

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City National Bank,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-1134
v.	:	(C.P.C. No. 10CVE-09-13959)
	:	
WBP Investments, LLC et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellants.	:	

D E C I S I O N

Rendered on November 29, 2011

Barren & Merry Co., L.P.A., Thomas R. Merry, Beth M. Miller, and Jeanine Loehr Bielby, for appellee.

McCarthy, Lebit, Crystal & Liffman Co., L.P.A., Daniel M. Singerman, Robert R. Kracht, and Charles Nemer, Wesp/Barwell, LLC, Lloyd Pierre-Louis, and Gregory P. Barwell, for appellants WBP Investments, LLC, and WBP Group, LLC.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendants-appellants, WBP Investments, LLC, and WBP Group, LLC ("appellants"), appeal from a judgment of the Franklin County Court of Common Pleas denying appellants' motion to vacate, dissolve, and/or modify order appointing receiver and from a judgment entering an amended order appointing receiver. For the reasons that follow, we affirm.

{¶2} In 2007, appellants obtained a loan from Imperial Capital Bank ("ICB") and executed and delivered a promissory note to ICB. Appellants used the proceeds of this loan to purchase a shopping center in Columbus, Ohio ("the property"). Appellants granted ICB an open-ended mortgage ("the mortgage") on the property to secure the promissory note. In 2010, plaintiff-appellee, City National Bank ("appellee"), entered into a purchase and assumption agreement with ICB and the Federal Deposit Insurance Corporation. Pursuant to this agreement, the mortgage was assigned to appellee.

{¶3} On September 23, 2010, appellee filed a complaint seeking monetary recovery on the promissory note and foreclosure on the mortgage. As part of the proceedings, on November 3, 2010, appellee moved for appointment of a receiver. The trial court granted the motion, entering an order appointing a receiver ("the Order"). Appellants filed a motion to vacate, dissolve, and/or modify the Order, and the trial court denied this motion. Appellee filed a motion to amend the Order; the trial court granted this motion and entered an amended order appointing a receiver ("the Amended Order").

{¶4} Appellants appeal from the trial court's judgments denying their motion to vacate, dissolve, and/or modify the order appointing the receiver and granting the motion to amend the order appointing the receiver, assigning four errors for this court's review:

I. The Appellee failed to show by clear and convincing evidence that it was entitled to the appointment of a receiver or that it would be irreparably harmed if a receiver were not appointed;

II. The Amended Order Appointing Receiver contravenes Ohio law by granting the Receiver the power to sell the Property before the conclusion of the foreclosure proceedings before recovering a judgment entitling Appellee to foreclose on its mortgage in derogation of Appellants' rights of redemption and Due Process;

III. The Amended Order Appointing Receiver contravenes Ohio law by granting the Receiver the power to sell the Property without following the safeguards contained in Ohio's foreclosure statute; and

IV. The Amended Order Appointing Receiver contravenes Ohio law by granting the Receiver the power of pre-judgment attachment without allowing a hearing and without requiring a bond.

{¶5} "It is well settled that a trial court is vested with the sound discretion to appoint a receiver." *Bur. of Workers' Comp. v. Am. Professional Emp., Inc.*, 184 Ohio App.3d 156, 2009-Ohio-2991, ¶7, citing *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 73. An order appointing a receiver will not be reversed on appeal absent a clear abuse of discretion. An abuse of discretion occurs when a decision is unreasonable, arbitrary, or unconscionable. *Am. Professional* at ¶7.

{¶6} In appellants' first assignment of error, they claim that appellee failed to show by clear and convincing evidence that it was entitled to appointment of a receiver or that it would be irreparably harmed if a receiver was not appointed. The trial court appointed the receiver pursuant to R.C. 2735.01(B) and (F). R.C. 2735.01(B) provides that a receiver may be appointed under the following circumstances:

In an action by a mortgagee, for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt[.]

R.C. 2735.01(F) is a "catch-all" provision, stating that a receiver may be appointed "[i]n all other cases in which receivers have been appointed by the usages of equity."

{¶7} Appellee presented evidence that appellants failed to make payment under the terms and conditions of the mortgage. Likewise, appellee presented evidence that the value of the property was likely insufficient to discharge the mortgage debt. Thus, the trial court found that appellee established the statutory requirements under R.C. 2735.01(B) by demonstrating that "the conditions of the Mortgage have not been performed, and that the Property is probably insufficient to discharge the mortgage debt." (Amended Order at 1.)

{¶8} This court has "conclude[d] that satisfaction of one or more of the statutory criteria does not automatically or necessarily entitle the movant to appointment of a receiver." *Am. Professional* at ¶13. "[A] party requesting a receivership 'must show by clear and convincing evidence that the appointment of a receiver is necessary for the preservation of the complainant's rights.' " *Id.* at ¶11, quoting *Malloy v. Malloy Color Lab, Inc.* (1989), 63 Ohio App.3d 434, 437. In reviewing a trial court order appointing a receiver, we must "determine 'whether there is evidence tending to prove the facts essential to sustain the order,' and [we] may not review the weight of the evidence." *Am. Professional* at ¶11, quoting *Parker v. Elsass*, 10th Dist. No. 01AP-1306, 2002-Ohio-3340, ¶63.

