

[Cite as *Yidi, L.L.C. v. JHB Hotel, L.L.C.*, 2017-Ohio-1374.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104907

YIDI, L.L.C.

PLAINTIFF-APPELLEE

vs.

JHB HOTEL, L.L.C., ET AL.

DEFENDANTS - APPELLEES

[Appeal by Historic Preservation Fund, 2012 L.L.C.]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-850496

BEFORE: Blackmon, J., Keough, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: April 13, 2017

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant, Historic Preservation Fund 2012, L.L.C. (“Historic” or “Appellant”), appeals from the order of the trial court denying its motion to intervene in a foreclosure action filed by plaintiff Yidi, L.L.C. (“Yidi”) arising from Yidi’s loans to JHB Hotel, L.L.C. (“JHB”), 3M Realty, L.L.C. (“3M Realty”), 3M Development, L.L.C. (“3M Development”), and Hickory Court, L.L.C. (“Hickory”) (collectively “defendants”).

Historic assigns the following three errors for our review:

I. The Trial Court erred by denying the timely-filed motion of [Historic] to Intervene and Consolidate, to enable Appellant to protect its rights as an interested party with respect to a receivership estate, and where Appellant’s interests were impaired and not adequately represented by the existing parties to the case. (T.d. 76 - Op. and Judg. Entry, dtd. 12/01/2015).

II. The Trial Court erred by denying the motion of [Historic] to intervene and consolidate, where both cases involved common parties and interests arising from the development of property in a receivership estate. (T.d. 76 - Op. and Judg. Entry, dtd. 12/01/2015).

III. The Trial Court erred by granting the Receiver’s motion to sell real property free and clear of liens, claims and encumbrances, and to transfer the interest of lienholders to the proceeds of sale, after failing to allow [Historic] to intervene, and failing to recognize Appellant’s rights as an intervenor and interested party. (T.d. 155 - Op. and Judg. Entry, dtd. 8/04/2016).

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

{¶3} In 2006, Yidi entered into a series of loans with defendants guaranteed by three properties located on Euclid Avenue in Cleveland.¹ *See Yidi, L.L.C. v. JHB Hotel,*

¹Defendants later entered into a consolidated loan from Yidi in the amount of \$4,300,000 that

L.L.C., 8th Dist. Cuyahoga No. 103872, 2016-Ohio-6955, ¶ 2 (“*Yidi I*”). JHB is the sole title holder of the real property.

{¶4} The record indicates that Historic owns a “99 percent share of Investor, which is in turn the sole shareholder of JHB; however, the entities are otherwise independent of each other under Ohio law.” *Id.* “It is undisputed that neither Historic nor Investor owns the [guaranteed] properties or were otherwise involved in the loan agreements between Yidi and JHB.” *Id.* The record further demonstrates that:

[Prior to August 31, 2015, or the date of Yidi’s filing of a foreclosure action against defendants,] Historic entered into an escrow agreement for the purpose of providing a \$4,500,000 capital contribution to Investor. Chicago Title acted as the escrow agent, managing the disbursement of the funds. The terms of the agreement, with the stated intent that Investor anticipated undertaking a business venture at JHB’s property, were completed and the funds entirely disbursed before [August 31, 2015]. Despite the stated intent, none of [Historic’s] disbursements involved JHB or its loans with Yidi.

Id. at ¶ 3.

{¶5} On August 31, 2015, Yidi filed a foreclosure action against defendants, alleging that defendants are in breach of the terms of the notes and that \$4,300,000 in principal, plus interest and penalties, is now due. Yidi also moved for the appointment of a receiver to take control of the property, a provision included in the mortgages that is to occur in the event of a default. The trial court granted this motion and appointed Mark Dottore (“Receiver”) as receiver.² Receiver subsequently demanded

was secured by the Euclid properties.

