

RENDERED: DECEMBER 20, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001183-MR

BARDSTOWN CAPITAL CORPORATION;
SOUTHPOINTE PARTNERS, LLC;
INVESTORS EXCHANGE COMPANY, LLC;
AND JMB REALTY LLC

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 16-CI-004356

TIAA, FSB d/b/a EVERBANK f/k/a EVERBANK

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: ACREE, NICKELL,¹ AND L. THOMPSON, JUDGES.

¹ Judge C. Shea Nickell concurred in this opinion prior to being sworn in as a Justice with the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

ACREE, JUDGE: Appellants, Bardstown Capital Corporation, Southpointe Partners, LLC, Investors Exchange Company, LLC, and JMB Realty LLC (Appellants) appeal the March 9, 2018 order of the Jefferson Circuit Court dismissing Appellee, TIAA, FSB d/b/a EverBank (EverBank), from the action. We reverse.

FACTS AND PROCEDURE

This case involves various interests in real property located at 9911 Wingfield Lane in Louisville. In 2008, John Lowry financed his purchase of the property by securing a mortgage loan eventually assigned to EverBank. In January 2013, Lowry defaulted on the loan and EverBank filed a foreclosure action. (*EverBank v. Lowry, John et al*, Jefferson Cir. Ct. No. 13-CI-400027).

According to the Commissioner’s Deed, “a judgment was rendered [in that foreclosure action] ordering the sale of the [subject] property and under that Judgment the Commissioner . . . reported a sale thereof as of the 3rd day of December, 2013, to EVERBANK at the sum of \$30,100.00.” (Record (R.) 47). There is no deed of the property to EverBank. However, the commissioner’s deed further indicates EverBank assigned its equitable interest as high bidder to the Department of Housing and Urban Development (HUD) about a year after the sale, on November 20, 2014. (*Id.*)

On December 15, 2014, legal title was still in the name of John Lowry. Consequently, on that date, the master commissioner finally prepared a deed. It identified those with any putative interest in the property as first parties and grantors, including EverBank,² and conveyed those interests to the second party and grantee, HUD. HUD did not record its deed until October 5, 2016.

Just prior to that date, on August 15, 2016, Lowry transferred by quitclaim deed all his interest in the property, if any, to Bardstown Capital Corporation and 9911 Wingfield LLC for \$500.00. Less than a month later, on September 9, 2016, well after the property was conveyed to HUD but before HUD recorded its deed, Appellants filed a complaint against EverBank, Kentucky Telco Federal Credit Union, and Louisville/Jefferson County Metro Government as defendants. Appellants variously owned properties adjacent to the subject property and sought damages for common law waste, common law nuisance, and statutory nuisance alleging EverBank, among others, was the owner that allowed the property to fall into disrepair beginning in October 2013.³

On April 7, 2017, EverBank filed a motion to dismiss. After some procedural matters not relevant here and before the court ruled on the motion to

² These parties were identified on the Commissioner's Deed as EverBank, John Lowry, Kentucky Telco Federal Credit Union, Inc., Louisville/Jefferson County Metro Government, Unknown Occupant, and Unknown Spouse, if any, of John Lowry.

³ The property had also sustained fire damage. (R. 3).

dismiss, Appellants filed a motion for leave to amend the complaint to which EverBank objected.⁴ On March 9, 2018, the circuit court granted Appellants' motion but dismissed the claims against EverBank. The circuit court's order stated, in pertinent part:

IT IS HEREBY ORDERED that the Motion [to dismiss] is GRANTED. Plaintiffs are granted leave to file an Amended Complaint in this action, and to that end, the Amended Complaint previously tendered by the Plaintiffs is hereby deemed filed. The Plaintiffs are hereby permitted to serve said Amended Complaint in accordance with the Civil Rules and otherwise prosecute the claims in this action. However, given that said Amended Complaint is futile [as] against [Defendant] EverBank, whose ownership in the property was before Nov[ember] of 2014, if ever, the Court grants EverBank's motion to dismiss as argued [at] the March 9, 2018 hearing. EverBank is dismissed as a [defendant] party to this action.

(R. 321). Upon motion, the circuit court declared this order final and appealable pursuant to CR⁵ 54.02. Appellants timely appealed.

⁴ The proposed amended complaint removed 9911 Wingfield LLC as a plaintiff and attempted to add HUD as a defendant on the belief that both owned an interest in the property at the time the original action was filed. The proposed amended complaint also omitted claims originally maintained against EverBank including claims to quiet title, priority of title, abandonment, and equitable title. Appellants retained their claims for waste and nuisance against EverBank.

⁵ Kentucky Rules of Civil Procedure.

