

[Cite as *Roberts v. Sorg*, 2017-Ohio-570.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

JAMES ROBERTS

Plaintiff-Appellant

v.

MATTHEW SORG, ESQ., RECEIVER,
et al.

Defendant-Appellee

:
:
:
:
:
:
:
:
:
:
:
:

Appellate Case No. 27134

Trial Court Case No. 2015-CV-3113

(Civil Appeal from
Common Pleas Court)

.....

OPINION

Rendered on the 17th day of February, 2017.

.....

GRANT D. KERBER, Atty. Reg. No. 0068474, 215 West Water Street, P.O. Box 310,
Troy, Ohio 45373

Attorney for Plaintiff-Appellant

MATTHEW C. SORG, Atty. Reg. No. 0062971, 2700 Kettering Tower, 40 North Main
Street, Dayton, Ohio 45423

Defendant-Appellee-Pro Se

GARY LEPPLA, Atty. Reg. No. 0017172, 2100 South Patterson Boulevard, P.O. Box 612,
Dayton, Ohio 45409

Attorney for Defendant-Appellee-Jackass Flats, LLC

.....

WELBAUM, J.

{¶ 1} Plaintiff-appellant, James Roberts, appeals from the decision of the Montgomery County Court of Common Pleas denying him leave to bring an action against defendant-appellee, Matthew Sorg, receiver for Jackass Flats, L.L.C., and granting summary judgment in favor of Sorg on that basis. For the reasons outlined below, the judgment of the trial court will be affirmed.

Facts and Course of Proceedings

{¶ 2} On June 12, 2015, Roberts filed a complaint for breach of contract, unjust enrichment, and promissory estoppel against Jackass Flats, L.L.C. (“Jackass Flats”), a restaurant business located in Dayton, Ohio. Roberts’s complaint alleged the following facts:

{¶ 3} In 2013, Sorg was appointed as receiver for Jackass Flats in Case No. 2012 CV 8182. Pursuant to his authority as receiver, Sorg employed Roberts as an independent contractor to provide for the management of the day-to-day operations of Jackass Flats. Sorg, with authority from the court, promised to pay Roberts \$1,000 per week for each week that Roberts provided management services. From time to time, Sorg, on behalf of Jackass Flats, asked Roberts to advance sums to finance the day-to-day operations and agreed to reimburse Roberts for those advancements. To that end, Roberts loaned \$16,206.41 to Jackass Flats, and was owed \$10,320.66 for those advancements. Jackass Flats, through Sorg, also agreed to pay Roberts a bonus of \$1,000 upon the sale of the receivership assets. By April 2015, Roberts was owed \$34,000 for unpaid management fees and the bonus. Roberts received \$13,248 in April

2015 and \$7,000 in June 2015. However, Roberts alleged that Jackass Flats, through its “duly authorized agent” Sorg, still owed him a total of \$31,072.66 in damages for unpaid management service fees and advancements.

{¶ 4} Roberts attempted to serve his complaint on Jackass Flats through service of summons upon the receiver, Sorg. No answer was filed, and Jackass Flats claimed that it was not properly served.

{¶ 5} On June 23, 2015, Jackass Flats and one of the company’s members, John Walsh, filed motions to dismiss Roberts’s complaint on grounds that Roberts had not provided any services to Jackass Flats pursuant to any written or oral agreement, as well as an allegation that Roberts was not acting on behalf of Jackass Flats. Walsh characterized the complaint as a collateral attack on the judgment in Case No. 2012 CV 8182, which Walsh claimed already determined Roberts’s entitlement to compensation for the services he rendered to the receiver. Accordingly, Walsh alleged that Roberts’s claims were barred by res judicata. Jackass Flats raised a similar argument, stating “the only remedy for an alleged contractee with a receiver is through pursuit in the receivership. On those issues this court has already spoken.”

{¶ 6} Roberts did not respond to the motions to dismiss, but subsequently filed an amended complaint and a motion to substitute Sorg for Jackass Flats as the party-defendant. The attempted amended complaint named Sorg, in his capacity as receiver for Jackass Flats, as the party-defendant, and Sorg’s name was substituted for Jackass Flats throughout the complaint. The amended complaint was otherwise substantially the same as the original complaint.

