

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

EAGLE'S VIEW PROFESSIONAL PARK :
CONDOMINIUM UNIT OWNERS :
ASSOCIATION, INC., : CASE NO. CA2014-06-134
Plaintiff-Appellee, : OPINION
- vs - : 5/18/2015
EVPP, LLC, et al., :
Defendants-Appellants. :

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2011-10-3837

Cuni, Ferguson & LeVay Co., L.P.A., Lisa M. Conn, 10655 Springfield Pike, Cincinnati, Ohio 45215, for plaintiff-appellee

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HENDRICKSON, J.

{¶ 1} Defendants-appellants, EVPP, LLC (EVPP) and Robert R. Rockenfield, appeal multiple decisions from the Butler County Court of Common Pleas in favor of plaintiff-appellee, Eagle's View Professional Park Condominium Unit Owner's Association, Inc. (Association) and intervenors-appellees, Michael Yoakum, Mark Schroder, Thomas Sullivan,

Michael White, Chris Eubank, Chris Boerger, and Doug Rolfes (collectively, the Purchasers).

For the reasons discussed below, the appeal is dismissed in part and affirmed in part.

I. FACTS

A. Proceedings Below

{¶ 2} The Association maintains and operates Eagle's View Professional Park, a multi-building, multi-unit professional condominium development.¹ EVPP was a member of the Association and owned 16 units in the Eagle's View Professional Park. On October 31, 2011, the Association filed a foreclosure complaint against EVPP to foreclose on liens for unpaid condominium assessments. The complaint also named Stock Yards Bank and Trust Company (Stock Yards) as a defendant as it held a mortgage on the subject properties. Stock Yards answered the Association's complaint and filed its own cross-claim in foreclosure and a third-party complaint against Rockenfield.² Rockenfield is the "Member/Manager" of EVPP, and he personally guaranteed EVPP's loan to Stock Yards. As to EVPP, Stock Yards requested judgment on the note and that the properties be foreclosed. As to Rockenfield, Stock Yards requested judgment against Rockenfield in the full amount of the debt.

{¶ 3} Ultimately, on October 26, 2012, a decree in foreclosure was filed by way of an agreement. The Association and EVPP entered into an "Agreed Final Appealable Judgment/Order" which ordered foreclosure of the properties and a subsequent sale. The Entry also determined the priority of the liens on the property. Rather than selling the properties at a sheriff's sale, EVPP, the Association, and Stock Yards entered into a "Right to Sell Agreement," wherein the parties agreed that the properties would be sold at a public

1. Eagle's View Professional Park Condominium Unit Owner's Association is now known as Fairfield Professional Park Condominium Unit Owner's Association, Inc.

2. In its pleading, Stock Yards designated its claim against Rockenfield as a counterclaim, however, we note that Stock Yards' claim against Rockenfield is more properly designated as a third-party complaint.

auction by a private auctioneer. The auction was conducted on December 8, 2012.³ The properties were purchased at this auction by the Purchasers. Purchase contracts were subsequently entered into for each of the properties and were signed by EVPP. Subsequently, in an effort to avoid the sales, EVPP filed a Chapter 11 bankruptcy petition on January 2, 2013. However, the United States Bankruptcy Court Southern District of Ohio Western Division dismissed the bankruptcy petition finding it was filed in bad faith.

{¶ 4} Thereafter, on June 26, 2013, the Association filed a motion to compel, in which it asserted that EVPP refused to close on the sales of the properties pursuant to the purchase contracts entered into as a result of the agreed upon December 8, 2012 auction. The Association requested the court to enforce the Right to Sell agreement and order EVPP to close on the sales of the properties to the Purchasers. On June 27, 2013, the Purchasers filed a motion to intervene, as well as a memorandum in support of the Association's motion to compel. The court granted both of the Purchasers' motions.⁴

{¶ 5} EVPP failed to timely respond to either motion. On July 26, 2013, the court granted the Association's motion to compel and ordered the following:

[1.] On or before July 31, 2013, Defendant EVPP, LLC shall take any and all action, including executing documents reasonably required to close the sale of the properties purchased at the December 8, 2012 private auction that is the subject of this Motion to Compel by * * * (the "Purchasers");

[2.] If EVPP, LLC fails to close the sale of the properties * * * then EVPP, LLC and the sole member of EVPP, LLC, Robert Rockenfield, shall be automatically held in contempt of this Court upon notice to this Court that the sale of any of the subject properties has not closed sale for no fault of the Purchasers. The Court may issue such further orders on contempt as are required.

