

[Cite as *Republic Bank v. Flynn Properties, L.L.C.*, 2009-Ohio-5552.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91573

REPUBLIC BANK, ET AL.

PLAINTIFFS-APPELLEES

vs.

FLYNN PROPERTIES, LLC, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-557338

BEFORE: Boyle, J., Gallagher, P.J., and Rocco, J.

RELEASED: October 22, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendants-appellants, Flynn Properties, LLC and Joseph Portale (collectively “Flynn”), appeal the trial court’s decision appointing a receiver in the underlying foreclosure case. Finding no merit to the appeal, we affirm.

Procedural History and Facts

{¶ 2} Although this foreclosure case has a long and convoluted history originating in March 2005 and involving several parties, previous appeals, and numerous filings, the issue on appeal is limited to the appointment of a receiver. The pertinent facts giving rise to the appeal are as follows:

{¶ 3} Plaintiff-appellee JDI is the holder of a mortgage and assignment of leases and rents secured by the property located at 12110 Mayfield Road, a multi-story building containing a commercial restaurant on the first floor and several residential apartments on the upper floors. JDI is also the holder of a promissory note in the sum of \$550,000 plus interest, executed by Flynn and personally guaranteed by Portale. Following Flynn’s default on the promissory note, the trial court entered judgment on January 9, 2008 in favor of JDI, allowing foreclosure of the mortgage and awarding judgment on the note and guaranty. (The trial court, however, stayed the order pending appeal upon defendants Terry Tarantino and La Dolce Vita Bistro’s motion.)

{¶ 4} Sometime in April 2008, Flynn transferred the property to Frances Pulliam, the ex-wife of Portale, by executing a quitclaim deed. Pulliam, in turn, attempted to collect rents from the residential tenants of the property and sought

to invalidate signed leases, which were previously being handled by a receiver assigned to the property. (The receiver had been appointed in Case No. CV-404277, a landlord/tenant dispute between Tarantino/La Dolce Vita Bistro and Portale/Flynn over the commercial lease on the property.)¹ The receiver, however, ceased performing his duties after Flynn appealed the appointment and obtained a stay of the appointment from this court on March 25, 2008.

{¶ 5} On April 25, 2008, JDI filed an emergency motion for the appointment of a receiver over the property after discovering (1) that Flynn had quitclaimed the property to Pulliam, (2) that Pulliam was interfering with its assignment of leases and rents by demanding that the tenants pay her directly, (3) that the tenants were confused over who was in charge of the building, (4) that a number of vacancies existed that were not being filled, and (5) that the building was in disrepair. At the time that JDI filed its motion, there was no acting receiver over the property. Flynn opposed the motion, and the trial court held a hearing on the matter.

{¶ 6} JDI called two witnesses to testify: Mark Nasca, a JDI representative, and Tarantino, the owner of the La Dolce Vita Bistro (the sole commercial tenant).

Both witnesses testified as to the condition of the building, indicating that the building was in disrepair, namely, a leaking roof, and that a hazardous condition existed regarding the unauthorized rerouting of gas lines. The evidence further

¹As discussed *infra*, Case No. CV-404277 was never consolidated with this underlying case and was heard by a different trial judge.

revealed that the gas bill had not been paid, and the building had been without heat for approximately one month. At the time of the hearing, the gas had been turned off. Nasca further testified as to the concern that the landlord was not actively seeking tenants for the vacant apartment units and that such rental income was needed to address the deterioration of the building. JDI further presented evidence that confusion existed among the tenants, including Tarantino, as to who was in charge of the building, and that the property had been quitclaimed to Pulliam, who was interfering with JDI's assignment of leases and rents.

{¶ 7} The trial court ultimately granted JDI's motion, finding that a receiver was necessary for the preservation of the property. Flynn appeals the trial court's decision, raising the following three assignments of error:

{¶ 8} "I. The trial court erred when it appointed a receiver in this action when there already was a receiver appointed in a prior action, with a lower case number, in violation of the judicial priority rule.

{¶ 9} "II. The trial court erred when it appointed a receiver without clear and convincing evidence of facts essential to sustain the order, including the financial condition of the entity that the receiver would be operating, under the standard enunciated by this court in *Neece v. National Premier Protective Services, LLC* [citation omitted].

{¶ 10} "III. The trial court erred when it appointed a receiver without notifying a necessary party to the proceedings."

{¶ 11} For ease of discussion, we will address the assignments of error out of order.

Evidentiary Burden

{¶ 12} In its second assignment of error, Flynn asserts that the trial court erred in appointing a receiver because the record did not contain clear and convincing evidence that a receiver was necessary. We disagree.

{¶ 13} The decision to appoint a receiver rests within the sound discretion of the court and will not be reversed absent an abuse of that discretion. *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 73. An abuse of discretion connotes an unreasonable, arbitrary, or unconscionable decision. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Provided that there is evidence “tending to prove the facts essential to sustain the order,” a reviewing court must uphold a trial court’s appointment of a receiver. *Equity Ctrs. Dev. Co. v. S. Coast Ctrs. Inc.* (1992), 83 Ohio App.3d 643, 649-650, citing *Malloy v. Malloy Color Lab., Inc.* (1989), 63 Ohio App.3d 434, 436. “Such order may be reversed only when there is failure of proof which would be essential to support the order, and the order may not, in any event, be reversed upon the weight of the evidence.” *Id.*, citing *Wilgus v. Arthur* (1943), 72 Ohio App. 511.

