

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

BENINATI CONTRACTING, INC.,

Plaintiff/Counter-Defendant,

vs.

Case No. 2015-1400-CB

PAUL BENINATI,

Defendant/Counter-Plaintiff.

OPINION AND ORDER

Defendant/Counter-Plaintiff ("Defendant") has filed a motion for the appointment of a receiver. Plaintiff Beninati Contracting, Inc. ("Plaintiff") has filed a response and requests that the motion be denied.

Background

Defendant is a 50% shareholder in Plaintiff. Defendant's brother, Mark Beninati ("M. Beninati") is Plaintiff's remaining 50% shareholder. Defendant and M. Beninati's working relationship has allegedly fallen apart, which ultimately has led to this litigation.

On September 28, 2015, Plaintiff filed its first amended verified complaint in this matter ("Complaint"). The Complaint includes the following claims: Count I- Trespass, Count II- Unjust Enrichment, Count III- Statutory Conversion, Count IV- Claim and Delivery, Count V- Breach of Fiduciary Duty, Count VI- Accounting, and Count VII- Dissolution. On June 28, 2015, Defendant filed its counter-complaint in this case ("Counter-Complaint"). The Counter-Complaint includes a single claim for slander of title.

On September 28, 2015, Defendant filed his first motion for appointment of a receiver. On October 2, 2015, Plaintiff filed its response. On October 5, 2015, the Court held a hearing in connection with the motion and took the matter under advisement. On December 4, 2016, the Court entered its Opinion and Order denying Defendant's request.

On August 26, 2016, Defendant filed his instant motion for the appointment of a receiver. On September 2, 2016, interested parties the Charter Township of Shelby and Aluia Investments, LLC filed a joint concurrence to the motion. On September 2, 2016, Plaintiff filed a response to the motion in which it requests that the motion be denied.

Arguments and Analysis

As was the case with his first motion to appoint a receiver, Defendant relies on MCL 600.2926, which provides:

Circuit court judges in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law. This authority may be exercised in vacation, in chambers, and during sessions of the court. In all cases in which a receiver is appointed the court shall provide for bond and shall define the receiver's power and duties where they are not otherwise spelled out by law. Subject to limitations in the law or imposed by the court, the receiver shall be charged with all of the estate, real and personal debts of the debtor as trustee for the benefit of the debtor, creditors and others interested.

The court may terminate any receivership and return the property held by the receiver to the debtor whenever it appears to be to the best interest of the debtor, the creditors and others interested.

This statute does not independently grant the court the authority to appoint receivers but rather confirms that appointment of a receiver is a remedy available to the court in situations where "allowed by law." *Wayne County Jail Inmates v Wayne County*

Chief Executive Officer, 178 Mich App 634, 649-650; 444 NW2d 549 (1989). Although there are several statutes which specifically allow appointment of a receiver, the phrase "allowed by law" is not limited to these statutes, since the Supreme Court has recognized that there are cases where the trial court may appoint a receiver in the absence of a statute pursuant to its inherent equitable authority. *Id*; see *Michigan Minerals, Inc v Williams*, 306 Mich 515, 525-527; 11 NW2d 224 (1943); *Grand Rapids Trust Co. v Carpenter*, 229 Mich 491; 201 NW 448 (1924). It thus becomes apparent that, as used in the statute, the phrase "allowed by law" refers to (1) those cases where appointment of a receiver is provided for by statute and (2) those cases where the facts and circumstances render the appointment of a receiver an appropriate exercise of the circuit court's equitable jurisdiction. *Id*.

In his motion, Defendant contends that a receiver is needed because M. Beninati is, through Plaintiff, committing waste on Plaintiff's property in violation of court orders entered in this matter precluding the parties from selling or disposing of any of Plaintiff's assets or committing waste or significant alteration of the property. (See Defendant's Exhibit A.) In support of his motion, Defendant has testified that M. Beninati has inappropriately sold Plaintiff's assets. (See Defendants' Exhibit B.) Moreover, Defendant avers that M. Beninati has created a nuisance in the form of a massive wood pile on the property in question, as is evidenced by the fact that Shelby Township has sued Plaintiff for nuisance (See Case No. 2016-2167-CZ). Further, Defendant contends that M. Beninati causing him to breach the terms of a land contract he entered into with Kless Properties, LLC ("Kless").

With respect to Defendant's reliance on the existence of two other lawsuits as evidence that M. Beninati is committing waste on the property in question, the fact that M. Beninati has been sued in connection with the use of the property in question merely establishes that there are allegations of waste and nuisance, not that such waste has taken place or that M. Beninati has created a nuisance. Consequently, Defendant's reliance on the existence of the other lawsuits is not persuading.

The remaining purported basis for Defendant's motion is that M. Beninati has improperly sold some of Plaintiff's assets. Specifically, Defendant asserts that M. Beninati's sale of certain assets violates two orders. The first order is an undated order entered by the 41-A district court which provides, in pertinent part, that none of Plaintiff's assets could be sold until further order of the Court. (See Defendant's Exhibit A, at p. 1) The second order is an August 17, 2015 order entered by this Court entered subsequent to the district court order. The August 17, 2015 order provides that Plaintiff is permitted to sell its equipment so long as the proceeds are placed in its counsel's client trust account.

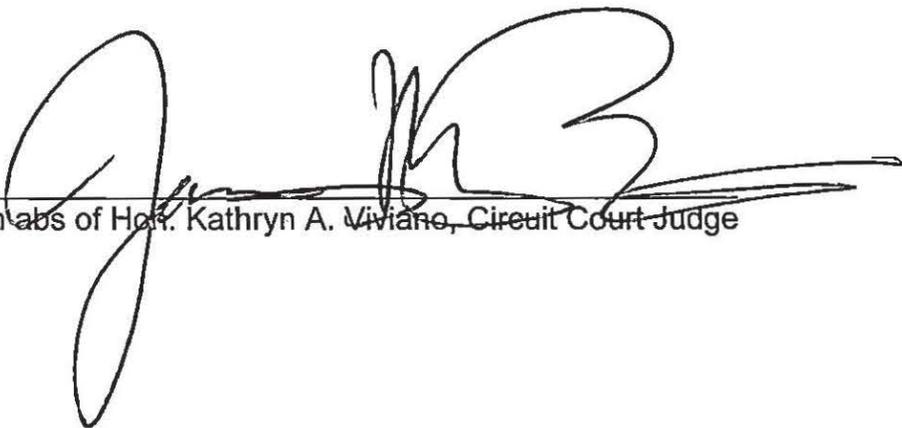
While Defendant has testified that certain property has been sold, he has failed to demonstrate that such sales were done in a manner that violated the August 17, 2015 Order. Moreover, while Defendant contends that the sales also violate the security interests of third parties and its bankruptcy reorganization plan, Defendant has failed to provide any documentary evidence supporting his conclusory testimony. As a result, the Court is satisfied that Defendant has failed to establish that good cause exists for the appointment of a receiver.

Conclusion

Based upon the reasons set forth above, Defendant's motion to appoint a receiver is DENIED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

Date: SEP 13 2016



In abs of Hon. Kathryn A. Viviano, Circuit Court Judge