IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

Karry Gemmell, et al.,	:	
	:	
Plaintiffs-Appellees,	:	Case No. 15CA16
	:	
v.	:	
	:	
Mark Anthony, et al.,	:	
	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants.	:	
	:	**RELEASED: 06/22/2015**

APPEARANCES:

Scott E. North & Christen M. Blend, Porter, Wright, Morris & Arthur, LLP, Columbus Ohio for Defendant-Appellant.

Dale D. Cook & Michael L. Close, Isaac Wiles Burkholder & Teetor, LLC, Columbus Ohio for Plaintiffs-Appellees.

McFARLAND, A.J.

{¶1} Appellants Mark Anthony and M&T Property Investments, Ltd. filed an appeal from the trial court's judgment entry granting the receiver, Reg Martin of Martin Management Services, Inc., authority to borrow funds for the purpose of renovating and reopening operations of the zip line park, including money for working capital, and to provide administrative priority to any party who lends money or provides assets on a credit basis to the receiver. The entry also authorizes the receiver to pay monthly rent on the park's premises in the sum of $500 and prohibits any of the parties in the case from interfering with the receiver's efforts to re-open and operate the park and from

entering the park site unless the receiver gives written consent. The order extends for five years or until further order of the court.

{¶2} Appellees filed a motion to dismiss the appeal on the ground that the judgment entry appealed from is not a final appealable order. Appellees argue that, although a previous order appointing the receiver is a final appealable order and the appeal of it is currently before this court in *Gemmell v. Anthony*, 4th Dist. App. No. 14CA11, the entry appealed from here is an interim order that governs the receiver's ongoing administration of the assets and does not affect a substantial right. Therefore, they argue that it is not a final order under R.C. 2505.02(B)(2). And because it does not terminated the receivership and make a final distribution of assets, the entry does not determine the action with respect to a provisional remedy so it does not satisfy R.C. 2505.02(B)(4)(a). Appellants argue that the entry grants a provisional remedy and is a final appealable order under R.C. 2505.02(B)(4)(a) and (b).

{¶3} We find that the trial court's entry is not a final appealable order under either R.C. 2505.02(B)(2) or (4). Thus, we **GRANT** appellees' motion to dismiss.

Legal Analysis

{¶4} Ohio law provides that appellate courts have jurisdiction to review only final orders or judgments. *See, generally*, Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505 .02. If an order is not final and appealable, an appellate court has no jurisdiction to review the matter and it must be dismissed. "An order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B), are met." *State ex rel. Scruggs v. Sadler,* 97 Ohio St.3d 78, 2002-Ohio-5315, 776

N.E.2d 101; *see also*, *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 541 N.E.2d 64, syllabus. The threshold requirement, therefore, is that the order satisfies the criteria of R.C. 2505.02.

{¶5} For purposes of this appeal, the relevant portions of R.C. 2505.02 define a final appealable order as follows:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
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> * * *
>
> (2) An order that affects a substantial right in an action made in a special proceeding or upon a summary application in an action after judgment;
>
> * * *
>
> (4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶6} We analyze the judgment entry under both R.C. 2505.02(B)(2), governing special proceedings, and R.C. 2505.02(B)(4), governing provisional remedies, because the Supreme Court of Ohio has held that an order appointing a receiver is an order affecting a substantial right made in a special proceeding and also that the proceeding for the appointment of a receiver is ancillary to the underlying proceeding and may be considered a provisional remedy appealable under R.C. 2505.02(B)(4). *See Forest City Invest. Co. v. Haas*, 110 Ohio St. 188, 143 N.E. 549 (1924), paragraph one of syllabus

("An order appointing a receiver is an order affecting a substantial right made in a special proceeding"); *Community First Bank & Trust v. Dafoe,* 108 Ohio St.3d 472, 476, 2006-Ohio-1503, 844 N.E.2d 825, ¶ 26 ("We agree that the appointment of a receiver, attachment, and a judgment ordering medication constitute ancillary proceedings. They are all separate procedures tied to a main action, acting in furtherance of the main action, but with their own lives.").

