

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

BRIAN H. SOLOMON, :
 :
 Plaintiff-Appellee, :
 : No. 110415
 v. :
 :
 DAWN M. SOLOMON, ET AL., :
 :
 Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: June 30, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-939954

Appearances:

Harold Pollock Co., L.P.A., and Harold Pollock, *for appellee.*

Lieberman, Dvorin & Dowd, LLC, David M. Dvorin, Amber N. Furdal, and Richard A. Teel, *for appellant.*

MICHELLE J. SHEEHAN, P.J.:

{¶ 1} Defendant-appellant Dawn Solomon appeals the trial court's judgment appointing a receiver to manage property jointly owned by her and her husband, plaintiff-appellee Brian Solomon. Because there was not clear and

convincing evidence necessitating the ex parte appointment of a receiver, we reverse the judgment of the trial court.

I. Procedural history and relevant facts.

A. The complaint

{¶ 2} On November 5, 2020, Brian¹ filed a complaint as cotenant for rents pursuant to R.C. 5307.21. He filed an amended complaint on November 6, 2020. The complaints contained counts of breach of fiduciary duty, theft, conversion, and fraudulent transfer. Within the complaints, Brian alleged that he and Dawn were co-owners of three parcels of real property located on Knickerbocker Road, Bay Village, Ohio; Langale Road, Westlake, Ohio; and on Moore Rd., Avon, Ohio (hereinafter collectively referred to as “the Properties”).

{¶ 3} In the complaints, Brian alleged that the Properties each had tenants and on or about January 1, 2016, Dawn took control over them and retained all rents. He alleged that Dawn breached duties to act in good faith, fair dealing, and due care; that she failed to protect his interests by collecting and retaining rents; and that she failed to account for those rents. He further stated Dawn committed waste in her management of the Properties and that she was unjustly enriched. The complaint sought various remedies, to include rescission of alleged fraudulent transfers, an order of accounting for rents, injunctive relief, monetary damages, partition of the Properties, creation of a constructive trust, an equitable lien, and punitive damages.

¹ As appellant and appellee share a surname, in the interest of clarity we refer to the parties by first names throughout this opinion.

Attached to the complaints were survivorship deeds for the Properties indicating Brian and Dawn received the properties as husband and wife. Brian also filed interrogatories and requests for admissions.

B. Attempts at service of the complaint

{¶ 4} Brian attempted service of the complaint through registered mail to an address in Mexico. On November 6, 2020, he again attempted service of the amended complaint through registered mail to the address in Mexico. On December 8, 2020, Brian filed an affidavit for service by publication. On January 15, 2021, he attempted service of the amended complaint through registered mail to an address in Las Vegas, Nevada. On January 25, 2021, Brian filed proof of publication of the complaint. On February 3, 2021, the court's clerk noted delivery of the amended complaint to the Las Vegas address.

C. The motion to appoint receiver

{¶ 5} On November 5, 2020, Brian filed a motion for the appointment of a receiver simultaneously with the initial complaint. On January 13, 2021, Brian filed a motion for hearing on the motion. The trial court scheduled a hearing date for the motion for appointment of a receiver for March 4, 2021.

{¶ 6} On February 27, 2021, Brian filed an affidavit from an accountant in support of the motion. In the affidavit, the accountant averred that he had prepared Brian and Dawn's tax returns from approximately 1990 through 2020, and that the Properties were owned as investments. The accountant also averred that Dawn reported receiving income from the Properties in the years 2016 through 2019.

{¶ 7} On February 28, 2021, Brian filed a motion for default judgment and a motion for the court to consider unanswered admissions as fact. On March 5, 2021, Brian filed a supplemental memorandum in support of his motion to appoint receiver, informing the trial court that his lawsuit was ancillary to divorce proceedings that were occurring in Mexico. The motion further argued that the trial court had in rem jurisdiction in this case.

