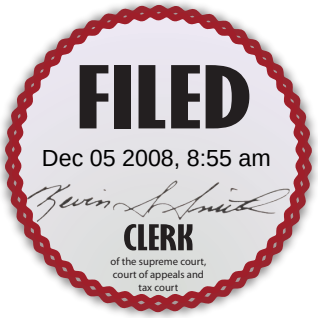


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| CGC BRIDGEWAY APARTMENTS, LLC, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 79A04-0804-CV-198 |
| | ) | |
| FIRST BANK AND TRUST COMPANY OF ILLINOIS, | ) | |
| | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0512-MF-351

**December 5, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

CGC Bridgeway Apartments, LLC ("Bridgeway") appeals the trial court's order foreclosing its property in favor of First Bank and Trust Company of Illinois ("First Bank"). Bridgeway raises one issue, which we revise and restate as whether the trial court's findings of facts and conclusions thereon foreclosing Bridgeway's property were clearly erroneous. We affirm.

The relevant facts follow. On March 9, 2004, First Bank entered into a loan agreement (the "Wintergreen Loan Agreement") with CGC Wintergreen Apartments, LLC ("Wintergreen"). Concurrently with the execution of the Wintergreen Loan Agreement, Wintergreen executed a promissory note to First Bank in the amount of $2,700,000. Wintergreen executed a Deed of Trust and Security Agreement which provided that Wintergreen's mortgaged property secured the obligations and liabilities of Wintergreen in connection with the Wintergreen Loan Agreement.

On May 13, 2004, First Bank entered into a loan agreement (the "Bridgeway Loan Agreement") in which First Bank loaned money to Bridgeway, Canoco Inc., Merfin Inc., and Minora Inc. In connection with the Bridgeway Loan Agreement, the borrowers executed and delivered to First Bank a secured promissory note in the sum of $8,290,000. Concurrently with the execution of the secured promissory note, Bridgeway executed a mortgage on its real estate in Lafayette, Indiana. The Bridgeway Loan Agreement was also secured by real estate in Shreveport, Louisiana.

That same day, the parties also entered into an amendment of the Deed of Trust for the Wintergreen Loan Agreement which provided that the Wintergreen Loan Agreement and the other Wintergreen loan documents, including the Deed of Trust, were cross collateralized to secure the obligations and liabilities of Bridgeway with respect to the Bridgeway Loan Agreement.

On July 8, 2005, First Bank and Bridgeway executed a First Amendment to Loan Agreement and Other Loan Documents ("Amended Bridgeway Loan Agreement"), which increased the principal balance of the loan to $8,942,323.62 so that Bridgeway could fully pay off and obtain a release of an existing first priority mortgage in favor of the U.S. Department of Housing and Urban Development. In connection with the Amended Bridgeway Loan Agreement, Bridgeway executed a First Amendment to Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing to reflect the increased amount of the loan. The Amended Bridgeway Loan Agreement also provided that the Bridgeway Loan Agreement and the Bridgeway loan documents, including the Amended Mortgage, were cross collateralized to secure the obligations and liabilities of Wintergreen under the Wintergreen Loan Agreement.

On September 9, 2005, First Bank sent Bridgeway a letter stating that Bridgeway had defaulted under the Amended Bridgeway Loan Agreement "by failing to pay interest and monthly tax and insurance escrow amounts due under the Loan for the months of August and September, 2005." Stipulated Exhibits at Tab 15. First Bank demanded

immediate payment of all amounts due under the Amended Bridgeway Loan Agreement. That same day, First Bank also sent a letter to Wintergreen stating that Wintergreen had defaulted under the Wintergreen Loan Agreement and its amendments "by failing to pay interest and monthly tax and insurance escrow amounts due under the Loan for the months of August and September, 2005." Id. at Tab 16.

On December 29, 2005, First Bank filed its complaint against Bridgeway for foreclosure of mortgage, replevin, and appointment of receiver.[1] On February 21, 2006, the trial court held a hearing on First Bank's motion for appointment of a receiver and later found that Bridgeway was in default under its loan agreement and appointed a receiver.

On July 11, 2006, Canoco Inc., Merfin Inc., and Minora Inc., each filed a petition for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Western District of Louisiana at Shreveport, and the matter was automatically stayed for those three defendants.

In November 2007, the trial court held a bench trial as to Bridgeway and took the matter under advisement. Pursuant to Ind. Trial Rule 52, Bridgeway requested that the trial court enter findings of facts and conclusions thereon. On January 18, 2008, the trial court issued an order finding that Bridgeway defaulted in the performance of the

[1] The record does not contain a copy of the complaint.

obligations under both the Bridgeway and Wintergreen Loan Agreements. The trial court "foreclosed as a first and prior lien on the Bridgeway Apartments Real Estate" the Amended Mortgage, and granted an *in rem* judgment to First Bank and a personal judgment against Bridgeway in the amount of $16,159,322.96. On February 13, 2008, Bridgeway filed a motion to correct error, which the trial court denied.