{¶ 7} On July 27, 2015, prior to any response by Sorg to the amended complaint,

the trial court sustained the motions to dismiss upon finding that Roberts was simply seeking to collaterally attack the court's judgment in Case No. 2012 CV 8182, wherein the court had already issued its decision relating to Roberts's claims against the receivership. The trial court also dismissed the complaint on the ground that Roberts had not sought leave to bring a claim against Sorg.

{¶ 8} Roberts thereafter appealed from the trial court's decision dismissing the complaint. On appeal, Roberts contended that the trial court "improperly dismissed the Appellant's Complaint based upon the principle of res judicata." After reviewing the matter, we agreed, noting that "in the absence of allegations in the complaint that reflect the trial court's actions in Case No. 2012 CV 8182, the trial court could not grant a Civ.R. 12(B)(6) on res judicata grounds" as " '[a] trial court is not permitted to take judicial notice of the record in other litigation, even when that action was before the same court.' " *Roberts v. Jackass Flats, L.L.C.*, 2d Dist. Montgomery No. 26811, 2016-Ohio-610, ¶ 12, quoting *Rodefer v. McCarthy*, 2015-Ohio-3052, 36 N.E.3d 221, ¶ 31 (2d Dist.).

{¶ 9} We further explained that:

Although the trial court was aware of Roberts's filings in Case No. 2012 CV 8182 and of the common pleas court's ruling in that case, Roberts did not attach any documents from Case No. 2012 CV 8182 to either complaint. As a result, the trial court was not permitted to consider the record in Case No. 2012 CV 8182 in ruling on the motions to dismiss. Based on the allegations in the complaint alone, the trial court erred in concluding that Roberts's complaint was a collateral attack on the judgment in Case No. 2012 CV 8182 and in dismissing the complaint on res judicata grounds.

Id. at ¶ 13.

{¶ 10} We also held that since Sorg did not seek dismissal of the lawsuit against him due to Roberts's failure to seek leave of court to bring a claim against him as receiver for Jackass Flats, the trial court erred in raising and granting this objection sua sponte.

Id. at ¶ 16. Accordingly, the matter was reversed and remanded for further proceedings.

Id. at ¶ 17.¹

{¶ 11} Shortly after our decision, on February 26, 2016, Sorg, in his capacity as receiver, filed an answer to Roberts's amended complaint. In his answer, Sorg raised multiple defenses including that Roberts failed to obtain leave of court to bring a claim against him as receiver.

{¶ 12} A month later, Sorg filed a motion for summary judgment alleging the same res judicata argument that Jackass Flats had previously raised regarding Case No. 2012 CV 8182, i.e., that Roberts's claims were already passed upon in Case No. 2012 CV 8182. Although Sorg admitted that Roberts was not a party in Case No. 2012 CV 8182, he argued that Roberts's claims are the same claims that were brought before the court in the prior action and were fully adjudicated. Sorg also argued in his motion for summary judgment that Roberts failed to request leave of court prior to pursuing an action against him and that he had not waived the requirement for Roberts to obtain said leave. Sorg attached no evidence in support of his motion for summary judgment.

¹In ruling on Roberts's appeal, we also stated in a footnote of our opinion that the trial court erred in granting Walsh's motion to dismiss because he was not named as a party to the action, was not mentioned in Roberts's complaint, and his status as a member of Jackass Flats did not authorize him to file a motion in the lawsuit. However, because Walsh's motion to dismiss raised substantially similar issues as the motion to dismiss filed by Jackass Flats, we found that the trial court's error was harmless. *Roberts*, 2d Dist. Montgomery No. 26811, 2016-Ohio-610 at fn. 3.

{¶ 13} On April 14, 2016, Roberts filed a memorandum opposing Sorg's motion for summary judgment arguing that Sorg failed to submit any evidence in support of his motion and failed to meet his burden to demonstrate that there is no genuine issue of material fact. Roberts further argued that he was never a party to Case No. 2012 CV 8182 and that he had tried to submit a claim in that case, but it was stricken. In addition, Roberts alleged that he was denied leave to intervene in the receivership, which prohibited him from engaging in discovery, presenting evidence, or cross-examining witnesses. In his memorandum, Roberts also requested the trial court to grant him leave to pursue the action against Sorg as the receiver.

{¶ 14} In ruling on Sorg's motion for summary judgment, and in light of our decision in the prior appeal of this matter, the trial court determined that it was not permitted to take judicial notice of the court proceedings in Case No. 2012 CV 8182 even though that action was before the same court and involved the same subject matter. Accordingly, the trial court determined that because Sorg provided no proper evidence under the Civ.R. 56(C) summary judgment standard that concerned the record in Case No. 2012 CV 8182, the court could not make a decision on Sorg's claim alleging res judicata.

