

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001702-MR

FILED
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MELISSA MAY

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 13-CI-00365

CONTINENTAL TOWERS
CONDOMINIUM ASSOCIATION, (CTA), ET AL.

APPELLEES

ORDER DENYING PETITION FOR REHEARING

*** * * * *

BEFORE: COMBS, MAZE AND STUMBO, JUDGES

Having considered the Petition for Rehearing and the Response thereto, and being sufficiently advised, the COURT ORDERS that the petition be, and it is hereby, DENIED.

ENTERED: 7-7-17

Jane L. Combs
JUDGE, COURT OF APPEALS

CB

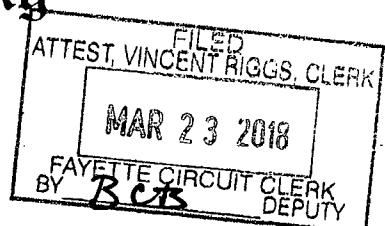
RELEASERED: MARCH 31, 2017; 10:00 A.M.
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FINAL Commonwealth of Kentucky
Court of Appeals

MAR 21 2018

NO. 2014-CA-001702-MR

DATE



MELISSA MAY

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v.
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 13-CI-00365

CONTINENTAL TOWERS CONDOMINIUMS
ASSOCIATION (CTCA); CONTINENTAL TOWERS
CONDOMINIUMS (CTC); SOUTHEASTERN
MANAGEMENT CO. (SMC); AND
GUY COLSON

APPELLEES

OPINION
AFFIRMING

BEFORE: COMBS, MAZE, AND STUMBO, JUDGES.

MAZE, JUDGE: Melissa A. May (May) brings this appeal from a foreclosure judgment and order of sale by Fayette Circuit Court foreclosing based upon a lien held by Continental Towers Condominiums Association ("Continental Towers"). Because we hold that May has failed to raise any issues on appeal in her prehearing

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statement, present any of the issues in her appeal to the circuit court, or allege any sufficient grounds for relief, we affirm.

Facts

May owned a condominium unit in a building located at 2121 Nicholasville Road in Lexington. The property was subject to a “Master Deed” and the by-laws of the Continental Towers. May leased this unit to Frank Blevins. In 2011, Blevins was arrested for possession of a controlled substance in the first degree, possession of drug paraphernalia and being a persistent felony offender in the first degree. After the police found that Blevins had allegedly been involved in the production of methamphetamine, the Lexington-Fayette Health Department posted a notice stating that the unit was contaminated, which required a professional decontamination before the Health Department would deem it safe for occupancy.

The Health Department instructed Continental Towers to install a deadbolt on the unit’s door in order to limit public access into the property until the Health Department cleared it for entry. The Lexington Police also notified May that hazardous chemicals had been seized from the residence, and that it was her responsibility to have the property decontaminated. Continental Towers notified May that a key to the property was being kept at its office. She did not contact

contractors to clean up the property until over a year after she had received the letter informing her that it was her responsibility to decontaminate the property.

From July 2011 until April 2013, May ceased making her monthly assessment payments to Continental Towers; she made sporadic payments thereafter. By July 1, 2014, May owed Continental Towers \$26,996.68 in unpaid fees. Continental Towers also expended money to determine the amount of methamphetamine in the unit and the impact its presence had on the other units.

After notifying May that it had acquired a lien on the property through her delinquent payments, Continental Towers commenced this foreclosure action. May filed a counterclaim, alleging that Continental Towers improperly deprived her of access to her property and requesting damages. The trial court granted summary judgment in favor of Continental Towers on its claim and on May's counterclaim because May failed to make any cognizable legal argument. We affirm.

Analysis

May makes four arguments on appeal: 1) KRS 381.9111 mandates that her property be treated the same as other types of property, and that therefore she was improperly prevented from entering it; 2) under KRS 381.9175, the burden was entirely on her to maintain and repair the property; 3) under KRS 381.870, the amount of her fees should have been abated because the property was

uninhabitable; and 4) KRS 514.030 forbids exercising control over another's property with the intent to deprive the true owner thereof.

In reviewing motions for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor.

Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480-482 (Ky. 1991);

Leslie v. Cincinnati Sub-Zero Prods., Inc., 961 S.W.2d 799, 804 (Ky. App. 1998).

“An appellate court need not defer to the trial court’s decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved.” *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004). The trial court “must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.” *Steelvest*, 807 S.W.2d at 480. “[T]he hope that something will come to light in additional discovery is not enough to create a genuine issue of material fact.” *Benningfield v. Pettit Envtl., Inc.*, 183 S.W.3d 567, 573 (Ky. App. 2005).

Continental Towers argues that May failed to identify any of the issues she raises on appeal in her prehearing statement. CR¹ 76.03(8) provides that “[a] party shall be limited on appeal to issues in the prehearing statement except that

¹ Kentucky Rules of Civil Procedure.

when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.” This Court has previously stated that the failure to raise an issue in the prehearing statement precludes our review of that issue. *Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004). We recognize that “[i]t has long been the rule in this Commonwealth that an appellant is limited to arguing the issues listed in his prehearing statement[.]” *Mullins v. Ashland Oil, Inc.*, 389 S.W.3d 149, 154 (Ky. App. 2012).

On August 27, 2015, this Court ordered May’s prehearing statement and all attempted supplements to be stricken for failure to comply with CR 76.03. This order directed May to file a new prehearing statement within thirty days from entry of that order, and permitted her to file any supplemental statement within ten days from the filing of a proper prehearing statement. She filed a new prehearing statement on September 29, 2015. However, the prehearing statement did not identify any of the issues that she raises in her brief. Furthermore, although we acknowledge that May is proceeding *pro se*, we note the extended period of time that May had in order to file a proper prehearing statement. There is simply no excuse for May not to have filed a prehearing statement listing all of the issues she planned on raising in her appeal during that length of time, particularly considering the extensions which this Court has granted to her.

Furthermore, we also agree with Continental Towers that May failed to present any of the issues she raised in her brief to the trial court. “An appellate court ‘is without authority to review issues not raised in or decided by the trial court.’” *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011), quoting *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009). Given May’s multiple failures to preserve these issues, we must conclude that she is not entitled to appellate review of those arguments.

Conclusion

Accordingly, we affirm the Fayette Circuit Court’s judgment and order of sale.

ALL CONCUR.

BRIEF FOR APPELLANT:

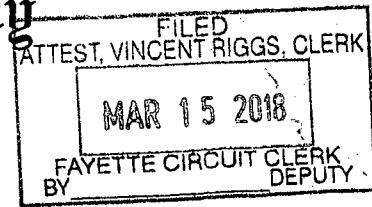
Melissa A. May, *pro se*
Lexington, Kentucky

BRIEF FOR APPELLEES:

Guy R. Colson
Christopher G. Colson
Lexington, Kentucky

Supreme Court of Kentucky

2017-SC-000379-D
(2014-CA-001702)



MELISSA MAY

MOVANT

v.

FAYETTE CIRCUIT COURT
2013-CI-00365

CONTINENTAL TOWERS CONDOMINIUM
ASSOCIATION, ET AL.

RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

The Respondents' motion to strike is denied as moot.

ENTERED: March 14, 2018.

A handwritten signature in black ink, appearing to read "John D. Hartman". Below the signature, the words "CHIEF JUSTICE" are printed in capital letters.

OB