{¶ 14} R.C. 2735.01 permits the appointment of a receiver by a court under certain circumstances, including the following:

{¶ 15} “(A) In an action by * * * a creditor to subject property * * * and when it is shown that the property * * * is in danger of being lost, removed, or materially injured;

{¶ 16} “(B) In an action by a mortgagee, for the foreclosure of his mortgage and sale of the mortgage property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured * * *;

{¶ 17} “* * *

{¶ 18} “(D) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal * * *;

{¶ 19} “(F) In all other cases in which receivers have been appointed by the usages of equity.”

{¶ 20} Here, all of the above-mentioned provisions apply in this case. The trial court appointed a receiver only after finding that one was necessary for the preservation of the property. Contrary to Flynn’s assertion, we find clear and convincing evidence in the record to support the trial court’s order. Nasca and Tarantino’s testimony and JDI’s exhibits reveal that there was confusion among tenants as to which party was responsible for collecting rent payments and that Pulliam was attempting to invalidate leases, thereby posing a risk of tenants vacating the premises. Second, JDI presented evidence that the property was in disrepair and in need of immediate improvements to the gas lines and roof. (At the time of the hearing, Dominion East Ohio Gas had turned off the gas to the building because of safety concerns.) Third, the evidence demonstrates that no

one was actively seeking tenants for the vacant apartments, which directly affected the amount of rent collected each month.

{¶ 21} Now on appeal, Flynn attacks this evidence as not being credible. Our job, however, is not to weigh the evidence. *Equity Ctrs.*, 83 Ohio App.3d at 649-650. JDI met its burden and produced evidence that its collateral was in danger of diminishing in value. Relying on such evidence, the trial court found that a receiver was necessary. We cannot say that the trial court abused its discretion simply because it found JDI's evidence compelling. And while Flynn suggests, without citing any authority, that the order cannot stand because there was no evidence "whatsoever regarding either Flynn's or Pulliam's financial condition," we find this argument to lack merit.

{¶ 22} Flynn's second assignment of error is overruled.

Jurisdictional Priority Rule

{¶ 23} In its first assignment of error, Flynn argues that the trial court erred in appointing a receiver in contravention of the jurisdiction priority rule. We disagree.

{¶ 24} The Ohio Supreme Court explained the jurisdictional priority rule as follows: "As between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties." *State ex rel. Racing Guild of Ohio v. Morgan* (1985), 17 Ohio St.3d 54, 56, quoting *State ex rel. Phillips v. Polcar*

(1977), 50 Ohio St.2d 279, syllabus. The rule, however, does not apply if (1) the cause of action in both cases differ, or (2) the parties in both cases differ. *State ex rel. Shimko v. McMonagle*, 92 Ohio St.3d 426, 429, 2001-Ohio-301. Thus, “if the first case does not involve the same cause of action or the same parties as the second case, the first case will not prevent the second.” *Id.*

{¶ 25} Flynn contends that the trial judge in this case was prohibited from appointing a receiver over the property because another judge had already done so in Case No. CV-404277 — a separate case involving a lease dispute between Flynn and one of its tenants (Tarantino). Flynn further contends that the trial court wrongly concluded that the issues in the lease dispute case and foreclosure case differ, thereby refusing to apply the jurisdictional priority rule. Flynn’s arguments, however, are misplaced.

{¶ 26} Initially, we note that at the time JDI moved for a receiver to be appointed, no receiver was overseeing the property. Although a receiver had been appointed in the lease dispute case, the appointment had been stayed and was later terminated in October 2008. Therefore, there is only one receiver over the property.

{¶ 27} “[T]he jurisdictional priority rule contemplates cases pending in two different courts of concurrent jurisdiction — not two cases filed in the same court.”

Fenner v. Kinney, 10th Dist. No. 02AP-749, 2003-Ohio-989, ¶14; *Bright v. Family Med. Found.*, 10th Dist. No. 02AP-1443, 2003-Ohio-6652, ¶13; see, also, *State ex rel. Republic Servs. of Ohio v. Pike Twp. Bd. of Trustees*, 5th Dist. Case

Nos. 2006CA00153 and 2006CA00172, 2007-Ohio-2086, ¶47. Thus, the jurisdictional priority rule does not apply to the facts of this case. And although two cases filed in the same court involving generally the same claims can be consolidated upon motion (as a matter of judicial economy), Flynn never moved to consolidate the two cases.

{¶ 28} Further, contrary to Flynn’s assertion, these two cases differ — one involves a lease dispute between a landlord and tenant, and the other involves a foreclosure stemming from a default under a promissory note and personal guaranty. Although the property is connected to both cases, the cause of actions in each case are separate and distinct. Likewise, although Flynn is a party to both actions, the foreclosure case involves several more parties. Accordingly, we find no merit to Flynn’s claim that the jurisdictional priority rule precluded the trial court from appointing a receiver.

{¶ 29} The first assignment of error is overruled.

Notice

{¶ 30} In its final assignment of error, Flynn argues that the trial court erred in appointing a receiver without providing notice of the evidentiary hearing to Pulliam, who Flynn now argues was a necessary party because the property had been quitclaimed to her. Flynn’s argument is flawed for several reasons. Pulliam was no longer a party to the proceedings at the time of the hearing. (Nor is she a party to the appeal.) We therefore fail to see any error by the trial court in not providing her notice of the hearing. To the extent that Flynn implies that

Pulliam's absence somehow affected its rights, Flynn failed to raise any argument before the trial court and therefore has waived it. See *Maust v. Meyers Products, Inc.* (1989), 64 Ohio App.3d 310 (failure to raise an issue in the trial court waives a litigant's right to raise that issue on appeal).

{¶ 31} The third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, P.J., and
KENNETH A. ROCCO, J., CONCUR