

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

TREASURER OF CUYAHOGA :
COUNTY, OHIO, :
 : No. 108240
Plaintiff-Appellee, :
 :
v. :
 :
DURHAM CONSTRUCTION TRADE :
INSTITUTE, ET AL., :
 :
Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 10, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-886043

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Hannah Singerman, Assistant Prosecuting
Attorney, *for appellee.*

James Alexander, Jr., Esq., L.L.C., and James Alexander,
Jr., *for appellant.*

EILEEN A. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant Durham Construction Trade Institute
("Durham Construction") appeals from the trial court's judgment in favor of

plaintiff-appellee the treasurer of Cuyahoga County (the “treasurer”) for foreclosure on its lien for delinquent taxes. Durham Construction contends that (1) the trial court erred because it failed to make a determination of the amount of taxes owed on its property, (2) the trial court erred in finding any tax delinquency because Durham Construction was tax exempt and did not receive notice that its property would be taxed and (3) it was denied due process because it was not given notice of the tax hearing. For the reasons that follow, we affirm.

Procedural and Factual Background

{¶ 2} On September 18, 2017, the treasurer filed a complaint for “collection of delinquent taxes, assessments, penalties and interest, foreclosure and equitable relief” pursuant to R.C. 323.25 and/or 5721.18(A). The complaint alleged that a delinquent land certificate (the “delinquent land certificate”) had been certified by the Office of the Fiscal Officer and filed with the treasurer with respect to property located at 7100 Kinsman Road in Cleveland (the “property”), which was owned by Durham Construction. A copy of the delinquent land tax certificate, dated October 26, 2015, was attached to the complaint and indicated that taxes had not been paid on the property for a period of one year and that the unpaid taxes, penalties and assessments on the property then totaled \$28,561.42. The complaint further alleged that the county’s lien for delinquent taxes constituted a “good and valid first lien on the property” and that Durham Construction, the Ohio Bureau of Workers’ Compensation, the Ohio Department of Job and Family Services, the United States of America, the Ohio Department of Taxation and The Illuminating

Company had or claimed to have some interest in or lien on the property but that those interests or liens were “inferior and subsequent” to the county’s lien.

{¶ 3} The Ohio Bureau of Workers’ Compensation, the Ohio Department of Job and Family Services, the United States of America, the Ohio Department of Taxation and The Illuminating Company all filed answers to the complaint setting forth their interests in the property. Durham Construction did not file an answer to the complaint.

{¶ 4} A tax hearing was held before a magistrate on November 16, 2018.¹ The notice scheduling the hearing, issued on October 30, 2018, stated that “[f]ailure to appear may result in dismissal of the claims or an entry of judgment.” Durham Construction did not appear for the hearing.

{¶ 5} At the conclusion of the hearing, the magistrate issued a journal entry stating: “Based on the evidence presented, including the delinquent land certificate attached to the complaint, plaintiff is entitled to a decree of foreclosure. A magistrate’s decision setting forth findings of fact and conclusions of law will issue forthwith.”

{¶ 6} On December 28, 2018, the magistrate issued a written decision. The magistrate found that all necessary parties had been properly served, that the proceedings complied with R.C. Chapter 5721 and that the treasurer was due \$28,561.42 as set forth in the delinquent land tax certificate, plus all taxes,

¹ A transcript from the hearing is not part of the record on appeal.

assessments, penalties and interest accruing between the date of the delinquent land certificate and the date of confirmation of the sheriff's sale, and the costs of the proceeding. The magistrate also recommended foreclosure of the property. The magistrate found that the Ohio Bureau of Workers' Compensation, the Ohio Department of Job and Family Services, the United States of America, the Ohio Department of Taxation and The Illuminating Company all claimed some right, title, interest, claim or lien on the property, that any such right, title, interest, claim or lien was inferior and subsequent to the county's lien and that such rights, title, interests, claims or liens would be transferred to the proceeds derived from the sale of the property after payment of the costs of the action and the amount due the treasurer. No objections were filed to the magistrate's decision.