A. Analysis under R.C. 2505.02(B)(2) – Special Proceeding

{¶7} A judgment entry qualifies as a final, appealable order under R.C. 2505.02(B)(2) if it "affects" a "substantial right" as defined by R.C. 2505.02(A)(1) and was "made in a special proceeding or upon a summary application in an action after judgment" as set forth in R.C. 2505.02(B)(2). Receivership proceedings are special proceedings. *Forest City Invest. Co., supra; PNC Bank, N.A. v. Creative Cabinet Sys., Inc.*, 2nd Dist. Darke App. Nos. 2013-CA-14, 2013-CA-15, 2014-Ohio-3264, ¶ 9, citing *Huntington Natl. Bank v. HPM Div., Taylor's Indus. Servs. L.L.C.*, 10th Dist. Franklin No. 10AP200, 2010-Ohio-6176, ¶ 16, n.1. However, if an order does not affect a substantial right, it is not a final appealable order under R.C. 2505.02(B)(2).

{¶8} A "substantial right" is defined as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). An order affects a substantial right when, if not immediately appealable, it would foreclose appropriate relief in the future. *Bell v. Mt. Sinai Med. Ctr.,* 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993).

{¶9} Four other appellate districts have reviewed interim orders that govern the receiver's ongoing administration of the assets and have held that these interim orders do not affect a substantial right and are not final appealable orders. *See PNC Bank, N.A. v. Creative Cabinet Sys., Inc.,* 2nd Dist. Darke App. Nos. 2013-CA-14, 2013-CA-15, 2014-Ohio-3264 (trial court order reimbursing receiver for $23,000 paid for Florida sales tax and ordering balance of $227,000 to be placed in escrow with the court did not affect a substantial right and was not a final appealable order under either R.C. 2505.02(B)(2) or (4)); *Leonard v. Georgesville Center, LLC,* 10th Dist. Franklin App. No. 13AP441, 2013-Ohio-5713 (trial court order approving receiver's motion to retain real estate broker, to retain counsel, and to approve the valuation used by the receiver to create a listing price was not a final appealable order because the order did not affect a substantial right as the appellant could challenge the fairness of any future sale price when an order approving the definitive disposition of assets was issued); *Whipps v. Ryan,* 10th Dist. Franklin App. No. 12AP509, 2013-Ohio-4334, ¶ 29 (a trial court order that approved the receiver's final application for fees and costs was not a final appealable order because it did not terminate the receivership and thus further action by the court regarding the receivership was required); *Champaign Natl. Bank v. Preferred Capital, Inc.,* 9th Dist. Summit App. No. 24180, 2009-Ohio-6699 (trial court order directing the receiver to pay outstanding expenses of the business and wind down the receivership was not a final appealable order because the entry did not award the assets to any party, did not terminate the receivership, and anticipated further action by the receiver); *Hall v. Hall,* 11th Dist. Geauga App. No. 2001-G-2393, 2002-Ohio-4363

(order refusing to award wages to party seeking compensation from receiver was not a final appealable order because the receivership was not terminated); *see generally,* Painter & Pollis, *Ohio Appellate Practice,* Section 2.15 (2014) ("an order appointing a receiver does affect a substantial right in a special proceeding—although interim orders relating to the receivership that can be rectified by an appeal after the conclusion of the case do not").

{¶10} Here the judgment entry does not order the final disposition of assets or terminate the receivership. Rather, it directs the receiver's ongoing efforts by allowing him to borrow additional funds of up to $100,000 for the purpose of renovating and reopening operations at the zip line park and gives an administrative priority claim to creditors willing to provide credit to the receiver. It authorizes the receiver to use cash flow to pay for the normal business operations and repayment of the loan, with the remaining funds held for distribution pursuant to future orders of the court. It authorizes the receiver to pay rent on the premises in the sum of $500 per month and operate the park for up to five years or until the court terminates the receivership. Last, it prevents the parties from interfering with the receiver's efforts or entering the zip line park without the receiver's written permission. Thus, the entry is like those addressed in the cases from other districts – an interim order governing the ongoing administration of the receivership. The entry does not affect a substantial right as it does not make a final distribution of assets or terminate the receivership and it anticipates further action by the receiver. The receiver was previously appointed to take over the operations of the zip line park and the judgment entry authorizes the receiver to take steps in furtherance of

his appointed duties. The appellants are not foreclosed from challenging the receiver's ultimate distribution of assets and the trial court's future termination of the receivership at the close of the case. Thus we find that the judgment entry is not a final appealable order under R.C. 2505.02(B)(2) because it does not affect a substantial right. Appellants do not need to appeal the entry immediately; appropriate relief is available to them in the future. *Bell v. Mt. Sinai Med. Ctr.,* 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993).

