[Cite as *Cawley JV, L.L.C. v. Wall St. Recycling, L.L.C.*, 2015-Ohio-1846.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102121

CAWLEY JV, L.L.C.

PLAINTIFF-APPELLEE

vs.

WALL ST. RECYCLING L.L.C., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-829204

BEFORE: Celebrezze, A.J., Stewart, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 14, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Appellants, Wall Street Recycling, L.L.C. ("Wall Street"), and its principals, Michael Ambrose, John Joseph, and Robert Murphy, appeal the appointment of a receiver and liquidating trustee over the assets and operations of JV Iron & Metal, L.L.C. ("JV Iron"). After a thorough review of the record and law, this court affirms in part, reverses in part, and remands the case to the trial court.

I. Factual and Procedural History

{¶2} In 2012, "WSR, L.L.C."[1] and Cawley JV, L.L.C. ("Cawley"), entered into a joint venture to operate JV Iron, a scrap metal company. These entities were to supply equal capital contributions and Cawley contributed approximately $3,000,000 from 2012 to 2013.[2] Cawley entrusted operations and accounting of JV Iron to Wall Street and its principals. According to Cawley's verified complaint, Wall Street did not make its capital contribution and engaged in deception and fraud to prevent Cawley from discovering this and other alleged improprieties perpetrated by Ambrose, Joseph, and Murphy in the management and operation of JV Iron.

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[1] Appellants assert that this is a distinct entity from Wall Street.

[2] The operating agreement called for an initial capital contribution of $200,000 by both parties. Cawley made additional contributions it claims totaled $3,000,000.

{¶3} On July 1, 2014, Cawley, individually and on behalf of JV Iron in a derivative capacity, filed suit against Wall Street, Ambrose, Joseph, Murphy, and JV Iron. The verified complaint[3] sounded in breach of contract, breach of fiduciary duty, fraud, conversion, unjust enrichment, and sought, among other remedies, an accounting and dissolution of JV Iron. The complaint documents a substantial history of Cawley's attempt to gain access to routine financial information and supporting documentation to which it has been denied.

{¶4} Appellants filed a combined answer on July 14, 2014. On August 27, 2014, Cawley sought the appointment of a receiver and liquidating trustee, specifically John T. Hillyer. The supporting memorandum to this motion includes a history of numerous attempts Cawley made for financial information and appellants' failure to turn over this information. Cawley also set forth the dire financial shape of JV Iron supported by emails in the record sent from employees of JV Iron requesting significant sums of money from Cawley in order to meet its financial obligations. Cawley also alleged that appellants have attempted to destroy financial records and change or remove inventory and assets of JV Iron. Appellants filed a brief in opposition to the appointment of a receiver. In an affidavit attached to the brief, Ambrose averred that JV Iron was in a good financial position, but agreed that the business had ceased operations in May 2014. The parties agree that they were attempting to liquidate JV Iron's inventory.

[3]Civ.R. 23.1 requires a verified complaint.

{¶5} On October 9, 2014, the trial court granted Cawley's motion for appointment of a receiver in part. The court appointed Nick Gautam as receiver and liquidating trustee rather than Cawley's nominee. Appellants filed the instant appeal on October 28, 2014, raising two errors for review:

> I. The trial court abused its discretion and violated Appellants' due process rights when it appointed a receiver for JV Iron without conducting a hearing prior to issuing said order.
>
> II. The trial court erred as a matter of law and violated Appellants' due process rights when it appointed a liquidating trustee prior to issuing a judicial decree of the dissolution of JV Iron and without conducting a hearing as to the necessity of such a dissolution and an appointment.

II. Law and Analysis

A. Appointment of a Receiver

{¶6} A receiver may be appointed in a number of situations, including "[i]n an action * * * between partners or others jointly owning or interested in any property or fund, * * * and when it is shown that the property or fund is in danger of being lost, removed, or materially injured[.]" R.C. 2735.01(A). A receiver may also be appointed "[i]n all other cases in which receivers have been appointed by the usage of equity." R.C. 2735.01(F). This includes the appointment of a receiver over a business to carry out an accounting. *Sobin v. Lim*, 8th Dist. Cuyahoga No. 101292, 2014-Ohio-4935, ¶ 19; *Walsh v. Smith*, 2d Dist. Montgomery No. 25879, 2014-Ohio-1451, ¶ 9.

