

# Commonwealth of Kentucky

## Court of Appeals

NO. 2011-CA-000379-MR

GREEN TREE SERVICING, LLC,  
SUCCESSOR IN INTEREST TO  
GREENPOINT CREDIT CORP.

APPELLANT

v.

APPEAL FROM JACKSON CIRCUIT COURT  
HONORABLE OSCAR G. HOUSE, JUDGE  
ACTION NO. 09-CI-00247

LINDA WEAVER; IVAN WEAVER;  
AND SHERMAN GRAY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND DIXON, JUDGES.

ACREE, CHIEF JUDGE: Green Tree Servicing, LLC, appeals the order of summary judgment entered in favor of the appellee, Linda Weaver, by the Jackson Circuit Court. We affirm.

**I. Facts and procedure**

In 1998, the appellees, Linda Weaver, Ivan Weaver, and Sherman Gray, purchased a mobile home. The purchase was initially financed by Greenpoint

Credit Corp., which obtained a security interest in the home. The contract governing the retail installment agreement and security agreement was later assigned to Green Tree.

The purchasers of the mobile home stopped making payments in 2009, and Green Tree filed suit. In its complaint, Green Tree sought to enforce the provisions of the installment and security agreement which permitted repossession and sale of the mobile home to recover money the appellees allegedly still owed.

Linda Weaver<sup>1</sup> filed an answer denying Green Tree was entitled to seize her home; she also filed a counterclaim by which she asserted state law entitled her not only to the discharge of her debt and a release of Green Tree's lien, but also to damages for Green Tree's usurious practices.

Following its answer to the cross-claim, Green Tree filed a motion seeking summary judgment on its own claim. The lender argued the plain language of the agreement and Weaver's default entitled it to seize the home.

Weaver filed a response and a motion of her own requesting entry of summary judgment in her favor for both the claim and counterclaim. She argued the finance agreement violated the Kentucky Retail Installment Act (KYRISA) because it provided for the financing of an origination fee in the principal amount. Kentucky Revised Statutes (KRS) 371.210-371.330. She claimed KYRISA prohibited the financing of and charging interest against such a fee and demanded "forfeiture of the time price differential, resulting in the application of all payments

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<sup>1</sup> The other appellee/defendants never entered an appearance.

to the original principal balance.” (Record on appeal, 93). She also argued additional discovery was necessary for proper resolution of her usury counterclaim.

The parties submitted an agreed order designating a briefing schedule, and the circuit court approved. The agreed order provided that Green Tree’s response to Weaver’s motion for summary judgment was due no later than January 15, 2010, and Weaver’s reply thereto was due January 25, 2010.

The agreed scheduling order did not permit the parties to submit additional motions, memoranda, or evidence prior to the hearing; Green Tree nevertheless filed a sur-reply outside of the timeline provided by the scheduling order. Therein, Green Tree raised an argument for the first time: that Weaver’s state law counterclaims were preempted by federal law. It also supplied evidence not previously presented: a history of Weaver’s account.

The circuit court granted summary judgment in Weaver’s favor and denied Green Tree’s motion.<sup>2</sup> In so doing, the circuit court refused to consider the preemption argument raised in Green Tree’s sur-reply because the lender had failed to raise the argument according to the briefing schedule.<sup>3</sup> Green Tree’s complaint was dismissed with prejudice with the result that Weaver owned the property in question and Green Tree’s lien rights were extinguished.

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<sup>2</sup> Notably, although Green Tree disputes Weaver’s interpretation of the contract, it agrees in the first sentence of its reply brief before this Court that there are no genuine issues of material fact. Presumably, that would include the material fact upon which the circuit court based its legal conclusion and summary judgment that Green Tree violated KYRISA – that the origination fee was, in fact, financed.

<sup>3</sup> The circuit court also noted, incidentally, that it appeared preemption did not apply, but the primary basis for dismissing Green Tree’s argument was the failure to timely raise it.

Green Tree appeals and presents the following arguments: (1) Weaver's state law claims are preempted by federal law; (2) since the only matter before the circuit court was a question of federal law, the circuit court was deprived of subject matter jurisdiction; (3) entry of summary judgment on Weaver's counterclaim was erroneous; and (4) KYRISA does not apply at all to the sale of mobile homes, and it therefore cannot support Weaver's counterclaim.

