

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

PNC Bank, National Association

Court of Appeals No. L-11-1303

Appellee

Trial Court No. CI0201003193

v.

Kidz Real Estate Group, LLC, et al.

**DECISION AND JUDGMENT**

Appellant

Decided: April 5, 2013

\* \* \* \* \*

Patricia B. Fugée, for appellee PNC Bank, National Association.

Kathleen M. Trafford and Polly J. Harris, for appellee McKinley, Inc.

Steven L. Diller, for appellant.

\* \* \* \* \*

**OSOWIK, J.**

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, in which the trial court denied a motion filed by appellant, Kidz Real Estate Group, LLC (“Kidz”), in which appellant (1) objected to the discharge of a receiver appointed to manage appellant’s property, and (2) asked the trial court for leave to assert certain

individual claims against the receiver and her employer, McKinley, Inc. On appeal, appellant sets forth the following three assignments of error:

First Assignment of Error:

The trial court erred as a matter of law when it determined that leave of court was required in this case for appellant to file claims against the receiver.

Second Assignment of Error:

The trial court violated appellant's due process rights by failing to grant appellant's request for an evidentiary hearing on its motion to file claims against the receiver.

Third Assignment of Error:

The trial court abused its discretion when it denied appellant's motion for leave to assert claims against the receiver.

{¶ 2} Appellant Kidz is a real estate investment corporation owned by Vladimir and Sharon Sklarov, and is part of a trust set up by the Sklarovs on behalf of their children. At all times relevant to this appeal, Kidz was the owner of a multi-building apartment complex located on Cribb Street in Toledo, Ohio, known as Riviera Maia. Appellee, PNC Bank, National Association ("PNC"), is the holder of a note and mortgage on the Riviera Maia.

{¶ 3} Kidz defaulted on its obligations to PNC and, on April 6, 2010, PNC initiated foreclosure proceedings against Kidz,<sup>1</sup> in which it sought to obtain judgment in the amount of \$8,367,583.80. On August 12, 2010, the trial court granted PNC's motion for the appointment of a receiver to manage the property, and appointed Patricia Moutes of the real estate investment firm McKinley, Inc., to fulfill that role. On August 13, 2010, Kidz filed an appeal from the trial court's order appointing a receiver ("first appeal"), and also asked the court for a stay of its order pending the outcome of that appeal. On August 24, 2010, PNC filed a memorandum in opposition to the stay, and also requested a hearing on the issue.

{¶ 4} The first appeal was never concluded because Kidz dismissed it as part of a stipulated order executed by both parties on June 30, 2011. In the stipulated order, the parties agreed that Kidz would sell the Riviera Maia complex and pay over all receipts from the sale to PNC, after which PNC would seek to terminate the receivership and discharge the receiver. In accordance with the parties' agreement, the receiver filed a motion for approval of the final receiver's report on August 16, 2011. On August 24, 2011, the 81-page final monthly report was filed. Included in that report was information regarding leasing activity at Riviera Maia for August 2011, including rental and occupancy rates, repairs needed, operating expenses, and revenue received as of August 15, 2011.

---

<sup>1</sup> PNC's foreclosure action was also brought against other entities that are not parties to this appeal.

{¶ 5} On August 25, 2011, Kidz filed an objection to the receiver's motion for discharge and release and a motion to leave to file individual complaints against the receiver and McKinley. In support of its request for leave to file a complaint, Kidz stated that the receiver failed to properly manage the apartment complex, including failure to effect adequate repairs and to assure adequate occupancy of the units. In support, Kidz stated that occupancy of Riviera Maia was 31.15 percent in August 2011. To highlight the receiver's mismanagement, Kidz cited statements made by Kenneth Polsinelli of McKinley, who represented at the receiver's appointment hearing that the occupancy rate of the apartments was as high as 45 percent in March 2010. Polsinelli also stated in this affidavit that, under McKinley's management, it was reasonable to project that occupancy of the units could approach 90 percent. Kidz also asserted that the receiver failed to adequately respond to a third-party lawsuit against Kidz, resulting in a default judgment of \$303,537.86.