{¶7} "Because the appointment of a receiver is such an extraordinary remedy, the party requesting the receivership must show by clear and convincing evidence that the appointment is necessary for the preservation of the complainant's rights." *Equity Ctrs.*

Dev. Co. v. S. Coast Ctrs., Inc., 83 Ohio App.3d 643, 649, 615 N.E.2d 662 (8th Dist.1992), citing *Malloy v. Malloy Color Lab, Inc.*, 63 Ohio App.3d 434, 437, 579 N.E.2d 248 (10th Dist.1989). This court reviews the appointment for an abuse of discretion. *State ex rel. Celebrezze v. Gibbs*, 60 Ohio St.3d 69, 73, 573 N.E.2d 62 (1991). However, there must be clear and convincing evidence tending to prove the facts necessary to sustain the order. *Malloy* at 436. In exercising discretion in appointing or refusing to appoint a receiver, a court "'"must take into account all the circumstances and facts of the case, the presence of conditions and grounds justifying the relief, the ends of justice, the rights of all the parties interested in the controversy and subject matter, and the adequacy and effectiveness of other remedies."'" *Debartolo v. Dussault Moving, Inc.*, 8th Dist. Cuyahoga No. 96667, 2011-Ohio-6282, ¶ 10, quoting *Celebrezze* at 73, fn. 3, quoting 65 American Jurisprudence 2d, Receivers, Sections 19, 20, at 873, 874 (1978).

{¶8} Further, an evidentiary hearing is not necessary in all cases. "[W]here the court is sufficiently convinced that the property is in danger from a review of the affidavits * * * admissions and inferences that can be rationally drawn from these materials and from any arguments presented[,]" then a decision appointing a receiver without hearing is not in error. *Victory White Metal Co. v. N.P. Motel Sys., Inc.*, 7th Dist. Mahoning No. 04 MA 245, 2005-Ohio-2706, ¶ 54.

{¶9} Applying the above factors in R.C. 2735.01(A) to the present case, the parties do not dispute that Cawley has an ownership interest in JV Iron and its assets. Therefore, Cawley has demonstrated an interest in the assets or fund at issue.

{¶10} Cawley asserts that it demonstrated sufficient evidence that the property or fund at issue is in danger of being lost, removed, or materially injured. The only evidentiary materials submitted by Cawley are the statements made in its verified complaint. It did not supply any other evidentiary materials apart from an unexecuted operating agreement between Cawley and "WSR LLC." Facts in the complaint that are based on information and belief without support do not constitute clear and convincing evidence. Therefore, only the verified allegations of the complaint based on personal knowledge should be considered by the trial court.

{¶11} Appellants claim the court erred in appointing a receiver without sufficient evidence such a need existed and without holding an evidentiary hearing to adduce such evidence. Appellants cite to *Neece v. Natl. Premier Protective Servs.*, 8th Dist. Cuyahoga No. 89643, 2007-Ohio-5960. There, this court reversed the appointment of a receiver because

> the trial court appointed a receiver based upon the "arguments of counsel." The trial court did not state what evidence it relied upon, nor did it specify which section of R.C. 2735.01, which governs the appointment of receivers, or R.C. 1705.47, which governs judicial dissolution of limited liability companies, it found relevant to the case. In fact, our review of the record

> does not indicate that the trial court had any evidentiary material before it tending to prove the facts essential to sustain plaintiffs' motion. Plaintiffs did not file a *verified complaint* nor did they file any affidavits in support of their motion. Accordingly, there was no evidence, in the form of affidavits or testimony, which addressed the various issues the trial court was required to consider before appointing a receiver.

(Emphasis added.) *Id*. at ¶ 12.

