2017 IL App (2d) 170006-U
No. 2-17-0006
Order filed February 27, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MB FINANCIAL BANK, N.A.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 16-CH-1361
	)	
ROYAL TEE, LLC; FOREKIDS, INC.;	)	
ROYAL FOX COUNTRY CLUB, L.P.;	)	
ROYAL FOX COUNTRY CLUB II, L.P.;	)	
JOHN WEISS; U.S. SMALL BUSINESS	)	
ADMINISTRATION; UNKNOWN	)	
OWNERS; and NON-RECORD	)	
CLAIMANTS,	)	Honorable
	)	Bonnie M. Wheaton,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: MB Bank demonstrated *prima facie* reversible error regarding the trial court's denial of its request to have its receiver operate the business of the golf course real estate that MB Bank was foreclosing upon. We therefore reversed that portion of the trial court's ruling and remanded for further proceedings.

¶ 2 Plaintiff, MB Financial Bank, N.A. (MB Bank) appeals from the trial court's order regarding receivership of a golf course upon which MB Bank was foreclosing. The trial court

granted its request to appoint a receiver but denied its request to allow the receiver to operate the business of the golf course. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 On September 6, 2016, MB Bank filed a complaint to foreclose on Klein Creek Golf Course in Winfield, Illinois. The following information comes from the complaint and attached documents. On February 27, 2009, Benchmark Bank made a $2,075,000 business loan to defendant Royal Tee, LLC (Royal Tee), to purchase the golf course. To secure its payment obligations under the note, Royal Tee granted Benchmark Bank a mortgage on the golf course and security interests on its business assets, such as it accounts, inventory, equipment, instruments and chattel paper, and investment property. Other entities and individuals signed loan guarantees, namely defendants Forekids, Inc.; Royal Fox Country Club, L.P.; Royal Fox Country Club II, L.P.; and John Weiss (golf course defendants). On December 4, 2009, the Illinois Department of Financial and Professional Regulation closed Benchmark Bank. The Federal Deposit Insurance Corporation, as Benchmark Bank's receiver, sold Benchmark Bank's assets, including the loan, to MB Bank.

¶ 5 Royal Tee failed to make the monthly payments due on June 27, 2016, July 27, 2016, and August 27, 2016, and failed to pay the golf course's 2014 and 2015 real estate taxes. As a result of the defaults, MB Bank accelerated the loan and declared the entire unpaid principal balance and interest immediately due and payable. Royal Tee failed to pay the accelerated amount, as did the guarantors. The indebtedness totaled over $1.8 million.

¶ 6 In its complaint, MB Bank sought to foreclose on the mortgage and security interests, obtain judgments against the guarantors, and terminate the junior lien interest of the U.S. Small Business Administration, which had a mortgage on the golf course recorded on April 6, 2009, to

secure an indebtedness of $1,487,000.

¶ 7 On September 27, 2016, MB Bank filed a motion to appoint a receiver. The trial court granted the motion on October 5, 2016. Its order required defendants to turn over to the receiver various documents, including those relating to the property's income and operation. According to MB Bank, the order gave the receiver plenary powers.

¶ 8 On October 12, 2016, defendants filed an emergency motion to vacate the order appointing the receiver, asserting that their originally-retained attorney had failed to appear in court, and that they should have an opportunity to respond. The same day, the trial court granted the motion and vacated its October 5, 2016, order. It set a briefing schedule on plaintiff's motion to appoint a receiver.

¶ 9 In defendants' response to plaintiff's motion for the appointment of a receiver, they "reluctantly concede[d]" that they were in default under the mortgage note. They stated: "Klein Creek operates as a public golf course and has a restaurant and banquet facility that derives income from its peration [*sic*] of the golf course and food and beverage sales including revenues from special events." They further stated: "All expenses for the Real Property, including but not limited to mortgage payments, and the operations of the Klein Creek [*sic*] are made from income generated by the Defendant[s'] operation of the Klein Creek [*sic*] as a golf course and banquet facility." Defendants requested that the trial court not appoint a receiver but instead issue an order leaving them in possession, subject to limitations regarding the receipt of income and disbursements of operating expenses.

¶ 10 A hearing on MB Bank's motion to appoint a receiver took place on December 5, 2016. The trial court granted MB Bank's request to appoint a receiver but refused to allow the receiver to operate the business of the golf course. The following exchange occurred:

"THE COURT: What I mean is are you proposing that he actually run the business that's going on in the property?

MR. YAN [MB Bank's attorney]: Correct, your Honor. Mr. –

THE COURT: No. That's not going to happen. That's not going to happen. The receiver is to manage the property. Not the business, but the property. That's the clubhouse, the sheds, the equipment used to run the lawnmowers or whatever else, but not to run the business itself. That's different.

