IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 8, 2023

WHEELHOUSE PARTNERS, LLC v. WILSON & ASSOCIATES, PLLC ET AL.

Appeal from the Chancery Court for Davidson County
No. 21-0968-II Anne C. Martin, Chancellor

No. M2022-00369-COA-R3-CV

This case stems from an unpaid promissory note secured by real property that was sold in foreclosure. Wheelhouse Partners, LLC ("Wheelhouse"), the beneficiary under a second deed of trust on the subject property, sued Wilson & Associates, PLLC ("Wilson"), the substitute trustee under the first deed of trust on the subject property, and James G. Akers and Deborah L. Akers (the "property owners" or, together with Wilson, "Defendants"). Wheelhouse alleged that the foreclosure sale produced excess funds sufficient to satisfy its second deed of trust and promissory note after satisfying the first deed of trust, but that Defendants refused to deliver such funds to Wheelhouse. Wheelhouse also alleged breach of contract against the property owners. Wilson interpleaded the surplus funds into the court and, following a successful motion for summary judgment, Wheelhouse was awarded the balance of its promissory note as well as its attorney's fees. Mr. Akers appeals. Because his appellate brief does not comply with Tennessee Rule of Appellate Procedure 27, his issues are waived and the lower court's judgment is affirmed. Because Wheelhouse's deed of trust clearly provides for an award of attorney's fees and Wheelhouse properly requested its appellate attorney's fees, we award Wheelhouse said fees.

Tenn. R. App. P. 3 Appeal as of Right; Judgment Affirmed; Case Remanded

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which ANDY D. BENNETT, J., and FRANK G. CLEMENT, JR., P.J., M.S., joined.

James G. Akers, Brentwood, Tennessee, Pro se appellant.

Deborah L. Akers, Brentwood, Tennessee, Pro se appellee.

Benjamin E. Goldammer, Nashville, Tennessee, for the appellee, Wheelhouse Partners, LLC.

Samuel S. High, Little Rock, Arkansas, for the appellee, Wilson & Associates, PLLC.

MEMORANDUM OPINION[1]

BACKGROUND

Wheelhouse filed its complaint against Defendants in the Davidson County Chancery Court (the "trial court") on September 27, 2021. According to the complaint, the property located at 543 Richmar Drive in Nashville, Tennessee (the "Property"), was encumbered by a first deed of trust. Wilson was the substitute trustee thereunder and, on September 8, 2021, sold the Property at foreclosure for $396,100.00. Wheelhouse alleged that the balance attached to the first deed of trust was only $182,016.80 as of the date of the sale, leaving over $214,000.00 in excess funds. Wheelhouse further alleged that its second deed of trust on the Property secured a promissory note in the principal amount of $211,000.00 issued to the property owners, which had matured on April 15, 2021 but remained unpaid in its entirety. Wilson did not release funds to satisfy the promissory note despite Wheelhouse's demand. Wheelhouse asserted claims for interpleader of the excess funds against Wilson and for declaratory judgment and breach of contract against the property owners.

By agreed order dated September 29, 2021, Wilson interpleaded into the trial court excess funds from the foreclosure sale in the amount of $214,058.25 and was dismissed from the action. Later, pursuant to another agreed order, Wilson interpleaded an additional $2,435.63 into the trial court, which it had received from the first-priority lienholder as a credit of additional foreclosure proceeds.

On November 1, 2021, the property owners moved the trial court to dismiss the complaint and to rescind the agreed order, citing, *inter alia*, the Due Process and Equal Protection clauses of the United States Constitution. On November 5, 2021, Wheelhouse moved for summary judgment against the property owners, asserting that the undisputed material facts entitled it to the principal amount of the promissory note plus court costs, expenses and attorney's fees, and prejudgment interest, and that the judgment should be

[1] Rule 10 of the Tennessee Court of Appeals Rules 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.

paid from the interpleaded funds, with the remaining balance, if any, paid to the property owners. Wheelhouse's motion for summary judgment, as well as the property owners' motion to dismiss and to rescind the agreed order concerning interpleading of funds, were set to be heard on December 17, 2021. The property owners did not appear.[2]

On December 21, 2021, the trial court entered an order denying the property owners' motion to dismiss and to rescind the agreed order concerning the interpleaded funds, finding no basis to support the requests. On January 6, 2022, the trial court entered a memorandum and order granting Wheelhouse's motion for summary judgment as to its breach of contract claim, finding that the property owners failed to submit materials demonstrating a genuine dispute as to material facts. The trial court awarded Wheelhouse the entire unpaid amount of the promissory note, prejudgment interest, and attorney's fees and expenses. The order noted that "[t]he final amount of the judgment will be determined upon the submission of an application for attorney's fees and expenses due within ten (10) days of this Order." Wheelhouse submitted its application for attorney's fees and expenses, as well as litigation costs, on January 10, 2022.

