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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000265-MR

M.D. WOOD — APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 14-CI-00039

MEW PROVIDENTIAL TRUST,
MERRIAM E. WEBB, TRUSTEE
AND COMMONWEALTH OF KENTUCKY,
COUNTY OF GRANT — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: M.D. Wood appeals from the denial of his motion to alter, amend or vacate the order dismissing his tax lien foreclosure action and mandating the release of his *lis pendens* notice against MEW Providential Trust, Merriam E. Webb, Trustee ("MEW"), and Grant County, Kentucky. The Grant Circuit Court

determined it was without jurisdiction to decide the controversy as Wood had failed to strictly comply with predicate statutory mandates. Wood disagrees with the trial court's assessment of the case and urges reversal. Following a careful review, we affirm.

Like all state governments, ours is authorized to collect taxes. *See* Ky. Const. § 3. KRS[1] Chapter 134 provides the statutory framework for collecting *ad valorem* taxes owed to the Commonwealth, its counties, and their respective tax districts. Tax delinquency impairs our government's ability to maintain a consistent stream of tax revenue, thereby frustrating the ability to fund its endeavors. Our General Assembly enacted legislation permitting the sale of delinquent tax bills, known as "certificates of delinquency" (tax certificates) to private, third-party purchasers as a method to combat tax delinquency. Third-party purchasers buy these tax certificates, and in doing so, satisfy the tax debt. In exchange, third-party purchasers may recoup the cost of tax certificates as well as additional fees generated during collection proceedings. The statutory scheme sets specific deadlines and procedures before a tax bill may be sold and, after the sale, additional specifications for collection of the delinquent debt by the third-party purchaser.

The statutory scheme for collecting taxes and selling tax certificates includes several notice provisions. The legislative scheme provides for a minimum of four actual notifications to the taxpayer identifiable in the records of the

[1] Kentucky Revised Statutes.

property valuation administrator (PVA). First, "[w]ithin thirty (30) days after the establishment of a certificate of delinquency, the county attorney or the department shall mail a notice by regular mail to the owner of record . . . ." KRS 134.504(4)(a). Others occur at various intervals or upon certain events until a foreclosure action is instituted. KRS 134.504(4)(d)1 ("[a]t least twenty (20) days after the mailing of the thirty (30) day notice . . . ."); KRS 134.490(1)(a) ("[w]ithin fifty (50) days after the delivery of a certificate of delinquency by the clerk to a third-party purchaser . . . ."); KRS 134.490(1)(b) ("[a]t least annually [after the 50–day notice and before litigation is commenced] . . . ."); and KRS 134.490(2) ("[a]t least forty-five (45) days before instituting a legal action . . . ."). Each of these statutory notice provisions specifies information which must be disclosed to the delinquent taxpayer. Only the notice provisions of KRS 134.490 related to third-party purchasers are pertinent to this appeal.

Wood is a third-party purchaser of delinquent tax bills in multiple counties across the Commonwealth. On August 29, 2012, Wood purchased the 2011 delinquent tax bill for MEW's property located in Dry Ridge, Kentucky, and was issued a Certificate of Delinquency. Two days later, Wood mailed a notice complying with the requirements of KRS 134.490(1)(a) to the property owner's address on file in the PVA's office. The letter was returned as undeliverable. Pursuant to KRS 134.490(3)(a)6, any notices sent to addresses obtained from the PVA that are returned as undeliverable "shall be re-sent by first-class mail with proof of mailing addressed to the 'Occupant' at the address of the property that is

the subject of the certificate of delinquency. These notices shall be sent within twenty (20) days of receipt of the returned notice." No such replacement letter was sent in the statutory time frame. On December 1, 2012, Wood sent a second letter —which was nearly identical to the first—to the address obtained from the PVA. The second letter was not returned. No further notices were sent.

In November 2013, while attempting to sell the subject property, MEW became aware of Wood's tax lien along with another tax lien held by a different third-party purchaser and attempted to settle both to clear the clouds on the title. The second lien was successfully cleared in short order. Obtaining information and a payoff quote from Wood proved to be substantially more complicated. However, the details of these efforts are not pertinent to this appeal. Suffice it to say, after several months of refusing to cooperate, when Wood was pressed by MEW and representatives from the Department of Revenue to provide a breakdown of amounts owed as required by statutory mandates, Wood instead filed the instant suit on February 11, 2014, and caused a notice of *lis pendens* to be recorded in the Grant County Clerk's office. Before being served with a copy of the Complaint, and acting on the explicit direction of a representative of the Department of Revenue, MEW paid the Grant County Clerk the delinquency amount as calculated by the Department of Revenue representative. MEW was then informed of the pending suit and *lis pendens* filing. MEW answered the complaint and filed a counterclaim for slander of title.

Nearly five months after filing this action, Wood for the first time outlined a breakdown of the amounts alleged to be due. MEW disagreed with the amounts claimed and moved the trial court to dismiss the action for Wood's failure to strictly follow the statutory notice and procedural requirements prior to filing the complaint. Alternatively, MEW moved for summary judgment.

In his response, Wood first alleged the statutory requirements had been complied with, indicating he had mailed the two notices referenced above on September 1 and December 1, 2012. Wood then outlined in great detail the factual background he believed made summary judgment inappropriate. He also challenged the propriety of MEW's purported payment of the lien to the County Clerk.