MR. YAN: Understood, your Honor. And perhaps Mr. Thompson will work with the business owner if that's your Honor's ruling to make sure that, you know, the owner can run the business, but we need to have a receiver in place to make sure that we know where the monies are going and that they're not –

THE COURT: Not the money from the business, the money from the rents."

Defendants argued that MB Bank's proposed order "gave [it] the right to run everything and basically tell our ownership and our employees you're done; we're taking over." The exchange continued as follows.

"MR. BONGIOVANNI [Royal Tee's and golf course defendants' attorney]: To me it's only regarding a lease of the golf course and the real property itself and not the business.

THE COURT: The real property, including the – as I said, the clubhouse, any sheds, any fixtures to the land or the property, the buildings. But, no, he's not going to run the Pro shop or –

MR. BONGIOVANNI: Or the events.

THE COURT: – the events, right. That's part of the business. That's not part of

the real estate."

The trial court directed the parties to prepare an order consistent with its ruling.

¶ 11 The trial court entered the order on December 7, 2016. It stated that the receiver was empowered with all of the duties, responsibilities, and powers enumerated in the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1101 *et seq.* (West 2014)). Defendants were ordered to turn over documents regarding the property but not from the business operations of the golf course.

¶ 12 MB Bank timely filed this interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(3) (eff. Nov. 1, 2016) (allowing an appeal from an interlocutory order of the trial court "giving or refusing to give other or further powers or property to a receiver").

¶ 13 II. ANALYSIS

¶ 14 We initially note that defendants have not filed an appellees' brief in this case. In *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976), our supreme court provided three possible approaches to such a situation. First, if justice requires, we may serve as advocate for the appellee and search the record for purposes of sustaining the trial court's judgment. Second, we may decide the appeal's merits if the record is simple and the claimed errors are such that we can easily decide them without the aid of an appellee's brief. Third, if the appellant's brief demonstrates *prima facie* reversible error, as supported by the record, we may reverse the trial court's judgment. *Id.*

¶ 15 This case is a commercial foreclosure situation, so we do not believe that the first approach applies. Regarding the second approach, while the record is simple, MB Bank raises an issue of first impression regarding a receiver's ability to operate the business of the real estate under the Foreclosure Law, and we have found no directly-relevant caselaw on the issue. We

therefore believe that the second approach is also inappropriate here. See *People v. Guillen*, 2014 IL App (2d) 131216, ¶¶ 57, 63 (Zenoff, J., specially concurring) (most issues of first impression are not easily decided and should not be definitively resolved in a *Talandis* situation). Accordingly, we will proceed under the third approach and will examine the case for *prima facie* reversible error. " '*Prima facie*' means, '[a]t first sight; on first appearance but subject to further evidence or information' and '[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted.' " *Thomas v. Koe*, 395 Ill. App. 3d 570, 577 (2009) (quoting Black's Law Dictionary 1228 (8th ed. 2004)).

¶ 16 MB Bank appeals from the trial court's ruling on its request to appoint a receiver. Where there was no evidentiary hearing on a motion to appoint a receiver, as in this case, we review the trial court's ruling *de novo*. *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 165 (2010). Similarly, the construction of a statute is a question of law that we review *de novo*. *Bueker v. Madison County*, 2016 IL 120024, ¶ 13.

¶ 17 MB Bank first argues that it has a contractual right to have the receiver operate the business of the golf course in addition to managing the real estate on which the golf course sits. MB Bank argues that both the mortgage and commercial security agreement allow it to take possession of the business assets and income generated by the golf course upon Royal Tee's default.

¶ 18 Although MB Bank referenced the note in the trial court as authorizing it to take possession of the real estate, it did not rely on the mortgage and commercial security agreements as a basis for allowing the receiver to operate the golf course. Therefore, it has forfeited this argument for purposes of appeal. See *Vantage Hospitality Group, Inc. v. Q Ill Development,*

LLC, 2016 IL App (4th) 160271, ¶ 49 (a party who fails to make an argument in the trial court forfeits the argument on appeal).

¶ 19 MB Bank additionally argues that it has a statutory right to have the receiver operate the business of the golf course.

¶ 20 Section 15-1701(b)(2) of the Foreclosure Law (735 ILCS 5/15-1701(b)(2) (West 2014)) provides that in cases involving nonresidential real estate, a mortgagee is entitled to possession of the property before the entry of a foreclosure judgment if the mortgagee shows that: (1) such possession is authorized by the mortgage's terms, and (2) there is a reasonable probability that the mortgagee will prevail in the final hearing in the case. Section 15-1702(a) of the Foreclosure Law (735 ILCS 5/15-1702(a) (West 2014)) provides that "[w]henever a mortgagee entitled to possession so requests, the court shall appoint a receiver." The trial court determined that MB Bank met the requirements of section 1701(b)(2) and granted its request to appoint a receiver.

