

RENDERED: OCTOBER 16, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000311-MR

SUSAN B. EBLEN

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 08-CI-00005

TAX EASE LIEN INVESTMENTS, LLC
and HON. VIRGINIA L. LAWSON

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT AND VANMETER, JUDGES; HENRY,¹ SENIOR
JUDGE.

LAMBERT, JUDGE: Susan B. Eblen appeals from the denial of her Kentucky

Rules of Civil Procedure (CR) 11 motion for sanctions against Appellees, Tax Ease

Lien Investments 1, LLC (“Tax Ease”) and its attorney, Virginia L. Lawson, and

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the denial of her CR 59.05 motion to alter, amend, or vacate the trial court's order denying sanctions. Eblen claims the Muhlenberg Circuit Court abused its discretion in not granting her motions. For the reasons set forth herein, we disagree and thus, affirm the trial court's orders.

On January 1, 2008, Lawson filed a complaint in Muhlenberg Circuit Court on behalf of her client, Tax Ease, against various defendants seeking to recover back taxes owed on certain real property located in that county. A title search revealed a 1979 deed indicating that Ron Curtis was the primary owner of this property. However, the title search also produced a 1981 land contract between Sellers, Ron and Susan Curtis, husband and wife, and Purchasers, Hemon and Nellie Johnson, husband and wife. The Muhlenberg County property records were silent as to whether the Johnsons ever satisfied the terms and conditions of this land contract so as to acquire an ownership interest in the property.

Susan B. Curtis, presumed wife of Ron Curtis, was listed among the various defendants in Appellees' action to recover delinquent property taxes for the years 2000 through 2004. On March 11, 2008, a Warning Order Report was filed in this case. According to this report, Susan B. Curtis was now known as Susan B. Eblen. Eblen was formerly married to Ron Curtis. Ron Curtis, however, was believed to be married to Gaye Curtis.

On March 28, 2008, Eblen's attorney wrote a letter to Lawson explaining that Eblen's marriage to Ron Curtis was formally dissolved by decree in Warren Circuit Court in 1983. Eblen's attorney further noted that none of the tax

bills for the years in question referenced Eblen's former name, but rather they referenced the name of Curtis' current wife, Gaye. Contending that Eblen had no ownership interest in the subject property, Eblen's attorney demanded that Lawson dismiss Eblen from the lawsuit.

Eblen's attorney received no response from Lawson to his letter. On April 14, 2008, Eblen filed an answer to Tax Ease's complaint. In her answer, Eblen disclaimed any ownership interest in the property. Thereafter, on October 2, 2008, Eblen filed a CR 56 motion for summary judgment and set this motion for hearing during the trial court's motion hour. At motion hour, Tax Ease did not oppose Eblen's motion. However, Eblen's attorney made an oral motion for CR 11 sanctions against Lawson at that time. On October 20, 2008, the trial court granted Eblen's motion for summary judgment, but reserved a ruling on the oral motion for sanctions until both parties had an opportunity to file legal memoranda in support of their positions.

On November 13, 2008, Tax Ease filed a counter-motion for CR 11 sanctions against Eblen's attorney. In its motion, Tax Ease asserted that it was compelled as a matter of law to name all parties in the complaint who may reasonably have an interest in the subject property so that these parties' interests could be adjudicated and extinguished, as necessary, for the purpose of clarifying and perfecting clear title to the property. *See* Kentucky Revised Statutes (KRS) 426.690; *Cumberland Lumber Co. v. First & Farmers Bank of Somerset, Inc.*, 838 S.W.2d 403, 405 (Ky. App. 1992) ("The foreclosing plaintiff must name as parties

all those he knows to have an interest in the property at the time of filing his petition even if that interest is unrecorded.”)

Tax Ease maintained that there was absolutely no record of Eblen’s disclaimer of interest or divorce from Ron Curtis in the Muhlenberg County property records. Without some adjudication or filing evidencing Eblen’s disclaimer of interest to this property, Tax Ease argued that a title defect existed which could have allowed a purchaser to take exception to any subsequent judicial sale in this case. Accordingly, Tax Ease contended that Eblen’s motion for CR 11 sanctions against its attorney was not well grounded in fact or warranted by existing law. Tax Ease also moved for an affidavit to be recorded in the Muhlenberg County property records noting Eblen’s disclaimer of interest in the property for the purpose of clarifying title to said property.

