

RENDERED: NOVEMBER 3, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2015-CA-000288-MR

ROGER A. GREENFIELD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE OLU A. STEVENS, JUDGE  
ACTION NO. 11-CI-006721

LOUISVILLE GALLERIA, LLC

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: DIXON, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Roger A. Greenfield has appealed from the Jefferson Circuit Court's entry of summary judgment in favor of Louisville Galleria, LLC, in its action for enforcement of a personal guaranty related to a breached commercial lease. Following a careful review, we affirm.

Louisville Galleria owns the retail and entertainment venues commonly known as Fourth Street Live! in downtown Louisville, Kentucky. On October 1, 2003, Louisville Galleria leased commercial space to Red Star Louisville, Inc. (“Red Star”), for development of a restaurant to be known as Red Star Tavern. In conjunction with execution of the lease, Greenfield and an affiliated entity, Restaurant Development Group, Inc. (“RDG”), signed personal guaranty agreements obligating each of them to satisfy Red Star’s debts in the event of default. In July 2010, Red Star defaulted under the terms of the lease by failing to pay all of the rental amounts due.

Louisville Galleria subsequently filed suit against Red Star, Greenfield and RDG, alleging breach of the lease, seeking a writ of attachment for personal property covered by a landlord’s lien, and requesting enforcement of the two personal guaranty agreements. Red Star and RDG failed to respond to the complaint and did not participate in the litigation. Greenfield answered the complaint, challenging the validity of his personal guaranty. He did not contest Louisville Galleria’s assertion regarding breach of the lease terms.

In June 2014 Louisville Galleria moved for summary judgment against Greenfield. At the time of filing, Red Star owed more than \$1,850,000, while Greenfield’s liability was capped under the terms of the personal guaranty at just over \$305,000 plus attorneys’ fees. Greenfield opposed the motion, first alleging the personal guaranty did not adequately reference the lease, and second contending summary judgment would be premature as a question existed whether a

clause related to another guarantor had been triggered which would thereby prohibit Louisville Galleria from seeking to enforce his personal guaranty pursuant to the express terms contained in the agreement.<sup>1</sup> Shortly before filing his response, Greenfield had tendered discovery requests seeking information regarding subsequent lessees and related guarantors of the premises previously leased by Red Star in an effort to bolster his position related to the “other guarantor” clause. When he received what he believed to be incomplete responses, Greenfield moved the trial court to compel discovery. No resolution of this motion appears in the record.

On January 21, 2015, the trial court granted summary judgment in favor of Louisville Galleria. It found the guaranty was valid and enforceable, specifically discussing and rejecting Greenfield’s contentions to the contrary. This appeal followed.

---

<sup>1</sup> Pertinent to this appeal, the personal guaranty executed by Greenfield contained a limitation on enforcement provision which stated as follows:

[Louisville Galleria] shall not exercise its rights under this Guaranty during the period if it is holding a guaranty in the same form from a guarantor that has a tangible net worth (exclusive of leasehold improvements) equal to or greater than Seven Hundred Fifty Thousand Dollars (\$750,000), increasing three percent (3%) on each anniversary of this Guaranty, and [Louisville Galleria] is provided documentation of such reasonably satisfactory to [Louisville Galleria], upon request.

As an initial matter, we note Greenfield’s failure to comply with CR<sup>2</sup> 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 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 (Ky. App. 1987)). Also in contravention of the provisions of CR 76.12(4)(c)(iv) and (v), Greenfield’s brief does not contain a single reference to the record supportive of his arguments. Further, in contravention of CR 76.12(4)(c)(vii), Greenfield has attached documents to his brief in this Court that were not made a part of the record below.<sup>3</sup> Failing to comply with these 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 Greenfield’s failure to comply with the rules. *Elwell*. While we have chosen not to impose

---

<sup>2</sup> Kentucky Rules of Civil Procedure.

<sup>3</sup> As they are not properly before us, the offending documents have been disregarded and not relied upon in any way in the rendition of this Opinion.

such a harsh sanction, we caution counsel that such latitude may not be extended in the future.