¶ 21 Section 15-1704(b) of the Foreclosure Law (735 ILCS 5/15-1704(b) (West 2014)) addresses the powers of receivers. It states:

> "(b) Powers. A receiver appointed pursuant to this Article 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. Without limiting the foregoing, a receiver shall have the power and authority to:
>
> (1) secure tenants and execute leases for the real estate***;
>
> (2) *collect the rents, issues and profits from the mortgaged real estate*;
>
> (3) insure the mortgaged real estate against loss by fire or other casualty;
>
> (4) employ counsel, custodians, janitors and other help; and

(5) pay taxes which may have been or may be levied against the mortgaged real estate." (Emphases added.) *Id.*

¶ 22 Section 15-1704(c) of the Foreclosure Law (735 ILCS 5/15-1704(c) (West 2014)) addresses the duties of receivers, which include using "reasonable efforts to maintain the real estate and other property subject to the mortgage in at least as good condition as existed at the time the receiver took possession, excepting reasonable wear and tear and damage by any casualty," and "apply[ing] receipts to payment of ordinary operating expenses, including royalties, rents and other expenses of management."

¶ 23 MB Bank argues that because the golf course's value is directly tied to its operation, the receiver's inability to operate the golf course business, which generates its revenue, prevents him from discharging his obligations to preserve the value of the real estate. MB Bank maintains that, as a practical matter, it is impossible to segregate management of the golf course real estate from management of the golf course business. MB Bank argues that even if fees collected to play a round of golf or to rent a golf cart are construed as income derived from the golf course real estate, that income would not be possible but for the business operation of the real estate as a golf course. MB Bank contends that courts in other states have therefore allowed receivers appointed in mortgage foreclosure actions involving golf courses to operate the courses. See *U.S. Bank National Ass'n v. Golf Course Management, Inc.*, No. CA2008-08-078, 2009 WL 1655395, at *1 (Ohio Ct. App. June 15, 2009) (receiver for golf course being foreclosed upon given access to all assets and information relating to its operation, including accounts receivable, assets, income, and security and maintenance records); *Peoples Federal Savings & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 425 S.E.2d 764, 769 (S.C. Ct. App. 1992) (noting that receiver was appointed to operate golf course as part of the foreclosure proceedings); *Kaanapali Golf*

Management, Inc. v. International Longshore & Warehouse Union, Local 142, No. Civ. 05-00672 SOM/KS, 2006 WL 278875, at *1 (same).

¶ 24 In construing a statute, our primary objective is to ascertain and give effect to the legislature's intent, which is best indicated by the statute's plain language. *J&J Ventures Gaming, LLC v. Wild, Inc.*, 2016 IL 119870, ¶ 25. We view the statute as a whole and may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute in a particular manner. *Id.*

¶ 25 Here, section 15-1704(b) specifically states that the receiver "shall have full power and authority to *operate*, manage and conserve such property" and "collect the rents, issues and *profits* from the mortgaged real estate." (Emphases added.) (735 ILCS 5/15-1704(b) (West 2014)). Based on this language, MB Bank has made a *prima facie* showing that the receiver's authority under the statute would encompass the operation of the golf course as a business.

¶ 26 In addition to the statute's plain language, the goals of the statute as a whole appear to support such an interpretation. As MB Bank points out, the receiver's duties include maintaining the real estate in at least as good condition as when the receiver took possession, which is a significant expense here given that the property is a golf course with various buildings. However, the trial court's order provided the receiver with no means to pay these expenses. Even defendants stated, in their response to MB Bank's request to appoint a receiver, that "[a]ll expenses for the Real Property, including but not limited to mortgage payments, and the operations of the Klein Creek [*sic*] are made from income generated by the Defendant[s'] operation of the Klein Creek [*sic*] as a golf course and banquet facility." The ability to "operate" the golf course and collect the "profits" would provide the receiver with the funds necessary to pay the real estate's expenses. As such, MB Bank's brief demonstrates *prima facie* error that is

supported by the record. See *Talandis Construction Corp.*, 63 Ill. 2d at 133. We therefore reverse the ruling of the circuit court of Du Page County insofar as it denied MB Bank's request to allow the receiver to operate the business of the golf course, and we remand for further proceedings.

¶ 27 III. CONCLUSION

¶ 28 We reverse the portion of the ruling of the circuit court of Du Page County denying MB Bank's request to allow the receiver to operate the business of the golf course, and we remand for further proceedings consistent with this order.

¶ 29 Reversed in part and remanded.