

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

The Huntington National Bank,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-200
v.	:	(C.P.C. No. 09CV07-10155)
	:	
HPM Division, Taylor's Industrial	:	(REGULAR CALENDAR)
Services, LLC et al.,	:	
	:	
Defendants-Appellants.	:	
	:	

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D E C I S I O N

Rendered on December 16, 2010

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*Goranson, Parker & Bella Co., LPA, and Christopher F. Parker, for appellee.*

*Strip, Hoppers, Leithart, McGrath & Terlecky Co., L.P.A., and Paul W. Leithart, II, for appellants.*

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Appellant, HPM America, LLC ("HPM"), appeals from an order of the Franklin County Court of Common Pleas joining HPM as an additional party-defendant and appointing Christopher Parker as receiver for HPM. Because the trial court appointed Parker as receiver for HPM without any evidence that a receiver was necessary to protect the movant's rights, we reverse.

{¶2} Beginning in 2006, plaintiff, The Huntington National Bank ("Huntington"), made various loans to defendant, HPM Division, Taylor's Industrial Services, LLC ("Taylor's"). These loans were reflected by notes that were delivered pursuant to a credit and security agreement. The loans were guaranteed by certain individuals and corporate entities, including Christopher A. Filos, Taylor's Property Management, LLC, and Sandretto USA, Inc. (collectively "guarantors"). Huntington also received a security interest in Taylor's assets as collateral for the subject loans.

{¶3} Apparently, Taylor's ceased business operations sometime in 2009. On July 8, 2009, Huntington filed a complaint against Taylor's and the guarantors alleging that the loans were in default. Huntington sought to recover amounts due on the notes, plus interest, attorney's fees, and costs.

{¶4} Shortly thereafter, the trial court appointed Christopher Parker as receiver for Taylor's pursuant to an agreed order for appointment of receiver. This order granted the receiver broad powers to conduct the business of Taylor's and to manage, control, and protect its assets in order to satisfy Taylor's outstanding obligations.

{¶5} HPM was not an obligor on the subject notes nor a guarantor. HPM was not sued by Huntington nor was HPM mentioned in the July 31, 2009 agreed order for appointment of receiver.

{¶6} Following the appointment of the receiver, a dispute arose between the receiver and HPM regarding the production of certain documents that allegedly reflected certain business transactions/relationships between HPM and Taylor's. Consequently, the receiver filed an emergency motion and request for instructions seeking a court order compelling HPM to produce documents and to join HPM as a party. The receiver alleged

that Christopher Filos owned and controlled both HPM and Taylor's and that HPM and Taylor's were alter ego entities. In addition, the receiver asserted that HPM was using assets leased from Taylor's in HPM's on-going business operations.

{¶7} Although the trial court ordered HPM to respond to the receiver's request for documents, it did not address the receiver's request to join HPM as a party.

{¶8} The receiver remained dissatisfied with HPM's response to his document requests. Therefore, the receiver filed a second motion to join HPM as a party. This motion also requested the trial court to make HPM subject to the same receivership that existed for Taylor's. By joining HPM as a party, the receiver and Huntington sought to recover the assets leased to HPM by Taylor's as well as any accounts receivable generated by HPM from its use of those assets. The receiver attached to this motion several unauthenticated documents that purport to show that Taylor's informed its customers that it had undergone a "name change" and that customers should make payments to HPM.

{¶9} While this motion was pending, the trial court granted summary judgment in favor of Huntington and against Taylor's and the guarantors in the total amount of \$13,769,470.18 plus interest, attorney's fees, and costs.

{¶10} Thereafter, without holding a hearing, the trial court granted the receiver's motion to join HPM as an additional party. The trial court's order also extended the receivership for Taylor's to HPM.

{¶11} HPM now appeals, assigning the following errors:

1. THE TRIAL COURT ERRED WHEN IT JOINED HPM AMERICA, LLC AS A PARTY.

2. THE TRIAL COURT ERRED WHEN IT ORDERED THAT A RECEIVER WAS TO BE APPOINTED FOR HPM AMERICA, LLC IN THE PENDING RECEIVERSHIP.