²Appellant appealed the order appointing a receiver to this court. However, this court sua

production of all of Chicago Title’s information concerning the escrow account between Investor and JHB. *Id.* at ¶ 4. In response, Chicago Title asserted that it had “no material that could be considered receivership property [and] the only relevant escrow agreement in its possession was between Historic and Investor.” *Yidi I* at ¶ 5. Chicago Title additionally asserted that the escrow agreement between Historic and Investor is privileged and confidential.

{¶6} On December 1, 2015, the trial court ordered Chicago Title to produce all of the information pertaining to Historic’s escrow agreement with Investor. Historic appealed. This court reversed and remanded, stating:

It is undisputed that neither Historic nor Investor owns the disputed properties or were otherwise involved with the loan agreements between Yidi and JHB. Historic’s relationship to JHB is based on Historic’s ownership of a 99 percent share of Investor, which in turn is the sole shareholder of JHB; however, the entities are otherwise independent of each other under Ohio law. Based on its indirect ownership of JHB, Historic unsuccessfully attempted to intervene in the foreclosure action, although Yidi had not advanced allegations to pierce JHB’s corporate veil, which might have made Historic’s indirect ownership of JHB’s shares relevant.
* * *

* * * The terms of the [escrow agreement providing for Historic’s capital contribution to Investor], with the stated intent that Investor anticipated undertaking a business venture at JHB’s property, were completed and the funds entirely disbursed before the foreclosure action was initiated. * * *

[R]eceiver and Yidi both claimed that receivership property was being sought because the escrow agreement between Historic and Investor indicated that Investor “plans to undertake the construction, development

sponte dismissed the appeal, noting that “a proposed intervenor is not a proper party to bring an appeal in this case.” *See Yidi, L.L.C. v. JHB Hotel, L.L.C.*, 8th Dist. Cuyahoga No. 103585 (Oct. 7, 2015) (“*Yidi* Order”).

and operation of a Le Meridian Hotel project” at the properties. According to Yidi and [R]eceiver’s theory, because Historic and Investor’s agreement contemplated an association with JHB, the material was somehow relevant to the foreclosure action. We acknowledge the possibility that Yidi and [R]eceiver could demonstrate the relevance of the nonparty’s confidential documentation through Investor’s status as a shareholder of JHB under the right circumstances, but at this stage of the proceedings, Yidi and [R]eceiver failed to allege, let alone demonstrate, that Historic’s capital contribution into Investor is relevant to the underlying action in which Yidi seeks to enforce the loan agreement entered between Yidi and JHB.

Id. at ¶ 2-5.

{¶7} The record additionally demonstrates that on April 14, 2015, Investor’s shareholders, including Hotelo, Ltd. (“Hotelo”) and individual shareholders, filed a shareholder derivative action, in Case No. CV-15-844051, against Hotelo manager Arthur Schamovic (“Schamovic”), Historic, Investor IV, JHB, 3M Realty, 3M Development, and other defendants. The Hotelo plaintiffs alleged, in relevant part, that “Defendants have either swindled Hotelo, Ltd. out of a \$1,350,000 investment or allowed themselves to be used as a pawn to perpetuate the [s]cheme.” *See Hotelo, Ltd. v. Investor IV 2010 , L.L.C.*, Cuyahoga C.P. No. CV-15-844051. Yidi is not a party to this action.

{¶8} On September 17, 2015, Historic moved to intervene in the instant foreclosure lawsuit filed by Yidi, and to transfer and consolidate it with the Hotelo shareholder derivative litigation pending in Case No. CV-15-844051. Hotelo and Schamovic also filed motions to intervene in the instant case. In relevant part, Historic asserted that it “claims an interest in the property that takes priority over all claims insofar as [Historic] now owns 99 percent of [Investor] which is the entity that wholly owns

[JHB Hotel] which in turn is the sole owner of the property at issue.” Historic also complained that its tax credits are in jeopardy in the foreclosure action, and “the appointment of a receiver is expressly barred and prohibited by the terms of a settlement entered in [Case No. CV-15-844051].”³ In opposition, the Receiver asserted that Historic is not a proper party to Yidi’s foreclosure action because Historic is not the fee title owner of the property, because it owns 99 percent of Investor and Investor owns JHB. Receiver also noted that Historic was not a signatory or guarantor of the loan documents, and does not have a recorded lien on the property.

