

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102067

TELECOM ACQUISITION CORP. I, INC.

PLAINTIFF-APPELLEE

vs.

LUCIC ENTERPRISES, INC.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. JL-14-680150

BEFORE: Blackmon, J., E.A. Gallagher, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: July 2, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Lucic Enterprises, Inc. (“Lucic”), appeals the trial court’s decision appointing a receiver in favor of judgment creditor Telecom Acquisition Corp. I, Inc. (“Telecom”). Lucic assigns the following errors for our review:

I. The trial court abused its discretion in appointing the Receiver because Telecom failed to prove by clear and convincing evidence that the appointment of the Receiver was necessary to preserve its rights.

II. The trial court erred in ordering the Receiver to take possession of Lucic’s liquor permit and sell it to satisfy Telecom’s judgment because liquor permits issued by the Ohio Department of Liquor Control are personal licenses and are not property which can be reached in receivership proceedings.

III. The trial court erred when it did not order the sale of the assets seized by Telecom before ordering further execution against Lucic’s other assets.

{¶2} After reviewing the record and pertinent law we affirm the trial court’s decision. The apposite facts follow.

{¶3} On May 22, 2014, at the conclusion of a jury trial, the Cleveland Municipal Court rendered judgment in favor of Telecom against Lucic, a former tenant, in the amount of \$74,203.93, plus interest, for nonpayment of rent. On June 4, 2014, Telecom transferred the judgment to the court of common pleas and caused a judgment lien to be filed.

{¶4} On June 6, 2014, Lucic filed a Uniform Commercial Code (“UCC”) statement with the Ohio Secretary of State seeking to grant a security interest in Lucic’s liquor license and other assets to Lucic General Contractor, L.L.C. (“LGC”), a separate entity owned and controlled by Lucic’s president. On June 20, 2014, in response to Lucic’s actions, Telecom filed a motion for appointment of a receiver. In the motion, Telecom sought an order appointing a receiver to take control of Lucic’s liquor license along with various other assets to sell them to satisfy the judgment.

{¶5} On August 4, 2014, Lucic filed a motion to intervene on behalf of LGC arguing that the property that would come within the ambit of the receivership was subject to a security interest in LGC. On August 21, 2014, Telecom filed a motion in opposition to Lucic’s motion to intervene stressing that the attempt to transfer its interest in the liquor license and other assets to LGC would be invalid because the attempted conveyance occurred after Telecom’s lien had been perfected. Telecom also pointed out that under R.C.1336.04, the attempted conveyance should have occurred not only prior to the lien being perfected, but at least four years prior, so as not to be considered a fraudulent conveyance.

{¶6} On September 3, 2014, the trial court conducted a hearing on Telecom’s motion for appointment of a receiver. On September 17, 2014, the trial court issued an order appointing attorney Luke McConville as receiver. The trial court’s order empowered McConville with the authority to transfer the liquor license to his name and to sell the liquor license and other assets to satisfy the judgment. Lucic now appeals.

Appointment of Receiver

{¶7} In the first assigned error, Lucic argues the trial court abused its discretion in appointing a receiver.

{¶8} The appointment of a receiver is an extraordinary remedy. *Am. Ent. Bank v. Garfield Hts. Prop., L.L.C.*, 8th Dist. Cuyahoga No. 98646, 2013-Ohio-2526, citing *Malloy v. Malloy Color Lab, Inc.*, 63 Ohio App.3d 434, 437, 579 N.E.2d 248 (10th Dist.1989). Therefore, normally 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. *Id.* Clear and convincing evidence is that "measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶9} We review a trial court's decision to appoint a receiver for an abuse of discretion. *Huntington Natl. Bank v. Prospect Park L.L.C.*, 8th Dist. Cuyahoga No. 96218, 2011-Ohio-5391, ¶ 9. A court in exercising its discretion to appoint or refuse to appoint a receiver 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. *Equity Ctrs. Dev. Co. v. South Coast Ctrs., Inc.*, 83

Ohio App.3d 643, 615 N.E.2d 662 (8th Dist.1992), citing *State ex rel. Celebrezze v. Gibbs*, 60 Ohio St.3d 69, 73, 573 N.E.2d 62 (1991).

{¶10} In the instant case, Lucic argues that the trial court abused its discretion by appointing a receiver without first conducting an evidentiary hearing and absent clear and convincing evidence as to irreparable loss.

