RENDERED: MARCH 24, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000439-MR

THERESA GERSTLE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 11-CI-400115

JOHN ANARUMA; UNKNOWN SPOUSES OF JOHN ANARUMA; UNKNOWN HEIRS OF JOHN ANARUMA AND HOLLY HOUSE CONDOMINIUM HOMES, BOARD OF ADMINISTRATION — APPELLEES

AND

NO. 2014-CA-001636-MR

THERESA GERSTLE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 11-CI-400115

HOLLY HOUSE CONDOMINIUM HOMES, INC., BOARD OF ADMINISTRATION;

JOHN ANARUMA; UNKNOWN HEIRS OF
JOHN ANARUMA; UNKNOWN SPOUSES OF
JOHN ANARUMA; UNKNOWN ADMINISTRATORS
OF JOHN ANARUMA; UNKNOWN DEVISES OF
JOHN ANARUMA; UNKNOWN EXECUTORS OF
JOHN ANARUMA; UNKNOWN SPOUSE OF
THERESA GERSTLE AND MAC SAWYERS APPELLEES

AND

NO. 2015-CA-001560-MR

THERESA GERSTLE APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 11-CI-400115

HOLLY HOUSE CONDOMINIUM HOMES, INC.;
HOLLY HOUSE CONDOMINIUM HOMES, INC.,
BOARD OF ADMINISTRATION;
JOHN ANARUMA; UNKNOWN HEIRS OF
JOHN ANARUMA; UNKNOWN SPOUSES OF
JOHN ANARUMA AND MAC SAWYERS APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Theresa Gerstle files this appeal from an order of the Jefferson Circuit Court selling property on which Gerstle had a mortgage. Because

Gerstle failed to present proof of her mortgage to the circuit court and she is not entitled to relief under Kentucky Rules of Civil Procedure (CR) 60.02, we affirm.

Holly House Condominium Homes filed suit alleging that John Anaruma owned Unit #48 of Holly House, an interest he acquired through a deed. Under Holly House's master deed, each owner in a Holly House property was assessed a condominium fee, as well as an apportioned share of utility bills. Holly House alleged that Anaruma failed to pay his fees, and as a result, it acquired a lien on Anaruma's property. Holly House's complaint also acknowledged that "Theresa Gerstle may have an interest in the [c]ondominum by reason of a [m]ortgage recorded November 21, 2001[.]"[1]

After Holly House was initially unable to locate Gerstle to serve her, it hired a warning order attorney. Gerstle then filed a *pro se* response to Holly House's claim stating "Theresa Gerstle[] is first lien holder, active, not to be voided, and can act on behalf of the owner of record regarding the unit of interest according to the Master deed." She concurrently filed an affidavit stating that she had not been served. Even though Gerstle filed motions and documents periodically, she never submitted the mortgage document to the court during the underlying action.

On March 4, 2013, the circuit court ordered the property be sold, stating Gerstle's "claim is subordinated to [Holly House's] claims. The Court

[1] According to the documents Gerstle filed in the record, she deeded the property to Anaruma on November 14, 2001. Anaruma also executed a promissory note to pay Gerstle $38,500, concurrently giving Gerstle a mortgage on his property

reserves jurisdiction to further adjudicate any claim she may have to the proceeds of the sale." The trial court also determined that Gerstle lacked standing to contest the matter on behalf of Anaruma. The property was sold on June 18, 2013, for $15,000.

The court denied Gerstle's motion to reconsider, stating "Issue previously determined – motion raises no new cognizable claim." Gerstle then filed a second motion to reconsider, which the trial court also denied stating "[m]ost if not all of the issues she raises have been previously addressed, and the exceptions are filed well outside of time."

On August 20, 2013, Gerstle filed documents with the court including a mortgage and promissory note executed to her by Anaruma. Gerstle then filed a motion under CR 60.02, and a supplement to that motion. The circuit court denied Gerstle's motion on July 2, 2014, again stating that Gerstle "simply reiterate[d] her belief that her lien takes priority." The court denied Gerstle's subsequent CR 60.02 motion, also finding that Gerstle failed to raise any arguments that had not been presented previously. Gerstle appeals from the judgment and order of sale in this case, as well as the denial of her CR 60.02 motions.