3. Rockenfield signed the agreement as the sole member of EVPP, LLC.

4. Purchaser, Doug Rolfe did not join the other purchasers in the motion to intervene filed on June 27, 2013. Rather, Rolfe filed his own separate motion to intervene in the action on September 9, 2013. The court also granted his motion to intervene.

{¶ 6} On July 30, 2013, EVPP and Rockenfield appealed the trial court's July 26, 2013 decision ordering EVPP and Rockenfield to comply with the Right to Sell Agreement and close on the sale of the properties to the Purchasers (first appeal).

{¶ 7} While the first appeal was pending, EVPP and Rockenfield moved for a stay in both the trial court and this court and both motions were denied. On August 20, 2013, as EVPP and Rockenfield had failed to comply with the court's July 26, 2013 order, the Association moved to hold Rockenfield in contempt. The Purchasers filed a memorandum in support of the Association's motion for contempt. EVPP and Rockenfield argued that the trial court was divested of jurisdiction due to the filing of the appeal, and therefore, asserted that the trial court was unable to rule on the motion for contempt. After holding a hearing on the motion, on November 21, 2013, the trial court found EVPP and Rockenfield in contempt for failing to abide by the order filed on July 26, 2013. The court consequently ordered the following:

[T]he money from the sale shall be deposited with the Butler County Clerk of courts. Each defendant shall be fined \$250 for the contempt and Defendant Rockenfield shall be sentenced to thirty (30) days in the Butler County Jail. Furthermore, each Defendant shall be required to pay \$100 per day for each day the sale of the subject properties does not close * * * Defendants shall have ten (10) days from the date of this entry to purge themselves of contempt and avoid the fine of \$250.00 each and the jail time for Defendant Rockenfield by closing on the sale of the subject properties.

On November 27, 2013, EVPP and Rockenfield filed a second appeal challenging the trial court's November 21, 2013 entry finding them in contempt (second appeal).

{¶ 8} A review hearing on the contempt finding was set for December 10, 2013. On December 17, 2013, Rockenfield appeared in court and signed the necessary documents to close on the sales of the properties. The trial court requested the Association and the Purchasers provide an accounting of attorney fees related to the motion to compel as well as

the contempt motion. Thereafter, the trial court issued a series of orders which detailed the amounts Rockenfield owed the Association and the Purchasers in attorney fees: (1) on March 4, 2014, the trial court awarded the Association \$8,580 in attorney fees; (2) on May 1, 2014, the trial court ordered Rockenfield to pay \$5,996.12 in attorney fees and costs to the Purchasers; and (3) on May 15, 2014, the trial court ordered Rockenfield to pay \$40 to the Association and \$40 to the Purchasers by the seventh of each month until the sums are paid in full.⁵ The trial court stated that no further contempt actions would be taken against Rockenfield as long as he made the ordered monthly payments.

B. Prior Appeals

{¶ 9} Appellants' first appeal was dismissed by this court on February 18, 2014, finding the July 26, 2013 order compelling EVPP and Rockenfield to comply with the Right to Sell Agreement and close on the sales of the properties was not a final and appealable order. *Eagle's View Professional Park Condominium Unit Owners Assoc., Inc. v. EVPP, LLC, et al.*, 12th Dist. Butler No. CA2013-07-132, 2014-Ohio-565, ¶ 16-17. Appellants' second appeal challenging the trial court's finding of contempt entered on November 21, 2013, was also dismissed. The second appeal was dismissed with prejudice due to appellants' failure to prosecute the appeal. *Eagle's View Professional Park Condominium Unit Owners Assoc., Inc. v. EVPP, LLC, et al.*, 12th Dist. No. CA2013-11-214 (Feb. 14, 2014) (Entry of Dismissal).

C. Current Appeal

{¶ 10} On June 13, 2014, EVPP and Rockenfield filed the instant and third appeal. Appellants' merit brief failed to set forth assignments of error for this third appeal and contains numerous typographical errors and incomplete sentences and arguments. At times, the brief is incomprehensible. The Association and Purchasers have requested this court to

5. It appears the trial court entered the same entry regarding the attorney fees owed to the Purchasers again on May 19, 2014.

strike the brief as "unintelligible." However, we decline to strike appellants' brief. Pursuant to App.R. 16(A) and Loc.R. 11, appellants are required to set forth assignments of error. This court, in the interests of justice, will construe appellants' arguments as assignments of error and consider the appeal. See *HSBC Mtge. v. Ballard*, 12th Dist. Butler No. CA2011-05-088, 2012-Ohio-2251, ¶ 4.

