

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

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BRUCE DESPELDER,

Plaintiff/Counter-Defendant,

and

MICHIGAN DEPARTMENT OF COMMUNITY  
HEALTH,

Intervenor,

v

BARRY L. COLE (in his capacity as Court Appointed  
Receiver), SKM DRILLING SERVICES, INC., SKM  
ENVIRONMENTAL SERVICES, INC., and SANDRA  
MYERS,

Defendants,

and

ANTONY SCHULTZ,

Defendant/Counter-Plaintiff/  
Third-Party Plaintiff,

v

MARTY GRIFFORE,

Third-Party Defendant.

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File No. 02-7817-NO  
HON. PHILIP E. RODGERS, JR.

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Sandra Myers  
Defendant in Pro Per

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ORDER GRANTING  
SUMMARY DISPOSITION FOR RECEIVER BARRY L. COLE

On September 13, 2004, the Defendant Barry L. Cole ("Cole") brought a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). On September 16, 2004, the Court issued a pre-hearing order giving any opposing party 21 days from the date of the order to file and serve a response to the motion and giving the moving party 28 days from the date of the order to file and serve a reply. Defendant/Counter-Plaintiff/Third-Party Plaintiff Antony Schultz ("Schultz") requested an extension of time to file a response and was given until October 18, 2004. These time limits have now expired. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3) and issues this written decision and order. For the reasons stated herein, the motion is granted.

BACKGROUND

Jess Kinsel was an employee of Defendant SKM Drilling Services, Inc. and Defendant SKM Environmental Services, Inc. (hereinafter collectively referred to as "SKM"). It is undisputed that, on August 10, 2001, Kinsel was injured on the job. Kinsel eventually assigned his cause of action to Plaintiff/Counter-Defendant Bruce Despelder.

On July 16, 2001, at a hearing in the related matter of *Schultz v Myers*, Antrim County Circuit Court File No. 01-7769-CZ, the Court orally ordered that a Receiver be appointed for SKM. On August 13, 2001, the Court entered an order appointing Barry L. Cole ("Cole") as the Receiver.

The complaint filed in this action alleges, among other things, that the negligence of a co-worker, Marty Griffore, can be imputed to Cole; that Cole had a duty to properly and safely operate

the drill rig upon which Kinsel was injured; and that Cole was liable because the injury occurred during the course of the receivership. Defendant Cole argues that Kinsel has no cause of action against the Receiver and he is entitled to summary disposition pursuant to MCR 2.116(C)(8) and (10) because, as a matter of law, the negligence of a co-worker cannot be imputed to him as Receiver; as Receiver, he did not have a duty to properly and safely operate the drill rig because he had no duty or obligation to operate or supervise the operation of the rig; and that, while this personal injury claim may ripen into a judgment that would be a claim against the receivership estate, it is not an administrative cost of the Receivership.

#### STANDARDS OF REVIEW

##### MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc*, 167 Mich App 202, 205; 421 NW2d 631 (1988).

##### MCR 2.116(C)(10)

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins. Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

#### ANALYSIS

The power to appoint receivers is inherent in courts of equity. *Michigan Minerals, Inc v Williams*, 306 Mich 515; 11 NW2d 224 (1943). A receiver may be appointed where necessary to prevent fraud or to protect property against imminent danger of loss. 65 Am Jur2d, Receivers, § 27, p 879. The primary purpose of a receiver is to preserve property and to dispose of it under order of the court. *Band v Livonia Associates*, 176 Mich App 95; 439 NW2d 285 (1989). In addition, a receiver may be appointed by the circuit court in the exercise of equitable powers under the authority of MCL § 600.2926. Circuit judges, in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law. *Id.* The phrase “allowed by law” is not limited to situations where appointment of a receiver is provided for by statute. It also refers to those cases where the facts and circumstances justify appointment of a

receiver in order to afford equitable relief. *Band, supra* at 105. A court has the basic responsibility of enforcing its own orders and has considerable discretion in choosing the means to be employed. *Id.*

*Black's Law Dictionary* (7th ed.) defines a "receiver" as "[a] disinterested person appointed by a court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims (for example, because it belongs to a bankrupt or is otherwise being litigated)." A receiver is an officer of the court who protects and preserves property on behalf of the parties to a pending lawsuit. 65 Am Jur2d, Receivers, § 1, p 654. The purpose of a receivership is to protect the parties' rights to the property until a final disposition of the issues. *Id.*, § 6, p 657. A receiver also may control and manage property. 19 Michigan Law & Practice (1957), Receivers, § 1, p 351.

In Michigan, leave of court must be obtained before bringing a lawsuit against a court-appointed receiver. In other words, a receiver cannot be sued without leave of the appointing court. *Cohen v Bologna*, 52 Mich App 149; 216 NW2d 586 (1974); *Petition of Briggs*, 51 Mich App 421; 215 NW2d 722 (1974); *Manchure v Wayside Oil Corp*, 259 Mich 667; 244 NW 224 (1932); *In re Guaranty Indemnity Co*, 256 Mich 671; 240 NW 78 (1932); *McAfee v Bankers' Trust Co of Muskegon*, 253 Mich 685; 235 NW 807 (1931); *Prather Engineering Co v Detroit, F & S Ry Co*, 152 Mich 582; 116 NW 376 (1908). In *Motion for Leave to Sue Receiver of Venus Plaza Shopping Center, In re*, 228 Mich App 357; 579 NW2d 99 (1998), the Court said:

Receivers may be appointed by circuit courts in the exercise of equitable powers under the authority of MCL § 600.2926; MSA § 27A.2926. In Michigan, leave of court must be obtained before bringing a lawsuit against a court-appointed receiver. *Citizens' Savings Bank v Ingham Circuit Judge*, 98 Mich 173, 177; 57 NW 121 (1893); *Petition for Appointment of a Receiver for Peoples State Bank*, 51 Mich App 421, 431-432; 215 NW2d 722 (1974). The grant or denial of leave to sue a receiver is reviewed for an abuse of discretion. *Citizens' Commercial & Savings Bank v Bay Circuit Judge*, 110 Mich 633, 634; 68 NW 649 (1896).

Therefore, the proper and orderly manner for the allowance of claims such as the claims asserted herein is by petition to the court appointing the receiver, and in the same action. *Id.*

The Plaintiff/Counter-Defendant did not seek leave to file this action against the Receiver. The Plaintiff/Counter-Defendant has already been granted leave to intervene in the related case of *Schultz v Myers*, Antrim County Circuit Court File No. 01-7769-CZ.

#### CONCLUSION

For the reasons stated herein, the Court grants the Receiver's motion for summary disposition and dismisses this action against the Receiver Barry Cole with prejudice.

IT IS SO ORDERED.

This decision and order does not resolve the last pending claim nor close the case.



HONORABLE PHILIP E. RODGERS, JR.  
Circuit Court Judge

Dated: 2/3/05