{¶ 7} On January 25, 2019, the trial court adopted the magistrate's decision and entered a decree of foreclosure in favor of the treasurer.

{¶ 8} On February 25, 2019, Durham Construction (1) appealed the trial court's judgment and (2) filed a motion for relief from judgment pursuant to Civ.R. 60(B).

{¶ 9} In its Civ.R. 60(B) motion, Durham argued that it was entitled to relief from judgment under Civ.R. 60(B)(1), (4) and (5) because (1) its motion was timely filed, (2) it had a meritorious defense, i.e., as a registered 501(c)(3) nonprofit organization it was tax exempt and owed no property taxes, and (3) it would have brought the "mistake" to the county and the trial court's attention and responded to the lawsuit were it not for its "financial and procedural burdens which reasonably

gave rise to not learning of the filing until the very last minute.” In support of its motion, Durham Construction submitted an unnotarized affidavit from its president, Quinton Durham (“Durham”). In his affidavit, Durham averred that Durham Construction was a nonprofit, tax-exempt, charitable 501(c)(3) organization, that when Durham Construction acquired the property in 2012 from the Garden Valley Neighborhood Center, the property’s tax-exempt use was recognized and the property taxes were \$0 and that after Durham Construction acquired the property, it maintained many of the programs that had been operated by the property’s prior owner. Durham further averred that in 2013, taxes were “mistake[nly]” and “incorrect[ly]” assessed against the property “without any notice or explanation for the change,” that the tax delinquency upon which the foreclosure action was based was “entirely a mistake and misunderstanding” and that “the organization has been beleaguered with keeping its doors open to such an extent that it missed the existence of this proceeding only out of excusable neglect.”

{¶ 10} In March 2019, the trial court issued an order that the property be sold at a sheriff’s sale on April 1, 2019. The court set a second sheriff’s sale, if necessary, for April 15, 2019.

{¶ 11} Durham Construction filed for bankruptcy. The order of sale was returned without execution and the appeal was stayed during the pendency of the bankruptcy proceedings. On January 6, 2020, Durham Construction filed a notice of termination of bankruptcy with this court, and the stay was lifted.

{¶ 12} On January 30, 2020, this court, sua sponte, upon agreement of the parties, remanded the matter to the trial court for a ruling on Durham Construction's motion for relief from judgment. On remand, the trial court denied the motion. The trial court found that Durham Construction had failed to establish that it had a meritorious defense because it was on notice that the property was being taxed, yet took "no action to remedy or to restore" the property's tax-exempt status and, instead, "merely permitted the unpaid taxes to accrue." The trial court further found that even if Durham Construction could establish a meritorious defense, it had not shown that it was entitled to relief under Civ.R. 60(B)(1), (4) or (5). The trial court noted that although Durham Construction claimed it was not aware the lawsuit had been filed, the docket showed that Durham Construction had been served with the complaint on December 7, 2017, that it had been served with copies of the treasurer's filings throughout the case and that it had been sent a copy of the magistrate's decision. Accordingly, the trial court found no "excusable neglect" under Civ.R. 60(B)(1). The trial court further found that Durham Construction had presented no evidence that "the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application" as required for relief under Civ.R. 60(B)(4) and that it had failed to demonstrate "any substantial grounds" that would entitle it to relief under the catchall, Civ.R. 60(B)(5). The trial court also noted that the affidavit submitted with Durham Construction's motion was not notarized and, therefore, had "no evidentiary value."

{¶ 13} Durham Construction did not appeal the trial court’s denial of its motion for relief from judgment.

{¶ 14} On April 13, 2020, pursuant to an administrative order of this court, all foreclosure cases were stayed through May 31, 2020. In June 2020, the stay was lifted, and the appeal proceeded.

{¶ 15} Durham raises the following four assignments of error for review:

Assignment of Error I: The trial court erred as a matter of law by failing to determine the amount of the delinquent tax pursuant to ORC § 5721.25.

Assignment of Error II: The trial court erred as a matter of law by finding a tax delinquency in violation of ORC § 5715.12.

