

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT C. BARNES,

Plaintiff/Counter-Defendant-
Appellee,

v

DAVID KIRCHER,

Defendant/Counter-Plaintiff-
Appellant,

and

JOHN C. RANKIN and VIDA L. RANKIN,

Defendants.

UNPUBLISHED

July 27, 2006

No. 258127

Washtenaw Circuit Court

LC No. 03-001265-CH

Before: Donofrio, P.J., and O’Connell and Servitto, JJ.

PER CURIAM.

Defendant David Kircher¹ appeals as of right from the trial court’s judgment of foreclosure. We affirm.

The instant action arises out of a separate action between defendant and the City of Ypsilanti and Ypsilanti Fire Marshal, which resulted in the appointment of plaintiff as successor receiver for property owned by defendant in Ypsilanti. The order appointing plaintiff as successor receiver provided that plaintiff was to oversee and undertake all repairs consistent with

¹ Defendants John and Vida Rankin were named in the complaint based on their appearance in the chain of title in connection with a land contract for the property at issue. However, the Rankins did not have any legal interest in the property at the time the complaint was filed and the complaint was dismissed as against them on March 22, 2004, for lack of service. Therefore, they are not subject to the lower court judgment from which defendant Kircher appeals and are not party to this appeal. Thus, the term “defendant” shall be used throughout this opinion to refer to defendant Kircher.

all city codes, statutes and ordinances to bring the property into compliance. The order permitted plaintiff to employ or contract with persons or entities as was reasonably necessary and appropriate to accomplish this task and to send monthly invoices to defendant for the same. The order defined the costs and fees for which defendant was to be liable as including all of the labor, materials, permit, inspection and administrative costs and attorney fees necessary and appropriate to bring the building into compliance with applicable codes, statutes and ordinances. The order additionally provided that plaintiff was granted a lien on the property for the amount of fees and costs not paid by defendant and that, in the event defendant did not pay plaintiff in full within 30 days of the final invoice, plaintiff was entitled to judicial foreclosure of that lien in accordance with the statutes and court rules pertaining to judicial foreclosures.

Pursuant to the order of appointment, plaintiff undertook repairs and improvements to the property and invoiced defendant for the costs of those repairs. Defendant admittedly did not pay those invoices, and plaintiff commenced the instant action to foreclose on a judicial lien related to those costs. Defendant filed a counter-claim, alleging that plaintiff's delay and running up of unreasonable expenses caused plaintiff to suffer losses of rent and other revenue to defendant. Plaintiff thereafter moved for summary disposition, relying upon MCR 2.116(C)(7), (8), (9), and (10) and defendant moved to terminate the receivership and restore the property to defendant. The trial court ultimately granted plaintiff's motion for summary disposition, denied defendant's motion, and dismissed defendant's counter-claim finding that there were no issues to be tried by a jury and that the amount of indebtedness owed by defendant would be determined by the court. After an evidentiary hearing, the trial court found defendant owed plaintiff \$243,103.32 and entered a judgment of foreclosure lien. Defendant sought a new trial, but was denied, and the trial court allowed immediate execution upon the judgment.

On appeal, defendant raises a number of issues relating to the validity of the order appointing plaintiff as successor receiver of the property, including that the lower court lacked jurisdiction to enter that order and that the order itself was defective because it failed to require plaintiff to post a bond, it did not set forth a specific list of repairs to be performed under the receivership, it did not provide defendant with a meaningful opportunity to be heard regarding the necessity of repairs before they were undertaken, and it did not require that the trial court review expenses incurred by plaintiff to determine whether they were reasonable before they became due and owing from defendant. The order appointing plaintiff was not, however, entered in the lower court case from which defendant now appeals. Thus, we lack jurisdiction to address those issues in the instant case. This Court's jurisdiction extends only to the orders entered in Washtenaw Circuit Court case number 03-001265-CH. MCR 7.203(A)(1); *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001). To obtain review of the validity of the order appointing plaintiff as successor receiver for the property at issue, defendant was required to perfect an appeal from that order, which was entered in Washtenaw Circuit Court case number 01-000889-CH. Because he failed to do so, we find that the order of appointment remains valid and enforceable for purposes of the instant appeal.

Defendant next argues on appeal that plaintiff lacked the authority to "gut" his building and to enter into contracts of considerable magnitude without specific court authority to undertake such actions. We disagree. The order appointing plaintiff as successor receiver expressly permitted plaintiff to undertake repairs and to enter into contracts with third parties so long as doing so was reasonably necessary and appropriate to bring the building into compliance

with applicable codes, ordinances and statutes. The order of appointment does not require that plaintiff obtain court approval of contracts or courses of action before commencement. The order was appropriate. MCL 29.23 provides a trial court with authority to make any order or decree to ensure the safety and security of human life, including directing a building “be repaired” and specifying in what manner and to what extent. As long as repairs and contracts were reasonable and appropriate to bring the building into compliance, plaintiff thus had court authority, expressed in the order of appointment, to make them.