After hearing the parties’ respective CR 11 motions for sanctions against each other, the trial court entered an order on December 5, 2008, denying the motions of all parties. Although Tax Ease possessed an erroneous belief that Eblen was a necessary party to this action for delinquent taxes, the trial court concluded that Tax Ease’s complaint was, nevertheless, not in violation of CR 11. As for Tax Ease’s motion for CR 11 sanctions, the trial court found that Eblen’s CR 11 motion for sanctions was also filed after reasonable inquiry and in good faith since it was not the usual practice for real estate practitioners in that jurisdiction to formally disclaim the interests of former spouses in real property where the former spouse’s name was not listed on the deed of conveyance.

On December 16, 2008, Eblen filed a CR 59.05 motion to alter, amend, or vacate the trial court's December 5, 2008, order denying sanctions against Lawson. This motion was denied by order of the trial court entered on January 21, 2009. This appeal now follows.

“As a threshold matter, Rule 11 is not, as the appellant seemingly contends, a vehicle to obtain relief by one who has suffered damages by simple negligence in the filing of a lawsuit or by the filing of a meritless lawsuit.” *Clark Equip. Co., Inc. v. Bowman*, 762 S.W.2d 417, 420 (Ky. App. 1988). As noted in *Bowman*, the proper remedy for the filing of such meritless lawsuits is “in the nature of a countersuit for malicious prosecution or abuse of process.” *Id.* In cases where the trial court chooses not to impose CR 11 sanctions, our standard of review is abuse of discretion. *Id.*

“The test to be used by the trial court in considering a motion for sanctions is whether the attorney's conduct, at the time he or she signed the allegedly offending pleading or motion, was reasonable under the circumstances.” *Bowman*, 763 S.W.2d at 420. Eblen argues that Lawson's conduct in naming Eblen as a defendant in this lawsuit was not objectively reasonable at the time she signed the complaint because Lawson failed to conduct a reasonable inquiry into whether the lawsuit against Eblen was well grounded in fact. Had Lawson conducted a reasonable inquiry, Eblen contends, Lawson would have discovered that Eblen was no longer married to Ron Curtis and as such, any interest in the real property Eblen may have possessed via the 1981 land contract would have been

extinguished by the subsequent 1983 divorce. Eblen cites two pieces of information that were readily available to Lawson at the time she filed the complaint: (1) Eblen's name, current or former, was not listed on the deed of conveyance; and (2) the tax bills for the subject real property were addressed as follows: "Ron Curtis, C/O Gaye Curtis." According to Eblen, these two pieces of information were sufficient to put Lawson on notice that Eblen did not have an ownership interest in the subject property.

The trial court determined that the above information was not sufficient to justify a conclusion that Lawson failed to comply with CR 11 in this case. We find no abuse of discretion in this determination for three reasons. First, the fact that a deed does not contain the name of a person's spouse is not dispositive as to the question of whether a spouse may have some ownership interest in the real property. Second, we do not agree with Eblen that it is obvious from the addressee listed on the tax bills, "Ron Curtis, C/O Gaye Curtis," that Gaye Curtis was Ron Curtis' current wife. It could have also been presumed that Gaye Curtis was a non-spousal family member of Ron Curtis, such as his mother or sister. Finally, it was not objectively unreasonable for Lawson to believe that Susan Curtis may have had some ownership interest in the real property due to the existence of the unresolved 1981 land contract, or at the very least, that a title defect may have existed as a result of this contract which required some sort of formal adjudication of ownership.

Eblen argues, however, that even the Warning Order attorney was able to discern that Eblen was likely divorced from Ron Curtis. In fact, the Warning Order report offers the following commentary: “[t]he Plaintiff made only minimal, if any, effort to identify and locate the above mentioned defendants.” Eblen further pleads that once Lawson became aware through both the Warning Order report and her attorney’s letter that Eblen was no longer married to Ron Curtis, Lawson was obligated to immediately dismiss her lawsuit against Eblen. To support this position, Eblen cites one case, *Whittington v. Ohio River Co.*, 115 F.R.D. 201 (E.D. Ky. 1987), which sets forth the interpretation of Rule 11 in federal courts as follows:

[a]n attorney must not only conduct a reasonable investigation into the facts and law before filing but must also continually review and reevaluate his position as the case develops. He must abandon claims or defenses as soon as it becomes apparent that it is unreasonable to pursue them.

