.

(3) No receiver may be appointed under the provisions of this section for any dwelling house or farm occupied by any owner thereof as his home or farm. No receiver may be appointed under the provisions of this section for any store or other business property having an assessed valuation of \$7,500.00 or less.

The plain language of the statute clearly specifies that a trial court may appoint a receiver under MCL 600.2927 if a mortgagor failed to pay taxes or insurance premiums. In this case, plaintiff neither alleged in its verified complaint nor presented any evidence that defendant failed to pay taxes or any insurance premiums. Therefore, to the extent that the trial court appointed a receiver in this case based on MCL 600.2927, the trial court erred. Nevertheless, a trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason. *Gleason*, 256 Mich App at 3.

In this case, plaintiff sued to foreclose its mortgage on the property under construction because defendant failed to complete the project. As part of its suit, plaintiff moved for appointment of a receiver under MCL 600.2926 and MCL 570.1122. As discussed already, the trial court had authority under MCL 600.2926 to appoint a receiver and plaintiff established all of the requisite conditions for appointment of a receiver in this case. So, despite the trial court's error in stating in its order that the receiver was appointed under the authority of MCL 600.2927, we conclude that the trial court made the right decision, albeit, in part, for the wrong reason.

Defendant also argues that MCL 570.1122 grants trial courts authority to appoint receivers in cases solely brought by construction lienholders, and because plaintiff lacked that status, the trial court erred by resting its ruling in part on that statute. Defendant's argument lacks merit.

MCL 570.1122 provides:

(1) If the improvement to the real property is not completed as of the date of commencement of an action in which enforcement of a construction lien through foreclosure is sought or in any action to foreclose a mortgage on the real property on which the incomplete improvement exists, any lien claimant or mortgagee may petition the court for the appointment of a receiver. The petition shall be heard as a motion. A receiver may be appointed by the court upon finding that a substantial unpaid construction lien exists, or that the mortgage on the real property is in default and that the lien claimant, the mortgagee, or both, are likely to sustain substantial loss if the improvement is not completed.

(2) When making an appointment of a receiver under this section, the court shall give consideration to the nominations of the mortgagee and the lien claimant. Any receiver appointed under this section shall be deemed a fiduciary for the benefit of all persons having or claiming interests in the real property, and shall exercise his or her office accordingly.

(3) A receiver shall not be appointed under this section for any residential structure, nor for any apartment building containing 4 or less apartments.

(4) The receiver shall be entitled to possession of the real property upon his or her appointment. Unless otherwise limited by the court, and subject to his or her fiduciary responsibility as provided in this act, the receiver shall have all powers generally exercised by a receiver in a court of equity, including the right to be compensated for his or her services and those of his or her agents and attorneys.

Plainly, under MCL 570.1122(1), in any action to foreclose a mortgage on real property on which an incomplete improvement exists, a mortgagee may petition the trial court for appointment of a receiver. In this case, plaintiff sued to foreclose its mortgage after the occurrence of several events of default under the parties' Loan Agreement. As a mortgagee, if the improvements on the property were incomplete, plaintiff could petition the trial court for appointment of a receiver under MCL 570.1122(1). As explained above, the record establishes

that the improvements on the subject property lacked completion. Defendant admitted that it failed to meet its substantial completion obligation by the deadline. Therefore, the trial court had authority under MCL 570.1122 to appoint a receiver.

Defendant next argues that the trial court erred by appointing a receiver based upon defendant's contractual consent to the appointment of a receiver under Mortgage § 9.3 which it claims was void because it functioned as a "clog" on defendant's right of redemption. The record, however, reflects that defendant failed to raise the issue of the validity and enforceability of Mortgage § 9.3 before the trial court.

Michigan generally follows a raise or waive rule of appellate review. *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008). Although the Michigan Supreme Court has held that this Court must review unpreserved errors in criminal cases for plain error affecting the defendant's rights, see *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), it has not established a similar holding for civil cases. See *Walters*, 481 Mich at 387-388; see also *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 377-378; 761 NW2d 353 (2008) (stating that the failure to properly raise a claim of error before the trial court in a civil case normally constitutes a waiver of that claim and declining to exercise its discretion to review the unpreserved claim under the facts of that case). Nevertheless, we have the discretion to overlook preservation requirements. See *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006) (stating that this Court may overlook preservation requirements where the failure to consider the issue would result in a manifest injustice, or if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented). But we exercise our discretion sparingly and only where exceptional circumstances warrant review. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993). We decline to review this issue because defendant failed to preserve it, and our review is neither necessary for the determination of this case nor will manifest injustice result by our declining to do so.

Lastly, defendant argues that the trial court erred by appointing McKinley because it managed commercial properties in Ann Arbor and lacked the ability to neutrally manage the project in the best interests of all concerned, and defendant asserts that the trial court erred by only requiring a \$20,000 bond from McKinley. We disagree.

MCL 600.2926 authorizes trial courts to appoint receivers and require them to post a bond. MCR 2.622 prescribes the procedure regarding appointment of a receiver and similarly prescribes factors for a trial court's consideration when deciding the amount of the bond to require from the appointed receiver. The record reflects that defendant argued to the trial court that McKinley managed unspecified local commercial properties in competition with defendant. Defendant asserted that McKinley intended only to sabotage the receivership estate for its own personal gain. The trial court considered defendant's argument but found no evidence supporting defendant's conclusory allegations. No evidence before the trial court supported that McKinley lacked the qualifications or ability to act as the receiver.

We believe that the record supports the trial court's conclusion. Other than stating conclusory allegations and unsupported speculation in objection to McKinley defendant failed to submit any evidence that McKinley had a disqualifying conflict of interest or lacked the requisite

ability to serve in this case as the receiver. In the absence of evidence to the contrary, we believe that the trial court could rely upon the evidence that McKinley could adequately protect the receivership estate and plaintiff's and defendant's interests. Accordingly, the trial court did not abuse its discretion by appointing McKinley as the receiver.

Regarding the bond the trial court ordered McKinley to post, MCL 600.2926 and MCR 2.622(G) leave the decision regarding the amount to the sound discretion of the trial court. Based upon the record before us, we hold that the trial court appropriately exercised its discretion in determining the amount of the bond it required from McKinley.

We affirm. As the prevailing party, plaintiff may tax its costs under MCR 7.219. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola