

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
February 16, 2016 Session

GREGORY GRIFFIN v. MARGARET SMITH, ET AL.

**Appeal from the Circuit Court for Shelby County
No. CT00467113 Felicia Corbin Johnson, Judge**

No. W2015-00334-COA-R3-CV – Filed February 23, 2016

This is an appeal from a detainer warrant action originally filed in the general sessions court by the purchaser of residential property at a foreclosure sale. The defendant in the detainer action appealed the general sessions judgment to circuit court and filed a third party complaint against the mortgage company. The trial granted the mortgage company's motion to dismiss. After a trial de novo, the trial court awarded the purchaser of the property possession of the premises. Because Appellant failed to comply with Rules 24 and 27 of the Tennessee Rules of Appellate Procedure and Rule 6 of the Rules of the Court of Appeals of Tennessee, we dismiss this appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the Court, in which W. NEAL MCBRAYER, and BRANDON O. GIBSON, JJ., joined.

Margaret Smith, Memphis, Tennessee, Pro Se.

Darrell L. West, Nashville, Tennessee, for the appellee, HSBC Mortgage Services, Inc.

Bruce L. Feldbaum and Mark Cantora, Memphis, Tennessee, for the appellee, Gregory Griffin.

MEMORANDUM OPINION¹

Background

On March 15, 2013, Plaintiff/Appellee Gregory Griffin filed a detainer warrant against Defendant/Appellant Margaret Smith (“Appellant”) in Shelby County General Sessions Court seeking possession of residential property located in Shelby County, Tennessee. On October 17, 2013, the general sessions court awarded Mr. Griffin possession of the property. Appellant timely appealed the general sessions judgment to the Shelby County Circuit Court (“trial court”).²

On December 3, 2013, Mr. Griffin filed a motion to dismiss Appellant’s appeal and/or to consolidate the appeal with a pending chancery court case. According to the motion, Appellant had also filed an action in the Shelby County Chancery Court to enjoin Mr. Griffin from recovering possession of the subject premises (“chancery court action”). Although the chancery court initially granted a temporary restraining order preventing Mr. Griffin from continuing with the general sessions proceeding, the restraining order was subsequently dissolved, and Mr. Griffin was authorized to proceed with his detainer warrant action. Mr. Griffin thus argued that any action seeking to prevent him from taking possession of the property was barred by the doctrines of res judicata and estoppel.³

Appellant filed a memorandum in opposition to the motion to dismiss on December 11, 2013. Appellant argued she was permitted by law to appeal the general sessions judgment and that her appeal should not be dismissed. On February 5, 2014, the trial court entered an order reserving judgment on the motion to dismiss and directing Mr. Griffin to file “additional pleadings setting out his cause of action.”

¹ Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION”, shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Error! Main Document Only.Tenn. Ct. App. R. 10

² Appellant was represented by counsel throughout the proceedings in the trial court; on appeal, however, Appellant is proceeding pro se.

³ The chancery court action was subsequently dismissed in its entirety on March 17, 2014.

On February 14, 2014, Mr. Griffin filed a more definite statement setting forth his claim to the property. Mr. Griffin alleged that he purchased the property for value at a foreclosure sale on March 7, 2013. Mr. Griffin included a copy of the Substitute Trustee's deed.

On March 4, 2014, Appellant filed an answer denying Mr. Griffin's entitlement to the subject property. In addition, Appellant filed a third-party complaint against Third-Party Defendant/Appellee HSBC Mortgage Services, Inc. ("HSBC Mortgage"). Appellant alleged that the foreclosure sale was improper because she had entered into an oral loan modification agreement with HSBC Mortgage, the holder of the mortgage on the property, in February 2013. According to Appellant, she complied with the oral agreement by paying additional money to HSBC Mortgage, but HSBC Mortgage went ahead with the foreclosure proceedings. Appellant sought possession of the subject property, \$800,000.00 in compensatory damages, punitive damages, and attorney's fees.

Mr. Griffin renewed his motion to dismiss on March 25, 2014. On April 4, 2014, HSBC Mortgage filed its own motion to dismiss and supporting memorandum. According to HSBC Mortgage, the property at issue was originally purchased by Appellant's mother, Annie Pearl Fields. At the time of purchase, Ms. Fields executed two promissory notes and deeds of trust securing the debt on the property in favor of the original creditor, Oak Street Mortgage, LLC. Appellant was never a party to the promissory notes or deeds of trust executed by Ms. Fields. HSBC Mortgage subsequently purchased the debts. According to HSBC Mortgage, it initiated foreclosure proceedings after the payments on the mortgages became delinquent. At some point, Ms. Fields died, and Appellant became the owner of the property.⁴ As HSBC Mortgage explained:

In February 2013, in response to inquiry made by [Appellant], [Appellant] was advised that \$3,200.00 was the amount required to reinstate the loan. When Plaintiff failed to submit the full amount required to reinstate the loan in a timely manner, HSBC proceeded with a foreclosure sale on March 7, 2013. On March 7, 2013, the Property was sold to Gregory Griffin for the sum of \$47,000.00. The Substitute Trustee's Deed was recorded on April 30, 2013 as Instrument No. 13051790 with the Shelby County Register of Deeds.

(References to exhibits omitted) (footnotes omitted). Appellant responded in opposition to HSBC Mortgage's motion to dismiss on June 23, 2014. On the same day, Appellant also responded in opposition to Mr. Griffin's renewed motion.

⁴ In the chancery court proceedings, the chancery court indicated that Ms. Fields quit claimed the property to Appellant prior to her death.

The trial court heard the pending motions to dismiss on December 12, 2014. On January 5, 2015, the trial court entered an order dismissing all claims against HSBC Mortgage, ruling that the contract claims were barred by the statute of frauds and that Appellant failed to make out a prima facie claim for misrepresentation where the alleged misrepresentation did not concern an existing or past fact.

The case proceeded to a bench trial with regard to Mr. Griffin's claim of possession on January 8, 2015, with the trial court orally ruling in favor of Mr. Griffin. On January 12, 2015, Appellant filed a motion to reopen the proof. On the same day, Appellant filed a motion to stay the judgment pending appeal. On January 20, 2015, Mr. Griffin filed responses in opposition to both pending motions. On January 27, 2015, the trial court entered a detailed order with appropriate findings of fact and conclusions of law in favor of Mr. Griffin, finding that he was a bona fide purchaser of the property. The trial court thus granted Mr. Griffin possession of the property. On February 24, 2015, the trial court denied Appellant's motion to reopen the proof. On March 23, 2015, the trial court denied Appellant's motion for a stay pending appeal. Appellant filed a timely notice of appeal.

Issues Presented

Appellant raises the following issues in her appellate brief, which we have restated slightly:

1. Whether the trial court erred in ruling in favor of Mr. Griffin in wrongful and improper detainer warrant actions against Appellant which is a direct result of the wrongful, improper, voidable, and fraudulent foreclosure sale on March 7, 2013 by HSBC Mortgage.
2. Whether the trial court erred in ruling of writ of possession eviction of Appellant from her home at 1718 Borden Drive, Memphis, Tennessee 38116 pending appeal to the Court of Appeals.
3. Whether the trial court erred in requiring Appellant to pay a cash bond in the amount of \$9,600.00 to remain in her home pending appeal to the Court of Appeals.
4. Whether the trial court erred in its ruling that Mr. Griffin has entitlement to the house purchased in the improper, invalid, and voidable foreclosure, and the eviction is proper and the forced payment is proper.
5. Whether the trial court erred in ruling to dismiss the jury trial motions against HSBC Mortgage when it did perform the improper, wrongful, and fraudulent foreclosure sale on the home of Appellant located at 1718 Borden Drive, Memphis, Tennessee 38116 on March 7, 2013.

6. Whether the trial court erred in ruling to dismiss the jury trial motions against HSBC Mortgage that it did breach its own mortgage modification agreement contract with Appellant.
7. Whether the trial court erred in ruling to dismiss the jury trial motions against HSBC Mortgage that it did breach its duty of good faith with Appellant.
8. Whether the trial court erred in ruling to dismiss the jury trial motions against HSBC Mortgage that did engage in fraud.
9. Whether the jury trial motion requested by Appellant should be honored and granted.
10. Whether Appellant's home should be returned.
11. Whether monetary awards be granted to cover the years of payments made by Appellant under a deliberate false impression created by HSBC Mortgage.
12. Whether additional monetary compensation and damages awards be granted to Appellant as outlined in the suit.
13. Whether any and all court costs taxed to Appellant be taxed to Mr. Griffin and HSBC Mortgage.

Mr. Griffin frames the issues, with slight alterations, as follows:

1. Was the forcible entry and detainer cause of action proper?
2. Is Mr. Griffin, as a good faith purchaser for value of the subject premises at a properly held foreclosure, entitled to possession of the premises?
3. Was the judgment for Mr. Griffin for possession of the property entered by the trial court in favor of Mr. Griffin against Appellant properly entered?

Finally, HSBC Mortgage asserts that the only issue on appeal concerning it is: “[W]hether the trial court erred in dismissing the complaint [against HSBC Mortgage] . . . for failure to state a claim upon which relief can be granted.”

Discussion

As an initial matter, we note that Appellant is proceeding pro se in this appeal. As this Court explained:

Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000); *Paehler v.*

Union Planters Nat'l Bank, Inc., 971 S.W.2d 393, 396 (Tenn. Ct. App. 1997). The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. *Irvin v. City of Clarksville*, 767 S.W.2d 649, 652 (Tenn. Ct. App. 1988). However, the courts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe. *Edmundson v. Pratt*, 945 S.W.2d 754, 755 (Tenn. Ct. App. 1996); *Kaylor v. Bradley*, 912 S.W.2d 728, 733 n. 4 (Tenn. Ct. App. 1995).

The courts give pro se litigants who are untrained in the law a certain amount of leeway in drafting their pleadings and briefs. *Whitaker v. Whirlpool Corp.*, 32 S.W.3d at 227; *Paehler v. Union Planters Nat'l Bank, Inc.*, 971 S.W.2d at 397. Accordingly, we measure the papers prepared by pro se litigants using standards that are less stringent than those applied to papers prepared by lawyers. *Hughes v. Rowe*, 449 U.S. 5, 9–10, 101 S.Ct. 173, 176, 66 L.Ed.2d 163 (1980); *Baxter v. Rose*, 523 S.W.2d 930, 939 (Tenn. 1975); *Winchester v. Little*, 996 S.W.2d 818, 824 (Tenn. Ct. App. 1998).

Pro se litigants should not be permitted to shift the burden of the litigation to the courts or to their adversaries. They are, however, entitled to at least the same liberality of construction of their pleadings that Tenn. R. Civ. P. 7, 8.05, and 8.06 provide to other litigants. *Irvin v. City of Clarksville*, 767 S.W.2d at 652. Even though the courts cannot create claims or defenses for pro se litigants where none exist, *Rampy v. ICI Acrylics, Inc.*, 898 S.W.2d 196, 198 (Tenn. Ct. App. 1994), they should give effect to the substance, rather than the form or terminology, of a pro se litigant's papers. *Brown v. City of Manchester*, 722 S.W.2d 394, 397 (Tenn. Ct. App. 1986); *Usrey v. Lewis*, 553 S.W.2d 612, 614 (Tenn. Ct. App. 1977).

Hessmer v. Hessmer, 138 S.W.3d 901, 903–04 (Tenn. Ct. App. 2003).

HSBC Mortgage contends Appellant's brief so lacks clarity that it is difficult to discern what errors Appellant asserts were committed by the trial court. Instead, HSBC Mortgage argues that Appellant's brief essentially shifts the burden of litigation to itself and

Mr. Griffin to show why the trial court's order should be upheld. According to HSBC Mortgage:

It is extremely difficult to respond substantively to Appellant's Brief, because it consists almost entirely of conclusory statements by [Appellant] concerning the relief to which she claims to be entitled, with no supporting citation to any legal authority of any kind, no references to the record on appeal, and no explanation of any reasons or basis for [Appellant's] belief that the trial court's dismissal of her claims against HSBC [Mortgage] was erroneous and should be reversed. There is not a single reference or citation in the brief to any portion of the record on appeal. Nor is a single legal authority (statute, decision, or other authority) cited in support of any of the statements made by her in the brief. The "argument" consists of a series of sentences alleging in conclusory language purported wrongdoing on the part of HSBC [Mortgage] and [Mr.] Griffin, and a recitation of relief to which [Appellant] considers herself entitled. HSBC [Mortgage] is aware that [Appellant] is appealing pro se. Respectfully, however, her filing is not an appellate brief in any sense; it is simply a re-pleading of her claims as if she were starting all over in this Court.

HSBC Mortgage asserts that "[h]aving no appropriate arguments from Appellant to refute, concerning why the decision [in the trial court] might be reversible," it was required to set forth why the trial court correctly dismissed the claims against it. Similarly, Mr. Griffin argues in his appellate brief that Appellant's appeal should be dismissed for her failure to file an adequate brief.

Having thoroughly reviewed Appellant's brief, we agree with HSBC Mortgage's and Mr. Griffin's concerns. Rule 27 of the Tennessee Rules of Appellate Procedure specifically provides that an appellant's brief "shall contain":

- (1) A table of contents, with references to the pages in the brief;
- (2) A table of authorities, including cases (alphabetically arranged), statutes and other authorities cited, with references to the pages in the brief where they are cited;

* * *

- (4) A statement of the issues presented for review;

(5) A statement of the case, indicating briefly the nature of the case, the course of proceedings, and its disposition in the court below;

(6) A statement of facts, setting forth the facts relevant to the issues presented for review with appropriate references to the record;

(7) An argument, which may be preceded by a summary of argument, setting forth:

(A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(8) A short conclusion, stating the precise relief sought.

Tenn. R. App. P. 27(a). Similarly, Rule 6 of the Rules of the Court of Appeals of Tennessee requires an appellate brief to include a written argument addressing the issues appealed, a statement of the trial court's allegedly erroneous action, and a specific reference to the record where the action is recorded. *See generally* Tenn. R. Ct. App. 6.

Unfortunately, as pointed out by HSBC Mortgage and Mr. Griffin, Appellant's brief is deficient. Although Appellant includes a statement of the issues presented for review, we agree with HSBC Mortgage that it is difficult to discern the legal basis for Appellant's contention that the trial court erred in its judgment. Indeed, none of the issues presented address the trial court's dispositive legal rulings with regard to the claims against HSBC Mortgage, such as the trial court's decision that Appellant failed to make out a prima facie case for misrepresentation or that her contract claims were barred by the statute of frauds. Appellant's brief also fails to contain a section setting forth the applicable standard of review. *See* Tenn. R. Civ. P. R. 27(a)(7)(B).

Additionally, the argument section of Appellant's brief contains no citation to any legal authority, relevant or otherwise, to support her arguments on appeal. *See* Tenn. R. Civ. P. R. 27(a)(7)(A). Although Appellant's brief does contain a table of authorities listing some twelve legal authorities, ranging from caselaw to the Tennessee Constitution, none of these

authorities is cited elsewhere in Appellant's brief or in any way used to buttress the arguments contained therein. *See* Tenn. R. Civ. P. R. 27(a)(2).

Appellant's brief also contains no references to the record on appeal, as required by Rule 27(a)(7)(a). As explained by Rule 6 of the Tennessee Rules of the Court of Appeal:

No complaint of or reliance upon action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.

Tenn. R. Ct. App. 6(b). Here, Appellant fails to include any references to the appellate record wherein the trial court's allegedly erroneous action may be found.