In reviewing a grant of summary judgment, our inquiry focuses on "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). *See* CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the

motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Trial courts must "refrain from weighing the evidence at the summary stage" and should "review the record after discovery has been completed to determine whether the trier of fact could find a verdict for the non-moving party." *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). "In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Id.*

Kentucky Revised Statutes (KRS) 381.883 provides in relevant part as follows:

> All sums assessed by the council of co-owners but unpaid for the unit's share of the common expenses constitute a lien on such unit prior to all other liens, except only (1) liens for taxes and assessments lawfully imposed by governmental authority against such unit, and (2) all sums unpaid on first mortgages of record.

After Holly House presented evidence that it had a lien on Anaruma's property, Gerstle was required to prove she had a first mortgage of record to establish that she had priority over Holly House's lien. Although Holly House's complaint stated that Gerstle "may" have an interest in Anaruma's property by way of a mortgage, Holly House later disputed to the trial court whether Gerstle had a mortgage at all, claiming that Gerstle may have a deed instead.

"[A] mortgage is simply a deed containing a clause of defeasance and no particular form of defeasance is required." *Farmers Nat'l Bank v.*

Commonwealth Dep't of Revenue, 486 S.W.3d 872, 884 (Ky.App. 2015) (quoting *Hart v. Hill*, 305 Ky. 216, 220, 203 S.W.2d 13, 16 (1947)). After reviewing the document in question, it is clear that Gerstle did indeed have a mortgage on the property. Even though the mortgage contains language that "convey[s]" the property "in fee simple," the mortgage also contains conditions by which the mortgagee may "enforce the mortgage." The document also provides that "should the Mortgagor well and truly pay off and discharge the note aforesaid, and perform all the covenants and stipulations of this instrument, the Mortgagee or assignee shall release this instrument on the request and at the cost of the Mortgagor." As such, it is clear that any interest Gerstle had in the property was defeasible. *See generally Hart*, 305 Ky. at 220, 203 S.W.2d at 15-16. Because the mortgage was executed on November 14, 2001, Gerstle had a first mortgage on this property under KRS 381.883. Therefore, Gerstle's mortgage had priority over Holly House's lien, even though Gerstle failed to prove her mortgage to the circuit court during the underlying case.

Because Gerstle held a mortgage on the property, she had standing to contest the matter on behalf of herself. Our Supreme Court has previously held that mortgagees have standing to contest the priority of their mortgage:

> We hold that Commonwealth Bank has first-party standing in this case for two reasons. First, the legislature has conferred standing upon Commonwealth Bank as a lienholder of the property. KRS 426.006 states, in pertinent part, that "[t]he plaintiff in an action for enforcing a lien on property shall state in his petition the liens held thereon by others...." Here,

> Commonwealth Bank, as mortgagee of the property, was a lienholder at the time Tax Ease filed suit and, pursuant to KRS 426.006, Tax Ease named Commonwealth Bank as a defendant in the lawsuit.
>
> Second, Commonwealth Bank has a present interest in the Agreed Judgment because it suffered a direct financial injury as a result of its existence. Under KRS 134.420(3), the state's tax lien is superior to Commonwealth Bank's recorded mortgage lien. Thus, by purchasing the certificate of delinquency, Tax Ease acquired a lien that is superior to Commonwealth Bank's lien. The award of attorneys' fees and costs—an amount which Commonwealth Bank contends is unreasonable—increases the amount of Tax Ease's lien, and consequently impairs Commonwealth Bank's mortgage security. Accordingly, the reduction of Commonwealth Bank's security interest in the property is an injury that merits its right to participate in the necessary determination. As a result, we hold that Commonwealth Bank has standing to contest the Agreed Judgment.

Tax Ease Lien Investments 1, LLC v. Commonwealth Bank & Trust, 384 S.W.3d 141, 143–44 (Ky. 2012) (footnote omitted). Not only did Holly House list Gerstle as a defendant by naming her in Holly House's complaint, but a judicial determination that Holly House has priority reduces the amount that Gerstle could recover. Therefore, Gerstle had standing in this case.

However, Gerstle failed to provide a copy of her mortgage to the trial court prior to the time the property in this case was sold. CR 43.01(1) provides that "[t]he party holding the affirmative of an issue must produce the evidence to prove it." Although Gerstle provided an affidavit to the court stating that she was the first lienholder, she did not produce the mortgage in question to the court until after the sale. As a result, Gerstle failed to timely prove that she had a mortgage

over the subject property. We cannot hold that the trial court erred under CR 43.01 in its determination absent Gerstle providing a copy of her mortgage to the court.