Assignment of Error III: The trial court erred as a matter of law by finding a tax delinquency on a property exempt from property tax pursuant to ORC 5709.12(B).

Assignment of Error IV: The trial court erred in depriving appellant of due process.

Law and Analysis

{¶ 16} In its first assignment of error, Durham Construction contends that the trial court’s judgment entry was deficient under R.C. 5721.25 because the trial court did not determine the specific amount of “taxes, assessments, penalties, interest, and charges then due and unpaid.” In its second and third assignments of error, Durham Construction argues that the trial court erred in finding any tax delinquency because Durham Construction was tax exempt, the property had previously been tax exempt and “the record is devoid of any evidence” that Durham Construction was given notice under R.C. 5715.12 that the property would be taxed.

In its fourth assignment of error, Durham Construction asserts that it was denied due process because “the record is silent as to any notice to appellant as [to] the November 16, 2018 tax hearing.”

{¶ 17} Durham Construction did not file any objections to the magistrate’s decision. In matters referred to a magistrate, Civ.R. 53(D)(3)(b) imposes an affirmative duty on parties to submit timely, specific, written objections to the trial court, identifying any error of fact or law in the magistrate’s decision. *See, e.g., Wells Fargo Bank, N.A. v. Lundeen*, 8th Dist. Cuyahoga No. 107184, 2020-Ohio-28, ¶ 11; *Huntington Natl. Bank v. Blount*, 8th Dist. Cuyahoga No. 98514, 2013-Ohio-3128, ¶ 11. Civ.R. 53(D)(3)(b)(iv) provides that “[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court’s adoption of any factual finding or legal conclusion * * * unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).” Thus, when a party fails to properly object to a magistrate’s decision in accordance with Civ.R. 53(D)(3)(b), it forfeits the right to assign those issues as errors on appeal. *U.S. Bank, N.A. v. Matthews*, 8th Dist. Cuyahoga No. 105011, 2017-Ohio-4075, ¶ 14; *see also Lundeen* at ¶ 11 (“[O]ne cannot object to an error on appeal that was not raised to the trial court who adopted a magistrate’s decision.”), quoting *Naple v. Bednarik*, 7th Dist. Mahoning No. 11 MA 121, 2012-Ohio-5881, ¶ 34. A notice to this effect, as required by Civ.R. 53(D)(3)(a)(iii), was included in boldface type on the magistrate’s decision sent to Durham Construction on December 28, 2018.

{¶ 18} Because Durham Construction did not timely and specifically object to any factual finding or legal conclusion in the magistrate’s decision, it has forfeited appellate review of all but plain error. Civ.R. 53(D)(3)(b)(iv); *Barker Invs., L.L.C., v. Cleveland Plating, L.L.C.*, 8th Dist. Cuyahoga No. 107367, 2019-Ohio-2435, ¶ 13.

{¶ 19} “Plain errors are errors in the judicial process that are clearly apparent on the face of the record and are prejudicial to the appellant.” *Lundeen* at ¶ 12, quoting *Macintosh Farms Community Assn., Inc. v. Baker*, 8th Dist. Cuyahoga No. 102820, 2015-Ohio-5263, ¶ 8. When applying the plain error doctrine in the civil context, reviewing courts “must proceed with the utmost caution.” *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). The doctrine is limited to those “extremely rare cases” in which “exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a materially adverse effect on the character of, and public confidence in, judicial proceedings.” *Id.* Plain error exists only where the error “seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.” *Id.* at 122-123. “The plain error doctrine should never be applied * * * to allow litigation of issues which could easily have been raised and determined in the initial trial.” *Id.* at 122. Durham Construction has not demonstrated plain error in this case.

Trial Court's Alleged Failure to Determine the Amount of Tax Due

{¶ 20} In support of its contention that the trial court erred in failing to determine the specific amount of delinquent tax due on the property, Durham Construction cites R.C. 5721.25 and this court's decision in *Rokakis v. Bowman*, 8th Dist. Cuyahoga No. 92950, 2010-Ohio-4666.