STANDARD OF REVIEW

Because the order dismissing refers to the non-existence of EverBank’s interest in the property, it is clear the circuit court considered matters outside the pleadings in its ruling, namely, the relevant deeds. “A trial court is free to consider matters outside the pleadings; however, doing so converts the request for dismissal into a motion for summary judgment.” *Middleton v. Sampey*, 522 S.W.3d 875, 878 (Ky. App. 2017) (citing CR 12.02; *McCray v. City of Lake Louisville*, 332 S.W.2d 837, 840 (Ky. 1960)). Accordingly, “[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

REQUEST FOR A HEIGHTENED STANDARD OF REVIEW

Before proceeding to Appellants’ arguments, we must consider EverBank’s request that this Court apply a heightened standard of review and reverse only if we find the circuit court’s order dismissing constitutes a manifest injustice.⁶ The well-taken request is based on the Appellants’ violations of CR 76.12, the rule governing briefs in the Court of Appeals. This Court agrees that

⁶ We know of no requirement that this be done by motion.

Appellants' brief fails to comply in the very ways EverBank identifies, and others.⁷ Appellants do attempt in their reply brief to correct those deficiencies where they can be corrected. They also cite *Eplion v. Burchett* for the grossly subjective view by a different panel of this Court that the record there was "neither large nor unwieldy" so the Court could "find all the information we need with little difficulty." 354 S.W.3d 598, 602 (Ky. App. 2011).

For the Appellants' part, they pray this Court concludes its brief at least substantially complies with the rule. We caution the Appellants' advocates against making this approach their regular practice.

Relying on the subjective rule of substantial compliance creates unnecessary risks that the Court will apply this heightened standard of review as in *Mullins v. Ashland Oil, Inc.*, 389 S.W.3d 149, 154 (Ky. App. 2012), or will strike the brief from the appellate record as in *Commonwealth v. Roth*, 567 S.W.3d 591, 594 (Ky. 2019), or will dismiss the appeal entirely as in *Craig v. Kulka*, 380 S.W.3d 546, 548-49 (Ky. App. 2012). We emphasize these risks are unnecessary because full compliance with CR 76.12 eliminates them all. Furthermore, full

⁷ For example, Appellants' introduction of three full paragraphs violates CR 76.12(4)(c)(i) because it is not a "brief" introduction "not exceeding two simple sentences"; Appellants' arguments violate CR 76.12(4)(c)(v) because they fail to "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"; and Appellants fail to comply with CR 76.12(4)(c)(vii) because they did not "place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court."

compliance with CR 76.12 is clear indication to the reviewing court and opposing counsel of the advocate's competence and professionalism.

Regarding Appellants' specific failure to cite to the record, this Court has said, "A party takes a significant risk upon failing to provide complete citations to the record. It is not the court's responsibility to search the record to determine if a party's factual contentions are supported." *O'Rourke v. Lexington Real Estate Co. L.L.C.*, 365 S.W.3d 584, 587 (Ky. App. 2011). Pinning appellate success, even in part, to the hope this Court will view this record as it viewed the record in *Eplion* is not proof of good judgment. And, in *Eplion* there was an additional factor – the Court said, "We see no reason to punish the appellant for deficiencies in his brief but ignore those of the appellees." *Eplion*, 354 S.W.3d at 602. The Appellee's brief complies with CR 76.12.

Notwithstanding cause exists to apply the heightened standard, we decline to do so in our own hope the Court will have no future need to address the issue of non-compliance with the rules by these appellate advocates.

ANALYSIS

Appellants first argue the circuit court erred by making improper factual findings related to the property. We disagree with that contention.

When a circuit court concludes there is no genuine issue regarding a particular material fact, that is not factfinding. The circuit court here concluded the

impossibility of Appellants prevailing based on its examination of deeds and court records of the foreclosure. Valid deeds can eliminate genuine issues of material fact regarding a party's ownership interest in real property. *See Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 302 (Ky. 2010). Valid deeds can also serve to create genuine issues of material fact, as in this case.

The material fact at issue in this appeal is EverBank's interest in the subject property. The circuit court concluded the Appellants could not demonstrate EverBank had a sufficient interest in the property to subject it to liability for the alleged torts. With that contention, we also disagree.

Under Kentucky law, the highest bidder at a master commissioner's foreclosure sale obtains equitable ownership of the property upon conclusion of the auction and acceptance of the purchase money bond, although the debtor retains legal title until confirmation by the circuit court. *Ky. Farm Bureau Mut. Ins. Co. v. Conley*, 498 S.W.2d 122, 125 (Ky. 1973). Although "legal title to property sold at decretal sale does not pass to the purchaser until it is conveyed to him by the commissioner under proper order of the court, . . . [the controlling element] is not the confirmation, but the purchaser's compliance with the terms of the sale." *Smith v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 239 Ky. 106, 39 S.W.2d 189, 190 (1931).

The master commissioner reported a sale to EverBank in December 2013 and an assignment to HUD of that interest in November 2014. If there was acceptance of the purchase money bond, or its equivalent, then EverBank was the equitable owner of the property for eleven months and during the time Appellants claimed EverBank was liable to them in tort.

No other reason need be given for reversing the dismissal in this case which we have properly treated as a summary judgment.

CONCLUSION

Based on the foregoing analysis, we reverse the March 9, 2018, order of the Jefferson Circuit Court dismissing EverBank as a party.

ALL CONCUR.

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