{¶ 15} The trial court did, however, deny Roberts leave to pursue an action against Sorg, and granted summary judgment in favor of Sorg on that basis. In denying leave, the trial court found that the request for leave was inappropriate. The court also found that there was no statutory authority permitting Roberts to sue Sorg as receiver and that there were insufficient grounds to let Roberts pursue the action.

{¶ 16} Roberts now appeals from the trial court's decision denying him leave to bring an action against Sorg and granting summary judgment in favor of Sorg.

First and Second Assignments of Error

{¶ 17} Because Roberts's assignments of error are interrelated, we will address them together. They are as follows:

- I. DID THE TRIAL COURT ABUSE ITS DISCRETION BY IMPROPERLY DENYING PLAINTIFF-APPELLANT LEAVE TO PURSUE THIS ACTION?
- II. DID THE TRIAL COURT DEPRIVE APPELLANT OF DUE PROCESS OF LAW BY DENYING APPELLANT LEAVE TO FILE SUIT AND GRANTING SUMMARY JUDGMENT IN FAVOR OF THE APPELLEE?

{¶ 18} Under his assignments of error, Roberts contends that the trial court erred and abused its discretion in denying him leave to bring his action against Sorg as receiver. Since the trial court granted summary judgment in favor of Sorg on that basis, Roberts also contends that the summary judgment decision was made in error. We disagree with both of Roberts's claims.

{¶ 19} Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C). Further, "summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the

party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.” *Id.*

{¶ 20} We have previously noted that “the Ohio Supreme Court has held that a receiver cannot be sued, in the absence of statutory authority, without leave of the court that appointed him or her.” *Roberts*, 2d Dist. Montgomery No. 26811, 2016-Ohio-610 at ¶ 15, citing *Dorr Run Coal Co. v. Nelsonville Coal Co.*, 21 Ohio Dec. 198, 11 Ohio N.P. 38, (1910). *Accord Sherrets v. Tuscarawas Sav. & Loan Co.*, 78 Ohio App. 307, 310, 70 N.E.2d 127 (5th Dist.1945), quoting 34 Ohio Jurisprudence, 1079, Section 167 (observing that as a general rule, “ ‘a receiver cannot be sued, in the absence of statutory authority, without leave of the court that appointed him’ ”); *Barton v. Barbour*, 104 U.S. 126, 128, 14 Otto 126, 26 L.Ed. 672 (1881) (stating that “[i]t is a general rule that before suit is brought against a receiver leave of court by which he was appointed must be obtained”).

{¶ 21} We have also explained that “ ‘[a] failure to obtain leave of court to sue a receiver does not affect the jurisdiction of the court in which the suit is brought to hear and determine it.’ ” *Roberts* at ¶ 15, quoting *Tobias v. Tobias*, 51 Ohio St. 519, 38 N.E. 317 (1894), syllabus. “ ‘The [leave] requirement is for the protection of the receiver; and, if waived by him [or her], no advantage can be taken of the omission by anyone else.’ ” *Id.*, quoting *Tobias*. *Accord Fusion Oil, Inc. v. American Petroleum Retail, Inc.*, N.D. Ohio No. 3:05 CV 7434, 2006 WL 2010770, *2 (July 17, 2006), citing *Tobias* at 520-521; Annotation, Failure to obtain permission to sue receiver as affecting jurisdiction of action, 29 A.L.R. 1460 (1924) (“Though leave to sue a receiver is generally required * * *, the great weight of authority is to the effect that failure to secure permission to sue a receiver appointed by a state court does not affect the jurisdiction of the court in which the suit is

brought. In the jurisdictions so holding, it is commonly held that the defect is merely technical, and may be remedied by order or may be waived.”).

{¶ 22} Nevertheless, it is entirely within the trial court's discretion whether to grant a party's request for leave to bring an action against a receiver. *Bancohio Nat. Bank v. Southland Lanes, Inc.*, 3d Dist. Seneca No. 13-87-10, 1988 WL 46193, *3 (May 12, 1988); *Huntington Nat. Bank v. Weldon F. Stump & Co., Inc.*, 6th Dist. Lucas No. L-06-1398, 2008-Ohio-2096, ¶ 20, citing *Bank One, N.A. v. The Oaks of Medina*, 9th Dist. Medina No. 04CA0080-M, 2005-Ohio-3546, ¶ 9. Accordingly, “a trial court's decision to grant or deny a request to bring claims against a receiver will not be overturned on appeal absent a finding of abuse of discretion.” *PNC Bank, Natl. Assn. v. Kidz Real Estate Group, L.L.C.*, 6th Dist. Lucas No. L-11-1303, 2013-Ohio-1357, ¶ 8, citing *Bank One, N.A.* at ¶ 9.

