[Cite as *State ex rel. Horvath v. Zmuda*, 2013-Ohio-55.]

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

State ex rel. Robin L. Horvath, et al.

Relators

v.

Hon. Gene Zmuda and
The Skutch Company, Ltd.

Respondents

Court of Appeals No. L-12-1009

DECISION AND JUDGMENT

Decided: January 11, 2013

* * * * *

Troy L. Moore and Thomas A. Matuszak, for relators.

Richard S. Walinski and Nicholas J. Hammond, for respondent Hon. Gene A. Zmuda.

Christopher F. Parker, for respondent The Skutch Company, Ltd.

* * * * *

YARBROUGH, J.

{¶ 1} This matter is before the court on respondents'—Hon. Gene A. Zmuda and The Skutch Company, Ltd.—motions to dismiss the pending original action against them. At issue is whether the trial court retained continuing jurisdiction in the receivership

matter following an appeal from the order denying relator Robin L. Horvath's Civ.R. 60(B) motion for relief from judgment, and an appeal from the order confirming the sale of receivership assets to TP Foods.

I. Facts and Procedural Background

{¶ 2} On August 18, 2010, Fifth Third Bank obtained a cognovit judgment against the Tony Packo's companies for their default on several notes. In addition, cognovit judgment was entered against relator Robin Horvath ("Horvath") in his capacity as a limited guarantor of the debt. Also on that date, the trial court appointed respondent, The Skutch Company, Ltd., as receiver over the companies' assets. Horvath did not appeal the cognovit judgment or the order of appointment.

{¶ 3} The matter proceeded to a receivership sale of the assets. On August 26, 2011, Horvath moved for relief from the cognovit judgment pursuant to Civ.R. 60(B). The trial court denied this motion on September 20, 2011. Horvath appealed. Following the denial, but prior to Horvath perfecting the appeal, the trial court held a hearing to determine which of two bidders had submitted the highest and best bid for the receivership assets. The two bidders were TP Foods, LLC ("TP Foods"), and Nancy Packo, LLC. Nancy Packo, LLC, is owned by Horvath and his wife Terrie Horvath—collectively, they are the relators in this original action.

{¶ 4} After the hearing, on October 7, 2011, the trial court selected TP Foods' bid, and ordered the receiver to accept the bid and to enter into an asset purchase agreement with TP Foods for the sale of the assets. Horvath appealed the October 7, 2011 order.

{¶ 5} Proceedings continued in the trial court over Horvath's objection that the trial court lacked jurisdiction due to his pending appeals. On December 19, 2011, the trial court entered an order authorizing the receiver to execute the asset purchase agreement it negotiated with TP Foods. On December 22, 2011, the trial court entered its order confirming the asset sale. Relators appealed from this order the next day. Subsequently, on January 5, 2012, this court dismissed Horvath's appeal from the October 7, 2011 entry for lack of a final, appealable order.

{¶ 6} On January 12, 2012, relators initiated this complaint for "peremptory, alternative, and permanent writs of prohibition." Through their complaint, relators seek to vacate the trial court's December 7, 19, and 22, 2011 orders,[1] and to prohibit respondents from taking any action that is not in aid of their appeals. On January 26, 2012, we issued an alternative writ, ordering respondents to, within 14 days, either do the acts requested by relators, or file a motion to dismiss pursuant to Civ.R. 12(B)(6) or an answer pursuant to Civ.R. 8. On February 3, 2012, the receiver and TP Foods "closed" the asset sale, and on February 4, 2012, TP Foods began operational control of the Tony Packo's companies. Thereafter, respondents moved to dismiss this original action.

II. Analysis

{¶ 7} Dismissal of relators' petition under Civ.R. 12(B)(6) is appropriate if, after all factual allegations of the petition are presumed true and all reasonable inferences are

[1] The December 7, 2011 order pertained to ownership of certain intellectual property rights.

made in their favor, it appears beyond doubt that they can prove no set of facts entitling them to the requested writ of prohibition. *State ex rel. Bell v. Pfeiffer*, 131 Ohio St.3d 114, 2012-Ohio-54, 961 N.E.2d 181, ¶ 12.

{¶ 8} To be entitled to a writ of prohibition, relators must show that (1) respondents were about to exercise judicial or quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Sullivan v. Ramsey*, 124 Ohio St.3d 355, 2010-Ohio-252, 922 N.E.2d 214, ¶ 15. However, "[w]here jurisdiction is patently and unambiguously lacking, relators need not establish the lack of an adequate remedy at law because the availability of alternate remedies like appeal would be immaterial." *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149, ¶ 11.

{¶ 9} Relators' complaint for a writ of prohibition contains two counts. First, they argue that the appeal from the denial of Horvath's Civ.R. 60(B) motion divested the trial court of subject-matter jurisdiction over the sale of the assets in the receivership matter. Second, they argue that their appeal from the December 19 and 22, 2011 orders divests the trial court of jurisdiction over any issue that is inconsistent with our ability to affirm, reverse, or modify the orders on appeal. We will address each count in turn.

