

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

CHERYL SMITH

Appellee

v.

ROBERT L. SMITH

Appellant

C.A. No. 27988
 27991

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2015-02-0406

DECISION AND JOURNAL ENTRY

Dated: January 31, 2017

WHITMORE, Judge.

{¶1} Appellant, Robert Smith, appeals a judgment of the Summit County Court of Common Pleas, Domestic Relations Division, that appointed a receiver over the two companies that the parties own as well as their various rental properties. This Court reverses.

I.

{¶2} Mr. Smith (“Husband”) and Appellee, Cheryl Smith (“Wife”), married in 1995. They own two companies, NTX, Inc. and Coastal Tool Supply, LLC, that were run by Husband. In February 2015, Wife filed a complaint for divorce. In June 2015, she filed an Emergency Motion for Appointment of Overseer/Receiver, requesting that the court appoint someone to control the businesses’ receipts and disbursements to ensure that Husband did not dissipate their assets. A magistrate held a hearing on the motion on August 27, 2015. During the hearing, the parties agreed to hire an overseer for the limited purpose of tracking the receipts of the businesses. Following the hearing, the magistrate entered an order appointing an overseer, which

it modified a couple of weeks later after the person whom the parties selected to be the overseer was unable to accept the appointment.

{¶3} On October 7, 2015, Wife moved for the appointment of a receiver, alleging that Husband had diverted the businesses' money for his own use. The trial court granted her motion the following day and appointed the person who had been serving as overseer to take custody and control over the businesses and the parties' rental properties. Husband has appealed the trial court's order, assigning three errors.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN VIOLATION OF R.C. 2735 WHEN IT MADE AN ORDER APPOINTING A RECEIVER WITHOUT PROVIDING NOTICE OR OPPORTUNITY TO BE HEARD AND WITHOUT HOLDING AN EVIDENTIARY HEARING OR CONSIDERING ANY EVIDENCE IN SUPPORT OF THE ORDER, AS REQUIRED BY R.C. 2735.01.

{¶4} Husband argues that the trial court incorrectly granted Wife's motion to appoint a receiver without giving him an opportunity to respond to the motion and without holding a hearing on the issue. He also argues that there were less restrictive remedies that the court could have considered. He further argues that Wife failed to support her motion with any evidence that demonstrated that the appointment of a receiver was necessary.

{¶5} R.C. 2735.01(A)(1) provides that the court may appoint a receiver "[i]n an action * * * between partners or others jointly owning or interested in any property or fund * * * when it is shown that the property or fund is in danger of being lost, removed, or materially injured." "Because the appointment of a receiver is such an extraordinary remedy, the party requesting the receivership must show by clear and convincing evidence that the appointment is necessary for the preservation of the complainant's rights." *Maynard v. Cerny*, 9th Dist. Summit No. 21652,

2004-Ohio-955, ¶ 10, quoting *Ferbstein v. Silver*, 9th Dist. Summit No. 18684, 1998 WL 388976, *2 (July 8, 1998). We review a trial court’s decision to appoint a receiver under an abuse-of-discretion standard. *State ex rel. Celebrezze v. Gibbs*, 60 Ohio St.3d 69, 73 (1991). An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). “Additionally, appellate review of an order appointing a receiver is confined to ‘the purpose of determining whether there is clear and convincing evidence tending to prove the facts essential to sustain the order.’” *Maynard* at ¶ 10, quoting *Ferbstein* at *2.

{¶6} The Ohio Supreme Court has held that “[t]he appointment of a receiver * * *, cannot be lawfully made without notice, unless the delay required to give such notice will result in irreparable loss.” *Railway Co. v. Jewett*, 37 Ohio St. 649 (1882), paragraph two of the syllabus. Regarding whether the court must hold a hearing, Ohio courts have generally held that “an evidentiary hearing is not required in order to appoint a receiver [if] the court is sufficiently convinced that the property is in danger from review of the affidavits, attachments to those affidavits, admissions, and the inferences that can be rationally drawn from these materials and from any arguments presented.” *Victory White Metal Co. v. N.P. Motel Sys., Inc.*, 7th Dist. Mahoning No. 04 MA 245, 2005-Ohio-2706, ¶ 53; *U.S. Bank, N.A. v. Gotham King Fee Owner, L.L.C.*, 8th Dist. Cuyahoga No. 98618, 2013-Ohio-1983, ¶ 11-12 (explaining that, although “the language of the receivership statute implies that the court may only appoint a receiver following a hearing and the receipt of evidence justifying the appointment * * * [t]he court may appoint a receiver without notice if the facts and situation warrant such an appointment”).

