

STATE OF MICHIGAN
COURT OF APPEALS

GRAND PACIFIC FINANCE CORPORATION,
Plaintiff,

UNPUBLISHED
June 30, 2011

and

SHEFA, L.L.C.,
Appellant,

v

No. 297408
Oakland Circuit Court
LC No. 2007-087754-PR

OTZER CAPITAL, L.L.C., JAMES P.
SCHNEIDER & ASSOCIATES, and SERVPRO
OF GREATER PONTIAC SOUTH,

Defendants,

and

KENNETH DALTO & ASSOCIATES, Receiver,
Appellee.

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Appellant, Shefa, L.L.C., appeals the order denying plaintiff Grand Pacific Finance Corporation's motion to modify order for closure of receivership. We affirm in part and vacate in part.

Initially, we note that appellee Kenneth Dalto & Associates, the receiver, argues that because there were several hearings for which appellant did not have transcripts prepared, it was not properly served with the entire record as required by MCR 7.210(B)(1). Appellee argues that appellant's appeal should be dismissed or adjourned until the transcripts have been prepared and served on appellee, and amended briefs have been filed. While the failure to comply with the court rules can lead to the dismissal of an appeal, MCR 7.217(A), based on the record before us and the fact that there is no indication that the preparation of additional transcripts would be

beneficial in deciding the issues set forth in this appeal, we decline to provide the relief requested by appellee.

Appellant argues that the trial court erred in modifying its original order of appointment by allowing the receiver to be compensated more money than what was ordered in the original order. In addition, appellant argues that the trial court abused its discretion by awarding significantly more than what was ordered as compensation in the original order. We “review for an abuse of discretion the circuit court’s decision to approve or disapprove the individual expenses incurred by the receiver.” *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 275; 761 NW2d 761 (2008). “The primary purpose of a receiver is to preserve property and to dispose of it under the order of the court.” *Band v Livonia Assoc*, 176 Mich App 95, 104; 439 NW2d 285 (1989). A receiver derives his authority from statutes, court rules, the order appointing him, and any other specific orders made by the court after appointing him. *Woodliff v Frechette*, 254 Mich 328, 329; 236 NW 799 (1931). Further, “[a] court has the basic responsibility of enforcing its own orders and has considerable discretion in choosing the means to be employed.” *Band*, 176 Mich App at 105. Based on the authority granted the trial court pursuant to the order appointing the receiver and MCR 2.622(D), we conclude that the trial court clearly had the authority to order that the receiver be paid more than six percent of the gross collections and receipts and to determine to what degree the receiver should be paid more. *Woodliff*, 254 Mich at 329.

Appellant also argues that the receiver should not have been reimbursed for accounting fees because such fees should have been included in receiver fees. In addition, appellant argues that the receiver double billed most of its monthly receiver fees when it charged both accounting and receiver fees. Further, appellant argues that the receiver essentially double billed by charging monthly receiver fees in amounts which were significantly more than what was ordered as compensation in the original order. Consequently, appellant argues that the trial court should have held an evidentiary hearing and required the receiver to prove each of its expenses instead of approving all of the receiver’s expenses without giving appellant due notice. We “review for an abuse of discretion the circuit court’s decision to approve or disapprove the individual expenses incurred by the receiver.” *Ypsilanti Charter Twp*, 281 Mich App at 275. We also review for an abuse of discretion a trial court’s decision that an evidentiary hearing is not warranted. “Findings of fact may not be set aside unless clearly erroneous.” *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002).

“Receivers have a right to compensation for their services and expenses.” *Band*, 176 Mich App at 111. “However, a receiver’s specific rate of compensation must be reasonable and must not be excessive.” *Ypsilanti Charter Twp*, 281 Mich App at 280-281. As stated by the Court in *Corell v Reliance Corp*, 295 Mich 45, 53; 294 NW 92 (1940), quoting 53 CJ, p 159:

“To obtain approval by the court of an expenditure not previously authorized to be made, a receiver must show that the expense was a reasonable one and not within the ordinary duties which he himself should perform, that the amount paid is fair and reasonable, and that it has been actually paid in good faith.”

Moreover, “[t]he trial court should normally hold an evidentiary hearing when the opposing party challenges the reasonableness of a fee request.” *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). However, a trial court does not err when awarding fees without holding an evidentiary hearing if “the parties created a sufficient record to review the issue, and the court fully explained the reasons for its decision.” *Id.*

Although appellant asserts that the receiver should not have been charging accounting fees as well as receiver fees, appellant does not cite a case which provides that the receiver should not be charging accounting fees as well as receiver fees if the receiver was providing the accounting services itself. In *Band*, 176 Mich App at 110, the Court indicated that with regard to legal fees, “[i]t is the plain duty of such receiver-attorney to render legal services to the estate himself and save the estate a duplication of attorney fees.” The same reasoning applies herein. Pursuant to the original order, one percent of the six percent calculation for receiver fees was for the execution of receiver duties and five percent of the six percent calculation for receiver fees was for duties as the property manager. The order did not contemplate accounting duties related to the property management as being included in the six percent calculation. In addition, the order appointing the receiver provided that the receiver could employ accountants. On this record, it was permissible for accounting fees to be accruing to appellee as well as receiver’s fees. *Corell*, 295 Mich at 53. Appellant’s argument that receiver fees as well as accounting fees should not have been charged has no merit based on the original order providing that both fees could be charged and the fact that the receiver’s authority under the receivership was derived from such order. *Woodliff*, 254 Mich at 329.