On November 13, 2014, the trial court entered an order dismissing the complaint. After setting forth a detailed recitation of the pertinent historical facts, including Wood's own evidence regarding the notices purportedly sent to MEW, the trial court found Wood had failed to strictly comply with the notice requirements of KRS 134.490. Because the notice provisions are predicates to filing an enforcement action, the trial court concluded it was without jurisdiction to hear the matter. In addition to dismissing the case, the trial court ordered the Grant County Clerk to release the *lis pendens* filed of record in that office. Having granted the motion to dismiss, no mention of MEW's alternative motion for summary judgment was included in the order.

Wood subsequently moved under CR 59.05, 60.02 and 62.01 to "set aside, vacate, alter or amend and to stay further proceedings of this Court's Order entered in this case on November 13, 2014." On January 13, 2015, the trial court denied the motion for post-judgment relief upon finding no new evidence or rationale had been presented and noting the motion sought relief from "summary judgment" when no such judgment had been entered. The trial court reiterated its earlier holding that Wood's failure to strictly comply with statutory notice mandates divested the court of jurisdiction and was fatal to the action. This appeal followed.

Before this Court, Wood contends the trial court's dismissal of his complaint was based on an erroneous conclusion he did not strictly comply with the notice requirements of KRS 134.490. He alleges the notices he mailed on September 1 and December 1, 2012, were sufficient to satisfy the statutory requirements. He also argues the trial court erroneously ordered the release of his *lis pendens* prior to the finality of the action, including this appeal. We disagree.

As an initial matter, we note Wood's failure to comply with CR[2] 76.12(4)(c)(v) which requires "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner."

> CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial

[2] Kentucky Rules of Civil Procedure.

> court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (1987)). Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis,* 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike the brief or dismiss the appeal for Wood's failure to comply. *Elwell*. While we have chosen not to impose such a harsh sanction, we caution counsel that such latitude may not be extended in the future.

"The giving of notice as required by the statute is mandatory and a condition precedent to the filing of the suit." *Baldridge v. City of Ashland*, 613 S.W.2d 430, 431 (Ky. App. 1981). *See Dukes v. City of Louisville*, 415 S.W.2d 110, 112 (Ky. 1967); *Berry v. City of Louisville*, 249 S.W.2d 818, 819 (Ky. 1952). The reasoning behind this statement is simple. Because the Legislature does not have to allow third-parties to purchase delinquent taxes, it is entitled to limit that remedy by requiring reasonable notice of the claim; it has so provided in KRS 134.490.

Therefore, courts are bound by the express terms of the statute and have no authority to provide any exceptions to strict compliance with the statutory language. *Baldridge*, 613 S.W.2d at 431; *Wellman v. City of Owensboro*, 282

S.W.2d 628, 630 (Ky. 1955). *See Hancock v. City of Anchorage*, 299 S.W.2d 794, 795 (Ky. 1957) ("We have held consistently that compliance with the statute is a prerequisite to the right to invoke the help of the courts."); *Wellman v. City of Owensboro*, 282 S.W.2d 628, 630 (Ky. 1955) ("We may not disregard the express commands of the Legislature accompanying permission to sue a municipality.") Strict compliance is required in all actions where the underlying right is a creature of statute. *See Taylor v. Kentucky Unemployment Insurance Commission*, 382 S.W.3d 826 (Ky. 2012) (when Legislature commands a procedure to invoke jurisdiction, substantial compliance is insufficient); *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ky. App. 2008) (strict compliance required in adoption proceedings as adoption exists only as a right bestowed by statute); *Pickhart v. U.S. Post Office*, 664 S.W.2d 939 (Ky. App. 1983) (failure to comply with statutory mandates is fatal to administrative appeal).

The evidence before the trial court clearly revealed Wood's failure to comply with the statutory notice requirements. Wood proffers no significant reasoning for his position that he did, in fact, follow proper protocols except his own self-serving statements to that effect. That is insufficient.

When the first notice was returned as undeliverable, Wood did not comply with the express terms of KRS 134.490(3)(a)6 by sending a second letter to the subject property addressed to "Occupant." Although he now tries to explain why a follow-up letter was not sent, no such explanation was provided to the trial court and no argument along those lines was advanced. It is axiomatic that a party

may not "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321, 327 (Ky. 2010) (citations omitted)). As the trial court was not presented with this additional argument, nor given the opportunity to rule thereon, we shall not consider it for the first time on appeal. Therefore, we conclude the argument is not properly before us and requires no further discussion. Regardless of his reasoning, Wood clearly failed to comply with the initial notice requirements of KRS 134.490(1)(a) as modified by KRS 134.490(3)(a)6. This failure alone was sufficient to deprive the trial court of jurisdiction to rule on his complaint. However, this was not Wood's sole failure to comply with the statutory scheme.

Having failed in his first attempt, Wood's second notice was sent outside the 50-day window of KRS 134.490(1)(a) and cannot serve to satisfy that requirement. Further, because the initial notice had not been timely provided, the second notice cannot serve to satisfy the requirements of KRS 134.490(2), contrary to Wood's contention. Additionally, the record is devoid of any indication an annual notice pursuant to KRS 134.490(1)(b) was sent nor that notice was provided 45 days prior to instituting the instant action as required by KRS 134.490(2).[3]

Based on these multiple failures, evident in the record through Wood's own pleadings, it is clear the prerequisite statutory notice provisions were

[3] Wood contends the December 1, 2012, notice was sufficient to serve as the 45-day prelitigation notification. Apart from his bald assertion, Wood offers no explanation or support for this position.

not complied with, thereby depriving the trial court of particular case jurisdiction. The trial court correctly so concluded. There being no error, the judgment of the Grant Circuit Court is AFFIRMED.

ALL CONCUR.

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