

ORIGINAL

IN THE SUPREME COURT OF OHIO

GENERAL ELECTRIC CAPITAL
CORPORATION,

Plaintiff-Appellee,

v.

THE GOLF CLUB OF DUBLIN, LLC,
ET AL.,

Defendant-Appellant.

Case No. 2010-1122

On Appeal from the Delaware
County Court of Appeals, Fifth
Appellate District (Case No.
09 CAE 12 0107)

**MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE
GENERAL ELECTRIC CAPITAL CORPORATION**

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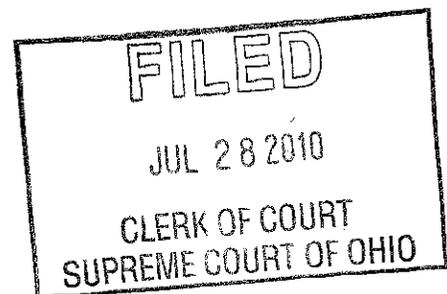


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THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT PRESENT A CONSTITUTIONAL QUESTION

This Court's jurisdiction over discretionary appeals is limited to *cases of public or great general interest*, which are cases that involve principles important to the public at large as opposed to simply the appellant in a particular case. See *Williamson v. Rubich* (1960), 171 Ohio St. 253, 259. Simply put, this appeal does not merit the Court's attention. While it is well-established in Ohio law that an order granting the appointment of a receiver is immediately appealable, the merits of the order appointing a receiver in this case are not at issue. Rather, The Golf Club of Dublin, LLC ("GCD") used the appointment as a vehicle to ask the appellate court to review an order denying a change in venue despite the fact that Ohio law is equally well-settled that such orders are not immediately appealable. The appellate court saw through and rejected GCD's game of bait and switch, dismissing GCD's appeal, and GCD has not and cannot provide this Court with any reason to disturb that ruling.

Although GCD opens its memorandum with a statement that this case is crucial to litigants in Ohio because of the "critical economic challenges" created by foreclosures nationwide and the purported damage that will be caused by the Fifth Appellate District's order in such an environment (Memorandum in Support of Jurisdiction of Appellant The Golf Club of Dublin, LLC ("App. Memo."), at 1), the remainder of GCD's memorandum focuses exclusively on its argument about the trial court's alleged error in denying a change in venue. In fact, GCD's jurisdictional memorandum does not even address the trial court's appointment of a receiver; nor could it, because GCD never opposed General Electric Capital Corporation's ("GECC") motion to appoint a receiver. Instead, the memorandum focuses solely on why GCD contends Franklin County is the only proper venue for the foreclosure case under Civ.R. 3(B)(2). (App. Memo., at 3-6.)

It is evident that GCD is attempting to appeal the merits of the trial court's order denying a motion to transfer venue. Worse yet, GCD is asking this Court to review this pedestrian issue in the context of an appeal from a court of appeals' decision that did not even reach the merits of its claims. While not actually applicable to this appeal, the proposition of law posited in GCD's jurisdictional memorandum is unremarkable, for it is *already* the law of Ohio that an order appointing a receiver is a final appealable order and nothing decided below contradicts that principle. *Forest City Invest. Co. v. Haas* (1924), 110 Ohio St. 188, paragraph one of the syllabus; see also, *Community First Bank & Trust v. Dafoe*, 108 Ohio St.3d 472, 2006-Ohio-1503, ¶¶ 25-26. Thus, this is far from a case of public or great general interest that warrants this Court's review.

Finally, it should be noted that GCD's notice of appeal purports to invoke this Court's jurisdiction under the additional basis that this case "raises a substantial constitutional question." (Notice of Appeal, at 2.) But nowhere in its jurisdictional memorandum does GCD explain what constitutional provision is implicated by this appeal, much less how the unspecified constitutional question is a "substantial" one in any sense worthy of this Court's time and effort. Accordingly, GCD must be deemed to have abandoned any claim that this case involves a "substantial constitutional question."

In sum, this case presents no issue worthy of this Court's review, and the Court should decline jurisdiction.