{¶ 23} “ ‘Abuse of discretion’ has been defined as an attitude that is unreasonable, arbitrary or unconscionable.” *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990), citing *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87, 482 N.E.2d 1248 (1985). Most abuses of discretion “will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.” *Id.* “A decision is unreasonable if there is no sound reasoning process that would support that decision.” *Id.*

{¶ 24} “[I]n determining on review whether there has been an abuse of that discretion it is not our function to determine the merits of the action which the person seeking leave desires to bring. In making our determination we are confined to the trial court record which has been properly brought before us on appeal and, in the absence of transcripts of proceedings we may not take as evidentiary fact the mere assertions of the

parties in their briefs and memoranda.” *Bancohio Nat. Bank at* *3.

{¶ 25} We also note that it is well-established that “[a] motion must be separately stated, and a ‘passing request’ for relief contained in the body of an unrelated pleading is not cognizable.” *Price v. Matco Tools*, 9th Dist. Summit No. 23583, 2007-Ohio-5116, ¶ 18, citing *White v. Roch*, 9th Dist. Summit No. 22239, 2005-Ohio-1127, ¶ 8. In *White*, the Ninth District Court of Appeals held that a trial court did not abuse its discretion in denying plaintiff-appellant leave to amend her complaint where she made a passing request for said leave in her brief opposing the defendant’s motion to dismiss as opposed to filing a formal motion for leave. *White* at ¶ 8.

{¶ 26} In this case, Roberts did not seek leave to bring an action against Sorg as the receiver until nine months after he filed his amended complaint that attempted to replace Sorg as the party-defendant. When Roberts did eventually seek leave, the request was embedded in his memorandum opposing Sorg’s motion for summary judgment, not in a separate, formal motion. By the time Roberts requested leave to pursue his action against Sorg, Sorg had already filed an answer to the amended complaint asserting the defense that Roberts had failed to obtain leave to sue him.

{¶ 27} Because Sorg did not waive the requirement for Roberts to obtain leave of court prior to suing him, and because Roberts failed to seek leave of court in a separate motion, we do not find that it was unreasonable for the trial court to find that Roberts’s request for leave was inappropriate, as Robert’s request was not cognizable since it was embedded in an unrelated pleading that was filed nine months after he had already attempted to bring the action against Sorg.

{¶ 28} It was also not unreasonable for the trial court to conclude that there was

no statutory authority permitting Roberts to bring an action against Sorg as the receiver. While Roberts argues that R.C. 2735.04 (B)(1) empowers the receiver to “bring and defend actions in the receiver’s own name as receiver,” Roberts fails to point to an applicable statute that permits him to pursue an action against a receiver without properly requesting and obtaining leave of court. See *Huntington Nat. Bank*, 6th Dist. Lucas No. L-06-1398, 2008-Ohio-2096 at ¶ 20 (“Once appointed, a receiver may bring and defend actions in his own name ‘as receiver,’ and ‘generally do such acts respecting the property as the court authorizes.’ R.C. 2735.04. In order for parties to file suit against a receiver for actions taken regarding the receivership estate, however, leave of court is required.”), citing *Barton*, 104 U.S. at 136, 14 Otto 126, 26 L.Ed. 672. (Other citations omitted.)

{¶ 29} For the foregoing reasons, we do not find that the trial court abused its discretion in denying Roberts leave to pursue his action against Sorg. In turn, we necessarily find that the trial court’s decision granting summary judgment on that basis was not in error, as without leave to pursue the action, there is no set of facts by which Roberts can prevail, and Sorg is therefore entitled to judgment as a matter of law.

{¶ 30} Roberts’s First and Second Assignments of Error are overruled.

Conclusion

{¶ 31} Having overruled both of Roberts’s assignments of error, the judgment of the trial court is affirmed.

.....

HALL, P.J. and FROELICH, J., concur.

Copies mailed to:

Grant D. Kerber

Matthew C. Sorg

Gary Leppla

Hon. Mary Katherine Huffman