{¶ 11} As an initial matter, we note that at each juncture in this appeal, appellants have attached different entries from which they are purportedly appealing. Accordingly, it is difficult for this court to determine what trial court orders appellants are indeed challenging. Attached to the notice of appeal were seven entries from the trial court. In their brief, appellants state that there were only four orders which triggered this appeal. Finally, the addendum to the brief contains eight orders from the trial court. There are only *two* orders that are attached to the notice, referenced in the brief, and included in the addendum. Although these orders do not provide much guidance, appellants did set forth the following two issues on appeal:

{¶ 12} [1.] DOES A TRIAL COURT HAVE SUBJECT MATTER JURISDICTION TO ORDER COMPLIANCE WITH EXTRA-JUDICIAL SALES AND LISTING CONTRACTS THAT WERE ENTERED INTO AFTER A FINAL APPEALABLE ORDER?

{¶ 13} [2.] THE TRIAL COURT ERRED IN FINDING ROBERT ROCKENFIELD IN CONTEMPT, ORDERING HI[M] TO SIGN DEEDS TRANSFERRING THE CONDOMINIUM UNITS AND FURTHER ERRED IN ORDERING HIM TO PAY THE ATTORNEYS FEES OF APPELLEES.

{¶ 14} Based on the two issues presented for review and the various orders attached and referenced in the brief and included in appellants' notice of appeal, we find appellants are essentially challenging two decisions by the trial court. First, appellants assert the trial court erred in ordering them to comply with the Right to Sell Agreement and close on the

sales of the properties. Additionally, appellants claim the trial court erred in finding Rockenfield in contempt, ordering him to sign the deeds transferring the condominium units, and ordering him to pay the related attorney fees of the Association and Purchasers. For purposes of this appeal, we construe these two issues as the assignments of error before this court.

II. LAW AND ANALYSIS

A. Order Compelling Performance of the Right to Sell Agreement

{¶ 15} In what this court construes as the first assignment of error, appellants contend that the trial court lacked subject matter jurisdiction to order them to comply with the Right to Sell Agreement and finalize the sales of the condominium units to the Purchasers. Appellants maintain that the trial court's jurisdiction terminated months earlier when the Agreed Final Appealable Judgment/Order was entered which granted judgment in favor of the Association and ordered foreclosure of the properties. Upon a review of the record, it is clear that this is the same assignment of error presented in appellants' first appeal. In both the first appeal and the instant appeal, appellants challenged the trial court's jurisdiction to enter the July 26, 2013 order.

{¶ 16} The first appeal was dismissed by this court on February 18, 2014, when we found that the July 26, 2013 order compelling EVPP and Rockenfield to comply with the Right to Sell Agreement and close on the sales of the properties was not a final and appealable order. *Eagle's View Professional Park Condominium Unit Owners Assoc., Inc. v. EVPP, LLC, et al.*, 12th Dist. Butler No. CA2013-07-132, 2014-Ohio-565, ¶ 16-17 (*Eagle's View I*). In *Eagle's View I*, this court stated:

In the instant case, the July 26, 2013 order which appellants now appeal is not a final appealable order as it fails to fully dispose of all the claims and parties below and it does not include Civ.R. 54(B) language. As set forth above, Stock Yards filed a cross-claim against EVPP based on its default on the note, as well as a

claim against Rockenfield, individually, based on his personal guarantee for the loans to EVPP. There is no indication in the record that Stock Yards has dismissed any of its claims against EVPP or Rockenfield, or that the claims have been otherwise resolved by the parties. The trial court's order does not reference any of these claims by Stock Yards. It simply grants the Association's motion to compel EVPP to complete the sale of the properties to the purchasers. As such, the trial court failed to enter judgment as to all the parties and all the claims so as to dispose of the entire action. Furthermore, the July 26, 2013 order contains no Civ.R. 54(B) language. Accordingly, as the order fails to dispose of all claims and all parties and does not include a Civ.R. 54(B) certification, the order is not final and appealable.

(Citations omitted.) *Id.* at ¶ 16.