{¶9} On October 8, 2015, the trial court denied Historic’s motion to intervene, transfer and consolidate. In relevant part, the trial court wrote:

It is clear from public records that the sole title holder of the property is JHB. None of the proposed intervenors claim to have superior or competing title to the Property.

All of the proposed intervenors have described their interests as derivative of JHB’s interest in the Property. * * *

At best, the proposed intervenors claim an interest in an entity that has an interest in JHB that has an interest in the Property. The proposed intervenors claim an interest through layers of corporate insulation. Their interests are fractional shares of whatever portion of JHB’s interest flows through Investor IV, L.L.C.. Accordingly, all of the proposed intervenors have an indirect interest in the Property solely arising from JHB’s interest.

* * *

³On December 29, 2016, the trial court in case no. CV-15-844051 issued an order that provided in relevant part, “[t]he court finds that the provisional settlement that parties entered into is null and void. * * * [S]ettlement did not occur * * *.” This order is the subject of a pending appeal in *Hotelo, Ltd. v. Investor IV 2010, L.L.C.*, 8th Dist. Cuyahoga No. 105407.

Their purported interest is their share, if any, of any proceeds from the Property.

This action does not concern the liquidation or dissolution of JHB. It concerns only the enforcement of loan documents executed between lender and borrower. None of the purported intervenors dispute Yidi's interest in the Property. Their allegation must be viewed solely as claimed impairment in the value of the Property.

* * * All of the proposed intervenors claim an interest in Investor IV 2010, L.L.C. that holds an interest in JHB. Thus, their only interest in the current case arises from JHB. JHB is party to this action and is represented by counsel. JHB has been cooperating with the Receiver in this action to maintain and maximize the value of the Property, an interest identical to the interest of the purported intervenors. * * *

The proposed intervenors have failed to demonstrate how their interests are not adequately represented by JHB, the entity they all claim to have an interest in through another entity or entities.

* * *

The proposed intervenors also * * * have not established [the right to permissive intervention because they have no] claim or defense relevant to the loans at issue in this matter.

{¶10} Finally, in denying Historic's motion to consolidate this case with *Hotelo*, the trial court stated:

The *Hotelo* case is at its core shareholder dispute to determine proportional ownership interests in Investor IV 2010, L.L.C. but the underlying facts are complex.

* * * The only facts relevant to the current action are whether Yidi loaned funds, whether those loans were secured by the Property, and whether the borrower defaulted on the loans. None of those facts appear to be in dispute in the *Hotelo* case. The only issues of law presented in the current

case are related to the enforcement of the loan documents between Yidi and the borrowers. The legal issues related to the loan documents are not at issue in the *Hotelo* case.

{¶11} After the trial court denied the motions to intervene, transfer and consolidate filed by Historic, and Hotelo and Schamovic, Hotelo and Schamovic filed a notice of appeal to this court. Following briefing on the issue of Hotelo and Schamovic's right to intervene, this court dismissed their appeal, stating:

Motion by appellee, Yidi, L.L.C., to dismiss appeal is granted. [Appellants Hotelo and Schamovic have] appealed a trial court order denying [their] motion to intervene in this foreclosure action. Appellant Hotelo, Ltd. asserts that it owns 1 percent of Investor IV L.L.C., which wholly owns JHB Hotel L.L.C., which wholly owns the property at issue. Appellant Arthur Schamovic is a member and manager of Hotelo.

Intervention for the purpose of asserting a beneficial interest in the property, based on an indirect interest in a party to the action, does not aid the action and so is not a provisional remedy. Therefore, the order denying intervention is not appealable pursuant to R.C. 2505.02(B)(4). Further, appellant can separately litigate its interest in Investor IV and JHB Hotel and their respective assets, so the denial of its motion to intervene here does not determine an action or prevent a judgment in its favor.