Before addressing the merits of Bridgeway's arguments, we address First Bank's argument that Bridgeway's appeal should be dismissed for its disregard of several appellate procedural rules. In American States Ins. Co. v. State of Ind. ex rel. Jennings, 258 Ind. 637, 640, 283 N.E.2d 529, 531 (1972), the Indiana Supreme Court held:

> Although our procedural rules are extremely important, it must be kept in mind that they are merely a means for achieving the ultimate end of orderly and speedy justice. We must examine our technical rules closely when it appears that invoking them would defeat justice; otherwise we become slaves to the technicalities themselves and they acquire the position of being the ends instead of the means.

With this in mind, we turn to First Bank's arguments.

A. Appellant's Case Summary

First Bank points out that Bridgeway failed to timely file its appellant's case summary. Ind. Appellate Rule 15(B) provides that "[t]he Appellant's Case Summary shall be filed within thirty (30) days of the filing of the Notice of Appeal . . . ." Here, Bridgeway filed its notice of appeal on April 2, 2008, and its case summary on August 13, 2008. Thus, Bridgeway filed its appellant's case summary late. However, Ind.

Appellate Rule 15(E) provides that "[t]he failure to file an Appellant's Case Summary shall not forfeit the appeal."

B. Service

First Bank also points out that Bridgeway failed to serve the Appellant's Case Summary and its Appellant's Brief "on Attorney Gregg S. Theobald, who appeared in the trial court case and represented a judgment lien holder, Carpetland USA of Lafayette." Appellee's Brief at 11. Ind. Appellate Rule 24 provides:

> The Appellant's Case Summary and appearances must be served on all parties to the appeal (see Rule 17), any persons seeking party status, and any persons required by statute to be served. Unless otherwise provided by these Rules, all other documents tendered to the Clerk for filing must be served upon all parties who have filed an Appellant's Case Summary or an appearance under Rules 15 or 16, any persons seeking party status, and any persons required by statute to be served. However, in Criminal Appeals only, any Appendix or Supplemental Appendix need not be served on the Attorney General.

The failure to serve all necessary papers upon an opposing party in an appeal may result in dismissal. In the Matter of Estate of Belanger, 437 N.E.2d 90, 91 (Ind. Ct. App. 1982) trans. denied. However, dismissal is not mandatory. In Murphy v. Ind. Harbor Belt R.R. Co., 152 Ind. App. 455, 460, 284 N.E.2d 84, 86 (1972), this court addressed former Ind. Appellate Rule 12, which is analogous to the current version of Ind. Appellate Rule 24, and held that Ind. Appellate Rule 12 "does not automatically require dismissal of this action but leaves it to the sound discretion of this court where justice so demands." Here, First Bank does not allege that it was prejudiced, and we decline to dismiss on this basis.

See In re Geake, 398 N.E.2d 1375, 1379 (Ind. Ct. App. 1980) (rejecting the appellee's argument that the appeal should be dismissed because the appellant failed to serve a copy of their brief upon other parties where appellee "ha[d] not alleged or demonstrated any prejudice to his interest.").

C. Appellant's Brief

First Bank argues that Bridgeway filed its appellant's brief late. Ind. Appellate Rule 45(B)(1) provides that "[t]he appellant's brief shall be filed no later than thirty (30) days after . . . the date the trial court clerk or Administrative Agency issues its notice of completion of the Transcript." Ind. Appellate Rule 45(D) provides that "[t]he appellant's failure to file timely the appellant's brief *may* subject the appeal to summary dismissal." (Emphasis added). "Dismissal for the late filing of an appellant's brief is within the discretion of this court." Haimbaugh Landscaping, Inc. v. Jegen, 653 N.E.2d 95, 98 (Ind. Ct. App. 1995), reh'g denied, trans. denied. Although we will exercise our discretion to reach the merits when violations are comparatively minor, if the parties commit flagrant violations of the Rules of Appellate Procedure we will hold issues waived, or dismiss the appeal. Terpstra v. Farmers & Merch. Bank, 483 N.E.2d 749, 752 (Ind. Ct. App. 1985), reh'g denied, trans. denied; Town of Rome City v. King, 450 N.E.2d 72, 76 (Ind. Ct. App. 1983).

Here, the trial court clerk issued its notice of completion of transcript on July 16, 2008. Thus, Bridgeway had until August 15, 2008 to file his appellant's brief.

Bridgeway filed its brief and appendix on August 15, 2008. The docket reveals that Bridgeway's brief did not contain a copy of the trial court's order. On August 21, 2008, a notice of defect was mailed. On August 29, 2008, First Bank filed a motion to dismiss. On September 9, 2008, Bridgeway filed a verified motion to file a belated appellant's brief. On October 6, 2008, our motions panel denied First Bank's motion to dismiss and granted Bridgeway's motion to file a belated appellant's brief. Based on Bridgeway's attempt to timely file his brief and the fact that the "preferred policy of this State is that courts should decide a controversy on its merits," Delphi Corp. v. Orlik, 831 N.E.2d 265, 269 (Ind. Ct. App. 2005), reh'g denied, we decline to dismiss the appeal on this basis.