{¶ 17} From a review of the record, it is clear that there still has been no entry resolving or dismissing Stock Yards' claims against EVPP or Rockenfield. For the reasons discussed in *Eagle's View I*, the July 26, 2013 order compelling appellants' performance with the Right to Sell Agreement, is not a final appealable order. Accordingly, this court is still without jurisdiction to consider appellants arguments related to the July 26, 2013 order. *Id.* at ¶ 13, 17.

B. Finding of Contempt and Order Awarding Attorney Fees

{¶ 18} In the second construed assignment of error, appellants challenge the trial court's order finding them in contempt. The trial court's November 21, 2013 order found EVPP and Rockenfield in contempt for failing to abide by the July 26, 2013 order. Appellants challenge the court's contempt finding and maintain that the trial court's procedure in holding Rockenfield in contempt violated his due process rights and did not comply with the requirements set forth in R.C. 2705.03. We find that appellants' arguments with regards to the trial court's contempt finding are barred by res judicata.

{¶ 19} Generally, res judicata precludes a party from both relitigating issues already decided by a court of competent jurisdiction or raising matters that should have been brought

by the party in a prior action involving the same parties. *Buckner v. Bank of New York*, 12th Dist. Clermont No. CA2013-07-053, 2014-Ohio-568, ¶ 38. Moreover, any issues raised or which could have been raised in an appeal that has been dismissed are deemed waived and barred from subsequent litigation under the doctrine of res judicata. *Marino v. Painter*, 11th Dist. Trumbull No. 2003-T-0133, 2004-Ohio-6033, ¶ 20, 23; *Weisberg v. Sampson*, 11th Dist. Portage No. 2005-P-0042, 2006-Ohio-3646, ¶ 36; see also *Irwin v. Lloyd*, 65 Ohio St. 55 (1901).

{¶ 20} The November 21, 2013 order finding Rockenfield in contempt was the subject of appellants' second appeal. Appellants' second appeal was dismissed with prejudice for failure to prosecute. *Eagle's View Professional Park Condominium Unit Owners Assoc., Inc. v. EVPP, LLC, et al.*, 12th Dist. No. CA2013-11-214 (Feb. 14, 2014) (Entry of Dismissal). This court's decision to dismiss the second appeal with prejudice resulted in a final judgment on the merits as to the contempt finding against appellants. Accordingly, appellants have waived and are barred by res judicata from relitigating the finding of contempt. Appellants' arguments regarding the finding of contempt are overruled.

{¶ 21} As to appellants' claim that the trial court erred in ordering Rockenfield to pay attorney fees, we find that absent the mere reference to attorney fees in the issue presented for appeal, appellants failed to elaborate or support with citations to authority or the record how the trial court erred in awarding attorney fees in this case. The burden of affirmatively demonstrating error on appeal and substantiating one's arguments in support thereof is on the appellant. *Rathert v. Kempker*, 12th Dist. Clermont No. CA2010-06-043, 2011-Ohio-1873, ¶ 12; see also App.R. 16(A)(7). It is not an appellate court's duty to "root out" or develop an argument that can support an assignment of error, even if one exists. *Rathert* at ¶ 12; *Hausser & Taylor, LLP v. Accelerated Systems Integration, Inc.*, 8th Dist. Cuyahoga No. 84748, 2005-Ohio-1017, ¶ 10. Accordingly, we do not address appellants' challenges to

the trial court's award of attorney fees in favor of the Association and the Purchasers. See App.R. 16(A)(7), App.R. 12(A)(2).

{¶ 22} Finally, we note that the Association and the Purchasers have requested that this court award them attorney fees associated with responding to this appeal. Pursuant to App.R. 23, this court may order appellants to pay the reasonable expenses of the appellees including attorney fees and costs if we determine that the appeal is frivolous. However, we do not find that the instant case warrants an award of attorney fees to appellees. Although portions of appellants' brief certainly violated App.R. 12(A) and App.R. 16, we do not find that these deficiencies are sufficient to render the appeal wholly frivolous. Accordingly, we overrule the Associations' and the Purchasers' requests for attorney fees.

C. CONCLUSION

{¶ 23} Based on the foregoing, appellants' appeal as it relates to the trial court's July 26, 2013 order is dismissed and the remaining judgments finding appellants in contempt and ordering Rockenfield to pay attorney fees are affirmed.

PIPER, P.J., and M. POWELL, J., concur.