

STATE OF MICHIGAN
IN THE BERRIEN COUNTY TRIAL COURT – BUSINESS DOCKET
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CLARENCE W. BROWN, JR., MD,

Plaintiff,

vs

VASSILIOS A. DIMITROPOULOS
M.D., et al.

Defendants.

Case No. 2016-0109-CB

HON. DONNA B. HOWARD

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OPINION & ORDER FOR PARTIES' MOTIONS FOR LEAVE TO SUE RECEIVER

At a session of the Berrien County Trial Court, held
On the 21st day of December, 2022, in the City of
St. Joseph, Berrien County, Michigan

PRESENT: HONORABLE DONNA B. HOWARD

I. BACKGROUND

This matter comes back before the Court on Plaintiff's and Defendant Dimitropoulos' long-ago filed motions for leave to sue the first-appointed receiver, Amicus Management ("Amicus"), which were initially argued as part of their respective motions to remove Amicus as the receiver

in January 2019.¹ At that time, and after hearing, this Court issued its Opinion and Order on March 14, 2019. As indicated in the March 14, 2019 Opinion and Order, this Court denied “the parties’ respective motions for leave to sue Receiver, without prejudice” and ordered that their “requests for leave to sue the Receiver are adjourned pending the submission of the current Receiver’s final report and accounting, and possible further briefing and/or hearing of the parties (OpOrder re Lv to Sue, 3/14/19, pp 4 & 9).

Contemporaneously, on Plaintiff’s pending motion for stay of proceedings during his appeal, the Court issued a separate Order granting the stay in part indicating:

[F]or the reasons stated on the record, that any proceedings or matters concerning the June 28, 2018 Opinion or July 26, 2018 Order are stayed pending the resolution of Plaintiff’s appeal and/or further order of this Court; however, the proceedings or matters, if any, **concerning the outstanding tax liability owed; the removal of the current Receiver; or the appointment of a new receiver are not stayed.** Lastly, this Order does not stay the parties’ ability to pursue informal or formal alternative dispute resolution; the parties may stipulate to enter into alternative dispute resolution.

(Order re Stay, 3/14/19, p 2)(emphasis added).

The Court incorporates herein by reference the factual and procedural background and additional factual references from the record included in its March 14, 2019 Opinions and Orders. Additionally, it should be noted that various other filings or documents² not mentioned in the March 14, 2019 Opinions and Orders have also been made part of the record in this matter, including but not limited to:

- 11/17/2016 Email from Defendant to Amicus and defense counsel acknowledging in part:

As a C corp, the 3.575M sale price will flow into Med prop Corp. Med Corp will then have a roughly \$2.5M net profit that will trigger a taxable event, and capital gains will need to be paid to the IRS by Medprop [sic]. Of course, as Dr. Brown and I are 50/50 owners of Medprop [sic], this expense will be paid out equally by both of us. This amount will be roughly \$500k, or \$250k each. Then what’s left of the profits will be distributed to each of us share holders [sic], where

¹ Defendant filed his joint motion to remove and for leave to sue on or about November 26, 2018. Plaintiff filed his motion for leave to sue on or about January 7, 2019. *See also*, Opinion & Order, 3/14/19, p 2 (“this Court is addressing Defendant’s and Plaintiff’s respective motions concurrently as both seeking leave to sue and/or remove Receiver”).

² All the referenced emails (2016-2017) were attached as exhibits to Amicus’ motion to order tax liability payments, 10/12/2018.

we will each be responsible to pay capital gains on what's left at the personal level. This will be around another \$300k in taxes each. . . .