"It is not the function of the appellate court to research and construct the parties' arguments." *Coleman v. Coleman*, No. 2011-00585-COA-R3-CV, 2015 WL 479830, at *9 (Tenn. Ct. App. Feb. 4, 2015) (citing *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)). "Courts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as required by Rule 27(a)(7) constitutes a waiver of the issue." *Forbess v. Forbess*, 370 S.W.3d 347, 355 (Tenn. Ct. App. 2011) (quoting *Bean v. Bean*, 40 S.W.3d 52, 55-56 (Tenn. Ct. App. 2000)); *see also Tellico Village Property Owners Ass'n, Inc. v. Health Solutions, LLC*, No. E2012-00101-COA-R3-CV, 2013 WL 362815, at *3 (Tenn. Ct. App. Jan. 30, 2013) (no perm. app. filed) (quoting *Branum v. Akins*, 978 S.W.2d 554, 557 n.2 (Tenn. Ct. App. 2001)) ("Where a party makes no legal argument and cites no authority in support of a position, such issue is deemed to be waived and will not be considered on appeal.") The appellee is entitled to fair notice of the appellate issues so as to prepare his or her response, and more importantly, "this Court is not charged with the responsibility of scouring the appellate record for any reversible error the trial court may have committed." *Owen v. Long Tire, LLC*, No. W2011-01227-COA-R3-CV, 2011 WL 6777014, at *4 (Tenn. Ct. App. Dec. 22, 2011). "It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived." *Sneed v. Bd. of Prof'l Responsibility of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010).

Finally, we note that at least some of the issues in this case were decided by bench trial. Appellant, however, failed to submit a transcript or statement of the evidence for this Court's review pursuant to Rule 24 of the Tennessee Rules of Appellate Procedure. *See* Tenn. R. Civ. P. 24(b), (c). "The appellant . . . has the burden to provide this Court with a transcript of the evidence or a statement of the evidence from which we can determine whether the evidence preponderates for or against the findings of the trial court." *In re*

M.L.D., 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005) (citing *Coakley v. Daniels*, 840 S.W.2d 367, 370 (Tenn. Ct. App. 1992). “In the absence of a transcript or statement of the evidence, we conclusively presume that the findings of fact made by the trial court are supported by the evidence and are correct.” *In re M.L.D.*, 182 S.W.3d at 895 (citing *J.C. Bradford & Co. v. Martin Constr. Co.*, 576 S.W.2d 586, 587 (Tenn. 1979)). Furthermore, while Appellant appears to take issue with the trial court’s decision to hear Mr. Griffin’s claim for possession as a bench trial rather than with the benefit of a jury, without a transcript or statement of the evidence from the hearing, we cannot discern whether Appellant objected to the bench trial procedure. *See* Tenn. R. App. P. 36(a) (“Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”).

Here, Appellant’s failure to substantially comply with Rules 24 and 27 of the Tennessee Rules of Appellate Procedure and Rule 6 of the Rules of the Court of Appeals of Tennessee renders appellate review unworkable. Appellant cites no legal authority to sustain her arguments, and none of her assertions are supported by references to the appellate record. In addition, Appellant failed to submit a transcript or statement of the evidence to this Court. Despite Appellant’s status as a self-represented party, we simply cannot allow the burden to shift to appellees to set forth why the trial court’s decisions should be upheld. *See Hessmer*, 138 S.W.3d at 904. Instead, the burden remains on the appellant to set forth a cogent argument showing where and how the trial court erred in its decision. Here, Appellant failed to meet that burden. Under these circumstances, we must conclude that the deficiencies in Appellant’s brief deprive this Court of the ability to review the trial court’s decision. This appeal is, therefore, dismissed. Costs of this appeal are taxed to Appellant Margaret Smith. Because Appellant is proceeding in *forma pauperis* in this appeal, execution may issue for costs, if necessary.

J. STEVEN STAFFORD, JUDGE