See Yidi v. JHB Hotel, L.L.C., 8th Dist. Cuyahoga No. 103707 (“*Yidi Order II*”).

{¶12} Following the denial of the motions to intervene filed by Historic, Hotelo and Schamovic, the trial court granted the Receiver permission to sell the property to Alto Partners, L.L.C.

1. Denial of Motion to Intervene

{¶13} In its first and second assigned errors, Historic argues that the trial court erred in denying its motion to intervene at the foreclosure sale and redemption proceedings because it has a financial stake in the property of the receivership estate. Historic defines that interest as a financial interest in the project. In opposition, Receiver and Yidi assert that Historic does not own the mortgage property, did not sign the loan documents, and does not have a lien. They assert that Historic's interest is its 99 percent ownership of Investor, and Investor is the sole shareholder of JHB. Neither Historic's nor Investor's names appear on the subject property, and it is JHB that owns the mortgaged property.

{¶14} While motions to intervene should be liberally construed, the standard of review of a ruling on a motion to intervene, whether as of right or by permission, is whether the trial court abused its discretion. *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935 ¶ 41, *Grogan v. T.W. Grogan Co.*, 143 Ohio App.3d 548, 560, 758 N.E.2d 702 (8th Dist.2001), citing *Peterman v. Pataskala*, 122 Ohio App.3d 758, 761, 702 N.E.2d 965 (5th Dist.1997); *Brady v. Benzig*, 8th Dist. Cuyahoga No. 81894, 2003-Ohio-3354, ¶ 5 (on review of intervention of right).

{¶15} Intervention is governed by Civ.R. 24, which provides:

(A) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the

action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(B) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * *

{¶16} A party seeking intervention of right must show: (1) the application is timely; (2) the intervenor claims an interest relating to the subject of the action; (3) the intervenor is so situated that the disposition of the action may as a practical matter impair or impede his or her ability to protect that interest; and (4) the existing parties do not adequately represent his interest. *Grogan*, citing *Widder & Widder v. Kutnick*, 113 Ohio App.3d 616, 624, 681 N.E.2d 977 (8th Dist.1996). This same standard is applied where the proposed intervenor seeks to challenge the appointment of a receiver. *Grogan*.

A. An Interest Relating to the Property or Transaction

{¶17} With regard to the requirement that the proposed intervenor claims an interest relating to the property or transaction that is the subject of the action, we note that the proposed intervenor's interest must be "direct, substantial, and legally protectable." *Fairview Gen. Hosp. v. Fletcher*, 69 Ohio App.3d 827, 832, 591 N.E.2d 1312 (10th Dist 1990); *Grover Court Condominium Unit Owners' Assn. v. Hartman*, 8th Dist. Cuyahoga No. 94910, 2011-Ohio-218, ¶ 16.

{¶18} In a foreclosure action, the mortgaged property is the subject matter of the action. *Women’s Fed. Savs. Bank v. Akram*, 33 Ohio App.3d 255, 256, 515 N.E.2d 939, 940 (8th Dist.1986). “Parties who claim an interest in the property * * * include mortgage holders, parties who have judgment liens, or parties who may have signed contracts to purchase or lease the property.” *KeyBank Natl. Assn. v. Liberty Holding Group, L.L.C.*, 8th Dist. Cuyahoga No. 93888, 2011-Ohio-923, ¶ 18, quoting *Green v. Lemarr*, 139 Ohio App.3d 414, 431, 744 N.E.2d 212 (2d Dist.2000).

{¶19} In this matter, Historic does not own the property, and is not a guarantor of the mortgage or a signatory on any of the loan documents. Historic does not have a lien on the property. Rather, Historic owns 99 percent of Investor and Investor in turn owns JHB, the sole title holder of the mortgage property. This is an indirect, rather than direct interest in the subject of the *Yidi* litigation. As stated in *Yidi I*, “[b]ased on its indirect ownership of JHB, Historic unsuccessfully attempted to intervene in the foreclosure action[.]” *Id.* at ¶ 2 (Emphasis added.) *See also Yidi Order II* (“Intervention for the purpose of asserting a beneficial interest in the property, based on an indirect interest in a party to the action, does not aid the action and so is not a provisional remedy.”).