Following a hearing, the trial court entered its final order on February 17, 2022, awarding attorney's fees and expenses and court costs to Wheelhouse in the amount of $7,180.30, the total amount of the judgment against the property owners becoming $229,328.36 plus post-judgment interest at the statutory rate. The order directed the clerk and master to release the entire amount of interpleaded funds, $216,493.88, to Wheelhouse.

Mr. Akers timely appealed to this Court.[3] On March 30, 2022, the trial court entered an order allowing Mr. Akers to proceed as an indigent person on appeal.

---

[2] On December 20, 2021, the trial court entered an order denying Mr. Akers' motion for a continuance, observing that the motion was not served on Wheelhouse until the morning of the hearing and that the court itself did not receive the motion until that morning because it had been fax-filed sometime the evening before. In addition, the court found that Mr. Akers' concern with "the health risk associated with appearing in Court" was not good cause to grant the request. Pursuant to its Local Rules, the trial court proceeded to adjudicate the outstanding motions based on the filings.

[3] Mr. Akers is the only party listed in the notice of appeal, and he is the only person listed on his principal appellate brief. On October 28, 2022, the clerk of this Court entered an administrative order providing that if Mrs. Akers planned to file a brief as an appellee, she had ten days from the entry of the order to do so. *See* Tenn. R. App. P. 5(c) (noting that even "if more than one party files a notice of appeal in an action appealed to the Court of Appeals pursuant to Tenn. R. App. P. 3, the first party filing a notice of appeal shall be deemed to be the appellant"). Mrs. Akers then filed a notice with the clerk of this Court attempting to join in Mr. Akers' brief. *See* Tenn. R. App. P. 27(j) ("In cases involving multiple parties, including cases consolidated for purposes of the appeal, any number of parties may join in a single brief, and any party may adopt by reference any part of the brief of another party."). On appeal, Wheelhouse takes issue with Mrs. Akers' posture in this case and whether she is properly before this Court. However, we need not address this further in light of our conclusion that Mr. Akers' brief is deficient and the issues waived. To the extent Mrs. Akers' participation in this appeal is limited to joining Mr. Akers' appellate brief, she has also waived any issues on appeal.

ISSUES

Mr. Akers raises one issue on appeal: whether the trial court abused its discretion by entering the agreed order on September 29, 2021.[4]

In its posture as appellee, Wheelhouse asserts that it is entitled to its attorney's fees incurred on appeal.

DISCUSSION

Mr. Akers proceeds in this appeal, as he did in the trial court, pro se. While it is well within his rights to do so, "pro se litigants must comply with the same standards to which lawyers must adhere." *Watson v. City of Jackson*, 448 S.W.3d 919, 926 (Tenn. Ct. App. 2014). As we have previously explained:

> Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. 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.

Id. at 926–27 (quoting *Jackson v. Lanphere*, No. M2010-01401-COA-R3-CV, 2011 WL 3566978, at *3 (Tenn. Ct. App. Aug. 12, 2011)).

Unfortunately, Mr. Akers' brief does not comply with the procedural rules of this Court. The Tennessee Rules of Appellate Procedure provide that an appellant's brief shall contain, *inter alia,*

> (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

[4] In his statement of the issues, Mr. Akers states that the trial court abused its discretion in entering the agreed order on "10/29/21." Insofar as there is no agreed order entered on October 29, 2021 in the record, this appears to be a typo.

> (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)[.]

Tenn. R. App. P. 27(a). Per Rule 27, it is well-established that "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." *Hyatt v. Adenus Grp., LLC*, 656 S.W.3d 349, 373 (Tenn. Ct. App. 2022) (quoting *Sneed v. Bd. of Pro. Resp. of S. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010)). Indeed, "[i]t is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her[.]" *Id.*; *see also Newcomb v. Kohler Co.*, 222 S.W.3d 368, 401 (Tenn. Ct. App. 2006) ("The failure of a party to . . . construct an argument regarding his position on appeal constitutes waiver of that issue").