Before this Court, Greenfield advances three arguments seeking reversal. First, he contends the trial court erred in failing to find Louisville Galleria was barred from enforcing his guaranty under the express terms of the “other guarantor” clause. Second, Greenfield alleges the trial court’s interpretation of the guaranty improperly added terms not found in the agreement. Finally, Greenfield argues summary judgment was prematurely entered as discovery had not been completed.

CR 56.03 provides summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment as a matter of law. Summary judgment may be granted when “as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted). “While the Court in *Steelvest* used the word ‘impossible’ in describing the strict standard for summary judgment, the Supreme Court later stated that that word was ‘used in a practical sense, not in an absolute sense.’” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court’s grant of summary judgment is reviewed *de novo*. *Coomer v. CSX*

*Transp., Inc.*, 319 S.W.3d 366, 370-71 (Ky. 2010). With these standards in mind, we turn to Greenfield's arguments.

Greenfield's first allegation of error centers on his reading of the "other guarantor" clause in his guaranty and his disagreement with the trial court's interpretation. In essence, Greenfield posits so long as Louisville Galleria has any guaranty from any guarantor whose net worth exceeds \$750,000, enforcement of his guaranty is barred. Greenfield offers no legal support for his position that a subsequent guarantor for an unrelated lease would somehow relieve him from his obligation. As did the trial court, we reject Greenfield's untenable stance.

A plain reading of Greenfield's guaranty reveals he was personally ensuring the debts incurred by Red Star to Louisville Galleria would be paid. The mere fact Louisville Galleria holds another personal guaranty from an entity unrelated to Red Star's debt simply does not invoke the prohibition language contained in the "other guarantor" clause. It is wholly unreasonable to believe the parties bargained for such an outcome, as evidenced by the documents memorializing the transaction when read as a whole. Greenfield's attempt to escape liability rests on a tortured reading of the guaranty language which is unsupported in law or logic. There was no error in the trial court's determination the guaranty was enforceable against Greenfield.

Next, Greenfield argues the trial court impermissibly added terms to the guaranty, thereby rendering entry of summary judgment improper. It is difficult to ascertain the exact reasoning behind Greenfield's position as it is

presented in a bare bones fashion with little meat. However, he appears to allege the trial court concluded the guaranty was ambiguous, thereby precluding summary judgment. As before, Greenfield offers no legal support for his position, aside from general citations of law relevant to summary judgment. Our reading of the trial court's order does not bear out Greenfield's contention. As before, the trial court's decision was based on the plain language of the lease and accompanying guaranty agreements evidencing Greenfield's obligation to cover a portion of Red Star's indebtedness. Contrary to Greenfield's allegation, the trial court did not graft additional requirements into the guaranty. Once again, we discern no error in the trial court's logic.

Finally, Greenfield contends the trial court erroneously entered summary judgment prior to completion of discovery. He believes the trial court should have permitted him to delve into the financial backgrounds of subsequent lessees to bolster his argument the "other guarantor" clause was applicable. However, Greenfield and RDG personally guaranteed Red Star's debts; Red Star and RDG are insolvent and did not participate in the litigation; no allegation exists that a subsequent related or unrelated entity agreed to assume Red Star's nearly two-million-dollar indebtedness; and the existence of a guaranty unrelated to the leasehold interest at issue legally and logically can have no bearing on Greenfield's obligation. The discovery sought was irrelevant to the matters before the trial court, despite Greenfield's wayward argument regarding the "other guarantor" clause. The potential net worth of subsequent lessees could not change the

analysis regarding Greenfield's clear obligation under his guaranty. Any subsequent lessees simply did not act to trigger the "other guarantor" provision of the guaranty. Thus, we discern no error in the timing of the trial court's ruling relative to discovery.

Following a careful review, we conclude the trial court correctly entered summary judgment in favor of Louisville Galleria. No genuine issue of material fact existed, it was impossible for Greenfield to prevail at trial, and Louisville Galleria was entitled to judgment as a matter of law. Thus, the judgment of the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Thomas M. Todd  
Tanya Richardson  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Michael M. Hirn  
Sarah M. McKenna  
Louisville, Kentucky