With regard to appellant’s argument that the receiver double billed most of its monthly receiver fees as a result of both accounting and receiver fees being charged, there is no evidence of record to reflect that such double billing occurred. The original order provided that both receiver and accounting fees could be charged. In addition, the record reflects that the receiver did not appear to be duplicating the accounting fees, but rather, separately accounted for fees related to accounting and fees related to the receivership, other than accounting.

With regard to appellant’s argument that the receiver essentially double billed by charging monthly receiver fees in amounts which were significantly more than what was ordered as compensation in the original order, that argument has no merit. In fact, the record reflects that the receivership saved money because the receiver providing the accounting services itself. Because the receiver saved the receivership a significant amount of money by employing itself as the accountant, the original order contemplated that the collections may not be sufficient to reasonably compensate the receiver, and the receiver managed this property, which was in dire financial straits for 19 months, we conclude on the record before us that the receiver was not paid significantly more than what was ordered as compensation in the original order.

Moreover, in this case, the receiver filed a final accounting and a motion to close the receivership. Appellant objected, and a hearing was subsequently held. The receiver addressed appellant’s objections to the receiver’s final accounting. Any argument by appellant that it did not have due notice that the trial court may be determining the reasonableness of receiver’s fees lacks merit. There was no plain error. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004). In addition, although appellant requested an evidentiary hearing to review each expense at the hearing to close the receivership, the trial court clearly found that the

sums were not excessive nor unreasonable. The trial court believed that if there were any deductions made as a result of an evidentiary hearing, those deductions would be minor. Further, the trial court specifically commented that it thought that this was a very difficult and hard-fought case. These findings by the trial court were not clearly erroneous based on the record and considering the vast amount of duties that were involved with the management and closure of the Plaza Hotel while the hotel was in dire financial straits. *Kernen*, 252 Mich App at 691. Despite the fact that an evidentiary hearing was not ordered, there was a sufficient record for us to review this issue and the trial court explained its reasons for its decision. *Head*, 234 Mich App at 113. “The circuit court’s determination concerning the propriety and reasonableness of a receiver’s expenses is treated as presumptively correct because the circuit court ‘has far better means of knowing what is just and reasonable than an appellate court can have,’” *Ypsilanti Charter Twp*, 281 Mich App at 275, quoting *Kurrasch v Kunze Realty Co*, 296 Mich App 122, 124; 295 NW 583 (1941). Therefore, we conclude that the trial court did not abuse its discretion when it approved the receiver fees and declined to order an evidentiary hearing. *Kernen*, 252 Mich App at 691.

Appellant next argues that it was a holder in due course, as set forth in MCL 440.3302(1), and thus should not be subject to the liabilities of Grand Pacific, which include the receiver’s outstanding invoices. We review this unpreserved issue for plain error. *Veltman*, 261 Mich App at 690. Because a mortgage is not a negotiable instrument, appellant was not a holder in due course, pursuant to MCL 440.3302(1), with regard to the mortgage. See *Mox v Jordan*, 186 Mich App 42, 46; 463 NW2d 114 (1990). Accordingly, there was no plain error with regard to appellant not being a holder in due course of the mortgage. *Veltman*, 261 Mich App at 690.

With respect to the note, appellant is arguably a holder in due course of the note. Apparently, appellant believes the receiver fees are an encumbrance on the property and, as such, it is not responsible for them as holder of the note. This argument ignores the facts of the case. First, there are no irregularities with the note. The holder in due course statute protects an entity that takes an instrument for value in good faith and without notice of a problem with the note. MCL 440.3302(1). Second, the receiver fees in this case were incurred, in part, as the result of appellant requesting that the receivership continue. Although appellant may have been a holder in due course with regard to the note, being a holder in due course of the note does not support a conclusion that appellant was not responsible for the receiver fees. Importantly, we note that appellant has not cited any applicable authority to support the conclusion that because it was a holder in due course, it is not responsible for receiver fees that it helped, at least in part, incur. Appellant may not merely announce its position and leave for us to discover and rationalize the basis for the claims; nor may appellant give issues cursory treatment with little or no citation to supporting authority. See MCR 7.212(C)(7); *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). There was no plain error. *Veltman*, 261 Mich App at 690.

Finally, appellant argues that the trial court erred by allowing the receiver to place a lien on the property because the lien was not fair and appropriate. “Whether a lien is authorized in a particular case is a question of law. We review questions of law de novo.” *Ypsilanti Charter Twp*, 281 Mich App at 281. “[A] receiver’s fees and compensation may be paid from the property or funds in receivership.” *Id.* at 282. However, “courts may not impose a lien on real property absent an express agreement of the parties or other legal authority.” *Id.* In the case at bar, the lien granted was not authorized by law because the trial court imposed the lien on the

property “notwithstanding the absence of an express agreement of the parties or any other legal authority.” *Id.* at 281-282, 284-285. Accordingly, we vacate the lien on the property. The receiver will then be permitted to proceed “in accordance with the provisions of Chapter 60 of the Revised Judicature Act.” *Id.* at 285 n 13.

Affirmed in part and vacated in part.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer

/s/ Jane M. Beckering