The question becomes, then, whether the repairs undertaken by plaintiff (and the contracts entered into) were reasonable and appropriate to bring the building into compliance. The trial court concluded, at least implicitly, that they were reasonable and appropriate to the purpose of the receivership. We will not reverse a trial court’s findings of fact unless they are clearly erroneous. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Plaintiff presented evidence indicating that the interior of the building had to be completely removed to ensure that the building was made safe. Defendant did not offer any testimony or evidence to establish a contrary conclusion. Therefore, the trial court did not clearly err in concluding that the contracts entered into by plaintiff, and the costs incurred as a result of plaintiff’s decision to gut the inside of the building, were reasonably necessary to bring the building into compliance.

While defendant also claims that the trial court erred in awarding plaintiff all of the amounts claimed, we disagree. Defendant was liable for the costs and fees associated with repairs required by applicable codes, statutes and ordinances. At the evidentiary hearing, plaintiff testified that all of the repairs were necessary and reasonable to bring the building into compliance and that the costs were consistent with such repairs. Another witness also testified that the costs incurred were typical in renovations such as this. While defendant challenged the necessity of perhaps two of the repairs at the hearing, he presented no evidence to contradict the testimony that the costs were reasonable and appropriate. Indeed, defendant presented not one witness who testified as to the unreasonableness of a single cost or repair, nor any documentary evidence that would establish the same. Provided only with evidence establishing the appropriateness of the costs, the trial court properly ruled:

The court finds. . .that this is appropriate costs for the type of work that was done. . .as to the amount, the court finds that you have presented that evidence. There’s no real testimony in contravention to the amount that has been established.

Defendant additionally argues that the trial court erred in providing for a deficiency judgment in the judgment of foreclosure. We disagree. The order of appointment indicated that the applicable statutes and court rules pertaining to judicial foreclosures would govern foreclosure of plaintiff’s lien on the property. MCL 600.3150 specifically provides that the original judgment in foreclosure cases shall provide for entry of a deficiency judgment if an amount owing remains unpaid after the proceeds of the sale are applied to the debt.

Defendant next argues that the trial court erred in dismissing his counterclaim pursuant to MCR 2.116(C)(7) and (8). While we agree with defendant that dismissal was not warranted under MCR 2.116(C)(7), we find that dismissal was proper under MCR 2.116(C)(8).

Contrary to plaintiff's assertion, defendant was not required to obtain leave of the appointing court before filing his counterclaim. As this Court explained in *Cohen v Bologna*, 52 Mich App 149, 151-152, 216 NW2d 586 (1974):

The receiver's function as officer of the court precludes unlimited suits against him in his capacity as conservator of the debtor's assets. The courts of this state have consistently recognized the problems inherent in suits against a court-appointed receiver brought in a different court. Such suits could lead to inconsistent verdicts on the same matter, thereby necessitating further litigation to resolve these inconsistencies and preventing efficient resolution of the matters in dispute. The rule in Michigan is therefore that a receiver cannot be sued without leave of the appointing court.

However, the *Cohen* Court cited *In re Petition of Chaffee*, 262 Mich 291; 247 NW 186 (1933), in support of this rule. In *Chaffee*, our Supreme Court explained that:

[I]n Michigan we are already committed to the view that, when a receiver has taken possession of property, such possession is that of the court itself, and no proceedings can be taken which attacks [or] challenges such possession without leave first obtained. . . . In an earlier decision of this court it is said:

“It is a general rule that property in custody of the law is not subject to attachment or garnishment. The law does not permit one court to assume control over the representative of another court, or the property confided to his charge. By this *it is not meant that personal remedies against the individual may not be sought*, but any proceeding in the nature of an action in rem, whereby it is sought to reach the property which another court has taken possession of, is forbidden.” *Hudson v Saginaw Circuit Judge*, 114 Mich 116 (47 LRA. 345, 68 Am St Rep 465).

[*Id.* at 293-294 (emphasis added).]

The concerns underlying the rule that a receiver cannot be sued without leave of the appointing court do not apply to the filing of a counterclaim against a receiver in an action initiated by that receiver. As noted in *Chaffee*, remedies may be sought against a receiver personally without leave. The rule that a receiver cannot be sued without leave of the court is usually not applied to actions which do not involve one seeking to reach property in the receivership. To the extent that the trial court premised the dismissal of defendant's counterclaim on the basis that leave of court was required, we find error. However, the error was harmless because dismissal was warranted under MCR 2.116(C)(8).

It is axiomatic that conclusory statements unsupported by factual allegations are insufficient to state a cause of action. *Churella v Pioneer State Mutual Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003); *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994). In his counterclaim, defendant offers only conclusory assertions, contained in a single paragraph and unsupported by factual allegations, that plaintiff's conduct caused him to incur financial loss. Defendant does not allege with any

specificity the manner in which plaintiff's actions caused him harm. The counterclaim was thus insufficient to state a claim upon which relief could be granted. *Churella, supra* at 272.

Affirmed.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto