

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000756-MR

EUMBLE DIXON

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 03-CI-00435

WISE COUNTY COAL COMPANY, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, NICKELL AND WINE, JUDGES.

NICKELL, JUDGE: Eumble Dixon has appealed from the Letcher Circuit Court's January 28, 2010, order dismissing his complaint against Wise County Coal Company, Inc. We affirm.

Wise County Coal is the owner of a tract or tracts of land comprising approximately sixty acres in Letcher County. Dixon paid the delinquent tax bills on Wise County Coal's property for the years 1989, 1990, and 1993-1999 by

redemption. He paid the 2000 and 2001 taxes when they became due. Dixon then changed the mailing address for the property tax bills to his own address and he paid the bills for the years of 2002-2005. The record indicates that Dixon is wholly unrelated to Wise County Coal.

On November 24, 2003, Dixon filed a complaint alleging he had paid taxes on the property for seven years and thus held a perfected lien on the property, and that Floyd Smith was the record owner of the property. He sought to have the property sold to satisfy the lien. A warning order attorney attempted to locate Smith but was unsuccessful. It would later be determined that Smith had died in 1959. A default judgment was entered against Smith on June 14, 2005, but failed to include the dollar amount of the judgment.

On August 24, 2005, Wise County Coal purchased the property from Smith's heirs. Wise County Coal, having knowledge of Dixon's lien, advised the trial court on March 24, 2006, that it had purchased the property and moved to intervene in the action, to have the June 14, 2005, judgment set aside, to dismiss the complaint, and to require Dixon to pay the costs of the action. It further advised that an offer to pay Dixon's claim in full, including interest, had been tendered to Dixon's counsel on January 12, 2006. Dixon did not respond to the offer.

On April 25, 2006, Dixon moved to amend his complaint to name Wise County Coal as the defendant. On May 2, 2006, the trial court entered an order naming Wise County Coal as a defendant to the action, setting aside the

default judgment, and granting Dixon ten days to amend his complaint. The May 2 order further ordered Dixon to pay the costs of the action incurred through April 27, 2006, including the cost of a cancelled Master Commissioner's sale. Dixon's amended complaint was filed on May 30, 2006.

On June 1, 2006, Wise County Coal renewed its motion to dismiss the complaint. Contemporaneously, Wise County Coal filed a confession of judgment in the amount of \$1,850.31, which it had calculated to be the total amount of the tax bills paid by Dixon plus interest at twelve percent per annum from the date the bills were paid. It tendered payment of the calculated amount to the circuit court clerk.

For reasons unclear from the record, little action was taken in the matter until Wise County Coal renewed its motion to dismiss once again on January 14, 2010. On January 28, 2010, the trial court entered an order dismissing Dixon's complaint, accepting Wise County Coal's confession of judgment, and ordering the circuit court clerk to pay over to Dixon the \$1,850.31 previously tendered by Wise County Coal along with any accumulated interest to satisfy the confessed judgment. Dixon's motion to alter, amend or vacate the order was denied on March 23, 2010, and this appeal followed. We affirm.

Initially, we note that the record on appeal does not contain copies of the videotaped hearings before the trial court nor transcripts of same. It is the duty of the appellant to ensure the record is complete and contains all of the evidence necessary to facilitate adequate appellate review, and in the absence of a complete

record we must assume the omitted portions support the trial court's ruling.

Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985). Further, contrary to the mandates of CR¹ 76.12(4)(c)(iv) and (v), Dixon's brief before this Court contains no references to the record supportive of his arguments nor does Dixon indicate whether or how his alleged errors were preserved for appellate review.

We would be well within our discretion to strike the brief or dismiss the appeal for Dixon's failure to comply with the rules. We will not impose such a harsh sanction, but we will decide the issue presented based solely on the facts appearing on the face of the record.

Dixon contends the trial court erred in dismissing his complaint and determining his only remedy was payment for the tax bills he had already paid. Although not clearly articulated, it appears Dixon believes the trial court erred in failing to permit him to foreclose on his lien and force the sale of Wise County Coal's property. We disagree with Dixon's assertions.

Compensation is often the aim of the law. The bottom principle of the law of damages is to restore a party as near as may be to his former position.

Hughett v. Caldwell County, 313 Ky. 85, 91, 230 S.W.2d 92, 96 (1950). "The measure of recovery is the extent to which he is actually injured or damaged. He must be made whole; reimbursed to the extent of his loss." *Newman v. Moore*, 12 Ky.L.Rptr. 1, 21 S.W. 759 (1893). In this appeal, Dixon appears to be seeking more than that to which he is entitled.

¹ Kentucky Rules of Civil Procedure.

Dixon contends that Wise County Coal's payment of the amount sued upon somehow deprived Dixon of his "right" to foreclose on the property and force its sale. We disagree. The entire amount at issue was due by reason of Dixon's payment of the delinquent tax bills on the property and his accompanying right to be repaid those sums expended plus interest at the legal rate. Absent an agreement to the contrary, satisfaction of his claim could only be accomplished by payment in full. Upon payment of the indebtedness by Wise County Coal, Dixon was made whole and was entitled to nothing further.

In his suit, Dixon sought payment of a debt and requested the subject property be sold to satisfy his lien. Wise County Coal paid the amounts due, with interest. Nevertheless, Dixon continues to insist the property must be sold to satisfy his lien, but cites no authority supportive of this position. We believe Dixon's argument is wholly without merit.

Generally, the purpose of a foreclosure is to force a sale to generate assets from which to pay an unpaid debt secured by the property. Clearly, Wise County Coal's voluntary payment of the debt rendered any sale wholly unnecessary. We are at a loss to understand Dixon's contention to the contrary. He is not entitled to anything more than being made whole. Even were the property to be sold at a judicial or private sale for an exorbitant amount, Dixon would be entitled to receive no more than that for which he sued and was paid by Wise County Coal. There was no error.

For the foregoing reasons, the judgment of the Letcher Circuit Court
is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Craft, II
Whitesburg, Kentucky

BRIEF FOR APPELLEE:

James D. Asher
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