

RENDERED: AUGUST 17, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001167-MR

JAMES WILLIAMS
AND
DOROTHY EDEN

APPELLANTS

v. APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 05-CI-90315

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES
(STATE GUARDIANSHIP SERVICES);
CLELA WILLIAMS MARKWELL; AND IVAN MARKWELL APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, DIXON, AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellants, James Williams and Dorothy Eden (“the Edens”), appeal from the Rowan Circuit Court’s order granting summary judgment in favor of the Appellee, Commonwealth of Kentucky, Cabinet for Health and Family

Services (State Guardianship Services) (“the Cabinet”), which resolved all claims in this case. After a careful review, we affirm.

Initially, we note that the Cabinet did not file a responsive brief before this Court. According to CR¹ 76.12(8)(c), we have three alternate routes when an appellee fails to file a brief: “(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.” It is wholly within our discretion to choose how to proceed in these situations. *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2007). We elect to accept the Appellants’ statement of the facts as correct, insofar as it does not conflict with the record below. We now proceed to the merits of this appeal.

The origins of this case date back to 2005 when the Rowan District Court ordered the real property of Lettie Williams (“Lettie”) to be sold. In 1996, Lettie was adjudged incapable of handling her personal and financial affairs, and the Rowan District Court assigned the Cabinet to serve as her conservator from June 11, 1996 until June 12, 2001. That date passed without further action on Lettie’s behalf. On May 4, 2005, at the request of the Cabinet (which was unknowingly still acting pursuant to the expired order), the Rowan District Court

¹ Kentucky Rules of Civil Procedure.

entered an order instructing the Cabinet to sell Lettie's real property, subject to the following provisions: (1) within thirty days of appraisal family members may offer to purchase the subject property for the appraised value; (2) after thirty days, the Cabinet must sell the property at public auction; and (3) within thirty days of entry of the order any aggrieved party may institute an adversary proceeding in circuit court, pursuant to KRS² 24A.120(2). The final provision of the order is codified in KRS 389A.010(4), which contains substantially similar language.

The property was sold on July 27, 2005, to Clela Williams Maxwell, Lettie's daughter, and Ivan Maxwell, pursuant to an offer made on May 17, 2005. On August 11, 2005, long past the thirty-day period for adversary proceedings, the Edens moved the Rowan District Court to set aside the sale. This motion was denied. Subsequently, the Edens instituted an action in Rowan Circuit Court, alleging that the sale was void because the Cabinet was not Lettie's conservator at the time of the May 4, 2005, order or during the sale of the subject property and because the sale did not occur in accordance with the terms contained in the May 4, 2005, order.³ The Edens moved for summary judgment on these claims, and the

² Kentucky Revised Statutes.

³ The procedural history in this case is convoluted, because the Edens pursued two separate legal tracks (though only one now remains) and the Cabinet also filed separate motions. Simultaneous to filing the adversarial action, the Edens had also appealed the district court's denial of the motion to set aside the sale to the circuit court, and the Cabinet had moved the district court to enter a *nunc pro tunc* order appointing it as Lettie's conservator, retroactive to 2001. The circuit

circuit court summarily denied their motion in an order designated as final and appealable. Thereafter, the Edens appealed that order to this Court, 2006-CA-002322-DG and 2007-CA-001425-MR.⁴ In the consolidated appeal, this Court dismissed the Edens' appeal because the summary judgment order was actually interlocutory and not final and remanded to the circuit court for any additional proceedings required.

After remand, the Cabinet moved for summary judgment on all claims based on this Court's prior opinion in this case. Because the adversarial action was not filed within thirty days of the May 4, 2005, order, the circuit court granted the Cabinet's motion, disposing of all the claims involved. This appeal followed.

On appeal, our standard of review is "whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Norton Hospitals, Inc. v. Peyton*, 381 S.W.3d 286, 290 (Ky. 2012); CR 56.03. Summary judgment "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible

court affirmed the district court's denial of the motion to set aside the sale. The Edens also appealed this decision to this Court. In response to the Cabinet, the district court entered an order re-appointing the Cabinet as Lettie's conservator, though not retroactively as the Cabinet desired.

⁴ Case No. 2006-CA-002322-DG is the appeal of the circuit court's affirmance of the district court's denial of the Edens' motion to set aside the sale, which this Court also affirmed. The Supreme Court denied discretionary review. That case is not involved here.

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) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). Further, “[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Id.* at 480. Because summary judgment only involves legal questions and factual findings are not at issue, “an appellate court need not defer to the trial court’s decision and will review the issue *de novo*.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Though not necessary to the resolution of this appeal, the reasoning for the Edens’ grievance and their resulting damages are unclear. Lettie’s will, executed in 1983, designates the Edens, along with a sister, as the intended beneficiaries of Lettie’s real property, but until her death the Edens would have no vested interest in receiving that property. Additionally, the Edens had the opportunity to offer to purchase the subject property within the thirty days, and the subsequent sale was for the appraised price, giving the estate its full value. Waiting for public auction to purchase the property was a risk taken by the Edens and any disappointment at not getting the opportunity to do so falls on themselves. Thus, the Edens have not demonstrated any damages suffered from the sale.

Regardless, we find the circuit court correctly granted summary judgment in favor of the Cabinet. The Edens argue that the May 4, 2005, order was void, along with the subsequent sale of the property, because there was not an appointed fiduciary or a bond. Unfortunately for the Edens, they failed to follow the terms of the May 4, 2005, order requiring them to file an adversarial proceeding within thirty days of the order. There was no reason why the expired conservatorship could not have been discovered within that thirty-day period. The Edens' challenge was not timely, and thus, their arguments cannot succeed.

For the reasons stated herein, the order of the Rowan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

NO BRIEF FOR APPELLEE

William D. Elkins
Winchester, Kentucky