

RENDERED: DECEMBER 8, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000054-MR

TAX EASE LIEN SERVICING, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 16-CI-401149

RONALD R. ROBERTS, JR.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, J. LAMBERT, AND NICKELL, JUDGES.

LAMBERT, J., JUDGE: Tax Ease Lien Servicing, LLC, appeals from the Jefferson Circuit Court order granting the motion to dismiss with prejudice filed by Ronald R. Roberts Jr. We affirm.

Roberts is the owner of a parcel of property located on Muhammed Ali Boulevard, in Louisville, Kentucky. In July 2004, Roberts was deeded the

property from his father (Ronald R. Roberts) for the sum of one dollar (although the stated value on the deed was \$28,500.00). The property became encumbered by unpaid taxes from the years 2007 to 2009. In 2009 and 2010, Tax Ease Lien Servicing purchased the subject tax liens from Louisville Jefferson County Metro Government. In 2011, Tax Ease filed its complaint seeking a total of \$1,926.15 plus interest at the rate of 12% per annum until paid, as well as costs and attorney fees. Tax Ease further requested that the subject property be sold by the Master Commissioner. In 2015, Roberts filed a *pro se* motion to dismiss and requested that the amount to be collected be finalized at \$1,925.00. Tax Ease failed to respond to the motion to dismiss, and the Jefferson Circuit Court entered an order dismissing without prejudice on December 16, 2015. No appeal was taken from that order.

On July 19, 2016, Tax Ease refiled a complaint in Jefferson Circuit Court, essentially requesting the same relief as did its 2011 complaint. Roberts filed a motion to dismiss with prejudice on August 15, 2016, and he renewed that motion on October 4, 2016. The Jefferson Circuit Court held a hearing on October 24, 2016, and entered its order dismissing the complaint with prejudice on October 27, 2016. Tax Ease filed a motion to alter, amend, or vacate (Kentucky Rule of Civil Procedure (CR) 59.05), which was denied on December 7, 2016, and Tax Ease filed its notice of appeal on January 6, 2017.

We note at the outset that the appellant's brief is lacking in that it fails to follow the directives of CR 76.12(4)(c)(v) and (vii). We shall lay out both sections of that Rule:

(v) An "ARGUMENT" conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law **and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.**

.....

(vii) An "APPENDIX" with appropriate extruding tabs containing copies of the findings of fact, conclusions of law, and judgment of the trial court, any written opinions filed by the trial court in support of the judgment, the opinion or opinions of the court from which the appeal is taken, and any pleadings or exhibits to which ready reference may be considered by the appellant as helpful to the appellate court. The first item of the appendix shall be a listing or index of all documents included in the appendix. The index shall set forth where the documents may be found in the record. **The appellant shall place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court.** Except for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs.

(Emphases ours.) The Appellant not only fails to advise this Court if and in what manner its issues are preserved for appeal, but it also fails to attach the circuit court orders from which it is appealing, instead attaching only two items from the 2011 litigation.

“[A]n appellate court cannot consider items that were not first presented to the trial court.” *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. 2012). “It is not so much to ensure that opposing counsel can find the point at which the argument is preserved, it is so that we, the reviewing Court, can be confident the issue was properly presented to the trial court[.]” *Id.*

Conversely, the Appellee has filed no brief at all. This leaves us with the options offered in CR 76.12(8), namely:

(a) A brief may be stricken for failure to comply with any substantial requirement of this Rule 76.12.

.....

(c) If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

See also Briggs v. Kreuztrager, 433 S.W.3d 355, 361 (Ky. App. 2014). Since the record contains fewer than 90 pages we have decided not to strike Tax Ease’s brief and dismiss its appeal, but we caution counsel to practice more vigilant compliance with CR 76.12 in future appeals. And because the Appellee had appeared *pro se* at the circuit court level, we decline to regard his failure to file a brief as a confession of error but rather accept the Appellant’s statement of the facts and issues as correct.

Our review is further complicated because the recording of the hearing was not certified as part of the video record on appeal, and there is nothing in the record to indicate that Tax Ease designated it to be included. Thus, we are unable to review the hearing. ■

Moreover, “[i]t has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.” *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Accordingly, our resolution of this appeal is based upon the record provided to us, and **we assume the missing portions of the record support the trial court’s decision.**

Smith v. Smith, 450 S.W.3d 729, 732 (Ky. App. 2014) (citing CR 75.01(1)) (emphasis ours).

In ruling against Tax Ease, the Jefferson Circuit Court stated:

At the hearing on this Motion [to dismiss], the Court questioned Plaintiff’s counsel on why it failed to respond to Mr. Roberts’ original Motion to which Plaintiff’s counsel had no explanation. Plaintiff does not allege that the prior Motion was improperly noticed or give any other plausible excuse for the Court to consider. The Court sees no reason to set aside Judge Smith’s prior Order dismissing this case. Accordingly, the Court will grant Mr. Roberts’ Motion and dismiss this case with prejudice.

Nothing in Tax Ease’s brief convinces us that the circuit court committed error. Counsel candidly admits that the attorney representing Tax Ease in the earlier proceeding was neglectful in failing to defend against the motion to dismiss. The order dismissing without prejudice was entered four years after the 2011 action was filed. Tax Ease has had ample opportunity to be heard, both in

those proceedings and in the current case. Assuming, as we must do, that the evidence presented at the October 2016 hearing supports the circuit court's decision, we decline to set it aside. *Smith, supra.*

The orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

Nicholas K. Rohner
Cincinnati, Ohio