{¶9} In addition to finding that the statutory criteria were met, the trial court concluded that the appointment of a receiver was necessary to avoid irreparable injury to appellee. The trial court did not recite the evidence on which it relied in reaching this conclusion, but a review of the parties' filings indicates that appellee presented evidence that would sustain the trial court's conclusion. Appellee presented an affidavit asserting that several units at the property were vacant and abandoned and that certain tenants of

the property informed appellee that they were dissatisfied with the state of the property. The affidavit further indicated that the management company that had been managing the property had terminated its services. Finally, the affidavit asserted that there was a leak in the roof at the property and that, without repair of the leak and further maintenance of the property, there was a risk of material injury to the property. As noted above, we do not review the weight of this evidence but only determine whether there was evidence tending to sustain the trial court's order appointing a receiver. Under this standard, we find that the evidence appellee presented supports the trial court's conclusion that a receiver was necessary to avoid irreparable injury.

{¶10} Appellant argues that, under the *Am. Professional* standard, appellee was not entitled to the appointment of a receiver. While appellant is correct that this court reversed an order appointing a receiver in *Am. Professional*, we find that case to be factually distinguishable from the present appeal. In *Am. Professional*, we found that the record contained "no evidence, let alone clear and convincing evidence" that a receiver was needed. *Am. Professional* at ¶18. See also *Huntington Natl. Bank v. HPM Div., Taylor's Indus. Servs.*, 10th Dist. No. 10AP-200, 2010-Ohio-6176, ¶24 (finding that there was no evidence to support appointment of a receiver for a particular business). By contrast, in this case, there was evidence of damage to the property and the risk of further damage due to the withdrawal of the management company. Under these circumstances, the trial court did not abuse its discretion by appointing a receiver.

{¶11} The trial court also found that appellee was entitled to appointment of a receiver under the terms of the mortgage agreement and associated loan documents. The mortgage agreement contained multiple clauses providing that appellants consented

to the appointment of a receiver. Two of these clauses provided that appellants "irrevocably and unconditionally" consented to the appointment of a receiver. Another clause provided that appellants waived the right to object to the appointment of a receiver and expressly consented to the appointment ex parte and without notice to appellants.

{¶12} Appellants argue that, despite the presence of these clauses in the mortgage, as a matter of law, they could not consent to the appointment of a receiver. We reject this contention in accordance with this court's prior decisions and those of other appellate courts in Ohio. In *Bank One, Columbus, NA v. O'Brien* (Dec. 31, 1991), 10th Dist. No. 91AP-166, we noted that "a receivership can be awarded upon the terms of a contractual agreement."¹ Similarly, in *Whipps v. Ryan*, 10th Dist. No. 08AP-838, 2009-Ohio-2228, we upheld a trial court's appointment of a receiver, finding that the appointment was authorized by statute and that the borrower had consented to the appointment of a receiver under a mortgage agreement. *Id.* at ¶21, 24. This is consistent with decisions from other appellate courts in Ohio, which have concluded that the requirements of R.C. 2735.01 may be waived by contract. See, e.g., *Huntington Natl. Bank v. Prospect Park, LLC*, 8th Dist. No. 96218, 2011-Ohio-5391, ¶11; *Harajli Mgt. & Invest., Inc. v. A&M Invest. Strategies, Inc.*, 6th Dist. No. L-04-1341, 2006-Ohio-3052; *Metro. Sav. Bank v. Papadelis* (Sept. 13, 1995), 9th Dist. No. 2380-M; *Columbia Sav. v. Mentor Inn Prop. Co., Ltd.* (Sept. 30, 1993), 11th Dist. No. 93-L-007; *Cypress Sav. Assn. v. Richfield Assoc.* (Mar. 8, 1989), 9th Dist. No. 13679. Appellants also argue that the

¹ In the context of *O'Brien*, this statement constituted dictum. Under the facts of that case, this court reversed the trial court's appointment of a receiver because the purported agreement authorizing the receivership was not properly submitted into evidence. However, we agree with this general principle as pronounced in the *O'Brien* decision.

relevant clauses in the mortgage and loan documents only authorized appellee to apply for a receiver and did not entitle it to a receiver as a matter of right. However, it is clear that the clauses not only authorized appellee to apply for a receiver but also that appellants consented to such an appointment. Moreover, appellee did not rely solely on this contractual authority but also established the required statutory elements under R.C. 2735.01(B).

{¶13} Accordingly, because the trial court did not abuse its discretion in appointing a receiver and because appellants consented to the appointment of a receiver under the mortgage agreement, we overrule appellants' first assignment of error.

{¶14} Appellants' claim in their second assignment of error that the Amended Order violates their right of redemption and right to due process by allowing the receiver to sell the property before the conclusion of the foreclosure proceedings. Similarly, appellants assert in their third assignment of error that the Amended Order violates Ohio law by permitting the receiver to sell the property without following the safeguards contained in the foreclosure statute. Because our analysis of these two assignments of error is similar, we will address them together.