- 01/16/2017 Email from Defendant to Amicus and defense counsel seeking sale proceeds
- 10/02/2017 Email from Amicus of 2016 tax returns to Defendant seeking review and signatures as soon as possible
- 10/09/2017 Email from Plaintiff to Amicus and plaintiff's counsel confirming review of 2016 tax returns, and acknowledging he "did not find any discrepancies."
- 10/10/2017 Email from Amicus to Plaintiff informing him "[t]here are not sufficient funds to pay the 2016 tax liabilities" from the Receivership Estate.
- 10/12/2018 Amicus' motion to order tax liability payments
- 02/08/2019 Defendant's motion for contempt against Amicus for not paying out of the Receivership Estate the \$298,869.00 reimbursement amount addressed in the Court's July 26, 2018 Order (entering the June 28, 2018 Opinion (by Hon. John Donahue))
- 02/11/2019 Amicus' motion for a second claims process to address the anticipated tax claims of the Internal Revenue Service ("IRS") and State of Michigan ("State") arising from the capital gains realized by the parties' dissolving business after the 2016 sale
- 03/05/2019 Defendant's response in opposition to Amicus' motion for second claims process
- 03/07/2019 Plaintiff's motion for stay pending his appeal.

Notably, the record also reflects that both parties vehemently opposed Amicus' request for tax payments or a second claims process as a means to address the anticipated tax claims from the Receivership Estate. The Court ultimately denied both of Amicus' requests (*see eg*, OpOrder, 2/13/19).

Pursuant to the March 14, 2019 Order, Amicus filed their final accounting with the Court on or about May 14, 2019, and their final application report on or about May 15, 2019. On June 24, 2019, the Court entered an Order regarding Amicus' fee applications (8th, 9th and 10th), approving same *except* for "any time entry exclusively related to the Motions for Leave to Sue the

Receiver” and reducing by 50% “any time entry that is related, in part, to the Motions for Leave to Sue the Receiver.” It is undisputed that despite the prior Orders of the Court, by late 2019, the parties were still in disagreement with Amicus over its final accounting and how to even proceed in continuing to engage an accountant to prepare tax returns for the businesses. Both Plaintiff and Defendant objected to Amicus’ application submission (*see*, Objections, 5/20/19 & 5/21/19, respectively). Also, it is undisputed that the parties were still not able to retain a new receiver. The Court granted Amicus’ application in part, noting that “the entries subject to objection shall be addressed by further order of this Court.” (Order Granting Rec’r’s Fee Applications, 6/12/19, ¶¶1, p 2). Amicus then transferred all remaining funds from the Receivership Estate to the Berrien County Clerk of Court in compliance with a subsequent order of the Court issued on or about October 28, 2019.

Finally, by November 2019 a new receiver, Jeff Hauswirth of J. Hauswirth Group was stipulated to by the parties. The Court entered a stipulated order on November 5, 2019, which specified in part:

IT IS FURTHER ORDERED that Plaintiff and Defendant, by counsel, confer with the Receiver and attempt to agree upon a detailed order regarding the appointment and if agreed, submitting the proposed agreed order within 21 days of this order. If the parties are unable to agree, then each party shall submit its own proposed order by that same date.

(Stipulated Order Appointing Rec’r, 11/5/19, ¶3, p 1).

Notwithstanding the earlier stay order (while Plaintiff’s appeal remained pending), on December 20, 2019, Defendant renewed its motion for leave to sue Amicus as the original receiver (Def Mot & Brf, 12/20/19).

On June 11, 2020, the Court of Appeals issued its Opinion and Order, affirming the Court’s June 28, 2018 Opinion (by Judge Donahue). *Brown v Dimitropoulos (Unpublished)*, COA Docket 347220 (MichApp, June 11, 2020). The court record was returned from the Court of Appeals on or about September 22, 2020. This Court subsequently granted a more detailed order appointing Mr. Hauswirth as the new Receiver on or about November 19, 2020. The Order specified the new Receiver’s duties and authority. (Order Appointing Rec’r, 11/19/20, pp 2-6).