{¶12} The two cases are not congruent. Here, Cawley filed a verified complaint that indicated a history of obstruction and obfuscation in its attempts to gain access to financial information to which it was entitled. Appellants also supplied evidence and affidavits the court had before it when ruling on the motion for appointment that indicated a failure to provide requested information. That was not the case in *Neece*.

{¶13} Cawley asserted that the capital contributions made by Wall Street were mainly through injections of inventory in the form of scrap metals. It also asserted that such inventory was under the exclusive control of Wall Street and the inventory was improperly fluctuating and the contributions lacked proper documentation. Cawley also set forth that JV Iron's place of business was a warehouse within Wall Street's larger operation. Appellants admitted to these fluctuations but explained they were the result of an extensive weighing and inventory of all the scrap metals in the possession of JV Iron. The trial court had sufficient information before it to determine that appointment

of a receiver was necessary to preserve the assets of JV Iron during the pendency of the litigation.

{¶14} The same evidence also demonstrated that the appointment of a receiver was necessary to accomplish an accounting. Cawley's complaint set forth a history of attempts to obtain financial information to which it was entitled. The emails submitted by appellants supported these claims. Under R.C. 2735.01(F), a receiver may be appointed to complete an accounting. *Sobin*, 8th Dist. Cuyahoga No. 101292, 2014-Ohio-4935, ¶ 19; *Walsh*, 2d Dist. Montgomery No. 25879, 2014-Ohio-1451, ¶ 9.

{¶15} Appellants also claim, without support, that their due process rights were violated when the court appointed a receiver that was chosen by it rather than the parties. The court has discretion in choosing a receiver and the appointment will not be reversed so long as the receiver meets the statutory qualifications. *Tonti v. Tonti*, 2d Dist. Franklin No. 4688, 118 N.E.2d 200 (1951). R.C. 2735.02 sets those qualifications broadly as a person not interested in the action (except with consent of the parties), and who resides in the state. Appellants have offered no evidence nor made any arguments that the receiver does not fit within these qualifications.[4] Therefore, the court did not abuse its discretion in appointing the individual it did.

{¶16} Appellants finally argue that "WSR LLC" is not a party to this action and is a necessary party. As a result, its due process rights were violated by the appointment of

[4] The legislature has recently amended this statute to give non-binding priority to a receiver nominated by the parties, but those amendments do not affect the decision of the trial court or impact this court's analysis.

a receiver. However, appellants' argument, raised for the first time on appeal, consists of a single paragraph without citation to any case law.

> **{¶17}** Arguments raised for the first time on appeal are generally barred.
>
> "Such arguments are barred by the doctrine of waiver for failure to raise these arguments before the trial court. 'It is well established that a party cannot raise any new issues or legal theories for the first time on appeal.' *Dolan v. Dolan*, Trumbull App. Nos. 2000-T-0154 and 2001-T-0003, 2002-Ohio-2440, at ¶ 7, *citing Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43, 322 N.E.2d 629. 'Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process.' *Mark v. Mellott Mfg. Co., Inc.* (1995), 106 Ohio App.3d 571, 589, 666 N.E.2d 631."

Hollish v. Maners, 5th Dist. Knox No. 2011CA000005, 2011-Ohio-4823, ¶ 44, quoting *Carrico v. Drake Constr.*, 5th Dist. Stark No. 2005CA00201, 2006-Ohio-3138, ¶ 37. This is reason enough to disregard appellants' argument on this point unless the failure is jurisdictional.