{¶20} Moreover, a corporation is a separate legal entity from its shareholders, even where there is but one shareholder. *LeRoux’s Billyle Supper Club v. Ma*, 77 Ohio App.3d 417, 420, 602 N.E.2d 685 (6th Dist.1991).

{¶21} In this matter, Historic is a separate entity from Investor, despite its 99 percent ownership, and Investor is an independent entity from JHB. Again, as noted in

Yidi I, “Historic’s ownership of a 99 percent share of Investor, which in turn is the sole shareholder of JHB; however, the entities are otherwise independent of each other under Ohio law.” *Yidi I* at ¶ 2. Moreover, as also noted in *Yidi I*, Yidi did not advance “allegations to pierce JHB’s corporate veil, which might have made Historic’s indirect ownership of JHB’s shares relevant.” *Id.*

{¶22} Accordingly, the trial court did not err when it concluded that Historic has only an indirect interest in this matter.

B. Will Disposition of the Action Impair Historic’s Interest?
Do Existing Parties Adequately Protect Historic’s Interest?

{¶23} We next consider whether disposition of the action may as a practical matter impair or impede Historic’s ability to protect its interest, and whether the existing parties to this litigation adequately represent Historic’s interest.

{¶24} In general, when the interests of a proposed intervenor are virtually identical to that of a party named in the action, intervention will not be granted unless the proposed intervenor makes a compelling showing that a party already participating in the proceeding cannot or will not adequately represent the prospective intervenor’s interest. *Toledo Coalition for Safe Energy v. Pub. Util. Comm. of Ohio*, 69 Ohio St.2d 559, 562, 433 N.E.2d 212 (1982); *State ex rel. Merrill*, 2011-Ohio-4612 at ¶ 42. Thus, absent a showing of inadequate representation by a corporation or partnership that is already party to a suit, courts ordinarily will not allow shareholders or partners to intervene as a matter of right. *See, e.g., Stadin v. Union Elec. Co.*, 309 F.2d 912 (8th Cir.1962). *Accord Metro N. State Bank v. Amcore Bank Natl. Assn.*, N.D. Ill. No. 90 C 20127, 1990 LEXIS

19162 (Nov. 20, 1990) (denying motion of limited partners to intervene in foreclosure action because their interest is “only indirect” and they made no showing that interest will not be adequately represented by the existing parties).

{¶25} In this matter, Historic has not shown that JHB cannot or will not adequately protect its interests. Moreover, the record indicates that JHB has retained attorneys to represent its interests. *Accord Grogan*, in which this court stated:

The sibling directors failed to show that they had an interest different from that of the corporation. Because they are directors of the company and, as a block, own a controlling share of the stock, their interests in intervening in the receivership proceeding would not be any different from that of the company.

Id. at 560.

{¶26} Although Historic further complains that it has been subjected to invasive discovery, as this court made clear in *Yidi I*, any nonparty may be subjected to discovery through a Civ.R. 45 subpoena, and the proper remedy for challenging confidential information requested by subpoena is to file a motion to quash. *Yidi I* at ¶ 8. This remedy was employed in *Yidi I* to bar production of privileged and confidential information.

{¶27} As to Historic’s claim that it has been denied due process, we note that the sole title holder to the property is JHB. Historic’s interest is derivative in that it is the 99 percent owner of Investor, which in turn owns JHB. As noted by the trial court:

At best, the proposed intervenors claim an interest in an entity that has an interest in JHB that has an interest in the property. The proposed intervenors claim an interest through layers of corporate insulation. Their

interests are fractional shares of whatever portions of JHB's interest flows through Investor[.]