As a result of the new Receiver’s motion and hearing held September 14, 2021, this Court authorized the new Receiver to make payments to the IRS from the amounts remaining in the Receivership Estate (*see*, Order Regarding Distribution and Discharge, 10/11/21, ¶ 1, p 2). Additionally, the Order approved the new Receiver’s accounting through July 31, 2021, and

ordered the new Receiver to make a “final accounting.” (Order Regarding Distribution and Discharge, 10/11/21, ¶ 2, p 2).³ On or about November 1, 2021, Plaintiff filed an application for interlocutory appeal of the Court’s Order. However, the Court of Appeals denied Plaintiff’s application for leave. *Brown v Dimitropoulos*, Order, COA Docket 359104, (MichApp, March 14, 2022).

About that same time, upon objections to the new Receiver’s final accounting and request for fees, and related motion of the Receiver, occurring December 2021 through January 2022, a hearing was scheduled and held in March 2022. This Court entered an Order Regarding Final Accounting and Discharge on March 23, 2022. Thereafter, the Court ruled upon related appeal bond issues raised on motion and/or briefing of the parties in April and May, 2022. Ultimately, the Court entered an Order for Release of Appeal Bond posted by Plaintiff (Order, 6/22/22).

As to the remainder of the pending matter, on June 30, 2022, the Court entered an Order allowing for supplemental briefing by the parties on their prior requests to sue Amicus. Plaintiff filed his supplemental brief on July 27, 2022; Defendant filed his supplemental brief on July 28, 2022. As described in more detail below, the Court now denies the parties’ motions for leave to sue Amicus, as the initial court-appointed receiver.

II. ANALYSIS

From the onset of the receiver appointment, this Court’s Order (by Judge Donahue) appointing Amicus as the receiver addressed circumstances in which Amicus may be held liable for its actions taken in managing the receivership. Paragraph 37 of the Order provides that:

The Receiver and its employees, agents, contractors and attorneys shall have no personal liability, and they shall have no claim asserted against them, relating to the Receiver’s duties under this Order, **except for claims due to their gross negligence, gross or willful misconduct, malicious act or a substantial failure to comply with this Court’s orders.**

(Order Appointing Rec’r, 9/13/16, ¶ 37, pg 13)(emphasis added). This is consistent with the standard to sue a court-appointed receiver under Michigan law. *See eg., In re Motion for Leave to Sue Receiver of Venus Plaza Shopping Ctr*, 228 MichApp 357, 361; 579 NW2d 99 (1998).

As previously addressed in the Court’s March 14, 2019 Opinion, pp 5-6, and incorporated herein by reference, a party seeking leave to sue a court-appointed receiver must be able to at least set forth factual allegations that, if true, demonstrate bad faith. *Venus Plaza, supra* at 361. Again,

³ As an aside, Daniel Yeomans, President of Amicus and who was principally involved in this matter while Amicus was the Receiver, unexpectedly passed away in August 2021.

mere negligence or errors in business judgment on the part of a court-appointed receiver are not actionable. *Id.* at 361-362.

Despite an opportunity to supplement, both parties essentially recycle much of their respective arguments from their prior filings. The parties are not allowed to state a position and then expect this Court to make arguments or search for authority to support the parties' respective positions. *Seifeddine v Jaber*, 327 MichApp 514, 519-521; 934 NW2d 64 (2019). A party's failure to adequately brief the claims raised constitutes abandonment. *Id.* at 520-521.

As the parties will recall, Defendant's initial motion for leave to sue Amicus, asserted sixteen allegations against Amicus (Def Mot, 11/26/18, ¶8, pp 3-5). As to Defendant's stated allegations, the Court previously indicated in pertinent part:

In this instance, the Court is not persuaded by any of Defendant's allegations as stated in his motion. The Court agrees with Defendant that he does not have to entirely prove his case as in a trial, before leave to sue Receiver is appropriate. However, Defendant must provide allegations that would minimally demonstrate a viable claim of good cause or Receiver's gross negligence, willful misconduct, malicious acts, or a substantial failure to comply with this Court's orders. Here, Defendants' claims are almost entirely overbroad and vague. Those that are more specific allegations against Plaintiff, not Receiver (*eg.* ¶ 13), and/or clearly fall within the business judgment of Receiver (*eg.* ¶8j (allowing credit bid process)).