3. THE TRIAL COURT ERRED WHEN IT ORDERED THAT A RECEIVER WAS TO BE APPOINTED FOR HPM AMERICA, LLC IN THE PENDING RECEIVERSHIP WITHOUT A HEARING.

{¶12} In its first assignment of error, HPM contends that the trial court erred when it joined HPM as a party-defendant in this action. We disagree.

{¶13} The receiver moved to join HPM as a party-defendant pursuant to Civ.R. 19(A), which provides in relevant part:

A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, or (3) he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee.

{¶14} An appellate court reviews a trial court's decision as to whether a person is a necessary party under an abuse of discretion standard. *Ford Motor Credit Co. v. Ryan*, 10th Dist. No. 09AP-501, 2010-Ohio-4601, ¶67 (citing *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 184).

{¶15} Here, the receiver alleged that HPM leased Taylor's assets and used those assets in its business operations. According to the receiver, Huntington cannot obtain complete relief without joining HPM because HPM is the entity that is in possession and control of the assets that served as collateral for Huntington's loans to Taylor's. The

receiver and Huntington also alleged that HPM and Taylor's are alter ego entities. Huntington has a judgment against Taylor's and the guarantors based upon Taylor's default on the notes. Because it appears that the right to these assets as well as the right to any accounts receivable generated by HPM as a result of its alleged use of these assets are at issue in this lawsuit, the trial court did not abuse its discretion when it joined HPM as a party-defendant. Accordingly, we overrule appellant's first assignment of error.

{¶16} In its second assignment of error, HPM contends that the trial court erred when it appointed a receiver for HPM. In its third assignment of error, HPM asserts that the trial court erred when it appointed a receiver for HPM without a hearing. Because these assignments of error are closely related, we address them together.<sup>1</sup>

{¶17} The appointment of a receiver is the exercise of an extraordinary, drastic, and sometimes harsh power, which equity possesses and is only to be exercised where the failure to do so would place the petitioning party in danger of suffering an irreparable loss or injury. *Parker v. Elsass*, 10th Dist. No. 01AP-1306, 2002-Ohio-3340, ¶60 (citing *Equity Ctrs. Dev. Co. v. S. Coast Ctrs., Inc.* (1992), 83 Ohio App.3d 643, 649-50); and *Hoiles v. Watkins* (1927), 117 Ohio St. 165, 174. 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

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<sup>1</sup> Although neither party to this appeal argued that the trial court's order was not a final appealable order, the issue was raised during oral argument. The Supreme Court of Ohio has held that "[a]n order appointing a receiver is an order affecting a substantial right made in a special proceeding and is a 'final order.'" *Mandalaywala v. Zaleski* (1997), 124 Ohio App.3d 321, 329, quoting *Forest City Invest. Co. v. Haas* (1924), 110 Ohio St. 188, paragraph one of the syllabus; *Parker v. Elsass*, 10th Dist. No. 01AP-1306, 2002-Ohio-3340, ¶53; *Lakhi v. Healthcare Choices & Consultants, LLC*, 10th Dist. No. 06AP-806, 2007-Ohio-4127. The Supreme Court of Ohio has also suggested that appointment of a receiver is ancillary to the underlying proceedings, and thus, may be considered a provisional remedy the grant or denial of which is appealable under R.C. 2505.02(A)(4). *Community First Bank & Trust v. Dafoe*, 108 Ohio St.3d 472, 2006-Ohio-1503, ¶25-26; *Collins v. Collins*, 8th Dist. No. 87986, 2007-Ohio-283, ¶7.

the complainant's rights. *Id.*, (citing *Malloy v. Malloy Color Lab, Inc.* (1989), 63 Ohio App.3d 434, 437). In determining whether to appoint a receiver, the court must take into account all the circumstances and facts of the case, the presence of conditions and grounds justifying the relief, the ends of justice, the rights of all the parties interested in the controversy and subject matter, and the adequacy and effectiveness of other remedies. *Ohio Bur. of Workers' Comp. v. Am. Professional Emp., Inc.*, 184 Ohio App.3d 156, 2009-Ohio-2991, ¶7 (quoting *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 73, fn. 3).