{¶ 6} The receiver filed a memorandum in opposition to Kidz's motion for leave on September 7, 2011. On October 28, 2011, the trial court issued an order in which it denied Kidz's request for leave to sue Moutes and McKinley for allegedly acting "negligently, intentionally and/or maliciously in managing and operating the Toledo properties, and/or in preventing waste upon same." In making its decision, the trial court relied on long-established Ohio case law which holds that a party must have leave of court to bring suit against a receiver in his or her individual capacity. *Bank One, N.A. v. Oaks of Medina*, 9th Dist. No. 04CA0080-M, 2005-Ohio-3546, ¶ 9, quoting *Barton v.*

*Barbour*, 104 U.S. 126, 136, 36 L.Ed. 672 (1881). On November 28, 2011, Kidz filed a timely notice of appeal (“second appeal”) in this court.

{¶ 7} In its first assignment of error, Kidz asserts that the trial court erred by finding that leave of court is required as a matter of law before Kidz can bring a lawsuit against the receiver in this case. In its second assignment of error, Kidz asserts that the trial court violated its right to due process by not holding an evidentiary hearing before denying its request for permission to sue the receiver. In its third assignment of error, Kidz asserts that the trial court erred when it denied the motion for leave to assert claims against the receiver. Because these three assignments of error are interrelated, we will consider them together.

{¶ 8} Generally, 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. *Bank One v. The Oaks of Medina*, 9th Dist. No. 04CA90080-M, 2005-Ohio-3546, ¶ 9. (Citation omitted.) An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 276 (1983).

{¶ 9} This court has recognized that, pursuant to R.C. 2735.01(B), a receiver may be appointed

[i]n 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 \* \* \*.

{¶ 10} Once appointed, R.C. 2735.04 authorizes a receiver, acting under the control of the appointing court, to “bring and defend actions in his own name as receiver, take and keep possession of property, receive rents, collect, compound for, and compromise demands, make transfers, and generally do such acts respecting the property as the court authorizes.”

{¶ 11} Ohio courts have also recognized that “a receiver can only be sued in his or her official capacity for actions taken under a court’s order.” *INF Ent., Inc. v. Donnellon*, 133 Ohio App.3d 787, 789, 729 N.E.2d 1221 (1st Dist.1999). Satisfaction of such judgments “can be obtained only from the fund in [the receiver’s] hands as directed by the court appointing him.” *Id.*, citing *Murphy v. Holbrook*, 20 Ohio St. 137, 142-143 (1870). Accordingly, where a party’s claim against the receiver involves the alleged negligence of the receiver, or any other fact upon which his liability depends, \* \* \* the court \* \* \* in the exercise of its legal discretion \* \* \* may allow him to sue the receiver in a court of law, or direct the trial of a feigned issue to settle the contested facts. *Barton*, 104 U.S. at 130-131, 26 L.Ed. 672; *Murphy* at 142; *see also Huntington Natl. Bank v. Weldon F. Stump & Co.*, 6th Dist. No. L-06-1398, 2008-Ohio-2096, ¶ 20. *Compare Bank One v. The Oaks of Medina*, 9th Dist. No. 04CA0080-M, 2005-Ohio-3546 (The trial court

did not err by denying leave to sue the receiver in a case where evidentiary hearings were held and summary judgment motions were filed.)

{¶ 12} In addition to the above obligations, “a receiver also has a personal duty to “faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.” R.C. 2735.03. In other words, “[t]he receiver acts in a fiduciary capacity and must use ordinary care in administering the assets of the corporation. If the receiver exceeds the authority granted by the court or fails to use ordinary care, the general rule is that he or she may be sued in a personal capacity.” *INF Ent., Inc., supra*, at 789.