STATEMENT OF THE CASE AND OF FACTS

I. The Loan

The Golf Club of Dublin, LLC is an Ohio-based limited liability company that owns and previously operated a golf course by the same name. (*General Electric Capital Corp. v. The Golf Club of Dublin, LLC*, 5th Dist. App. No. 09 CAE 12-0107, 2010-Ohio-2143 (“App. Op.”), at ¶ 6.) In July 2007, GCD entered into a Loan Agreement under which GECC agreed to make a loan of up to \$8.5 million in connection with GCD’s golf course. (App. Op. at ¶ 7.) The Promissory Note was secured by a Mortgage on GCD’s leasehold interest on the golf course property. (App. Op. at ¶ 7.) Though the golf course is located in Franklin County, the Mortgage and other significant loan documents were executed in Delaware County. (App. Op. at ¶ 7.) Moreover, the Loan Agreement specifically represented and warranted that GCD’s “principal place of business” was located at a Delaware County address—“The Golf Club of Dublin, LLC, 8070 Tartan Fields Drive, Dublin, Ohio 43017.” Schedule 4.1 of the Loan Agreement confirms that the Chief Executive Office of GCD is in Delaware County. GCD never gave GECC notice of any modification to these representations.

II. GCD’s Default And Bankruptcy

GCD defaulted on its obligations under the Note, Mortgage, and other loan documents by failing to make required interest and impound payments due in May 2009. Accordingly, on June 9, 2009, GECC filed a Complaint for Foreclosure in the Delaware County Court of Common Pleas. (App. Op. at ¶ 8.) Contemporaneously with the Complaint, GECC also filed a Motion for Immediate Appointment of Receiver. (App. Op. at ¶ 9.) Just hours before a scheduled hearing on the receivership motion, however, an involuntary Chapter 11 bankruptcy petition was filed under 11 U.S.C. § 303 against GCD. (App. Op. at ¶ 10.) The Chapter 11 petition triggered an automatic stay in the proceedings before the Delaware County court. (App. Op. at ¶ 10.)

GECC sought relief from the automatic stay in the bankruptcy court, and in September 2009, the bankruptcy court entered an Unopposed Order Granting General Electric Capital Corporation's Motion for Relief from the Automatic Stay (the "Unopposed Order"). (App. Op. at ¶¶ 12-13.) Based on the Unopposed Order, the Delaware County Court of Common Pleas moved the case back to its active docket and set a hearing date for GECC's motion to appoint a receiver. (App. Op. at ¶¶ 14-15.)

III. No Opposition To Appointment Of A Receiver

Three days before the scheduled hearing on the motion for appointment of a receiver, GCD filed a Motion to Transfer Venue (App. Op. at ¶ 16), arguing that venue was proper only in Franklin County because the golf course that is the subject of the foreclosure action is located within Franklin County. Though GCD moved to transfer venue, it did not file an opposition to GECC's motion for immediate appointment of a receiver.

Although the hearing on October 19, 2009 was noticed as a hearing on the motion to appoint a receiver, the trial court heard argument on the venue issues raised in the Motion to Transfer Venue. GCD did not object to the appointment of a receiver during the hearing: the only arguments presented at the hearing related to the issue of proper venue. GECC argued in opposition to GCD's venue motion that the Loan Agreement supported proper venue in Delaware County, Ohio because of its representation and warranty that GCD's principal place of business was in Delaware County. After the hearing and in separate entries, the court (1) granted GECC's motion for appointment of a receiver and (2) denied GCD's motion to transfer venue. (App. Op. at ¶¶ 19-20.)

As a result of the trial court's rulings, GCD commenced a mandamus action in this Court, seeking this Court's issuance of a writ to command the trial court to transfer the case to Franklin County. This Court dismissed the writ case summarily. *State ex rel. The Golf Club of Dublin,*

LLC v. Whitney, 124 Ohio St.3d 1468, 2010-Ohio-374. GCD's counsel also filed *two* affidavits of disqualification with this Court, seeking to disqualify Judge Whitney from presiding over GECC's foreclosure case. Both affidavits were overruled. See *General Elec. Capital Corp. v. The Golf Club of Dublin, LLC (In re Disqualification of Whitney)* (Feb 1, 2010), Ohio Sup. Ct. No. 09-AP-122 (Moyer, C.J.), and *General Elec. Capital Corp. v. The Golf Club of Dublin, LLC (In re Disqualification of Whitney)* (May 27, 2010), Ohio Sup. Ct. No. 10-AP-42 (Brown, C.J.).