Furthermore, both of Gerstle's motions under CR 60.02 were properly denied. CR 60.02 provides that "[o]n motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect … or (f) any other reason of an extraordinary nature justifying relief." Relief under CR 60.02(a) must be requested within one year after the judgment while relief under 60.02(f) must be requested within a reasonable time.

Gerstle's failure to provide a copy of her mortgage to the trial court does not allow for CR 60.02 relief. In *Brozowski v. Johnson*, 179 S.W.3d 261, 262 (Ky.App. 2005), the circuit court dismissed a complaint because an attorney failed to obtain admittance to practice *pro hac vice*. This Court upheld that dismissal, noting that "[n]egligence of an attorney is imputable to the client and is not a ground for relief under … CR 60.02(a) or (f)." *Brozowski*, 179 S.W.3d. at 263 (quoting *Vanhook v. Stanford-Lincoln Cty. Rescue Squad, Inc.*, 678 S.W.2d 797, 799 (Ky.App. 1984)). Gerstle is not permitted to complain of her own negligence in failing to provide a complete record to the trial court.

Furthermore, "one of the chief factors guiding the granting of CR 60.02 relief is the moving party's ability to present his claim prior to the entry of the order sought to be set aside." *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536, 541–42

(Ky.App. 2007). In *U.S. Bank, NA*, this Court affirmed the trial court's denial of a motion under CR 60.02(a), stating:

> With minimal effort the bank could have discovered the judgment lien prior to the entry of a final judgment in the foreclosure action and litigated Heights Finance's judgment lien therein. As such, it had the ability to have presented its claim prior to the entry of the judgment. Moreover, we do not believe that the circumstances presented rise to the level of an extraordinary nature so as to justify CR 60.02 relief.

Id. at 542 (footnote omitted). *See Bethlehem Minerals Co. v. Church & Mullins Corp.*, 887 S.W.2d 327, 329 (Ky. 1994) (affirming the denial of relief to Bethlehem under CR 60.02(f) in part because it had a full, fair and lengthy opportunity to litigate its theories and relevant evidence was available but it failed to investigate earlier); *Schott v. Citizens Fid. Bank & Trust Co.*, 692 S.W.2d 810, 814 (Ky.App. 1985) (determining named party who was served with appropriate notice of a motion for an early order of distribution could not obtain CR 60.02 relief where she chose not to make a prompt objection). Because Gerstle failed to include the mortgage in the record prior to the judgment and order of sale, she is not entitled to relief under CR 60.02. Gerstle assumed the risks of proceeding *pro se*. "Proceeding *pro se* does not provide one with 'a license not to comply with relevant rules of procedural and substantive law.'" *Smith v. Bear, Inc.*, 419 S.W.3d 49, 55 (Ky.App. 2013) (quoting *Faretta v. California*, 422 U.S. 806, 835 n. 46, 95 S.Ct. 2525, 2541 n. 46, 45 L.Ed.2d 562 (1975)).

Whether Gerstle has raised an issue on appeal concerning her right to redemption is unclear. Regardless, because she has not cited any authority on this matter, we find that it is waived. "Our courts have established that an alleged error may be deemed waived where an appellant fails to cite any authority in support of the issues and arguments advanced on appeal." *Drummond v. Todd Cty. Bd. of Educ.*, 349 S.W.3d 316, 325 (Ky.App. 2011) (quoting *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky.App. 2005)).

Finally, we note that Gerstle's second CR 60.02 motion was improper as successive. *See generally Cardwell v. Commonwealth*, 354 S.W.3d 582, 585 (Ky. App. 2011) (discussing the procedural impropriety of filing multiple post-conviction motions under CR 60.02).

In sum, we hold that the Jefferson Circuit Court did not err when it subordinated Gerstle's mortgage to Holly House because Gerstle failed to present the court with proof of her mortgage prior to the time the property was sold. The court did not err when it denied Gerstle relief under her first CR 60.02 motion because Gerstle's own negligence caused the error. The court did not err when it denied Gerstle's second CR 60.02 motion because that motion was successive.

The Jefferson Circuit Court's order is affirmed.

MAZE, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Theresa Gerstle, *Pro se*
Louisville, Kentucky

BRIEFS FOR APPELLEE, HOLLY HOUSE CONDOMINIUM HOMES, INC.:

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