2018 IL App (1st) 161284-U

FIRST DIVISION
November 5, 2018

No. 1-16-1284

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BANK FINANCIAL, FSB, Plaintiff-Appellee, v. DENNIS HARRIS, Defendant-Appellee, and JOHN MUNSON, Non-party Receiver-Appellant.	) Appeal from the Circuit Court of Cook County))))) No. 15 CH 9853)))) Honorable Michael F. Otto,) Judge Presiding.

JUSTICE GRIFFIN delivered the judgment of the court.
Presiding Justice Mikva and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held*: The interlocutory order from which the receiver appeals was not entered on *ex parte* application. Even if the order was appealable under the Supreme Court Rules and if the receiver had sufficient standing to bring the appeal (which are both questionable propositions), the appeal was nonetheless untimely and must be dismissed for lack of jurisdiction.

¶ 2 The receiver, John Munson, was appointed by the trial court in a mortgage foreclosure proceeding. A few months after being appointed, the trial court discharged the receiver during a court appearance at which the receiver was present. The receiver did not appeal the order discharging him for six months. The receiver, however, had filed a motion to reconsider his discharge in the trial court and he argues that we can review his discharge under the Illinois Supreme Court Rules because the order discharging him was an *ex parte* interlocutory order from which a party can appeal within 30 days of a motion to vacate the interlocutory order being denied, regardless of when the interlocutory order was entered. We disagree that the interlocutory order was entered *ex parte*, and we dismiss the appeal for lack of jurisdiction.

¶ 3 BACKGROUND

¶ 4 Plaintiff Bank Financial, FSB, not a party to this appeal, filed this foreclosure case against defendant Dennis Harris and his dissolved company. The foreclosure case concerned two parcels of property: a strip mall in Calumet Park, Illinois and an investment property in Country Club Hills, Illinois. The trial judge appointed a receiver, appellant John Munson. The July 16, 2015 order appointing Munson continued the case to November 3, 2015 at which time Munson was ordered to present his first receiver's report.

¶ 5 In the meantime, on August 10, 2015, Bank Financial filed a motion for a default judgment against Harris. In the motion, Bank Financial stated that Harris had been served and had not answered or otherwise appeared in the case. Harris responded with an emergency motion to quash service on August 15, 2015 in which he stated that he had not been personally served. He also pointed out that the court file contained no affidavit of service or return of service indicating that service had been effectuated. The motion to quash service was set for a hearing to be held on October 27, 2015. Before the trial court could hear the motion for default and the motion to quash, Harris filed an emergency motion to advance the hearing on his motion to

quash service.

¶ 6 In his emergency motion to advance the hearing, Harris stated that he was not served in the case and indicated that the receiver, Munson, was taking actions harmful to the property. Harris supported his motion with his own affidavit, averring that Munson had come to the property while Harris was out of town and told the tenants that they were evicted. Harris also averred that Munson had allowed the tenants to steal items from the property and that all of Munson's actions were done without notice to Harris or his attorney. The motion contains statements from others who claim to have witnessed Munson taking the adverse actions Harris included in his affidavit, though the statements from those people are not sworn.

¶ 7 The trial court denied the motion to advance the hearing, finding that it was not an emergency. The court ruled that the motion to quash service would be taken up at the time the motion was previously set to be heard—October 27, 2015. All of the above-mentioned activity in the case regarding service was taking place in the time between when Munson was appointed on July 16, 2015 and when he was due in court to present his first report on November 3, 2015. Munson, as receiver, was not receiving copies of the parties' filings about the service issue and was purportedly unaware of the allegations being made against him in court by Harris.

¶ 8 After a hearing on Harris's motion to quash service on October 27, 2015, the trial court denied the motion. The trial court continued Bank Financial's motion for a default judgment generally and gave Harris leave to file a responsive pleading thereto. The trial court ordered that the court date already scheduled for a week later for the receiver to present its first report would remain as scheduled at which time the court would receive status on all other matters.

¶ 9 Munson was present in court and presented his report on November 3, 2015. No new motions from the parties were presented at that time, and Munson was still purportedly unaware

that the court was advised of any alleged misconduct on his part as receiver. There is no transcript from that court appearance, but the trial court rejected Munson's receiver's report. In addition, the trial court removed Munson as receiver. The trial court entered an order finding that "Munson acted outside the order appointing him receiver and there is good cause for immediate removal." Munson did not object on the record to his removal.

¶ 10 The trial court's order removing Munson also indicated that the court would "retain jurisdiction to entertain claims against John Munson." Harris later filed what he titled a counterclaim against Bank Financial and Munson that included allegations of Munson's supposed misconduct while acting as receiver. However, the record does not reflect what has transpired with regard to that claim and, for purposes of the matters raised in this appeal, it is irrelevant.

¶ 11 Munson now appeals from the order discharging him as receiver. Although Munson was discharged as receiver on November 3, 2015, he did not file a notice of appeal from that order until May 6, 2016.