{¶ 21} R.C. 5721.25 involves the right to redeem delinquent land subject to foreclosure for nonpayment of taxes. It provides, in relevant part:

After a foreclosure proceeding has been instituted under Chapter 323. or this chapter of the Revised Code with respect to delinquent land, but before the filing of an entry of confirmation of sale pursuant to the proceeding or before the expiration of the alternative redemption period as may apply under section 323.78 of the Revised Code, any person entitled to redeem the land may do so by tendering to the county treasurer an amount sufficient, as determined by the court, to pay the taxes, assessments, penalties, interest, and charges then due and unpaid, and the costs incurred in any proceeding instituted against such land under Chapter 323. or this chapter of the Revised Code, and by demonstrating that the property is in compliance with all applicable zoning regulations, land use restrictions, and building, health, and safety codes.

There is nothing in the record to suggest that Durham Construction filed a motion for redemption or otherwise sought to exercise a right of redemption with respect to the property.

{¶ 22} In *Bowman*, a property owner appealed from a judgment that found a tax delinquency on a parcel of property and ordered foreclosure of the property in order to satisfy the county's tax lien. 2010-Ohio-4666 at ¶ 1. The county treasurer had filed a complaint seeking collection of \$17,869.86 in delinquent taxes (plus penalties and interest) and a decree of foreclosure in order to satisfy the amounts

due and unpaid. *Id.* at ¶ 2. A magistrate heard the matter and found that property taxes were “due and unpaid” along with money payable for assessments, penalties and interest, that the county had “a good and valid first lien against the parcel” and that the lien should be foreclosed. *Id.* at ¶ 3, 6. The magistrate’s decision did not specify the amount of taxes, assessments, penalties and interest that were due and unpaid and there was no delinquent tax certificate in the record. *Id.* at ¶ 6.

{¶ 23} The property owner objected to the magistrate’s decision on, among other grounds, that the decision failed to state the amount of taxes due. *Id.* at ¶ 4. The trial court overruled the property owner’s objections, adopted the magistrate’s decision and ordered foreclosure of the property. *Id.* On appeal, the property owner argued that the trial court’s judgment should be reversed because the trial court had failed to make a determination of the amount of taxes owed on the property. *Id.* at ¶ 1, 5. This court held that because the trial court “failed to set forth an ascertainable amount of tax due in its judgment entry,” there was no final, appealable order under R.C. 2505.02 and dismissed the appeal for lack of jurisdiction. *Id.* at ¶ 5, 7, 9. This case is distinguishable.

{¶ 24} R.C. 5721.19(A) states, in relevant part:

In its judgment of foreclosure rendered with respect to actions filed pursuant to section 5721.18 of the Revised Code, the court * * * shall enter a finding with respect to each parcel of the amount of the taxes, assessments, charges, penalties, and interest, and the costs incurred in the foreclosure proceeding instituted against it, that are due and unpaid.

{¶ 25} In this case, the trial court’s judgment entry set forth an ascertainable amount due in its judgment entry, specifically referencing the amount identified as due and unpaid in the delinquent land certificate. The trial court found that “there is due Plaintiff on the delinquent land tax certificate the sum of \$28,561.42, plus all taxes, assessment[s], penalties, and interest accruing between the date of the delinquent land tax certificate and the date of confirmation of the Sheriff’s sale.”

{¶ 26} The record reflects that the trial court determined the tax delinquency based on the delinquent land certificate. Pursuant to R.C. 5721.18(A), the delinquent land certificate was “prima-facie evidence at the trial of the foreclosure action of the amount and validity of the taxes, assessments, charges, penalties, and interest appearing due and unpaid and of their nonpayment.” And Durham Construction, unlike the appellant in *Bowman*, raised no objection to the magistrate’s decision.

Durham Construction’s Alleged Tax-Exempt Status

{¶ 27} Durham Construction also contends that the trial court’s judgment should be reversed because the property was subject to a tax exemption under R.C. 5709.12(B) and, therefore, there could be no tax delinquency.

