

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 25, 2006

JOHN LYKINS, ET AL. v. KEY BANK USA, NA, ET AL.

**Appeal from the Chancery Court for Washington County
No. 35595 G. Richard Johnson, Chancellor**

No. E2005-01572-COA-R3-CV - FILED AUGUST 29, 2006

John Lykins and Cathy Lykins (“the plaintiffs”) entered into a lease-to-purchase agreement for real property owned by Martha Sadler. The plaintiffs took possession of a house on the property and began making Sadler’s mortgage payments to the defendant Key Bank, USA, NA (“the bank”). Later, Martha Sadler died. Thereafter, the plaintiffs had discussions with the administratrix of Sadler’s estate. They reached an understanding with her regarding the property. The plaintiffs claim that when they tried to secure financing to purchase the property, they were informed that Sadler owed the bank more than the administratrix had indicated. The plaintiffs ceased making payments in October, 2003. While they were attempting to ascertain exactly how much was owed on the mortgage, the bank initiated foreclosure proceedings and sold the house. The plaintiffs filed suit and obtained an injunction prohibiting the bank from evicting the plaintiffs pending a hearing. Approximately 11 months later, the trial court dismissed the plaintiffs’ complaint with prejudice based upon a finding that the plaintiffs had failed to respond to discovery requests and had failed to prosecute their action. The plaintiffs appeal. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Michael D. Kellum, Johnson City, Tennessee, for the appellants, John Lykins and Cathy Lykins.

Lawrence W. Kelly, Atlanta, Georgia, for the appellees, Key Bank, USA, NA, and Premiere Asset Services.

OPINION

I.

On July 7, 2004, the plaintiffs filed a complaint and petition for temporary injunction in the trial court. The plaintiffs sued several defendants including the bank, Premiere Asset Services (“Premiere”),¹ and Marsha VanDyke, administratrix of the estate of Martha Sadler (“the administratrix”). The plaintiffs alleged that, prior to Martha Sadler’s death, they had entered into a lease-to-purchase agreement with her pertaining to a house and lot owned by Sadler in Johnson City. Pursuant to this agreement, the plaintiffs took possession of the house and began making Sadler’s monthly mortgage payments to the bank. After Sadler died, the plaintiffs and the administratrix entered into an agreement for the plaintiffs to purchase the property, with that agreement being presented to and approved by the Washington County General Sessions Court, Probate Division. According to the agreement approved by the general sessions court, the plaintiffs were to pay \$89,103.91 for the property. Of this amount, \$70,540.03 was to be used to pay off the mortgage owed to the bank. The remaining balance was to be used to pay other debts of the estate.

The plaintiffs claim that, in reliance on their agreement with the administratrix, they expended approximately \$15,000 in improvements to the house. They claim that, when they sought financing to purchase the property, they learned that the bank was owed more than the \$70,540.03 alluded to in their agreement with the administratrix. The plaintiffs allege that they attempted to contact the bank, but their calls were not returned. The plaintiffs claim that, due to problems they were experiencing and their inability to communicate with the bank, they ceased making their monthly mortgage payments in October, 2003. Two months later, the plaintiffs were informed by the attorney for Sadler’s estate that a deed conveying the property had been executed. As a result of this communication, the plaintiffs believed that the problem had been resolved. As a consequence of this belief, the plaintiffs again sought financing to purchase the house. However, the bank again indicated that more was owed on the property than the \$70,540.03 figure. The plaintiffs then claimed that, while they were in the process of trying to ascertain exactly how much the bank was owed, the bank initiated foreclosure proceedings and the property was sold in March, 2004. The plaintiffs sought and received a temporary injunction enjoining the bank and Premiere from evicting the plaintiffs from the house pending a hearing on the merits.

The bank, Premiere, and the administratrix filed answers to the complaint, generally denying much of the pertinent allegations or averring that they lacked sufficient knowledge to either admit or deny same. All of these defendants denied any liability to the plaintiffs. On April 18, 2005, the trial court notified the parties that the case had been set for trial on June 6, 2005.