D. The judgment entry appointing a receiver

{¶ 8} On March 9, 2021, the trial court entered an order of appointment of a receiver over the properties. In the order the trial court made the following findings of fact:

Based upon the allegations of the Verified Complaint filed in this case as the Motion, the Court finds that: (i) it is in the best interest of Plaintiff that a receiver be immediately appointed over the Property, to take charge of the Property, to collect all rents, revenues, to determine the amount of rents misappropriated by Defendant from Plaintiff, and to pay all rents minus the Receiver's fees to Plaintiff until Plaintiff has recouped all sums misappropriated from him, and thereafter to divide all distributable sums equally between Plaintiff and Defendant. [sic]

This Court further finds that the appointment of a receiver is necessary to avoid the harm that Plaintiff will continue to suffer if a receiver is not put in place to collect rents, manage the Property, and market and sell the Property.²

{¶ 9} On March 15, 2021, following the trial court's order, Dawn filed a motion for leave to plead and a motion for an extension of time to respond to discovery. On March 16, 2021, Brian filed a motion to expand the scope of the

² We note that the complaint filed in this was not verified by oath or affidavit.

receivership to include foreign property. On March 31, 2021, Brian filed a second amended complaint, including additional allegations that Dawn engaged in common law and statutory creditor fraud under R.C. 2913.45 and 2307.06 and that she concealed or destroyed evidence regarding the collection of rents.

{¶ 10} On April 3, 2021, Dawn filed a motion to vacate the trial court's order appointing the receiver. Dawn alleged that she was never properly served with the complaint and became aware of the litigation via a phone call from the appointed receiver. She argued that without proper service, the court was without jurisdiction to appoint a receiver because R.C. 2735.01 precluded the order of a receiver where there was no pending case. Dawn also argued that Brian is aware of her residence in Mexico and did not properly obtain service. She further argued that the purported service by publication was defective because Brian knew of Dawn's residence. Moreover, Dawn argued, where a plaintiff is aware a defendant resides outside the United States, Civ.R. 4.5(A) precludes service by publication.

{¶ 11} Dawn also argued that there was insufficient evidence upon which the trial court could appoint a receiver. Under R.C. 2375.01(A) a receiver may be appointed where "it is shown that the property or fund is in danger of being lost, removed, or materially injured." She argued that the party seeking a receiver must do so by presenting clear and convincing evidence that the appointment is necessary for the preservation of the complaining parties' rights. Finally, she argued that Brian only submitted evidence that rents were reported to an accountant in 2015, 2016, 2017, 2018, and 2019 and there was no evidence in the form of affidavits or

testimony before the trial court that the Properties were in danger of being lost, removed, or materially injured.

E. The judgment appealed and procedure on appeal

{¶ 12} On April 7, 2021, Dawn filed an appeal of the court’s March 9, 2021 order appointing the receiver in this case. On July 2, 2021, Brian filed a motion for remand of the case in this court asking that the case be remanded for the trial court to correct the record as to whether a hearing was held.

{¶ 13} On July 12, 2021, this court granted the motion and remanded the matter to the trial court for the purpose of correcting the docket regarding whether a hearing was conducted. After remand, the trial court entered the following entry on the docket:

On 2/16/2021 a hearing was scheduled for 3/4/2021 at 1:00 PM in Courtroom 23-D. Defendant did not appear. Attorney Pollock timely appeared for plaintiff and spoke with the court in chambers. Given Defendant’s failure to appear or file a responsive pleading, and in reliance on Civ.R. 8(D), the Court entered its receivership order on 3/9/2021.³

II. LAW AND ARGUMENT

A. Assignments of Error

{¶ 14} Dawn raises three assignments of error. The second alleges that the trial court was without jurisdiction to appoint a receiver. It reads:

Second assignment of error: The trial court erred in appointing a receiver because it did not have jurisdiction or authority over the

³ Civ.R. 8(D) provides that “[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.”

matter due to a lack of service pursuant to the Ohio Rules of Civil Procedure and the Hague Convention.

Her first and third assignments of error address the propriety and procedure taken by the trial court in appointing a receiver. They read:

First assignment of error: The trial court erred by abusing its discretion when it appointed a receiver without clear and convincing evidence warranting such a remedy and/or providing notice or conducting an evidentiary hearing.

Third assignment of error: The trial court erred by appointing a receiver when the allegations of theft against appellant were unsubstantiated and there was no evidence showing that the properties were in danger of financial loss or damage pursuant to R.C. 2735.