A. Appeal from the Denial of the Civ.R. 60(B) Motion

{¶ 10} In support of their motion to dismiss, respondents argue that relators have failed to satisfy the second and third requirements for a writ of prohibition. The issue

turns on whether the appeal from the denial of the Civ.R. 60(B) motion divested the trial court of subject matter jurisdiction over the sale of the receivership assets. Relators conclude that it does, citing to the principle that a trial court loses jurisdiction over issues that are inconsistent with an appellate court's ability to reverse, modify, or affirm the orders being appealed. *Yee v. Erie Cty. Sheriff's Dept.*, 51 Ohio St.3d 43, 44, 553 N.E.2d 1354 (1990). They theorize that the sale of the receivership assets ostensibly moots Horvath's appeal from the denial of his Civ.R. 60(B) motion, thereby inhibiting our ability to reverse or modify the judgment.

{¶ 11} Respondents counter with two arguments. First, they argue that, absent a stay of execution, the trial court retains jurisdiction to enforce its judgments. Second, they argue that Horvath's Civ.R. 60(B) motion applied only to the cognovit judgment against him, and consequently the sale of the receivership assets, which belonged to the Packo's companies, not Horvath personally, does not interfere with our ability to affirm, modify, or reverse the judgment denying his Civ.R. 60(B) motion. We agree with respondents' first argument; therefore, we do not need to reach the second.

{¶ 12} The law is clear that absent a stay of execution, trial courts retain jurisdiction to enforce their judgments, even while an appeal is pending. *State ex rel. Klein v. Chorpening*, 6 Ohio St.3d 3, 4, 450 N.E.2d 1161 (1983) ("Until and unless a supersedeas bond is posted the trial court retains jurisdiction over its judgments as well as proceedings in aid of the same"). To that end, R.C. 2505.09 provides, "an appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to

the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed by the appellant to the appellee."

{¶ 13} R.C. 2327.02 identifies three types of execution of judgment: "(1) Against the property of the judgment debtor, including orders of sale or orders to transfer property * * *; (2) Against the person of the judgment debtor; (3) For the delivery of the possession of real property, including real property sold under orders of sale or transferred under orders to transfer property * * *." Notably, in this case, a receivership sale is one manner of enforcing and satisfying a judgment; it is an alternative remedy to a sheriff's sale. *Huntington Natl. Bank v. Motel 4 BAPS, Inc.*, 191 Ohio App.3d 90, 2010-Ohio-5792, 944 N.E.2d 1210, ¶ 8 (8th Dist.). Therefore, because an appeal alone does not operate as a stay of execution, and because Horvath never sought a stay of execution or posted a bond, the trial court retained jurisdiction over the execution of the cognovit judgment via the receivership sale.

{¶ 14} Relators contend this result is incongruous with the principle that a trial court lacks jurisdiction to take any action inconsistent with an appellate court's jurisdiction to reverse, modify, or affirm the appealed order. Clearly, the result that relators seek is to gain control of the assets of the Packo's companies. Their line of reasoning is that if the underlying cognovit judgment is vacated, then there would be no need for a receivership or a receivership sale, and the assets would revert back to the company. Relators recognize, however, that if the assets are sold at a duly confirmed receivership sale, then R.C. 2325.03 would protect the subsequent purchaser from losing

the assets.[2] Thus, because the assets could not be recovered by relators, they conclude the Civ.R. 60(B) motion for relief from the cognovit judgment could not afford them any effective relief. Therefore, the sale of the assets is inconsistent with our ability to reverse or modify the order denying the Civ.R. 60(B) motion.

{¶ 15} Contrary to relators' argument, however, even if the assets are sold at a duly confirmed receivership sale, effective relief is still available to relators, albeit not in the manner in which they seek. Although the receivership assets would no longer be available pursuant to R.C. 2325.03 because they have been sold to a bona fide purchaser, Horvath would still be entitled to monetary relief from the proceeds of the asset sale. *See KeyBank Natl. Assn. v. Mazer Corp.*, 188 Ohio App.3d 278, 2010-Ohio-1508, 935 N.E.2d 428, ¶ 55 (2d Dist.) (party whose assets were wrongfully sold in a receivership sale is entitled to restitution for all that was lost). *See also Chupp v. Thomas*, 6th Dist. No. H-97-027, 1997 WL 796532 (Dec. 8, 1997) (appeal from foreclosure order is not moot even though the property has been sold at a sheriff's sale).

{¶ 16} In sum, because effective relief is still available to Horvath if we reverse the order denying his Civ.R. 60(B) motion for relief from the cognovit judgment, the receivership sale proceeding does not interfere with our ability to reverse, modify, or affirm that order. Therefore, the trial court retained jurisdiction over the receivership

[2] R.C. 2325.03 provides, "The title to property, which title is the subject of a final judgment or order sought to be vacated, modified, or set aside by any type of proceeding or attack and which title has, by, in consequence of, or in reliance upon the final judgment or order, passed to a purchaser in good faith, shall not be affected by the proceeding or attack * * *."

proceeding during the pendency of Horvath's appeal from the denial of his Civ.R. 60(B) motion. Accordingly, relators' first count fails to satisfy the required elements for a writ of prohibition.