{¶18} In a declaratory judgment action, the failure to join a necessary party is jurisdictional and cannot be waived. *Capital City Community Urban Redevelopment Corp. v. Columbus*, 10th Dist. Franklin No. 12AP-257, 2012-Ohio-6025, ¶ 15, citing, *e.g.*, *Gannon v. Perk*, 46 Ohio St.2d 301, 348 N.E.2d 342 (1976). In other types of cases, the failure to properly raise and maintain a joinder defense waives that defense: "[R]egarding the defense of joinder, merely asserting a claim that a party must be joined is insufficient to raise this defense and parties asserting this defense must take action to both identify specific parties to be joined and further prosecute or pursue their claims that joinder is required." *Brown v. Miller*, 11th Dist. Geauga No. 2012-G-3055,

2012-Ohio-5223, ¶ 43, citing *Allason v. Gailey*, 189 Ohio App.3d 491, 2010-Ohio-4952, 939 N.E.2d 206, ¶ 62 (7th Dist.) ("merely raising the defense [of joinder] in an answer without further affirmative action to prosecute the raised defense results in a waiver of the defense") (citation omitted); *Std. Plumbing & Heating Co. v. Farina*, 5th Dist. Stark Nos. 2001CA00018 and 2001CA00034, 2001 Ohio App. LEXIS 4197, *12-13 (Sept. 17, 2001) (a "cursory statement" raising failure to join an indispensable party in answer to a complaint without providing necessary information to adjudge the defense waives that defense).

{¶19} Appellants did not argue in their brief in opposition that the entity that purportedly signed the operating agreement, "WSR LLC," was not joined as a party. Appellants did not pursue this defense in the trial court and have waived the argument for purposes of this appeal.

{¶20} Even if this were not the case, the appointment of a receiver over JV Iron does not deprive "WSR LLC" of property. It merely preserves the assets of JV Iron until litigation is concluded. Nor did "WSR LLC" seek to intervene because its principal owners were all named in the suit. Therefore, appellants' arguments raised on behalf of a party that they do not represent are unavailing. The trial court did not err in appointing a receiver to safeguard the assets of JV Iron, to facilitate an accounting, and to maintain the status quo during the pendency of litigation.

B. Appointment of a Liquidating Trustee

{¶21} The dissolution of a limited liability company occurs, according to R.C. 1705.43(A), when any of the following events occur:

> (1) The expiration of the period, if any, fixed by the operating agreement or articles of organization for the duration of the company;
>
> (2) One or more events specified in writing in the operating agreement as causing the dissolution of the company;
>
> (3) The unanimous written agreement of all members to dissolve the company;
>
> (4) Except as provided in division (C) of this section, the withdrawal of a member of the company, unless the business of the company is continued by the consent of all of the remaining members or under a right to continue the company that is stated in writing in the operating agreement;
>
> (5) Upon entry of a decree of judicial dissolution under section 1705.47 of
>
> the Revised Code.

{¶22} After a decree of dissolution is entered, a liquidating trustee may be appointed by a trial court pursuant to R.C. 1705.44. This statute provides in part,

> [u]pon application of any member of a dissolved limited liability company or his legal representative or assignee, the court of common pleas may wind up the affairs of the company or may cause its affairs to be wound up by a liquidating trustee appointed by the court.

{¶23} It is undisputed in this case that JV Iron ceased its operations and was in the process of liquidating its inventory. However, the record is devoid of any indication that a provision of R.C. 1705.43(A) is satisfied in this case. There is no termination date set forth in the operating agreement. The two events specified in the operating agreement

that would trigger dissolution are a "Vote[5] of a majority-in-interest" or "the entry of a decree of judicial dissolution." The record does not evidence either has occurred. Unanimous written agreement by all members also does not exist in the record such that R.C. 1705.43(A)(3) is satisfied. There is no unanimous written agreement between Cawley and "WSR LLC" to dissolve JV Iron. No member withdrew, and a judicial decree of dissolution has not been entered.

{¶24} No provision of R.C. 1705.43(A) is satisfied in this case. Therefore, the trial court acted prematurely in appointing a liquidating trustee.

III. Conclusion

{¶25} The trial court properly appointed a receiver in this case to effectuate an accounting and to maintain the status quo during the pending litigation. However, the court erred in appointing a liquidating trustee without a hearing where none of the provisions in R.C. 1705.43(A) have been satisfied.

{¶26} Judgment affirmed in part, reversed in part, and remanded.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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[5] "Vote" is a defined term in the operating agreement with specific formalities.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., and
SEAN C. GALLAGHER, J., CONCUR