On May 31, 2005, the administratrix filed a witness and exhibit list pursuant to the trial court’s local rule 8.01(c). On June 1, 2005, the bank and Premiere also filed a witness and exhibit list pursuant to the same rule. The next document in the record is an order entered on June 14, 2005, dismissing the entire case. The order states as follows:

¹ According to the complaint, Premiere Asset Services “is an agent of Defendant Key Bank for the purpose of initiating eviction proceedings for Key Bank.”

This cause came to be heard on the 1st day of June, 2005 on various Motions of Defendants Marsha Van Dyke, Key Bank and Premiere Asset Services. The Court finds that the request for involuntary dismissal in accordance with Rule 41.02 of the Tennessee Rules of Civil Procedure is well taken. The Plaintiffs have failed to take any affirmative steps to prosecute their claims since filing the Complaint in July, 2004 and their actions constitute an abuse of the discovery rules and an abuse of the duty to prosecute their complaint. It is therefore:

ORDERED, ADJUDGED and DECREED that the Complaint is hereby dismissed with prejudice to refile in accordance with Rule 41.02 of the Tennessee Rules of Civil Procedure....

With the exception of a \$500 injunction bond, the record on appeal contains no pleadings or other documents which purport to have been filed by the plaintiffs in between the filing of their complaint on July 7, 2004, and the filing of their notice of appeal, an event that occurred one year later on July 7, 2005. After the plaintiffs filed a notice of appeal, pursuant to motion we granted the plaintiffs an extension of time to prepare a statement of the evidence. There apparently was some disagreement regarding the contents of the statement of the evidence as prepared by counsel for the plaintiffs. We entered an order directing the trial court "to determine the appropriate statement of the evidence for consideration on appeal in accordance with Tenn. R. App. P. 24(c) and (e)." The trial court did as instructed and approved a statement of the evidence which provides, in its entirety, as follows:

This motion hearing was heard on June 1, 2005. The motions before the Court were defendants', Marsha VanDyke and Key Bank's Motions to "Compel and/or for Sanctions" and these same defendants' motions to "*Deem Admitted her First Request for Admissions to Plaintiffs.*"

This cause was filed on July 7, 2004. Plaintiffs were attempting to purchase realty from the Estate of Martha Sadler, the defendant, Marsha VanDyke being the Administratrix of this estate. On or about February 18, 2004, the defendant, Key Bank advised plaintiffs that the decedents [sic] promissory note, secured by a deed of trust on the realty plaintiffs desired to purchase was in the approximate sum of \$72,000.00 which sum would have to be paid if plaintiffs desired to purchase the subject realty. Key Bank, as a courtesy, advised plaintiffs on or about February 21, 2004, that the decedents [sic] promissory note was in default and foreclosure would occur on or about March 25, 2004. Pursuant to plaintiffs [sic] request, this Court entered a Temporary Restraining Order on July 7, 2004 prohibiting the foreclosure sale so the Court could consider plaintiffs [sic] alleged contract to purchase which was allegedly negotiated with the Sadler Estate in the General Sessions

Probate Court of Washington County, Tennessee. Plaintiffs alleged that the Sadler estate had violated the agreement to purchase by stating one sum for purchase and Key Bank stating a higher sum purchase per the sum on its promissory note.

Key Bank responded by providing its promissory note and deed of trust and requested it be permitted to foreclose. Administratrix Marsha VanDyke responded by disputing its alleged violation of the contract. Administratrix VanDyke alleged there was no contract between the estate and the plaintiffs but rather the plaintiffs were relying on a "Plan of Distribution" (POD) approved by the General Sessions Probate Court. The Administratrix further alleged that as an element of the POD, plaintiffs were to pay \$89,103.91 for the subject realty, but plaintiffs never paid this sum or any sum for the purchase of the realty.

On March 3, 2005, Defendant, Administratrix VanDyke, filed her first set of "*Interrogatories*" to plaintiffs and her first set of "*Request for Admissions.*" Administratrix VanDyke wrote plaintiffs on April 4, 2005 requesting a reply to the discovery. The plaintiffs did not reply. On May 17, 2005, plaintiffs promised VanDyke that the responses would be delivered to her that date. The responses were not delivered as promised. On May 18, 2005, plaintiffs promised VanDyke that the responses would be faxed to her that day. On May 18, 2005, VanDyke received a response to her Request for Admissions but same were not signed by plaintiffs or their counsel. TRCP 36.01. No response was made to this defendants [sic] "*Interrogatories*". Plaintiffs never answered VanDyke's discovery request. Defendant, Key Bank served its "*First Request for Admissions, First Request for Production of Documents and First Set of Interrogatories*" on plaintiffs on November 15, 2004. Plaintiffs did not timely respond. On May 18, 2005, Key Bank requested plaintiffs to respond to its discovery request. Plaintiffs did not respond. Plaintiffs never responded to Key Bank's discovery request.

On April 18, 2005, the Court notified the parties that the cause was set for trial on the merits on June 6, 2005.

On May 31, 2005, plaintiffs filed a "*Response to Motions to Compel*". The response does not answer the discovery request of defendants, Administratrix VanDyke and Key Bank, but rather gives excuses for failure to respond to the defendants [sic] request and ask[s] the Court for "... 48 hours to respond to all discovery request[s]." The plaintiffs' responses to the defendants' discovery

request were not filed with the Court or delivered to defendants within 48 hours or at any other time.

Plaintiffs were noticed into court by the defendants for a June 1, 2005 hearing on defendants' motions. As of the date of the motions hearing, the plaintiffs still had not responded to the defendants [sic] discovery request. Furthermore, plaintiffs had not filed their witness and exhibit list (required by Local Rule 8.01C to be filed five days prior to the trial date) in spite of the trial date of June 6, 2005. The defendants had filed their witness list and exhibit list pursuant to the local rule.

The Court found that the plaintiffs had taken no affirmative steps of any nature whatsoever (other than filing the Complaint) to prepare and present this cause for trial on June 6, 2005. The Court further found that plaintiffs had failed to timely or untimely respond to defendants [sic] discovery request. The Court found that plaintiffs were abusing the discovery process and that the plaintiffs had failed to prosecute their claim. (Ftn. 1. In plain vernacular, the plaintiffs were jerking the defendants around without a hint of going to trial. Circumstantially, it appears that the plaintiffs desire to remain as residents of the subject realty without payment for their occupancy.).

The Court sanctioned the plaintiffs by dismissing their Complaint based upon their failure to respond to discovery, their failure to prosecute and their failure to follow the Local Rules. T.R.C.P. 37.02, T.R.C.P. 41.02, Local Rule 8.01(c).

*Clerk and Master, enter Statement of Evidence into the appellate record in this cause and mail a copy of the attached to counsel of record.

(Emphasis in original; footnote in original).

II.

The plaintiffs appeal, raising as their *sole* issue whether the trial court erred or abused its discretion when it involuntarily dismissed their complaint with prejudice for failing to file sworn discovery responses. The plaintiffs make no issue as to the dismissal for failure to prosecute.

III.

At the outset, we are compelled, reluctantly, to discuss the plaintiffs' brief and its many deficiencies. The trial court dismissed the plaintiffs' complaint for two reasons. The first reason can be found in the statement of the evidence wherein the court stated that the complaint was

dismissed because the plaintiffs failed “to respond to discovery,” specifically referencing Tenn. R. Civ. P. 37.02. The second reason for the dismissal was the trial court’s determination that the plaintiffs had failed to prosecute their case. This latter basis for dismissal was referenced in the order dismissing the case as well as the statement of the evidence. Specifically, the order states that the “[c]ourt finds that the request for involuntary dismissal in accordance with Rule 41.02 of the Tennessee Rules of Civil Procedure is well taken.” The statement of the evidence states that the plaintiffs were being sanctioned with the dismissal of their complaint for “their failure to prosecute,” again referencing Tenn. R. Civ. P. 41.02.

The sole issue raised in the plaintiffs’ brief is whether the trial court erred when it dismissed their complaint with prejudice for failing to timely file sworn discovery responses. In the argument section of the plaintiffs’ brief, which is one and a half pages long, the plaintiffs cite only to Tenn. R. Civ. P. 37.02 which addresses discovery sanctions. Nowhere in the plaintiffs’ brief do they raise the issue of whether the trial court properly dismissed their complaint pursuant to Tenn. R. Civ. P. 41.02 based upon their failure to prosecute. Tenn. R. Civ. P. 41.02 is not cited anywhere in the plaintiffs’ brief. Furthermore, the plaintiffs do not cite or discuss any cases involving the propriety of an involuntary dismissal pursuant to Tenn. R. Civ. P. 41.02.