¶ 12 On appeal, Munson argues that the trial court erred when it removed him as receiver. Munson argues that the order finding that he exceeded his authority as receiver is an *ex parte* order. Munson maintains that he was deprived of due process because he was not given notice that there were allegations of misconduct levied against him and he was not given a meaningful opportunity to defend himself against the allegations at the court appearance. Munson also argues that the trial court erred by not adequately explaining how he acted outside the order appointing him as receiver, which leaves him unable to defend himself against the claims that have now been brought against him. In that regard, Munson asks us to hold that when trial courts remove a receiver for cause they be required to enter specific findings of wrongdoing. Harris

filed a response to the appeal. Despite four extensions spanning more than two months being granted in his favor, Munson did not file a reply brief.

¶ 13 ANALYSIS

¶ 14 A court of equity has the inherent power to appoint a receiver in foreclosure proceedings in a proper case. Jack K. Levin, *Appointment and Removal of Receiver*, 7A Nichols Ill. Civ. Prac. § 125:110 (May 2018 Update) (citing *De Kalb Bank v. Purdy*, 166 Ill. App. 3d 709, 716 (1988)). Moreover, under the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 (West 2016)), the court is required to appoint a receiver for the mortgaged real estate when requested by any party and there is a showing of good cause. 735 ILCS 5/15-1704(a) (West 2016). When a receiver is appointed under the Mortgage Foreclosure Law, the receiver "shall have possession of the mortgaged real estate and other property subject to the mortgage during the foreclosure, shall have full power and authority to operate, manage and conserve such property, and shall have all the usual powers of receivers in like cases." 735 ILCS 5/15-1704(b) (West 2016). The purpose of having a receiver appointed is to bring the mortgaged property into the custody of the court, and the receiver's possession is in legal effect custody of the court for the benefit of all parties in interest. *Bleck v. Cosgrove*, 32 Ill. App. 2d 267, 274 (1961).

¶ 15 A receiver is an officer of the court, not an agent of the mortgagee or the owner, and his or her duty is to preserve and operate the property, within the confines of the order of appointment and any subsequent authorization granted to him or her by the court. 55 Am. Jur. 2d Mortgages § 852 (August 2018 Update); *U.S. Bank National Association v. Randhurst Crossing LLC*, 2018 IL App (1st) 170348, ¶ 68. The court may remove a receiver upon a showing of good cause. 735 ILCS 5/15-1704(h) (West 2016).

¶ 16 The first issue is whether Munson, as the receiver but a non-party in the foreclosure case,

can appeal the order discharging him as receiver. The order discharging him as receiver also contains a finding of good cause to remove him as receiver on the basis that he exceeded the scope of his appointment. To argue that the order is appealable, Munson relies on Illinois Supreme Court Rule 307(a)(2-3) which makes certain interlocutory orders appealable as of right. See generally Ill. S. Ct. R. 307 (eff. Nov. 1, 2017).

¶ 17 Among the interlocutory orders that are immediately appealable as of right are orders appointing or refusing to appoint a receiver. Ill. S. Ct. R. 307(a)(2) (eff. Nov. 1, 2017). Also appealable are interlocutory orders "giving or refusing to give other or further powers or property to a receiver" who is already appointed. Ill. S. Ct. R. 307(a)(3) (eff. Nov. 1, 2017). While those Rules plainly speak to the right to appeal interlocutory orders pertaining to receivership, neither straightforwardly addresses the right to appeal an order *removing* a person as receiver.

¶ 18 Neither subsection of the Supreme Court Rule Munson relies upon in his jurisdictional statement expressly gives him the right to immediately appeal an order discharging him as receiver. See *Wolfe v. Illini Federal Savings & Loan Ass'n*, 158 Ill. App. 3d 321, 324 (1987) ("Rule 307 does not expressly permit interlocutory appeal from an order approving the action of a receiver or discharging a receiver"). "In the absence of a special statutory provision to the contrary, an interlocutory order *** removing *** a receiver is generally not appealable." 4 C.J.S. Appeal and Error § 210 (Sept. 2018 Update). Thus, it is questionable whether Munson can appeal under Rule 307 at all. Nonetheless, regardless of which subsection Munson relies upon or whether Illinois law even allows a receiver removed for cause to immediately appeal, Munson did not timely file his appeal. The order discharging Munson was not an *ex parte* order and his appeal must be dismissed as untimely.

¶ 19 Illinois Supreme Court Rule 307 states that the appeal from an interlocutory order "must

be perfected within 30 days from the entry of the interlocutory order." Ill. S. Ct. R. 307(a) (eff. Nov. 1, 2017). The Rule contains an exception for interlocutory orders entered on an *ex parte* basis (as we will discuss below) and appeals pertaining to temporary restraining orders. *Id*. But as for appealability under subsections (a)(2) and (a)(3) alone, Munson's appeal is plainly time-barred.