Here, Mr. Akers' argument section is skeletal. While it is clear that he takes issue with the disposition of the funds resulting from the foreclosure sale, his argument is not developed in any way. Rather, the bulk of the argument is a long, copied and pasted portion of the Fair Debt Collection Practices Act, with no explanation as to how the Act pertains to the September 29, 2021 agreed order. Instead, Mr. Akers claims that "in due course, [he] fully intends to enforce, *inter alia*, specific provisions and definitions" of the Act. Mr. Akers also claims that "if given the opportunity to do so, [he] would certainly have argued that the [trial court] was completely without jurisdiction to hear or adjudicate [this] case[.]" Consequently, the "argument" in Mr. Akers' brief is not a discussion of how the trial court erred in entering the agreed order at issue, but rather an amalgam of various authorities sprinkled with conclusory statements. Further compounding this problem is the absence of citations to the record. *See* Tenn. R. App. P. 27(a) (providing that the appellant's brief "*shall* contain" an argument with "appropriate references to the record"); *see also O'Shields v. City of Memphis*, 545 S.W.3d 436, 443 (Tenn. Ct. App. 2017) (issues waived due to failure to cite to the appellate record); *Murray v. Miracle*, 457 S.W.3d 399, 403 (Tenn. Ct. App. 2014) (appeal dismissed because, among other reasons, "the purported argument section of [the] brief contain[ed] no references whatsoever to the record and no citations to authorities").

"'[J]udges are not like pigs, hunting for truffles buried in briefs.'" *Coleman v. Coleman*, No. W2011-00585-COA-R3CV, 2015 WL 479830, at *9 (Tenn. Ct. App. Feb. 4, 2015) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)). While Mr. Akers clearly takes issue with the foreclosure sale, he simply has not articulated any specific error for review. *See Murray*, 457 S.W.3d at 403 ("It must be clear that a party has constructed an argument regarding his or her position on appeal; if not, the matter is subject to waiver."). Mr. Akers has failed to comply with Tennessee Rule of Appellate Procedure 27 by submitting a skeletal argument lacking appropriate citations to the record. This failure is so substantial that, notwithstanding his pro se status, it cannot be overlooked. Although we "are mindful of [his] pro se status[,]" we cannot write the brief for him or "create arguments or issues where none are otherwise set forth." *Murray*, 457 S.W.3d at

402; *see also Watson*, 448 S.W.3d at 926 (noting that "the courts must [] be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary"). Any issues Mr. Akers has attempted to raise are therefore waived, and the trial court's ruling is affirmed. Inasmuch as Mrs. Akers joined in and adopted Mr. Akers' brief in its entirety, any issues she has attempted to raise are also waived.

Next, Wheelhouse urges that it should be awarded its attorney's fees incurred on appeal. This contention is based on the language of Wheelhouse's deed of trust, which provides:

> [I]f Beneficiary employs an attorney to collect any or all of this indebtedness secured hereby or to foreclose this Deed of Trust by judicial proceedings, or authorizes Trustee to conduct Trustee's sale proceedings hereunder, Trustee and Beneficiary shall be reimbursed by Grantor, immediately and without demand, for all reasonable costs, charges and attorney's fees incurred by them or either of them in any such case, and the same shall be secured hereby as a further charge and lien upon the premises.

Wheelhouse properly raises this issue in its brief and "courts have uniformly enforced these provisions in deeds of trust providing for the collection of attorneys' fees." *Rumpf v. Home Fed. Sav. and Loan Ass'n of Upper East Tenn.*, 667 S.W.2d 479, 480 (Tenn. Ct. App. 1983) (citing *Vick v. Vick*, 398 S.W.2d 74 (Tenn. Ct. App. 1964); *Seaton v. Dye*, 37 263 S.W.2d 544 (Tenn. Ct. App. 1953)); *see also G.T. Issa Constr., LLC v. Blalock*, No. E2020-000853-COA-R3-CV, 2021 WL 5496593, at *11 (Tenn. Ct. App. Nov. 23, 2021) ("[W]hen the parties' valid and enforceable agreement requires an award of reasonable attorneys' fees to a prevailing party, appellate courts must enforce the agreement." (citing *Eberbach v. Eberbach*, 535 S.W.3d 467, 478 (Tenn. 2017))).

The trial court awarded Wheelhouse its attorney's fees pursuant to the language above. Mr. Akers does not challenge that ruling on appeal, nor does Mr. Akers make any argument in his reply brief as to why Wheelhouse is not entitled to appellate attorney's fees pursuant to the deed of trust. Because Mr. Akers did not appear at oral argument, he made no argument regarding attorney's fees then. Consequently, and because the deed of trust clearly provides for them, we conclude that Wheelhouse is entitled to an award of its reasonable appellate attorney's fees, the specific amount to be determined by the trial court on remand.

CONCLUSION

Based on the foregoing, we affirm the ruling of the Chancery Court for Davidson County, and this case is remanded for proceedings consistent with this opinion. Costs of this appeal are taxed to the appellant, James G. Akers, for which execution may issue if necessary.

_____

KRISTI M. DAVIS, JUDGE