(OpOrder, 3/14/19, p 7)

Notably, Defendant's December 26, 2019 renewed verified motion for leave to sue Amicus asserts similar, if not the same, bases to his 2018 request for leave to sue, albeit pared down from sixteen to three. Defendant asserts:

[T]hree separate categories of misconduct by the Receiver that warrant an order granting leave to sue:

1. The Receiver failed to pay estimated taxes following the auction of the receivership businesses;
2. The Receiver knowingly assisted Clarence Brown in converting medical records by migrating them to Dr. Brown's new medical practice;
3. The Receiver knowingly assisted Dr. Brown in converting tangible business property of the receivership entities.

(Def Suppl Brf, 7/28/22, p 2). According to Defendant, Amicus' "malfeasance is multi-faceted," indicating:

Judge Donahue ordered reimbursement to Dr. Dimitropoulos for one aspect of the Receiver's misconduct (migration of medical records), but there is no money to pay

that reimbursement due to another aspect of the Receiver's misconduct (mishandling of the taxes).

(Def Suppl Brf, 7/28/22, p 2). In his 1½ page supplemental brief, Defendant provides no additional evidence, does not highlight previously submitted evidence or legal authority, and adds no new authority upon which he seeks the Court's consideration of the above three allegations of supposed misconduct.

Likewise, aside from reference to prior filings, Plaintiff highlights as his bases to sue Amicus the issues with the bid process and Plaintiff's belief that Amicus did not effectively communicate with the parties (Pltf Suppl Brf, 7/27/22, ¶¶ 7-8, pp 3-4). Plaintiff, similar to Defendant, takes issue with the tax liabilities that were incurred as a result (Pltf Suppl Brf, 7/27/22, ¶ 9, p 4).

However, as reflected in the court record, some of which is noted above, the Court finds that any delays in the payment of the taxes were wholly due to actions of Plaintiff, Defendant or both. From delays in submitting the 2016 tax returns to even selecting an accountant, Plaintiff and/or Defendant were the cause of such delays; not Amicus. With each recommendation made by Amicus to move the tax filings along, one or both of the parties filed objections and motions which caused further delays. There has been no evidence presented or emphasized to this Court that establishes even a colorable claim of misconduct or gross negligence as it relates to tax filings, tax payments, or the initial bid sale for which leave to sue should be granted.

Moreover, all of the alleged actions asserted respectively by these parties against Amicus as they relate to the bid process, sale, the distribution of the sale proceeds, the transfer of records, were business decisions, and fully approved by the Court (by Judge Donahue or Judge Howard). At most Amicus' actions in this regard would amount to mere negligence. *See, Venus Plaza Shopping Ctr, supra* at 360 (business decisions made in good faith, even if wrong, are not actionable for leave to sue a receiver). Thus, to the extent a mistake was made in this regard, the Court later addressed it through Judge Donahue's June 28, 2018 Opinion, which has since been affirmed by the Court of Appeals.

Given the opportunity of hindsight, the parties may have regrets as to the approved bidding process, the amounts of their bids, and the resultant tax implications, but plainly, such actions by Amicus are not actionable as gross negligence, willful misconduct, malicious acts, or substantial failure to comply with this Court's orders.

Therefore, the Court being otherwise advised in the premises and for the reasons stated in the foregoing:

IT IS HEREBY ORDERED that Dr. Brown's and Dr. Dimitropoulos' individual requests for leave to sue the Receiver, Amicus, are respectively **DENIED**.

IT IS SO ORDERED.

There being no other pending claims, this is a final order which closes the case. MCR 2.602(A)(3)

DATED: 12/21/2022

//s// Donna B. Howard

HONORABLE DONNA B. HOWARD
Berrien County Trial Court – Civil Div.

Certificate of Service: The undersigned certifies that a copy of the foregoing Opinion & Order was served upon the attorneys and/or parties of record to the above cause by mailing the same to them at their respective addresses as disclosed by the file with postage fully prepaid (or inter-office if available) on:

Date

Deputy Clerk/Bailiff