¶ 20 The order discharging Munson as receiver was filed November 3, 2015. His notice of appeal was not filed with the trial court until May 6, 2016—more than six months after he was removed as receiver. Filing a motion to reconsider does not extend the deadline for filing civil interlocutory appeals. *Robert A. Besner & Co. v. Lit America, Inc.*, 214 Ill. App. 3d 619, 626 (1991). If an order is entered that is immediately appealable under Rule 307, an appeal must be taken within 30 days or the right to challenge the ruling will be lost. *Id*. So unless Munson qualifies for some exception to that rule, his appeal is untimely.

¶ 21 Munson argues that his appeal is timely because the interlocutory order was entered on an *ex parte* basis. One of the exceptions for filing an appeal of an interlocutory order within 30 days of the order being entered under Rule 307 is if that interlocutory order is entered *ex parte*. Rule 307 provides that "if an interlocutory order is entered on *ex parte* application, the party intending to take an appeal therefrom shall first present, on notice, a motion to the trial court to vacate the order." Ill. S. Ct. R. 307(b) (eff. Nov. 1, 2017). The Rule continues by stating that "an appeal may be taken if the motion [to vacate] is denied" and "[t]he 30 days allowed for taking an appeal *** begins to run from the day the motion is denied or from the last day for action thereon." *Id*.

¶ 22 Munson filed a motion to reconsider on December 3, 2015. The trial court denied the motion to reconsider on April 6, 2016. Munson filed his notice of appeal from that order on May 6, 2016—the 30th day after the motion to reconsider was denied. Accordingly, he argues,

because the order removing him as receiver was entered on an *ex parte* basis and because he appealed within 30 days of the motion to vacate that order being denied, his appeal is timely. However, the order removing Munson does not qualify as *ex parte* for purposes of Rule 307.

¶ 23 The Illinois Supreme Court approvingly cited *Stella v. Mosele*, 299 Ill. App. 53, 56–57 (1939) for its interpretation of what an interlocutory order entered on *ex parte* application means for purposes of Rule 307(b). *Parks v. McWhorter*, 106 Ill. 2d 181, 185 (1985). In *Stella*, we stated that *ex parte* means a judicial proceeding brought for the benefit of one party only, and without notice to or contest by any person adversely interested. *Stella*, 299 Ill. App. at 56. We explained that the purpose of requiring that a motion to vacate be filed before an appeal of an *ex parte* interlocutory order was to prevent appeals from orders entered under circumstances indicating only partial and one-sided consideration. *Id*. The reason for such a rule is that "appeals should not lie from ex parte orders, because courts ought to have an opportunity to rectify mistakes that may have been made through the presentation of a motion in the nature of an injunction or for the appointment of a receiver, where only one side appeared before the court, by a subsequent motion to vacate the order." *Id*. at 56-57.

¶ 24 In this case, Munson was present when the order discharging him as receiver was entered. Munson cannot complain about lack of notice when he had actual notice and was present and participated in the proceedings. The trial court did not need an opportunity to rectify any potential mistake that might have resulted from partial or one-sided consideration because all parties affected by the order, including Munson, were present. When the decision was rendered in Munson's presence, he did not object.

¶ 25 Moreover, neither party "applied" for the order discharging Munson as receiver. The order was not entered based on an initiative for the benefit of either party. Harris simply filed a

motion to expedite a hearing that contained complaints about Munson's conduct—the record does not reflect that he ever demanded that Munson be discharged. In fact, Harris simply requested that Munson be enjoined from further destroying his property. In its order, the trial court explained that the matter was before the court for "presentment of Receiver's first report." There was no *ex parte* application by any party for Munson's removal. Like in *City National Bank & Trust Co. v. Davis Hotel Corp.*, 280 Ill. App. 247, 251 (1935) which was also referenced in the supreme court's decision in *Parks*, the trial court apparently removed Munson as receiver on its own initiative. "[A]n order entered by the court on its own motion and based upon its own personal knowledge cannot be said to be *ex parte*." *City National Bank*, 280 Ill. App. at 251. "The purpose of the rule was to prevent appeals from orders entered under circumstances indicating only partial and one-sided consideration. That reason does not apply where a court of its own motion deliberately enters the order." *Id*.

¶ 26 In Munson's jurisdictional statement he only relies upon Illinois Supreme Court Rule 307(a)(2-3) and Illinois Supreme Court Rule 307(b) as the bases for our jurisdiction. Because the order removing Munson as receiver was not entered on an *ex parte* application, our jurisdiction is not vested under Rule 307(b). And appeals pursuant to Illinois Supreme Court Rule 307(a)(2-3) must be filed within 30 days of the interlocutory order being entered. Thus, we do not reach the question of whether an order discharging a receiver would be immediately appealable under Illinois Supreme Court Rule 307(a)(2-3) or if the non-party receiver would have the requisite standing to bring that appeal. We lack jurisdiction to consider Munson's appeal and we must dismiss it.

¶ 27 CONCLUSION

¶ 28 Accordingly, we lack jurisdiction and the appeal must be dismissed.

¶ 29 Appeal dismissed.