B. Applicable law and standard of review

{¶ 15} R.C. 2735.01(A) allows a court to appoint a receiver “[i]n an action * * * between partners or others jointly owning or interested in any property * * * on the application of the plaintiff * * * when it is shown that the property * * * is in danger of being lost, removed or materially injured.” Under R.C. 2735.01(F), a court may appoint a receiver “[i]n all other cases in which receivers have been appointed by usages of equity.” We have found the appointment of a receiver is a procedure that “is the exercise of an extraordinary, drastic and sometimes harsh power which equity possesses and is only to be exercised where the failure to do so would place the petitioning party in danger of suffering an irreparable loss or injury.” *Malloy v. Malloy Color Lab, Inc.*, 63 Ohio App.3d 434, 437, 579 N.E.2d 248, 250 (10th Dist.1989), citing *Hoiles v. Watkins*, 117 Ohio St. 165, 174, 157 N.E. 557 (1927). Because the appointment of a receiver is an extraordinary remedy, the party seeking

the receivership must show by clear and convincing evidence that the appointment is necessary for the preservation of the complainant's rights. *ATAC Corp. v. Shetty*, 8th Dist. Cuyahoga No. 70865 and 70904, 1997 Ohio App. LEXIS 511, 9 (Feb. 13, 1997). We review the trial court's decision to appoint a receiver for an abuse of discretion. *Leight v. Osteosymbionics, L.L.C.*, 2017-Ohio-5749, 94 N.E.3d 995, ¶ 28 (8th Dist.).

C. A trial court may appoint a receiver ex parte without service of the complaint or without notice only under certain circumstances

{¶ 16} In her second assignment of error, Dawn complains service was not perfected and thus the trial court was without jurisdiction to appoint a receiver. Brian argues service was perfected and, even if not, the trial court had jurisdiction over the case and could appoint a receiver. In this case, Brian argued Dawn was committing financial misconduct, alleging theft, conversion, and breach of fiduciary duty.

{¶ 17} A trial court may ex parte order the appointment of a receiver only upon a showing of irreparable harm and where there are allegations of fraud, insolvency, or imminent danger of harm to the property even when no personal service of the action has been perfected in a case and no notice of a hearing has been issued. *Saferin v. Mach Ents.*, 6th Dist. Lucas No. L-85-070, 1985 Ohio App. LEXIS 8842 (Oct. 18, 1985), citing *Ry. Co. v. Jewett*, 37 Ohio St. 649 (1882), syllabus; see *Leight v. Osteosymbionics, L.L.C.*, 2017-Ohio-5749, 94 N.E.3d 995, ¶ 31 (8th Dist.), quoting *United States Bank, N.A. v. Gotham King Fee Owner, L.L.C.*, 8th Dist.

Cuyahoga No. 98618, 2013-Ohio-1983, ¶ 12 (“[T]he general rule requiring notice ‘is not inflexible’ and, thus, a trial court may appoint a receiver without notice if the ‘facts and situation warrant such an appointment.’”). The ex parte appointment of a receiver is appropriate where the failure to do so would result in irreparable loss or harm. *Mfrs. Life Ins. Co. v. Patterson*, 51 Ohio App.3d 99, 100, 554 N.E.2d 134 (8th Dist.1988). In the context of determining the necessity of an injunction, irreparable harm has been defined as “an injury for which there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete.” *DK Prods. v. Miller*, 12th Dist. Warren No. CA2008-05-060, 2009-Ohio-436, ¶ 13.

{¶ 18} Brian’s complaint concerns real property located in Cuyahoga County, Ohio and sought among other remedies, partition. As such, the trial court had subject-matter jurisdiction over the action. *See* R.C. 5307.04. As long as the trial court has subject-matter jurisdiction over a case, it has the power to appoint a receiver. *See* R.C. 2735.01 et seq. A trial court may also appoint a receiver ex parte and without notice or before personal service is made under certain circumstances.

{¶ 19} Because the trial court had subject-matter jurisdiction in this case over the Properties and had the authority to appoint a receiver without notice of hearing or service of the complaint, we need not determine whether service was perfected in this case and do not do so. Such determination does not affect the trial court’s authority to appoint a receiver ex parte, nor would such determination

preclude or affect our review of that order. The second assignment of error is overruled.