IV. Appeal To The Fifth Appellate District

In addition to its other tactics, GCD also filed a direct appeal to the Fifth Appellate District, purporting to appeal from the trial court's order granting appointment of a receiver. In the briefing on appeal, however, as before this Court, the *only* issue addressed or discussed by GCD was a challenge to the trial court's denial of GCD's motion to transfer venue. GCD asserted no substantive challenge to the trial court's appointment of a receiver. Thus, the majority opinion held that GCD was appealing, in substance, from the order denying its motion for a change of venue. (App. Op. at ¶ 27.) And because an order denying a change of venue was not a "final order" within the meaning of R.C. 2505.02, the court dismissed the appeal for want of appellate jurisdiction. (App. Op. at ¶¶ 38-44.)

Judge Hoffman dissented from the judgment but would *not* have reversed the trial court's decisions below. Rather, Judge Hoffman stated that he would have *affirmed* the trial court's decision rather than dismiss GCD's appeal for lack of jurisdiction, treating it as being an appeal from the receivership order and reaching the merits. On the merits, Judge Hoffman found no abuse of discretion in the trial court's venue order. (App. Op. at ¶¶ 48-49 (Hoffman, J., dissenting).)

On June 28, 2010, GCD commenced this discretionary appeal, again improperly seeking appellate review of the trial court's order denying a change of venue. For all of the reasons set

forth herein, GCD's request that this Court accept jurisdiction should be rejected.

ARGUMENT IN RESPONSE TO PROPOSITION OF LAW

Appellee's Response To Appellant's Proposition Of Law: The ability to immediately appeal an order appointing a receiver is a well-established principle of Ohio law, but the appealability of a receivership order does not make an order denying a motion to transfer venue also final and appealable.

I. The Appellate Court's Decision Does Not Contradict Well-Settled Ohio Law That An Order Appointing A Receiver Is A Final Appealable Order And Therefore Does Not Raise Any Issue Important To The Public At Large.

The court of appeals correctly dismissed GCD's appeal for what it was—a thinly veiled and ill-conceived attempt to obtain interlocutory appellate review of an order denying a motion to transfer venue when it is well settled that such an order is *not* a final appealable order. See, e.g., *State ex rel. Lyons v. Zaleski* (1996), 75 Ohio St.3d 623, 625, citing *State ex rel. Starner v. DeHoff* (1985), 18 Ohio St. 3d 163, 165. It is true that an order appointing a receiver is a final appealable order reviewed for an abuse of discretion. *Forest City Invest. Co. v. Haas* (1924), 110 Ohio St. 188, paragraph one of the syllabus; see, also, *Community First Bank & Trust v. Dafeo*, 108 Ohio St.3d 472, 2006-Ohio-1503, at ¶¶ 25-26. But this principle is of no help to GCD's discretionary appeal.

GCD fails to explain how the trial court could possibly have abused its discretion in appointing a receiver. More fundamentally, GCD does not explain how the court of appeals erred in its determination that a venue order is not transformed into a final appealable order upon the trial court's appointment of a receiver. Indeed, GCD barely even tries to overcome the jurisdictional bar to appellate review of an order denying a change of venue. It simply states that the venue order in this case, though not itself a final appealable order, was reviewable because the trial court also issued an order appointing a receiver, which is a final appealable order. But

there is no authority to support this proposition. Indeed, existing authority cuts firmly against GCD's right to bring such a challenge at this point. This Court has explicitly held that *an order denying a change of venue is appealable only after final judgment* in the case. *State ex rel. Lyons*, 75 Ohio St.3d at 625. This is true because an “appeal following a final judgment provides an adequate legal remedy” for a trial court’s error—if any—in a decision on a motion to change venue. *Id.* at 625. GCD does not even attempt to argue that this rule should be limited or distinguished based on the facts of this case, let alone in the interest of the public at large.