D. Page Numbers

First Bank points out that Bridgeway failed to include page references to the record in its statement of the case. We remind Bridgeway of Ind. Appellate Rule 46(A)(5), which provides that "[p]age references to the Record on Appeal or Appendix are required in accordance with Rule 22(C)" in the statement of the case. However, we do not find that Bridgeway's failure to include page numbers thwarted our review, and we decline to dismiss on this basis. See Masonic Temple Ass'n of Crawfordsville v. Ind. Farmers Mutual Ins. Co., 837 N.E.2d 1032, 1036 (Ind. Ct. App. 2005) (addressing the merits of the case after holding that our review had not been thwarted even though every factual statement was not supported by a citation to the record), reh'g denied.

In summary, we note that Bridgeway violated multiple appellate rules, but we will address the merits of Bridgeway's arguments because we do not view the violations as flagrant, and our review has not been thwarted. Thus, we turn to the merits of Bridgeway's arguments.[2]

The sole issue is whether the trial court's findings of fact and conclusions thereon foreclosing Bridgeway's property were clearly erroneous. Pursuant to a motion by Bridgeway, the trial court issued findings of fact and conclusions thereon pursuant to Ind. Trial Rule 52. When reviewing the trial court's findings of fact and conclusions thereon, we consider whether the evidence supports the findings and whether the findings support the judgment. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. In order to determine that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made. Id.

Bridgeway appears to argue that it was not in default in July 2005. Bridgeway points to a portion of the May 28, 2004 mortgage, which provides:

[2] First Bank also argues that this appeal should be dismissed because Bridgeway failed to: include the findings of fact and conclusions thereon relating to the issues on appeal, identify specific issues for review, and make any cogent argument on the issue of attorney fees. We decline to dismiss Bridgeway's appeal on these bases, but address these issues in addressing the merits of Bridgeway's arguments.

> Monthly Tax and Insurance Deposits, together with monthly payments of principal, if any, and interest shall be paid in a single payment each month, to be applied to the following items in the following order:
> (A) Tax and Insurance Deposits;
> (B) Secured Obligations other than principal and interest on the Note;
> (C) Interest on the Note;
> (D) Amortization of the principal balance of the Note.

Stipulated Exhibits at Tab 3, Page 6. Bridgeway also points to the testimony of Robert Walker, an employee of First Bank, at the February 2006 hearing on First Bank's motion to appoint a receiver in which Walker testified that Bridgeway was current as of July 2005.[3] Bridgeway argues that "[a]s payments would not be applied to interest until after they were applied to tax and insurance deposits, it follows that Bridgeway was current in those payments as well." Appellant's Brief at 7. Bridgeway also points to the testimony of Richard Breseman, First Bank's expert at the bench trial in November 2007. Bridgeway concedes that Breseman testified "that the Bridgeway and Wintergreen Loans were in default on or before September 9, 2005," but argues that "Breseman, however, never made an analysis as to when or if a default had occurred after July 8, 2005 if the loans were current on that date." Id. Bridgeway also concedes that a default occurred

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[3] Specifically, the following exchange occurred during recross examination of Walker:

> Q As of the date of the loan last July the amended loan. As of that date is it fair to say that the – that my clients were current as of the date of the loan?
>
> A Were current with respect to the interest – interest payments yes I believe that was an accurate statement.

Transcript at 30-31.

under the Bridgeway Loan Agreement when borrowers Canoco Inc., Merfin Inc., and Minora Inc. filed their bankruptcy petitions. Bridgeway argues that "the trial court failed to find Bridgeway current as of the Amendment which is clearly erroneous, and further failed to establish the date upon which Bridgeway alleged by [sic] came into default which is crucial to any determination of the amount due and unpaid to First Bank." Id. at 8.

Bridgeway does not develop these arguments, explain why it is important that Bridgeway was not in default in July 2005, explain how the trial court's calculations were erroneous, or explain how this affects whether it was current in August and September of 2005, which were the months when Bridgeway failed to pay interest and monthly tax and insurance escrow amounts according to First Bank's notices of default. See Stipulated Exhibits at Tab 15, 16. Because Bridgeway does not develop these arguments, we conclude that Bridgeway waived these arguments. See, e.g., Loomis v. Ameritech Corp., 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding argument waived for failure to cite authority or provide cogent argument), reh'g denied, trans. denied. Thus, we cannot say that the trial court's findings or conclusions thereon were clearly erroneous.

Lastly, Bridgeway argues: "Included in the $16,065,322.96 found due and unpaid were attorney fees in the amount of $178,748.96. The court, however, found that the Plaintiff's attorney fees should be $94,000.00 which was added to the other amount resulting in fees of $272,748.96. This was clearly erroneous." Appellant's Brief at 8.

Bridgeway does not develop this argument or cite to the record. Consequently, Bridgeway has waived this argument. See, e.g., Loomis, 764 N.E.2d at 668.

For the foregoing reasons, we affirm the trial court's order.

Affirmed.

BAKER, C. J. and MATHIAS, J. concur