D. The record did not contain clear and convincing evidence that a receiver was necessary

{¶ 20} In her first assignment of error, Dawn complains there was no evidence presented to the trial court that the Properties were in danger of financial loss or damage or that Brian would suffer irreparable harm. Brian relies, in general, on the following facts to argue a receiver was necessary:

- He and Dawn are equal owners of the subject properties;
- His rights in the properties are the same as those of Appellee;
- Dawn collected all rents from the tenants since January 1, 2016;
- Dawn excluded Appellee from dealing with the tenants;
- He is entitled to one-half of all rents paid; and
- Dawn misappropriated and converted his share of the rents and was continuing to do so.

{¶ 21} In his motion seeking the appointment of a receiver, Brian stated that he and Dawn owned the Properties as joint tenants with right of survivorship, that the rents for the Properties amounted to approximately \$10,000 per month, and that Dawn had collected and retained all rent since 2016. In his supplement to the motion, Brian informed the trial court that this case was ancillary to divorce proceedings in Mexico and argued the trial court should resolve his motion under Ohio law. As a corollary to his motion to appoint a receiver, Brian filed a motion for the trial court to take facts as established from the unanswered complaint as well as unanswered requests for admissions. In seeking a receiver, Brian relied on R.C. 2735.01(A)(1) and (A)(7) and argued:

The appointment of receiver is warranted in this action. Defendant has been collecting all of the rents of the properties. As a joint tenant Plaintiff has an equal right to the rents.

{¶ 22} The trial court appointed a receiver in this case ex parte, without a formal hearing or notice. Although the trial court had authority to appoint a receiver ex parte, courts have found that the ex parte appointment may be done only in certain circumstances and only when necessary to prevent irreparable harm. *See Ry. Co. v. Jewett*, 37 Ohio St. 649, 1882 Ohio LEXIS 229 (1882), paragraph two of the syllabus (“The appointment of a receiver to take from the defendant the possession of his property, cannot be lawfully made without notice, unless the delay required to give such notice will result in irreparable loss.”); *Leight v. Osteosymbionics, L.L.C.*, 2017-Ohio-5749, 94 N.E.3d 995, ¶ 40 (8th Dist.) (Without appointment of receiver, medical devices would not be produced preventing necessary brain surgeries for patients). *Harbor Island Assn. v. Stecks Buckeye Storage Units, LLC*, 6th Dist. Ottawa No. OT-20-012, 2021-Ohio-2969, ¶ 29, 34 (Court abused discretion in grant of receiver without hearing where plaintiff’s motion argued receiver would be most efficient means of implementing court order and where no showing of undue hardship was made as required under local rule of procedure.).

{¶ 23} Under R.C. 2735.01(A)(1), the trial court needed to find that property was “in danger of being lost, removed or materially injured.” Under R.C. 2735.01(A)(7), the trial court would have to find that the appointment of receiver would be in conformity with the requirements of any other case “in which receivers

have been appointed by usages of equity.” Thus, in order to ex parte appoint a receiver in this case, the trial court must be able to find by clear and convincing evidence that there would be irreparable harm and that property was subject to being lost, removed, or materially injured and/or the appointment was appropriate in equity.

{¶ 24} Although Brian generically alleges in the complaint Dawn is committing theft and conversion and may have fraudulently transferred the Properties, these allegations do not describe acts that constitute fraud, conversion, or theft. Further, the unanswered discovery requests Brian relies upon seek admissions of financial misconduct without denoting particular acts demonstrating financial misconduct. In addition, within those materials, Brian does not aver that he would suffer irreparable harm or be unable to recoup any of the claimed lost rents were no receiver to be appointed.

{¶ 25} In all, the trial court had facts indicating Dawn managed the couples’ marital property for a period of years, collected rents from that marital property, and did not distribute any portion of the rents to Brian and was presented with Brian’s conclusions that this arrangement constituted financial misconduct necessitating immediate redress. The trial court did not have any framework or context that would lead to the conclusion that Dawn was in violation of any agreement regarding management of the Properties or distribution of rents between the couple, nor did it have an order from the divorce proceedings that indicated any of Brian’s or Dawn’s responsibilities and rights concerning the Properties.