B. Analysis under R.C. 2505.02(B)(4) – A Provisional Remedy

{¶11} Appellants focus exclusively on the provisional remedy provision in R.C. 2505.02(B)(4). They argue that the judgment entry grants a provisional remedy to the receiver by allowing him to pay rent for the park premises, which they assert is a contentious issue and the subject of underlying business litigation. Thus, they claim the first requirement of R.C. 2505.02(B)(4) is met because the order grants a provisional remedy to the receiver. However, while the case law holds that the granting of a receivership is a provisional remedy, it is less clear that each subsequent interim order in furtherance of the receiver's duties constitutes a provisional remedy:

> [N]o "order" is *ever* a "provisional remedy" under the statute. The General Assembly expressly defined a "provisional remedy" as a type of *proceeding.* R.C. 2505.02(A)(3). An "order" is thus properly understood as the mandate from the trial court that grants or denies the particular relief at issue in that proceeding—not as the provisional remedy itself. See R.C. 2505.02(B)(4). (Emphasis in original).

State v. Muncie, 91 Ohio St.3d 440, 447-448, 2001-Ohio-93, 746 N.E.2d 1092.

{¶12} Thus while the appointment of a receiver occurs in a proceeding ancillary to the main action, the subsequent interim orders governing the administration of the receivership would themselves be "ancillary" to the ancillary proceeding:

> [F]or purposes of R.C. 2505.02(A)(3)'s definition, "[a]n ancillary proceeding is one that is attendant upon or aids another proceeding." *Bishop,* 134 Ohio App.3d at 324, 730 N.E.2d at 1081. The *Bishop* court derived its definition of an ancillary proceeding from *Sorg v. Montgomery Ward & Co., Inc.* (Dec. 17, 1998), Erie App. No. E–98–057, unreported, 1998 WL 904945. *Bishop* at 324, 730 N.E.2d at 1081. As the *Sorg* court noted, Black's Law Dictionary defined "ancillary" as "'[a]iding; attendant upon; describing a proceeding attendant upon or which aids another proceeding considered as principal. Auxiliary or subordinate.'" *Sorg,* 1998 WL 904945 at *3, citing Black's Law Dictionary (5 Ed.1979) 78. See, also, Black's Law Dictionary (7 Ed.1999) 85 (defining "ancillary" as "[s]upplementary; subordinate").
>
> The *Bishop* and *Sorg* courts' understanding of the term "ancillary" corresponds to the word's common and ordinary meaning, as well as to this court's prior understanding of the term. See R.C. 1.42; see, also, *Forest City Invest. Co. v. Haas* (1924), 110 Ohio St. 188, 192, 143 N.E. 549, 550. In *Forest City,* we noted that the appointment of a receiver occurs in a proceeding "*ancillary* to the main action." (Emphasis added.) *Id.* The proceeding for the appointment of a receiver *aids the principal proceeding*—the underlying litigation—for the receiver conserves the interests of litigants with respect to property that is in the custody of the court during the course of the principal litigation. *Id.* at 192–193, 143 N.E. at 550; see, also, *Lincoln Tavern, Inc. v. Snader* (1956), 165 Ohio St. 61, 68, 59 O.O. 74, 78, 133 N.E.2d 606, 612 (noting that "an attachment is a provisional remedy; an ancillary proceeding which must be appended to a principal action and whose very validity must necessarily depend upon the validity of the commencement of the principal action").

Muncie, at 449–450.

{¶13} Applying this understanding of the statutory term "ancillary" we find that the application for an appointment of a receivership under R.C. 2735.01, et seq. is an ancillary proceeding, which R.C. 2505.02(A)(3) defines as a "provisional remedy", and an order granting a receivership is a mandate from the trial court that grants or denies

the particular relief at issue in that provisional remedy. However, subsequent interim orders governing the receivership's operations are not ancillary to the main action, but are ancillary to the receivership proceedings, which is itself ancillary. Thus, it is not clear that an interim order in a receivership proceeding "grants or denies a provisional remedy" as that term is used in R.C. 2505.02(B)(4) and explained by the Supreme Court of Ohio. Appellants cite no cases which have held that an interim receivership order is an order granting or denying a provisional remedy under R.C. 2505.02(B)(4).