{¶15} The Amended Order provides that the receiver is authorized "to advertise and list the Property for sale and at City National's subsequent election and **upon the Court's approval**, to sell the Property free and clear of all liens." (Emphasis sic.) (Amended Order at 2.) Thus, any sale of the property would be contingent on approval by the trial court. Therefore, we must consider whether appellants' claims regarding the receiver's power to sell the property are ripe for our review.

{¶16} " 'In order to be justiciable, a controversy must be ripe for review.' " *State v. Loving*, 180 Ohio App.3d 424, 2009-Ohio-15, ¶4, quoting *Keller v. Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599, ¶26. Ripeness involves whether a legal question is sufficiently concrete for decision. *O'Brien v. McGraw*, 10th Dist. No. 10AP-1198, 2011-Ohio-3826, ¶15. "A claim is not ripe for our consideration if it rests on contingent future events that may not occur as anticipated or may never occur at all." *Loving* at ¶4, citing *Texas v. United States* (1998), 523 U.S. 296, 300, 118 S.Ct. 1257, 1260. See also *Meyer v. Chieffo*, 193 Ohio App.3d 51, 2011-Ohio-1670, ¶17; *State v. Robinson*, 11th Dist. No. 2009-L-168, 2011-Ohio-4695, ¶35; *Kalnasy v. MetroHealth Med. Ctr.*, 8th Dist. No. 90211, 2008-Ohio-3035, ¶5. Under the Amended Order, the receiver is authorized to sell the property "upon the Court's approval." Appellants argue that the Amended Order allows the receiver to sell the property in derogation of its rights of redemption and without following the safeguards of the foreclosure statute. However, appellants do not claim that the receiver has identified a potential buyer or applied to the trial court for approval to sell the property. Appellants' claims effectively turn on an assertion that the receiver *might* propose a sale of the property, that the trial court *might* approve the proposed sale, and that the conditions of such sale *might* violate appellants' rights of redemption and the procedures required under the foreclosure statute. Accordingly, because any sale would be contingent upon the trial court's approval and the conditions under which the trial court would approve a sale are not established, we find that appellants' second and third assignments of error are not ripe for review.

{¶17} In their fourth assignment of error, appellants claim that the Amended Order authorizes the receiver to take control of appellants' property without judgment being

entered against them. They assert that this effectively permits the receiver to undertake a prejudgment attachment of their property without following the statutory procedures governing prejudgment attachment. Appellants argue that this case is analogous to *State ex rel. Gaines, Stern, Schwarzwald & Robiner Co., L.P.A. v. Fuerst* (Feb. 7, 1980), 8th Dist. No. 41787. In *Fuerst*, the appellate court granted a writ of prohibition to halt the continuing effect of a preliminary injunction order requiring a law firm to deposit a payment into the court related to an underlying dispute about allocation of attorney's fees. The court concluded that the preliminary injunction order was improper because the legislature intended the prejudgment attachment statute to be the exclusive method of obtaining a valid prejudgment attachment of property. However, *Fuerst* did not involve a foreclosure action or a receivership. We find the present case to be more analogous to *Metro. Life Ins. Co. v. Triskett Illinois, Inc.* (1994), 97 Ohio App.3d 228.

{¶18} The *Metro. Life* case arose from a foreclosure action involving a commercial office park. *Id.* at 232. The foreclosing party ("Metlife") sought, among other remedies, the appointment of a receiver, and the trial court granted the request for a receiver. *Id.* at 233. The mortgagor ("Triskett") claimed that the appointment of a receiver effectuated a prejudgment attachment of its property without following the notice and hearing requirements under the attachment statute. *Id.* at 236. The First District Court of Appeals rejected this argument, concluding that "[t]he appointment of a receiver * * * did not, as Triskett asserts, constitute a prejudgment attachment subject to the strictures of R.C. 2715.01 *et seq.*, but was accomplished pursuant to and in accordance with R.C. 2735.01(B) and the terms of the mortgage." *Id.* Additionally, the court found that Triskett

waived the requirement of pre-appointment notice of the receivership under the terms of the mortgage. *Id.*

{¶19} In this case, the Order and the Amended Order clearly indicate that the trial court appointed the receiver pursuant to R.C. 2735.01(B) and (F) and the terms of the mortgage agreement. By statute, a receiver is granted the power to "take and keep possession of property" and "generally do such acts respecting the property as the court authorizes." R.C. 2735.04. Moreover, both the Order and the Amended Order authorize the receiver to take possession of accounts with "funds related to the operation of the property." (Amended Order at 6.) The trial court's orders do not create a prejudgment attachment scenario under R.C. 2715.01, which would involve all property, other than personal earnings, of appellants. Thus, as in *Metro. Life*, we conclude that the Amended Order does not give the receiver the power of prejudgment attachment without following the statutory procedures. Accordingly, appellants' fourth assignment of error is overruled.

{¶20} For the foregoing reasons, appellants' first and fourth assignments of error are overruled, and the second and third assignments of error are not ripe for review. The judgments of the Franklin County Court of Common Pleas are hereby affirmed.

Judgments affirmed.

BROWN and KLATT, JJ., concur.