{¶7} In her motion for appointment of receiver, Wife alleged that Husband was diverting funds from the parties’ businesses to his own use and dissipating marital assets. She

also alleged that he was collecting rent from the parties' various rental properties but not paying any of the expenses connected with maintaining and operating the properties. The only exhibit that she attached to her motion was a list of the real estate properties owned by the parties along with an estimate of their fair market value and the amount of equity that the parties had in the properties.

{¶8} Wife argues that Husband did not need to be notified about her motion to appoint a receiver because he was notified of her previous motion to appoint an overseer/receiver and did not file a response to the motion. She also argues that the parties discussed her motion to appoint an overseer/receiver at hearings on July 15, 2015, and August 27, 2015, meaning that the court was already familiar with the situation. Wife also argues that, after the court appointed a receiver, Husband moved to vacate the appointment, and the trial court held an evidentiary hearing on that motion on November 10, 2015. She further argues that the trial court held another hearing regarding the receiver in December 2015, allowing Husband to be heard on the issue. The Receiver makes similar arguments.

{¶9} Wife's initial motions requested that the court appoint an "Overseer[]/Receiver" for the companies. Although the motions asked the court to appoint someone to "control the business receipts and business disbursements[,]" Wife explained at the August 27, 2015, hearing that all she was asking was to have "someone reporting to the Court that this business is * * * being operated in normal, customary, reasonable, and prudent business standards." At that hearing, the parties agreed to the appointment of an overseer over the parties' businesses. They also agreed that the overseer would collect the rent payments from the parties' rental properties and distribute them to the parties. The magistrate, therefore, issued an order that granted the overseer the power to "track[] the funds received by the companies" and collect and distribute

the rental property rents. In Wife's subsequent motion for the appointment of a receiver, however, she asked the court to appoint someone to take custody and control of the rental properties as well as control of the parties' businesses. She also asked the court to give the receiver "all necessary powers to preserve the marital assets[.]"

{¶10} Although Wife alleged in her motion for the appointment of a receiver that Husband was dissipating marital assets and diverting money to his own use, she did not submit any evidence in support of her allegations. Upon review of the record, we conclude that there was insufficient evidence before the trial court to support its appointment of a receiver without providing notice to Husband or holding a hearing on the motion. *See Neece v. Natl. Premier Protective Servs., L.L.C.*, 8th Dist. Cuyahoga No. 89643, 2007-Ohio-5960, ¶ 12-13; *Bank One, Columbus, N.A. v. O'Brien*, 10th Dist. Franklin Nos. 91AP-166, 91AP-441, 1991 WL 281429, *5 (Dec. 31, 1991) ("[W]e find a complete absence of evidence to support either of the court's findings. The briefs and memoranda of the parties are not evidence."). The trial court, therefore, abused its discretion when it granted Wife's motion. *See Neece* at ¶ 13.

{¶11} Regarding Wife's and the Receiver's assertion that the trial court cured any defect by later holding a hearing on whether a receiver was necessary, we note that Husband filed his notice of appeal regarding the appointment of a receiver on October 19, 2015. Accordingly, none of the proceedings that occurred after that date are part of the appellate record. *See Stackhouse v. Stackhouse*, 2d Dist. Clark No. 16244, 1997 WL 451471, *6 (July 25, 1997) (explaining that trial court's efforts to correct problem were not part of the appellate record because they were undertaken after the notice of appeal was filed). Husband's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

THE TRIAL COURT FAILED TO FOLLOW BOTH SUMMIT COUNTY LOCAL RULES AND THE OHIO RULES OF CIVIL PROCEDURAL (SIC), IGNORING PROCEDURAL SAFEGUARDS THEREIN.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CONTINUED TO MAKE ORDERS AND HOLD HEARING AFTER THE APPEAL HAD BEEN PERFECTED.

{¶12} In his second assignment of error, Husband argues that the trial court violated state and local rules when it appointed a receiver without providing him notice. In light of our disposition of his first assignment of error, we conclude that his argument is moot. App.R. 12(A)(1)(c). In his third assignment of error, Husband argues that the trial court improperly continued to issue orders regarding the parties' case even after he filed a notice of appeal of its order appointing a receiver. As we noted earlier, the appellate record does not contain any information regarding the trial court's actions after Husband filed his notice of appeal. In addition, Husband has not indicated that he has appealed any of those subsequent decisions by the trial court. Accordingly, we lack jurisdiction to consider his argument. Husband's third assignment of error is overruled.

III.

{¶13} The trial court incorrectly granted Wife's motion for appointment of a receiver without notice and a hearing. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is reversed, and this matter is remanded for proceedings consistent with this decision.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
HENSAL, J.
CONCUR.

APPEARANCES:

RICHARD J. MARCO, Attorney at Law, for Appellant.

KENNETH L. GIBSON, Attorney at Law, for Appellee.

RANDAL A. LOWRY, Attorney at Law, for Appellee.