Accordingly, there was no clear and convincing evidence that Brian would suffer an irreparable loss if the trial court failed to appoint a receiver ex parte.

{¶ 26} We recognize that under R.C. 2735.01(A)(1), the appointment of a receiver to manage property may be found to be appropriate where a joint owner of property withholds income from other owners. *See, e.g., Kunkle v. Kunkle*, 6th Dist. Fulton No. F-07-034, 2008-Ohio-5804 (Trial court did not abuse its discretion in ordering receiver to manage family farm.). However, in appointing the receiver ex parte in this case, the trial court found only that “it is in the best interest of Plaintiff that a receiver be immediately appointed” and “that the appointment of a receiver is necessary to avoid the harm that Plaintiff will continue to suffer if a receiver is not put in place.” These findings are general in nature and do not indicate a danger of immediate harm, loss, or removal of the Properties as required by R.C. 2735.01(A)(1). Further, the finding that Brian would continue to suffer harm is qualitatively different than a finding that he would suffer *irreparable* harm if no receiver were to be appointed.

{¶ 27} Our review of the record, including the allegations within the complaints and the requests for admissions does not lead to a showing of clear and convincing evidence that the Properties were in danger of loss, removal, or harm as required by R.C. 2735.01(A). Nor do we find the materials before the trial court sufficient to demonstrate that Brian would suffer irreparable harm if Dawn

continued to manage the Properties, especially in light of the fact divorce proceedings were pending that would determine and divide the marital property.⁴

{¶ 28} And, in this case, although we find no evidence of irreparable loss or harm, the trial court could not rely on R.C. 2735.01(A)(7) to appoint a receiver either. Pursuant to R.C. 2735.01(A)(7), a court may appoint a receiver when necessary, such as to prevent the concealment or dissipation of assets. *See, e.g., Jardine v. Jardine*, 8th Dist. Cuyahoga No. 110670, 2022-Ohio-1754, ¶ 13 – 14. However, an ex parte order appointment of a receiver upon allegations a spouse diverted funds to his own use was found to be error where there was insufficient evidence presented. *Smith v. Smith*, 9th Dist. Summit Nos. 27988 and 27991, 2017-Ohio-360, ¶ 10. Here, the parties are married and currently engaged in divorce proceedings. The factual elements in the unanswered complaint and admissions did not present evidence that would allow the trial court to determine the necessity of appointing the receiver or that Brian would suffer irreparable harm without the appointment of a receiver. Further, there was no evidence presented as to the size of the marital estate, Brian’s and Dawn’s incomes, or any other relevant financial information that would allow a court to fairly determine in equity that a receiver was necessary or that an equal division of rents would be equitable.

{¶ 29} We find the ex parte appointment of a receiver in this case to be unsupported by the record where there was not clear and convincing evidence that

⁴ Dawn argues that the value of the Properties far exceeds the damages Brian claimed, but no valuation of the Properties was contained within the record at the time the trial court appointed the receiver.

the Properties were in danger of being lost, removed, or materially injured or that Brian would suffer irreparable harm unless a receiver was appointed. Further, there was not clear and convincing evidence that a receiver was necessary as an equitable remedy necessitating an equal division of the rents. Accordingly, we sustain appellant's first assignment of error and reverse the judgment of the trial court appointing a receiver. Our resolution of the first assignment of error renders the third assignment of error moot.

III. CONCLUSION

{¶ 30} In resolving this appeal, we find the trial court had jurisdiction over the case and had the authority to appoint a receiver ex parte. The trial court's order granting the motion to appoint receiver is reversed because the record did not contain clear and convincing evidence that the Properties were in danger of being lost, removed, or were being materially injured or that there would be irreparable harm unless a receiver was appointed. Further, the record did not contain information that equity required the appointment of a receiver or justified an equal division of rents.

{¶ 31} Judgment reversed, and case remanded.

It is ordered that appellant recover of appellee 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.

A handwritten signature in cursive script, reading "Michelle J. Sheehan", is written over a horizontal line.

MICHELLE J. SHEEHAN, PRESIDING JUDGE

LISA B. FORBES, J., and
EMANUELLA D. GROVES, J., CONCUR