B. Appeal from the December 2011 Orders Confirming the Asset Sale

{¶ 17} In their second count, relators contend that their appeal from the December 22, 2011 order confirming the asset sale to TP Foods divested the trial court of jurisdiction to take any action that was not in aid of their appeal. Although not identified in their initial petition, this action later manifested itself as the "closing" of the asset sale and the hearings surrounding it. Respondents again argue that absent a stay of execution, the trial court retained jurisdiction to enforce its judgment. In this case, they contend the closing was the enforcement of the order confirming the asset sale. Respondents also raise a second argument that the closing of the asset sale has rendered this original action moot because the assets are now owned by TP Foods—a bona fide purchaser subject to the protection of R.C. 2325.03. Relators counter that the closing of the asset sale was inconsistent with our ability to reverse, modify, or affirm the order confirming the sale.[3] As support, they point to respondents' argument that this action has been mooted by the closing of the asset sale.

[3] Relators also contend that our issuance of the alternative writ of prohibition divested the trial court of jurisdiction to close on the asset sale. This, however, confuses the matter before the court. In determining respondents' motions to dismiss the petition, we are required to examine whether, assuming all the facts alleged in the petition are true, relators can still prove no set of facts entitling them to relief. Respondents' actions after our issuance of the alternative writ are not relevant to determining the sufficiency of relators' petition.

{¶ 18} Recently, this court dismissed Horvath's, Terrie Horvath's, and Nancy Packo, LLC's appeal from the December 19 and 22, 2011 orders for lack of a final, appealable order. We found that the trial court lacked jurisdiction to enter those orders due to Horvath's pending appeal from the October 7, 2011 order directing the receiver to accept TP Foods' bid. Therefore, we concluded the December 19, and December 22, 2011 orders were void. This, however, is inconsequential to our resolution of the present matter because even if the appeal had not been dismissed, the closing of an asset sale does not interfere with our ability to reverse, modify, or affirm an order confirming the sale.

{¶ 19} An order confirming a receiver sale is a final, appealable order. *Mandalaywala v. Zaleski*, 124 Ohio App.3d 321, 329-331, 706 N.E.2d 344 (10th Dist.1997). The "decision whether to confirm or set aside a judicial sale is left to the sound discretion of the trial court." *Citimortgage, Inc. v. Haverkamp*, 12th Dist. No. CA2010-11-089, 2011-Ohio-2099, ¶ 14, quoting *Natl. Union Fire Ins. Co. v. Hall*, 2d Dist. No. 19331, 2003-Ohio-462, ¶ 12. "Where the trial court abuses its discretion in confirming the sale, a reviewing court will reverse that decision." *Ohio Sav. Bank v. Ambrose*, 56 Ohio St.3d 53, 55, 563 N.E.2d 1388 (1990).

{¶ 20} As it relates to the ownership of the receivership assets, the Ohio Supreme Court has held that "purchasers at a foreclosure sale have no vested interest in the property prior to confirmation of the sale by the trial court." *Id.* Thus, because it is the order of confirmation of sale that vests title in the purchaser, it follows that where that

order is vacated or reversed, the purchaser no longer has title to the assets. *See* 64 Ohio Jurisprudence 3d, Judicial Sales, Section 112 (2012) ("An order confirming a judicial sale having been set aside, the case stands as though the order had never been made. The sale and the confirmation are nullified so that no title passes to the purchaser"). Therefore, while it is true that the purchaser of assets at a duly confirmed judicial sale is protected if the underlying judgment of foreclosure is reversed or vacated, that protection does not apply where the order confirming the judicial sale is reversed or vacated. *Id.* As a result, if the order confirming the asset sale is reversed, the assets can be resold.[4] *See Rak-Ree Enterprises, Inc. v. Timmons*, 101 Ohio App.3d 12, 654 N.E.2d 1310 (4th Dist.1995) (order of confirmation of sheriff's sale reversed, and cause remanded for a new public sale).

{¶ 21} In sum, the closing of an asset sale does not render the action moot because where the order confirming the sale is reversed, no title passes to the purchaser, and the assets are available to be resold at a subsequent judicial sale. Consequently, the closing of an asset sale has no effect on our ability to reverse, modify, or affirm an order confirming the sale. Therefore, relators' second count, which is founded on the trial court's lack of jurisdiction, fails to satisfy the required elements for a writ of prohibition.

[4] In this event, "[t]he purchaser is entitled to reimbursement for the purchase money which he has paid, sometimes with interest, expenses, and the cost of any improvements that he may have made, and any taxes he may have paid." 64 Ohio Jurisprudence 3d, Judicial Sales, Section 112 (2012).

III. Conclusion

{¶ 22} Accordingly, respondents' motions to dismiss relators' petition for peremptory, alternative, and permanent writs of prohibition are granted. This original action is dismissed. Costs are assessed to relators.

{¶ 23} It is so ordered.

Writ denied.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____

Stephen A. Yarbrough, J. _____
CONCUR.

JUDGE

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JUDGE