{¶ 28} Pursuant to R.C. 5709.12(B), “[r]eal and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation[.]” However, there is nothing in the record to indicate that the property at issue was being used by Durham Construction “exclusively for charitable purposes” during the time period at issue.

{¶ 29} Durham Construction further contends that, “even in [its] absence,” the treasurer was required “to produce notice” at the tax hearing that Durhman Construction “had received notice that it’s [sic] property was subject to being taxed.” The only authority Durham Construction cites in support of this contention is R.C. 5715.12. That provision states:

The county board of revision shall not increase any valuation without giving notice to the person in whose name the property affected thereby is listed and affording him an opportunity to be heard. Such notice shall describe the real property, the tax value of which is to be acted upon, by the description thereof as carried on the tax list of the current year, and shall state the name in which it is listed; such notice shall be served by delivering a copy thereof to the person interested, by leaving a copy at the usual place of residence or business of such person, or by sending the same by registered letter mailed to the address of such person. If no such place of residence or business is found in the county, then such copies shall be delivered or mailed to the agent in charge of such property. If no such agent is found in the county, such notice shall be served by an advertisement thereof inserted once in a newspaper of general circulation in the county in which the property is situated. Notices to the respective persons interested in different properties may be united in one advertisement under the same general heading. Notices served in accordance with this section shall be sufficient.

{¶ 30} R.C. 5715.12 does not support Durham Construction’s contention that, “even in [its] absence,” the treasurer was required to produce evidence at the tax hearing that Durham Construction had “received notice” that its property was “subject to being taxed” before the trial court could properly issue a decree of foreclosure. Further, even if the treasurer was required to “produce” such notice at the tax hearing, because a transcript of the tax hearing is not part of the record, it is unknown what, if any, evidence beyond the delinquent land certificate was presented at the tax hearing. It is, however, well settled that when portions of the

transcript necessary to resolve issues are not part of the record on appeal, we must presume the regularity of the proceedings and affirm. *See, e.g., Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980); *see also Treasurer of Guernsey Cty. v. Parcels of Land Encumbered with Delinquent Tax Liens (In re Foreclosure of Liens for Delinquent Land Taxes)*, 2020-Ohio-2814, 154 N.E.3d 494, ¶ 32 (5th Dist.).

Notice of Tax Hearing

{¶ 31} With respect to its claim that it was denied due process because it did not receive notice of the November 16, 2018 tax hearing, even if Durham Construction did not receive notice of the tax hearing,² it does not dispute that it was properly served with the complaint on December 7, 2017, that it never filed an answer to the complaint, that it was served with and received copies of the treasurer’s filings in the case (including its motion to set date for tax hearing) and that it was sent and timely received copies of the trial court’s December 24, 2018 order and the magistrate’s decision — which clearly indicated that a tax hearing had been held on November 16, 2018. Indeed, Durham Construction expressly acknowledges in its brief that, with the exception of its alleged failure to receive

² The record does not contain specific information regarding service of the notice of tax hearing on Durham Construction. However, there is no indication in the record — beyond Durham Construction’s unsubstantiated assertions in its briefs — that Durham Construction did not receive notice of the tax hearing. Indeed, even Durham’s unnotarized affidavit submitted in support of Durham Construction’s motion for relief from judgment does not contain an averment that Durham Construction did not receive notice of the tax hearing. The docket contains entries that indicate “[n]otice issued” with respect to both the October 30, 2018 order scheduling the November 16, 2018 tax hearing and the December 24, 2018 order setting forth the results of the tax hearing.

notice of the November 16, 2018 tax hearing, “it had been afforded notice of every other event along the way, including the decision of the court resulting from that hearing.” Nevertheless, Durham Construction never raised any issue with the trial court regarding its lack of notice of the tax hearing or any other objection to the magistrate’s decision and did not appeal the denial of its motion for relief from judgment.

{¶ 32} Because Durham Construction has not demonstrated plain error, its assignments of error are overruled.

{¶ 33} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN A. GALLAGHER, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
EMANUELLA D. GROVES, J., CONCUR