If the Court were to accept GCD's argument in favor of jurisdiction, a party could appeal from any interlocutory order in an appeal from an order appointing a receiver, regardless of whether the party was actually challenging the trial court's appointment of a receiver on the merits. This rule would be an anomaly, to say the least, because it runs against orderly appellate procedure. Indeed, Ohio's appellate courts are consistent in their pronouncement that an appeal from a “final order” other than a final judgment brings before the court only those issues relating to the final order; the court of appeals' jurisdiction does *not* include the authority to adjudicate appeals from any other unrelated order. For example, in *Medical Mutual of Ohio v. Schlotterer*, 8th Dist. App. No. 89388, 2008-Ohio-49,¹ the court of appeals rejected an appellant's attempt to appeal from an order denying a change of venue under the guise of an appeal from an order requiring the production of privileged medical records. See *id.* at ¶¶ 11, 17. Though the court of appeals acknowledged that the order requiring production of medical records was a final appealable order under R.C. 2505.02(B)(4)'s “provisional remedy” provision (*id.* at ¶ 17) and adjudicated that issue on the merits (*id.* at ¶¶ 33-36), the court of appeals held that *it lacked jurisdiction* to consider the trial court's decision denying a change of venue (*id.* at ¶ 37). In other

¹ Reversed on other grounds, 122 Ohio St.3d 181, 2009-Ohio-2496.

words, the court's order denying a change of venue did not merge into the final appealable order relating to privileged documents, so as to make the venue order immediately reviewable. Cf., also, *Haley v. Reisinger*, 9th Dist. App. No. 24376, 2009-Ohio-447, at ¶¶ 12-13 (dismissing appeals taken from non-final orders that were unrelated to the partial summary judgment order that was immediately appealable); *Davis v. Galla*, 6th Dist. App. No. L-08-1149, 2008-Ohio-3501, at ¶¶ 6-7 (same). The *Schlotterer* reasoning applies equally in this case where GCD is attempting to obtain review of an order denying a change of venue by attaching it to an appeal from a *separate* order that *is* recognized as final and appealable under R.C. 2505.02.

GCD begins its jurisdictional memorandum by describing this case as one that “urgently needs correction” because of the court of appeals’ supposed trampling upon the “sacrosanct” right to immediate appeal of a receivership order. (App. Memo., at 1.) Even looking past the admission that this case is about error “correction” and nothing more, the analysis herein and as stated by the appellate court makes two things blatantly clear. One, the appellate court properly applied well-established law governing the appealability of receivership orders. Two, this case has nothing to do with the issue of whether a receivership order is immediately appealable, and GCD’s appeal was properly dismissed for want of jurisdiction over a denial of a motion to transfer venue. Cf., also, *Hollis v. Hi-Port Aerosol, Inc.*, 8th Dist. App. No. 90546, 2008-Ohio-4230, at ¶¶ 11-15 (dismissing appeal from an order compelling production of documents claimed to be privileged when appellant only articulated arguments regarding a prior interlocutory order). GCD offers no reason why the court of appeals’ reasoning should be reviewed, much less rejected, by this Court, particularly given the high standard that must be satisfied to justify this Court’s discretionary jurisdiction.

II. Even Had The Appellate Court Reached The Merits Of GCD's Claims, GCD Has Offered No Basis On Which To Challenge The Trial Court's Order Appointing A Receiver.

While GCD's jurisdictional memorandum may suggest otherwise, the appellate court did not reach the substance of GCD's arguments as to any order. Thus, this Court's analysis would also be limited to the jurisdictional question decided by the appellate court. Had the court of appeals examined the underlying merits, however, such an analysis would have shown that GCD presents no basis, let alone one of great general interest, to reverse the trial court's order appointing a receiver in this case. Nor is there one.

First, GCD has yet to offer any opposition to the appointment of a receiver in this case, other than on the basis of venue—not in the trial court, not in the appellate court, and not before this Court. GCD also fails to make any showing that even a court in another venue would have come to a different conclusion or would disturb the trial court's ruling on GECC's motion for appointment of a receiver. In any case, however, any such argument has long since been waived by GCD. *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 210 (stating that “an appellate court will not consider any error which could have been brought to the trial court's attention, and hence avoided or otherwise corrected”); see, also, *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121.

In lieu of any specific allegations relating to the trial court's appointment of a receiver, GCD makes the hollow comment that receiverships generate fees that “push[] businesses past the tipping point, so that they become liquidated rather than rehabilitated.” (App. Memo., at 1.) GCD fails, however, to offer *any* support for this broad statement and fails to acknowledge that it is secured lenders such as GECC that are ultimately harmed by the fees that are a necessary consequence of bringing new management into deteriorating businesses.