{¶11} At the outset of the hearing on Telecom's motion to appoint a receiver, the trial court placed on the record that there was a motion in opposition filed as well as a motion by LGC to intervene. The trial court also indicated that it had denied the motion to intervene. Further, before hearing the oral arguments of the parties, the trial court referenced its discussion with the parties in chamber.

{¶12} We have reviewed the record including LGC's motion to intervene and Lucic's UCC filing statements with the Ohio Secretary of State. Attached as Exhibit "A" to the UCC financing statement, filed June 6, 2014, was a list of 47 items that Lucic signaled its intention to transfer to LGC, a separate entity owned and controlled by Lucic's president. Our review reveals that the list of 47 items represented a list of the equipment, furniture, fixtures, lighting, inter alia, of the restaurant and bar that Lucic formerly operated as a tenant at Telecom's property. Our review of the record further reveals that Lucic filed the UCC financing statement granting LGC a security interest in the aforementioned assets a paltry two days after Telecom transferred the \$74,203.93 judgment to the common pleas court.

{¶13} Here, given that a valid judgment had been rendered against Lucic, and given that it had been brought to the trial court’s attention that Lucic had undisputedly attempted to grant a security interest in the very assets that would ostensibly help to satisfy the judgment, it was reasonable for the trial court to conclude that Lucic was attempting to put the assets beyond Telecom’s reach. As such, appointing a receiver was the proper mechanism to ensure that Lucic’s assets would be utilized to satisfy the judgment. Consequently, we find no abuse of discretion in the trial court’s decision. Accordingly, we overrule the first assigned error.

Transfer of Liquor Permit to Receiver

{¶14} In the second assigned error, Lucic argues the trial court had no authority to order the receiver to take possession of the liquor permit.

{¶15} Initially, we note, the Ohio Division of Liquor Control (“ODLC”) has the exclusive authority to regulate the sale and consumption of alcoholic beverages. R.C. 4301.10(A)(2). In addition, no holder of a permit shall sell, assign, transfer, or pledge the permit without the written consent of the division. R.C. 4303.29(A). Finally, Ohio Adm.Code 4301:1-1-14(A)(4) provides:

(A) Upon written application on forms prescribed and furnished by the division and upon approval by the superintendent of liquor control, the ownership of a permit, location of a permit, ownership and location of a permit, or interests therein may be transferred, unless otherwise prohibited by law or rule.

* * *

(4) In the case of a receiver having been appointed for a permit holder, to such receiver and thereafter from such receiver to another person when such

transfer is in connection with the bona fide sale of the business or personal property assets of such permit holder, or pursuant to an order of the commission or a court of competent jurisdiction when the other person and the location meet all other necessary requirements under rule and law.

{¶16} Thus, from a plain reading of the above, a liquor permit may be transferred to a receiver, and from the receiver to another person, so long as the transactions comply with the ODLC's requirements. Here, nothing in the record suggests that the appointed receiver was seeking a security interest in the liquor license. Pursuant to the trial court's order, the receiver's duty was to sell the liquor permit to satisfy the judgment. Of course, once a buyer has been identified, the receiver would need approval from the ODLC to complete the sale. Consequently, in this case, the trial court did not abuse its discretion in granting the receiver authority over Lucic's liquor license. Accordingly, we overrule the second assigned error.

Previously Seized Assets

{¶17} In the third assigned error, Lucic argues the trial court erred when it failed to order the sale of previously seized assets before appointing a receiver. However, the record reveals that Lucic never raised this issue below. Issues that could have been raised and resolved in the trial court cannot be raised for the first time on appeal. *Unifund CCR, L.L.C. v. Johnson*, 8th Dist. Cuyahoga No. 100600, 2014-Ohio-4376, citing *Miller v. Romanowski*, 8th Dist. Cuyahoga No. 100120, 2014-Ohio-1517. See also *Hous. Advocates, Inc. v. Am. Fire & Cas. Co.*, 8th Dist. Cuyahoga Nos. 86444 and 87305, 2006-Ohio-4880, ¶ 33. Therefore, issues not raised in the trial court are forfeited on

appeal. *Id.*, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306,

¶ 21-23. Accordingly, we overrule the third assigned error.

{¶18} Judgment affirmed.

It is ordered that appellee recover from appellant 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.

PATRICIA ANN BLACKMON, JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR