RENDERED: JANUARY 18, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001368-MR

SANDRA BROWN, AS EXECUTRIX
OF THE ESTATE OF JEAN SMITH
(FALK) APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 15-CI-00816

WATERSIDE TAX SERVICE
COMPANY, LLC APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND NICKELL, JUDGES.

NICKELL, JUDGE: In this tax lien foreclosure action, Jean Smith (Falk)[1] appeals from the Kenton Circuit Court's entry of summary judgment in favor of Waterside Tax Service Company, LLC. Following a careful review, we affirm.

[1] Jean Smith (Falk) died during the pendency of this appeal. By order entered January 16, 2019, Sandra Brown, as Executrix of the Estate of Jean Smith (Falk) was substituted as the appellant.

KRS[2] Chapter 134 governs the payment, collection and refund of taxes. If an *ad valorem* tax claim is not timely paid, it is thereafter referred to as a Certificate of Delinquency and is transferred by the sheriff to the county clerk. *See* KRS 134.122 and KRS 134.126. After transfer to the county clerk, private persons or businesses may purchase an unpaid Certificate of Delinquency pursuant to a process described in various provisions of Chapter 134. Such purchasers are referred to as "third-party purchasers." KRS 134.010(16), KRS 134.128.

Smith failed to pay the *ad valorem* taxes on real property she owned in Kenton County, Kentucky, for tax year 2013. Waterside purchased the delinquent tax bill on July 29, 2014. Collection efforts were unsuccessful, resulting in the instant foreclosure action being filed on April 27, 2015. Shortly thereafter, Smith requested and received a payoff amount of $3,707.03, which included amounts for principal, interest, administrative fees, prelitigation attorney fees, court costs/fees, and litigation attorney fees. Convinced the amount was excessive, specifically the demand for attorney fees, Smith offered to settle the debt for $2,000.00. Her offer was immediately rejected. That same day, by counsel, Smith remitted a check to Waterside for $1,695.44, which she indicated covered all expenses related to her debt, save attorney fees. In a letter accompanying the remittance, Smith stated she would "entertain an offer to pay

[2] Kentucky Revised Statutes.

some additional attorneys fees that are reasonable." Waterside rejected the tendered payment and returned the uncashed check to Smith. No further communication occurred between the parties.

On March 4, 2016, Waterside moved for summary judgment and requested an order of sale. Smith filed no response and was not present when the motion was called for hearing. On May 27, 2016, the trial court granted Waterside summary judgment. Included in the award was $3,650.07 for Waterside's expenses, costs and attorney fees incurred; all amounts were derived from supporting affidavits attached to the judgment. The trial court further referred the matter to the Master Commissioner for purposes of conducting a judicial sale of the subject property.

Smith subsequently moved to alter, amend or vacate the May 27, 2016, judgment, asserting genuine issues of material fact existed regarding the amount of attorney fees due to Waterside. While no direct ruling on Smith's motion appears in the record, on August 25, 2016, the trial court entered an order discussing the amount of attorney fees and specifically concluding the amount awarded "is within the standard for reasonable and appropriate attorney fees in the community for a real estate foreclosure action." This appeal followed.

Smith presents two allegations of error in seeking reversal. First, she argues the trial court should have convened a jury trial to determine whether the

requested attorney fees were reasonable. Second, she alleges the trial court erred in treating the case "like a real estate foreclosure action" when it instead was "a simple tax collection case for an uncontested property tax liability." She is not entitled to the relief she seeks.

In contravention of CR[3] 76.12(4)(c)(v), Smith does not state how she preserved any of her arguments in the trial court.

> 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)). 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). We require a statement of preservation:

> so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard

[3] Kentucky Rules of Civil Procedure.

> of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012). Smith has not requested palpable error review.

We have reviewed the record and find no mention by Smith of any of the grounds presented to us. This failure is fatal to her arguments on appeal.

> It has long been this Court's view that specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal. Most simply put, "[a] new theory of error cannot be raised for the first time on appeal." *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999) (discussing specifically a directed verdict issue); *see, e.g.*, *Harrison v. Leach*, 323 S.W.3d 702, 708–09 (Ky. 2010); *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009) ("More importantly, this precise argument was never made in the trial court. An appellate court 'is without authority to review issues not raised in or decided by the trial court.'") (quoting *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989)); *Combs v. Knott County Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859, 860 (1940) ("[A]ppellant is precluded from raising that question on appeal because it was not raised or relied upon in the court below. It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court.").

Fischer v. Fischer, 348 S.W.3d 582, 588 (Ky. 2011), *abrogated on other grounds by Nami Res. Co., LLC v. Asher Land & Mineral, Ltd*., 554 S.W.3d 323, 323 (Ky. 2018). "The appellate court reviews for errors, and a nonruling is not reviewable

when the issue has not been presented to the trial court for decision." *Turner v. Commonwealth*, 460 S.W.2d 345, 346 (Ky. 1970); *see also Hatton v. Commonwealth*, 409 S.W.2d 818, 819-20 (Ky. 1966). "[I]t is the accepted rule that a question of law which is not presented to or passed upon by the trial court cannot be raised here for the first time." *Hutchings v. Louisville Trust Co.*, 276 S.W.2d 461, 466 (Ky. 1954); *Benefit Ass'n of Ry. Employees v. Secrest*, 239 Ky. 400, 39 S.W.2d 682, 687 (1931). "The underlying principle of the rule is to afford an opportunity to the trial court, before or during the trial or hearing, to rule upon the question raised." *Hartsock v. Commonwealth*, 382 S.W.2d 861, 864 (Ky. 1964).

Because none of the allegations raised were properly preserved in the trial court, they cannot serve as the basis of reversal on appeal. Further, even if the issues were properly before us, the record contains no indication manifest injustice exists. Therefore, the judgment of the Kenton Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Carl E. Knochelmann Jr. Covington, Kentucky	J. Shannon Bouchillon Louisville, Kentucky