Second, improper venue is not a jurisdictional defect. See *State ex rel. Lyons v. Zaleski*, 75 Ohio St.3d at 624, citing *State ex rel. Ruessman v. Flanagan* (1992), 65 Ohio St.3d 464, 467. Thus, even if venue was improper, it would not affect the validity or enforceability of the trial court's order appointing a receiver and would not provide a basis for reversal of any of the orders below.

Accordingly, it is clear that this appeal is simply GCD's latest attempt to circumvent the rule that an order denying a motion to transfer venue is *not* a final appealable order, and there is no good reason why this Court should entertain it.

III. Even Had The Appellate Court Examined The Merits Of GCD's Arguments Regarding Venue, The Trial Court Did Not Abuse Its Discretion.

In addition to ignoring the distinction between an order appointing a receiver and an order denying a change in venue, and failing to provide any substantive challenge to the appointment of a receiver in this case, GCD's jurisdictional memorandum goes through a full-blown argument about how the trial court's order denying its motion to transfer venue was erroneous. This Court need not indulge these arguments, however, as they are irrelevant to the jurisdictional question decided by the appellate court and to the issue GCD claims to be the basis for this appeal. More importantly, the irrelevance of this issue to the public makes this case unworthy of the Court's review.

Moreover, even if the Court were to indulge GCD, orders as to the transfer of venue are reviewed for an abuse of discretion by the trial court, *Sheet Metal Workers Local 98 Pension Fund v. Whitehurst*, 5th Dist. App. No. 03-CA-29, 2004-Ohio-191, at ¶ 23, and contrary to what GCD represents in its jurisdictional memorandum, there was ample basis for the trial court to decide, within its sound discretion, that venue is proper in Delaware County. For example:

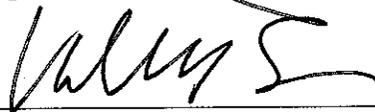
- GCD represented in the loan documents that its principal place of business was in Delaware County, Ohio, making venue appropriate under Civ.R. 3(B)(2).
- Significant loan documents providing consideration for the loan made to GCD were executed in Delaware County, meaning that the parties' agreement was formed there. Such a circumstance made venue appropriate in Delaware County under Civ.R. 3(B)(3) or 3(B)(6). See *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, 89 (describing place of the making of a promissory note as a proper venue under Civ.R. 3(B)(3) and 3(B)(6)).
- Despite GCD's contentions that there was no evidence presented or attempt made by GECC to authenticate the loan documents, affidavit testimony that was before the trial court on GECC's motion for appointment of a receiver did establish the authenticity of the Loan Agreement and other loan documents, including GCD's representation regarding its principal place of business.
- The foreclosure in this matter is against GCD's leasehold interest in the property, not against the property itself. Thus, the trial court rejected GCD's argument that the county in which the property is situated constitutes the exclusive proper venue.
- While GCD argues that reversal of the venue order is warranted because the trial court did not wholesale adopt the allegations made by Mr. Adams, the court was free to discount or disbelieve that affidavit as it saw fit. This is particularly true given that the affidavit was contradicted by other evidence demonstrating that GCD's principal place of business was in Delaware County. The fact that Mr. Adams is both GCD's lead counsel and its star witness – a fortuitous situation – does not entitle his affidavit to greater weight.

As illustrated by just this sampling of factual circumstances, the trial court had ample reason to decide that GCD had not met its burden of proving that venue was improper in Delaware County. See *Sheet Metal Workers*, at ¶ 23 (noting that the moving party bears the burden of proof on a motion to transfer venue). Dissatisfied with that result, GCD is asking this Court to wade through the conflicting factual arguments of the parties and act as a court of error to review the trial court's analysis and application of settled law governing proper venue. This is not an appropriate or worthy use of the Court's limited resources and is certainly not the type of case that presents an issue of public interest that warrants this Court's discretionary jurisdiction.

CONCLUSION

The court of appeals properly dismissed GCD's appeal for want of jurisdiction over what was actually a denial of a motion to transfer venue. Now, GCD does little more than ask the Court to revisit this question and correct what it perceives as error, but does not posit an issue of law worthy of review, much less demonstrate how the court of appeals erred in the first place. Accordingly, this Court should decline jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing *Memorandum In Opposition To Jurisdiction Of Appellee General Electric Capital Corporation* was served upon the following by regular United States mail, postage prepaid, as indicated below this 28th day of July, 2010:

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