{¶18} The appointment of a receiver will not be disturbed on appeal absent a clear abuse of discretion. *Am. Professional* at ¶7 (citing *Gibbs* at 73). An abuse of discretion is more than error of law; it implies an unreasonable, arbitrary, or unconscionable attitude by the trial court. *Id.* An appellate court first reviews an order appointing a receiver to determine whether there is evidence tending to prove the facts essential to sustain the order, without weighing the evidence. *Am. Professional* at ¶11 (citing *Parker* at ¶63). An appellate court may reverse the order when there is a failure of proof that would be essential to support the order. *Id.*; *Malloy* at 436. If there is evidence to support the order, the trial court is vested with the sound discretion to appoint a receiver. When the record lacks evidence tending to prove the facts essential to sustain a motion to appoint a receiver, including the necessity of a receiver to protect the movant's rights, a trial court abuses its discretion by appointing a receiver. *Am. Professional* at ¶21.

{¶19} In the case at bar, the trial court appointed a receiver for HPM pursuant to R.C. 2735.01(A) and (C), which provides:

A receiver may be appointed by the supreme court or a judge thereof, the court of appeals or a judge thereof in his district,

the court of common pleas or a judge thereof in his county, or the probate court, in causes pending in such courts respectively, in the following cases:

(A) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured;

\* \* \*

(C) After judgment, to carry the judgment into effect[.]

{¶20} R.C. 2735.01 is a procedural statute and is to be liberally construed. *Am. Professional* at ¶8 (citing *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943).

{¶21} Satisfaction of one or more of the statutory criteria does not automatically or necessarily entitle the movant to the appointment of a receiver. The satisfaction of the statutory criteria gives rise to the trial court's discretion to decide whether to appoint a receiver. The decision whether to appoint a receiver remains discretionary despite a demonstration that at least one of the statutory bases exists. *Am. Professional* at ¶13.

{¶22} HPM argues that the trial court abused its discretion when it appointed a receiver for HPM without any evidence. We agree.

{¶23} To justify the appointment of a receiver under R.C. 2735.01(A), the receiver had to present evidence that: (1) Huntington had a probable interest in the assets Taylor's leased to HPM or the accounts receivable generated by HPM's use of those assets, and (2) the assets or accounts receivable were in danger of being lost, removed, or materially injured. Before the trial court could appoint a receiver under R.C.

3735.01(C), the receiver had to prove that a receivership was necessary to carry Huntington's judgment against HPM into effect. The receiver, however, did not adduce any authenticated documents or testimony to establish either of these grounds. Instead of providing sufficient evidence to satisfy R.C. 2735.01(A) or (C), the receiver merely alleged that HPM did not produce certain documents and that HPM may be an alter ego of Taylor's. Neither allegation is sufficient to justify appointment of receiver under R.C. 2735.01(A) or (C).

{¶24} Because the receiver offered no evidence, let alone clear and convincing evidence, that the appointment of a receiver for HPM was necessary to protect the assets at issue or to preserve the rights of the receiver or Huntington, the trial court abused its discretion by appointing a receiver for HPM. *Am. Professional* at ¶22 (in the absence of evidence tending to show that a receiver is necessary to preserve or protect movant's rights, the trial court abused its discretion by appointing a receiver). *Jensen v. Zanesville Heart Specialists, Inc.*, 5th Dist. No. CT2003-0043, 2004-Ohio-873 (reversing appointment of a receiver where the evidence did not address all of the various issues a trial court is required to consider before appointing a receiver, and where the judgment entry did not mention what evidence the court considered in granting the motion to appoint a receiver); *BFD Investors, Inc. v. Hershey Pasta Group* (Mar. 16, 1995), 8th Dist. No. 67831 (noting that the party seeking the appointment of a receiver must provide evidence of the necessity for a receiver, and holding that the trial court had abused its discretion by appointing a receiver when the record contained no evidentiary materials at all).

{¶25} While we do not suggest that the receiver and/or Huntington are incapable of producing evidence justifying the appointment of a receiver for HPM, the record before

us contains no such evidence. Therefore, we sustain appellant's second and third assignments of error and we reverse the judgment of the Franklin County Court of Common Pleas.

*Judgment reversed; cause remanded.*

SADLER and McGRATH, JJ., concur.

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