## **II. Procedural Irregularity**

We first note the appellant's brief fails to comply with CR 76.12 in a number of important respects. It contains no citations to the record. Instead of citing to the record on appeal, Green Tree has opted to refer to the Appendix it created from copies out of counsel's file and not from copies of the record which includes page numbers placed there by the circuit clerk when certifying that record. This practice is not authorized by CR 76.12. CR 76.12(4)(c)(iv), (v). Moreover, Green Tree has not directed us to the portion of the record where it purports to have preserved the arguments it presents on appeal. CR 76.12(4)(c)(v). It may seem self-evident that a party's arguments in support of its unsuccessful motion for summary judgment were made in said motion; however, where, as here, the circuit court found the arguments were not timely made, a reference to the record is necessary to our review. Finally, and perhaps least problematically, the Statement of Points and Authorities does not comply with CR 76.12(4)(c)(iii).

In circumstances such as these, where substantial compliance with CR 76.12 is lacking, we have several options; among them are the options to strike the

appellant's brief or to apply a manifest injustice standard of review. CR 76.12(8); *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990). But we will not exercise either of these options because Green Tree could not succeed under any applicable standard.

Pursuant to CR 76.03(8), “[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.” Green Tree identified the following issues for our consideration in its prehearing statement:

- a. Whether the trial court abused its discretion in refusing to consider the Plaintiff/Appellant's preemption argument; and
- b. Whether 12 U.S.C. 1735 preempts KRS 371.210 *et seq.* and KRS 360.010 *et seq.*

In accordance with CR 76.03(8), our review will be limited to those issues.<sup>4</sup>

### **III. Preemption**

Before this Court, Green Tree avoids the matter of whether the circuit court properly disregarded its preemption argument and delves directly into the substance of the argument. Before we can consider the argument, we must ascertain whether it is properly before us at all.

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<sup>4</sup> Green Tree presents other arguments in its brief, including one raised for the very first time, before either court, in its reply brief. We will not consider that argument because “[t]he reply brief is not a device for raising new issues . . . .” *Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979). With the exception of the argument that the circuit court lacked subject matter jurisdiction, we will consider no argument based on issues not identified in the prehearing statement. CR 76.03(8). We caution counsel to fully comply with all the rules of appellate procedure, particularly CR 76.12 and CR 76.03(8), in future filings with this Court.

A circuit court is empowered with broad discretion to manage its docket and the cases before it. *Craft v. Commonwealth*, 343 S.W.2d 150, 151 (Ky. 1961) (noting courts’ “inherent power to prescribe rules to regulate their proceedings and to facilitate the administration of justice.”); *Mitchell v. Justice & Public Protection Cabinet*, 2007 WL 38668 \*3 (Ky. App. 2007). To that end, it may schedule hearings and briefing deadlines with which the parties must comply. *See* CR 42.01(1). Although a circuit court may, in its discretion, consider an argument which is brought outside the time it has prescribed for the filing of memoranda, it is not compelled to do so.

In this case, Green Tree raised for the first time an argument outside the briefing schedule in a sur-reply which was not authorized by the circuit court’s scheduling order. The circuit court had no obligation to consider the argument. Furthermore, the circuit court expressed its opinion that such an argument should have been asserted as an affirmative defense in the answer to the counterclaim. We have found no indication in the record that the circuit court’s refusal to consider the preemption argument was an abuse of discretion.

Because the preemption argument was never properly brought before the circuit court, it was waived and cannot be asserted here. *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky. App. 1998). We will not reverse on the basis of preemption – the only issue Green Tree identified in its prehearing statement.

#### **IV. Subject Matter Jurisdiction**

Green Tree contends the circuit court lacked subject matter jurisdiction over the parties' dispute because it involved only federal questions. If this argument is correct, the timeliness of its preemption argument is irrelevant because a challenge to a court's subject matter jurisdiction can be raised at any time. *Duncan v. O'Nan*, 451 S.W.2d 626, 631 (Ky. 1970).

However, this argument is unpersuasive. State courts are authorized to entertain civil actions brought pursuant to federal law absent an express provision to the contrary in the federal statute. *Tafflin v. Levitt*, 493 U.S. 455, 459, 110 S. Ct. 792, 795, 107 L. Ed. 2d 887 (1990). Green Tree has cited no provision which would deprive Kentucky courts of jurisdiction.

**V. Conclusion**

Green Tree presents no argument warranting reversal in this case. We will not disturb the circuit court's judgment. Therefore, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kembra Sexton Taylor  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Addison Parker  
Richmond, Kentucky