{¶14} Nevertheless, assuming that the interim order is an order that grants or denies a provisional remedy under R.C. 2505.02(B)(4), we find that it fails to satisfy *either* subpart (a) or (b), and *both* (a) and (b) must be met for an order to be a final appealable order under R.C. 2505.02(B)(4). As to R.C. 2505.02(B)(4)(a), the interim order does not determine the action with respect to the provisional remedy and prevent a judgment in the action in favor the appellants with respect to the provisional remedy. The provisional remedy is the proceeding for the appointment of a receivership. The order appointing a receiver is a final appealable order and is currently pending on appeal. The judgment entry in this appeal authorizes the receiver to obtain additional financing and reopen and operate the zip line park without interference from the parties. Thus, interim order does not determine the action and prevent a judgment in favor of the appellants, particularly not the portion that most directly addresses the parties – the prohibition against interference with the receiver. Parties have no right to interfere with a court-appointed receiver's efforts; the receiver is the arm of the court. *Hummer v. Hummer*, 8th Dist. Cuyahoga App. No. 96132, 2011-Ohio-3767, ¶ 18.

{¶15} Appellants argue that R.C. 2505.02(B)(4)(a) is met because the portion of the order authorizing the receiver to pay rent of $500 makes a determination of the rent M&T will receive and therefore determines the action against it and prevents a judgment in its favor. Appellants contend that the lease and the receiver's right to occupy the premises is a contested issue in underlying business litigation and the interim order makes a final and appealable determination as to this dispute. However, the order only authorizes the receiver to pay monthly rent in the sum of $500. It does not make any factual findings or legal conclusions concerning any alleged dispute or possible claims that might exist in the underlying business litigation, nor does it prevent the parties from obtaining a judgment in that litigation in their favor. Accordingly the judgment entry does not meet the requirement of R.C. 2505.02(B)(4)(a).

{¶16} Finally, under R.C. 2505.0(B)(4)(b) an order arising from a provisional remedy is not a final order unless the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action. The statute recognizes that, in spite of courts' interest in avoiding piecemeal litigation, occasions may arise in which a party seeking to appeal from an interlocutory order would have no adequate remedy from the effects of that order on appeal from final judgment. In some instances, "[t]he proverbial bell cannot be unrung and an appeal after final judgment on the merits will not rectify the damage" suffered by the appealing party. *Id* at 451.

{¶17} As we determined in our analysis under R.C. 2505.02(B)(2), there is nothing in the court's order that affects a substantial right or requires an immediate

appeal. There is no final disposition of assets and no termination of the receivership. The order does not "effectively evict Appellants from their property" as they contend. The receiver was appointed previously, thus any alleged "eviction" occurred when the receiver was appointed to take control of the zip line park operations. Additionally, although appellants complain that the order forces M&T to accept "nominal rent" that is "woefully below market rate," the lease appellants attached to their memorandum states that M&T agrees to a monthly rental payment of $500 and that on March 29, 2015, the lease could be extended for an additional five-year term at the same $500 monthly rental payment. Thus, while we understand the appellants claim to have underlying business litigation regarding the parties' rights under the lease or possible regrets over the agreed upon rent, the court's interim order does nothing more than maintain the status quo and authorize the receiver to make monthly rent payments in the sum of $500. Thus, there is no need for immediate appellate review. The appellants will have a meaningful and effective remedy by an appeal after the final judgment is reached. *See PNC Bank, N.A. v. Creative Cabinet Sys., Inc.,* 2nd Dist. Darke App. Nos. 2013-CA-14,2013-CA-15, 2014-Ohio-3264, ¶ 13-14 (a interim order in a receivership proceeding is not a final appealable order under R.C. 2505.02(B)(4)(b) because it merely maintained the status quo "so there is no need for 'swift and decisive action' to preserve the funds"); *Dudek v. Lesnick*, 11th Dist. Trumbull App. No. 2010-T-58, 2010-Ohio-3251, ¶ 18 (holding that an entry does not satisfy R.C. 2505.02(B)(4)(b) that "merely maintains the status quo pending the trial court proceedings. Appellants will have a meaningful and effective remedy by ay of an appeal once final judgment is

reached as to all claims and parties when the case is decided and/or dismissed.”). Thus, interim order does not satisfy R.C. 2505.02(B)(4)(b).

{¶18} Accordingly, based upon the foregoing reasons, we find the judgment entry appealed is not a final appealable order and the appellees’ motion is **GRANTED** and the appeal is hereby **DISMISSED**.

{¶19} The clerk shall serve a copy of this order on all counsel of record at their last known addresses by ordinary mail.

{¶20} MOTION TO DISMISS GRANTED. APPEAL DISMISSED. COSTS TO APPELLANT. IT IS SO ORDERED.

Harsha, J. & Abele, J.: Concur.

FOR THE COURT

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Matthew W. McFarland
Administrative Judge