In addition to the foregoing, there is not one single citation to the record anywhere in the plaintiffs’ brief. Tenn. R. App. 27(a)(6) clearly requires that an appellant’s brief is to contain a “statement of facts, setting forth the facts relevant to the issues presented for review *with appropriate references to the record.*” (Emphases added). We further note Rule 6(b) of the Rules of the Court of Appeals which states that

[n]o 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.

In *Bean v. Bean*, 40 S.W.3d 52 (Tenn. Ct. App. 2000), this Court was confronted with similar deficiencies in a brief, including the failure to comply with Tenn. R. App. P. 27, and Rules 6 and 15 of the Rules of the Court of Appeals.² We dismissed the appeal, stating:

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. *See State v. Schaller*, 975 S.W.2d 313, 318 (Tenn. Crim. App. 1997); *Rampy v. ICI Acrylics, Inc.* 898 S.W.2d 196, 210 (Tenn. Ct. App. 1994); *State v. Dickerson*, 885 S.W.2d 90, 93 (Tenn. Crim. App. 1993). Moreover, an issue is waived where it is simply raised without any argument regarding its merits. *See Blair v. Badenhope*, 940 S.W.2d 575, 576-577

² Former Rule 15 pertains to items that were required in briefs of certain domestic relations cases. Rule 7 now addresses that requirement.

(Tenn. Ct. App. 1996); *Bank of Crockett v. Cullipher*, 752 S.W.2d 84, 86 (Tenn. Ct. App. 1988).

Because of the numerous deficiencies in Appellant's brief, we decline to address the issues raised. As noted in *England v. Burns Stone Company, Inc.*, 874 S.W.2d 32, 35 (Tenn. Ct. App. 1993), parties cannot expect this court to do its work for them. This Court is under no duty to verify unsupported allegations in a party's brief, or for that matter consider issues raised but not argued in the brief. *Duchow v. Whalen*, 872 S.W.2d 692, 693 (Tenn. Ct. App. 1993) (citing *Airline Const. Inc., v. Barr*, 807 S.W.2d 247 (Tenn. Ct. App. 1990)).

For the foregoing reasons we dismiss this appeal with costs of the appeal assessed to appellant.

Bean, 40 S.W.3d at 55, 56. We have relied upon the analysis in *Bean* in subsequent cases to reach similar results when issues were not properly addressed or presented in briefs. See *Walker v. Huff*, No. E2005-01096-COA-R3-CV, 2006 WL 721308 (Tenn. Ct. App., E.S., filed March 22, 2006), *no appl. perm. appeal filed*; *Ray v. Ray*, No. E2004-01622-COA-R3-CV, 2005 WL 1981801 (Tenn. Ct. App., E.S., filed August 16, 2005), *no appl. perm. appeal filed*.

In order for the plaintiffs to ultimately succeed on their appeal, they would have to demonstrate that the trial court committed reversible error when it dismissed the complaint as a discovery sanction, *and* that the trial court erred when it dismissed the complaint for failure to prosecute. If we were to agree with the trial court's judgment on either of the two bases, then the judgment of the trial court would have to be affirmed. Thus, even if the plaintiffs are correct that the trial court abused its discretion when it dismissed the complaint as a discovery sanction, we would still affirm the trial court's judgment absent a showing that the trial court also abused its discretion when it dismissed the complaint for failure to prosecute. Because the plaintiffs only raise the discovery sanction issue, it would be an exercise in futility for us to discuss the merits of that issue in detail since we would have to affirm the trial court's judgment regardless of whether that issue had merit. For the foregoing reasons, and particularly considering the deficiencies in the plaintiffs' brief, we consider the one issue raised by plaintiffs to be waived. Having said all of this, we hasten to add that our review of the skimpy record before us does not reflect that the trial court abused its discretion in dismissing the plaintiffs' complaint on either of the two bases relied upon by that court.

IV.

The judgment of the trial court is affirmed and this cause is remanded to the trial court for collection of costs assessed below. Costs on appeal are taxed to the appellants, John Lykins and Cathy Lykins, for which execution may issue.

CHARLES D. SUSANO, JR., JUDGE