{¶ 13} In this case, the trial court’s order appointing the receiver states, in relevant part, that:

No legal actions, administrative proceedings, self-help remedies, or any other acts or proceedings \* \* \* shall be taken or continued against the Receiver, or the assets of the Receiver or any part thereof without leave of this Court first having been obtained. The Receiver and the Receiver’s attorneys and agents \* \* \* shall not be liable to anyone for their acts or omissions, except upon a finding by this Court that such acts or omissions are outside the scope of the matter described [herein] \* \* \*

{¶ 14} The appointing order specifically states that the receiver shall:

Care for and maintain the Receivership Property;

Sell the receivership Property as expeditiously as is compatible with the best interests of the parties in interest, subject to approval of PNC and on notice and hearing;

Collect all rents and proceeds of the Real Property;

Account for all Receivership Property received;

Prepare a complete inventory of the Receivership Property;

Keep records of receipts and of the disposition of money and Receivership Property;

Report to the Court and the parties the financial condition of the Receivership Property and progress of administration;

File any information required to be filed with any governmental unit charged with responsibility for collection or determination of tax arising out of the operation.

{¶ 15} The appointment order further states that “[t]he Receiver and McKinley shall be immune, as an officer of this Court for any personal liability of any kind arising from, caused by or in any way connected with exercising any rights or performing any duties in her capacity as Receiver.”

{¶ 16} In its motion for leave to file a complaint against the receiver, Kidz alleged that the receiver “acted negligently, intentionally, and/or maliciously in managing and operating the Toledo properties, and/or in preventing waste upon the same.” Specifically, Kidz asserted that the receiver needlessly allowed the condition of the property to



deteriorate, and failed to make an effort to maintain an acceptable occupancy level in the apartments. Kidz also alleged that the receiver accepted service of process in a third party lawsuit on behalf of Kidz without properly responding to that complaint, resulting in a default judgment of \$300,000 against Kidz.

{¶ 17} In analyzing whether or not to grant leave, the trial court found that, while Kidz sought permission to bring suit against the receiver and to employ discovery to ascertain whether any individual duties were breached, it had not set forth any claims for damages resulting from such alleged negligence. In addition, the trial court found that Kidz agreed to the appointment of a receiver to manage the property on behalf of PNC, and the complaint did not set forth any allegations that the receiver failed to manage the property in accordance with the orders of the court. Accordingly, the trial court concluded that Kidz articulated no basis “upon which the court might grant leave to file suit against the Receiver, its agent, or its bond” and denied the motion on that basis. Thereafter, the trial court granted the receiver’s motion for approval of its final report, and for termination, discharge and release of the receiver and her agents.

{¶ 18} It is undisputed that the trial court did not hold an evidentiary hearing before finding that Kidz had set forth no cognizable claim against the receiver and denying its motion for leave to file a complaint on that basis. However, as set forth above, unless the claim is barred as a matter of law the trial court may either: (1) grant a party leave to file a complaint against the receiver, or (2) consider the claim and resolve

the issue before discharging the receiver from his or her duties. *Barton v. Barbour*, *supra*.

{¶ 19} On consideration, this court finds that the allegations made by Kidz raise issues as to whether the receiver failed to fulfill the obligations set forth in the appointment orders, and also whether the receiver's actions constitute a breach of her fiduciary duties that exist outside of those orders. Under such circumstances, we find that the trial court's decision to both deny Kidz's request for permission to file a complaint against the receiver and to refuse to hold an evidentiary hearing before discharging the receiver was an abuse of discretion. Accordingly, appellant's three assignments of error are well-taken.

{¶ 20} The judgment of the Lucas County Court of Common Pleas is hereby reversed and the case is remanded to the trial court for further proceedings consistent with this decision. Appellee PNC is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

PNC Bank Natl. Assn.  
v. Kidz Real Estate Group, LLC  
C.A. No. L-11-1303

Arlene Singer, P.J.

\_\_\_\_\_  
JUDGE

Thomas J. Osowik, J.

\_\_\_\_\_  
JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

\_\_\_\_\_  
JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
---