In any event, there is no dispute that JHB and Historic have had notice and an opportunity to be heard in this matter.

{¶28} In accordance with the foregoing, the trial court did not abuse its discretion in denying Historic's motion to intervene. Historic's first and second assigned errors are without merit.

2. Motion to Consolidate

{¶29} In its first and second assigned errors, Historic additionally claims that the trial court erred in denying its motion to transfer the instant matter for consolidation with *Hotelo, Ltd. v. Investor IV 2010 L.L.C.*, Cuyahoga C.P. No. CV-15-844051, because both cases involved common parties and interests arising from the development of the property in a receivership estate. In opposition, Receiver and Yidi argue that the trial court acted within its discretion since Yidi is not a party to the *Hotelo* action and that action is a shareholder derivative action that is unrelated to the instant foreclosure action.

{¶30} Civ.R. 42(A) provides that the trial court may consolidate pending actions if there are common questions of law or fact between the actions. It is within the trial court's discretion whether to consolidate, and the decision will not be reversed on appeal absent an abuse of that discretion. *Waterman v. Kitrick*, 60 Ohio App.3d 7, 572 N.E.2d 250 (10th Dist.1990); *McDonnold v. McDonnold*, 98 Ohio App.3d 822, 827, 649 N.E.2d 1236 (11th Dist.1994). As the Ohio Supreme Court noted:

[T]he thrust of Civ.R. 42(A) is to vest discretion in the Court of Common Pleas to determine whether consolidation of cases is to be permitted where

the circumstances specified in the rule exists. The purpose of the rule is to avoid unnecessary costs or delay in the interests of judicial efficiency. * *
* The management of cases lies within the discretion of the court, and not with the parties so long as the rights of the parties are adequately protected. (Quotes omitted.)

Dir. of Hwys. v. Kleines, 38 Ohio St.2d 317, 319-320, 313 N.E.2d 370 (1974).

{¶31} In *Keybank Natl. Assn. v. Environment First Servs. Co., Inc.*, 11th Dist. Ashtabula No. 2001-A-0064, 2002-Ohio-3126, the court found no abuse of discretion where the trial court denied the movant ESC's motion to consolidate KeyBank's foreclosure action against ESC with an action filed by ESC's sole shareholder, Linda Fronk, against KeyBank for alleged wrongful liquidation of company's certificates of deposit. In affirming the trial court's denial of ESC's motion to consolidate, the appellate court stated:

In the instant case, the foreclosure action and the suit brought by Linda Fronk against Keybank, Case No. 00 CV 390, do not involve common questions of law or fact; they do not even involve the same parties. Although Fronk is ESC's sole shareholder, ESC does not argue or present any evidence that Fronk and the corporation, are one and the same. Further, the record is devoid of any evidence showing that the trial court's decision to deny ESC's motion to consolidate negatively affected ESC's rights.

Id. at ¶ 14.

{¶32} Likewise, in the instant matter, we find no abuse of discretion as the instant matter involves the foreclosure of the defendants' loans secured by JHB's property, whereas the *Hotelo* litigation is a shareholder derivative action involving the claims of the Investor shareholders. There are no common questions of law. Further, although JHB, 3M Development, 3M Realty and others are parties to both actions, Yidi is not a party to

the shareholder action and Historic is not a party to the foreclosure action. Each action has its own distinct claims and parties. Therefore, the trial court could properly determine, within the sound management of its docket, that the matters should remain separate.

3. Challenge to Grant of Receiver's Motion to Sell Property

{¶33} In its third assigned error, Historic argues that the trial court erred by granting the Receiver's motion to sell the property. In that this court has concluded that the trial court did not err in denying Historic's motions to intervene and to consolidate, we conclude that Historic has no standing to challenge the Receiver's sale of the property.

Therefore, we find no merit to this assigned error.

{¶34} The assigned errors are without merit.

{¶35} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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

KATHLEEN ANN KEOUGH, A.J., and
MARY EILEEN KILBANE, J., CONCUR