Id. at 208.

Tax Ease maintains that it did conduct a reasonable investigation into the facts and law before and during the pendency of this lawsuit by conducting a full title search of the subject real property. Tax Ease notes that even if it had searched the Muhlenberg County records for evidence of a divorce between Susan Curtis and Ron Curtis, no record would have been found since the Curtises were divorced in Warren County. Tax Ease pleads that it would have been unreasonable

for them to have searched the records of every Kentucky County for evidence of such a divorce.

Tax Ease further argues that it did stop pursuing its claim against Eblen once she disclaimed any interest in the real property on the record. However, Tax Ease contends that Eblen's disclaimer of interest was not valid until it was submitted and accepted by the trial court. Without Eblen's formal disclaimer of interest on the record, Tax Ease argues that the 1981 land contract listing Eblen as an owner of the property was a defect in the title that necessitated a formal adjudication.

While finding that this extent of caution by Tax Ease was not legally necessary to obtain clear title to the real property in this case, the trial court concluded that it was not a violation of CR 11 for Tax Ease to seek such an adjudication. We find nothing "arbitrary, unreasonable, unfair, or unsupported by sound legal principles" in this determination. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (setting forth the test for whether a determination by the trial court is an abuse of discretion). It is an attorney's obligation to advocate for his or her client and to seek the most favorable resolutions possible in any given case. While Tax Ease's position may not have been accepted by the trial court, it does not follow that this resolution sought by Tax Ease or its attorney was objectively unreasonable.

In her final argument, Eblen claims the trial court erred in utilizing an incorrect standard of review in the determination of whether CR 11 sanctions were

appropriate in this case. Our review of the December 5, 2008, order indicates some ambiguity. It appears that the trial court's ultimate conclusion that CR 11 sanctions were not warranted is premised on the finding that both parties filed their pleadings "in good faith and after reasonable investigation." Citing *Louisville Rent-A-Space v. Akai*, 746 S.W.2d 85 (Ky. App. 1988), Eblen notes that "the good faith or lack of it of an attorney representing a party is not a question in determining the reasonableness of a factual inquiry." *Id.* at 87. Although employing a poor choice of words in explaining its ruling, our review of the record indicates that the trial court did utilize an objective standard of reasonableness in its determination of this case. While the trial court clearly disagreed with Lawson's legal positions, it appears equally apparent that the trial court did not believe that these positions were the result of inadequate investigation or inquiry into the facts or the law.

Unfortunately, no transcript of the November 17, 2008, hearing addressing this matter appears in the record. Both parties referenced the correct standard of review in their memorandums addressing the issue before the trial court. As noted in *Akai*, "an appellant has the duty to make a sufficient record to enable a review of alleged errors." *Id.* Eblen failed to make such a sufficient record or to request in its CR 59.05 motion for the trial court to clarify its findings. Accordingly, we find this error to be unpreserved. *Id.* ("Further, an appellant has the duty to show that alleged errors were properly preserved."). Because there is not a substantial probability that Eblen would have prevailed even if it was clear

that the trial court utilized an incorrect standard of review, we find that any error in this case is not substantial enough to warrant reversal. CR 61.02.

When this record is viewed in its entirety, we are not convinced that the trial court abused its discretion when it concluded that Lawson was not unreasonable under the circumstances in naming Susan Curtis (now known as Susan Eblen) as a defendant in this lawsuit or in waiting for a formal disclaimer of interest on the record prior to abandoning the claim against Eblen. Even if there was some negligence in Lawson's identification and location of Eblen, we do not believe any such negligence was egregious enough to mandate the imposition of CR 11 sanction in this case. *See Bowman*, 763 S.W.2d at 420 ("Rule 11 is not . . . a vehicle to obtain relief by one who has suffered damages by simple negligence in the filing of a lawsuit or by the filing of a meritless lawsuit.").

Accordingly, we hereby affirm the Muhlenberg Circuit Court's December 5, 2008, order denying sanctions against Lawson and its January 21, 2009, order denying Eblen's CR 59.05 motion to alter, amend, or vacate the December 5, 2008, order.

ALL CONCUR.

BRIEF FOR APPELLANT:

B. R. Paxton
Central City, Kentucky

BRIEF FOR APPELLEE:

Jeffrey C. Rager
Lexington, Kentucky