

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)**

MACRINO V. BLOOMFIELD TOWNHOMES

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JANEEN MACRINO AND RICHARD GREGG, APPELLANTS,

v.

BLOOMFIELD TOWNHOMES, INC., ET AL., APPELLEES.

BLOOMFIELD TOWNHOMES, INC., A NEBRASKA NONPROFIT CORPORATION,
APPELLEE AND CROSS-APPELLANT,

v.

RICHARD GREGG AND JANEEN MACRINO, APPELLANTS AND CROSS-APPELLEES.

Filed April 2, 2024. Nos. A-23-239, A-23-254.

Appeals from the District Court for Douglas County: PETER C. BATAILLON, Judge.
Affirmed.

Richard L. Gregg, pro se.

Joel D. Nelson, of Keating, O’Gara, Nedved, & Peter, P.C., L.L.O., and Douglas W. Ruge,
for appellees.

PIRTLE, Chief Judge, and RIEDMANN and WELCH, Judges.

PIRTLE, Chief Judge.

I. INTRODUCTION

Richard Gregg and Janeen Macrino appeal multiple decisions of the district court for Douglas County in their consolidated lawsuits involving Bloomfield Townhomes, Inc., and its board members (collectively Bloomfield). The lawsuits relate to a special assessment imposed by Bloomfield and a subsequent lien placed on Macrino’s property. We first find that Gregg, a

nonlawyer, engaged in the “unauthorized practice of law” by purporting to represent Macrino’s interests. As a result of this unauthorized practice of law and in the absence of a brief filed by Macrino that conforms to our rules of appellate practice, we dismiss her appeal.

On cross-appeal, Bloomfield appeals the district court’s finding that Gregg and Macrino’s bond qualified as a supersedeas bond. Bloomfield also appeals the denial of its motion to approve decree of sale where the district court prevented it from enforcing its lien against Macrino’s property. For the reasons that follow, we affirm the decision of the district court.

II. BACKGROUND

Gregg and Macrino are a married couple living at the Bloomfield Townhomes in Omaha, Nebraska. Although Macrino is the sole owner of their residence, both Gregg and Macrino are members of the homeowner’s association (HOA) that governs the townhomes.

On June 23, 2019, at the HOA’s annual meeting, the members of the HOA voted to replace the street leading to the townhomes. As a result of that vote, Bloomfield imposed a street improvement assessment against each member household for \$5,175. After the project was approved, Gregg raised concerns to Bloomfield’s board of directors about the project. Specifically, Gregg was concerned about the lack of a contract between Bloomfield and the contractor selected to perform the work, and whether the contractor provided a warranty once the project was completed. On several occasions between June 24 and September 27, 2019, Gregg requested the president of the HOA send him the contract so he could review it. The president of the HOA told Gregg he would send him a copy of the contract and forwarded him copies of the relevant proposal. However, Gregg was not satisfied with this and continued to request copies of the contract with the requisite warranties.

Meanwhile, Macrino never paid the \$5,175 special assessment. Beginning on July 1, 2019, Macrino’s monthly HOA statement reflected that she owed the \$5,175 special assessment as part of her dues. She received two more monthly statements reflecting this charge in August and September. On September 19, with no payment received, Bloomfield filed a lien against Macrino’s property.

On October 16, 2020, Gregg and Macrino, both acting pro se, filed a complaint in the district court against Bloomfield for willful negligence and breach of fiduciary duty. This case was assigned to Judge Peter C. Bataillon as case No. CI 20-8406 (the tort case).

On October 20, 2020, Bloomfield filed a complaint in the district court against Macrino and Gregg seeking enforcement of its lien. Gregg and Macrino defended this action pro se. This case was assigned to Judge James M. Masteller as case No. CI 20-8480 (the lien case).

On February 18, 2021, having missed the 30-day deadline on serving an answer in the tort case, Bloomfield motioned for leave to file answers out of time. On February 24, Gregg and Macrino filed a motion for default judgment. A hearing on the parties’ motions was held on March 12. On March 16, the district court issued an order granting the motions for leave to answer out of time and denying the motion for default judgment.

On February 19, 2021, Bloomfield moved for summary judgment in the lien case. On March 15, Judge Masteller consolidated the two cases, moving the lien case to Judge Bataillon’s docket.

On April 23, 2021, Gregg and Macrino filed an amended complaint in the tort case alleging negligence and breach of fiduciary duty. The amended complaint also sought a release of Bloomfield's lien and relief from paying the special assessment based on the theory of promissory estoppel.

On July 22, 2021, Macrino and Gregg filed a motion for partial summary judgment in the tort case. In this motion, they sought the release of Bloomfield's lien, reimbursement by the individual board members for the \$12,660 Bloomfield spent on hiring an attorney to defend the action, reimbursement by the board members for \$18,682.60 spent by Gregg and Macrino in prosecuting the action, and payment by the board members for the \$5,174 that Macrino was billed for the special assessment. On August 18, Bloomfield filed its motion for summary judgment in the tort case which sought the dismissal of Gregg and Macrino's claims.

Bloomfield's motion for summary judgment in the lien case was heard on July 27, 2021. The parties' dueling motions for summary judgment in the tort case were heard on December 21. On August 3, 2022, the district court issued an order pertaining to all three motions. In the tort case, the district court denied Gregg and Macrino's motion for partial summary judgment, granted Bloomfield's motion for summary judgment, and dismissed the case. In the lien case, the district court granted Bloomfield's motion for summary judgment and ordered Gregg and Macrino to pay the \$5,175 special assessment. This order also set a further hearing to determine attorney fees, costs, and interest sought by Bloomfield in the lien case. On February 23, 2023, the court awarded Bloomfield \$31,648.25 in attorney fees, \$362.13 in costs, and \$4,064.44 in interest.

On March 8, 2023, in the lien case, Bloomfield motioned to approve decree of sale in which it sought the court's permission to foreclose on its lien by selling Macrino's property.

On March 23, 2023, Gregg and Macrino filed their notice of intent to appeal in both cases. Gregg and Macrino also filed a document titled "Supersedeas Bond" which stated, "By filing this bond, Litigants wish to stay the execution and judgement [sic] of costs awarded against Litigants. In lieu of surety, the Appellants deposit cash bond to secure the judgment entered on February 23, 2023 of \$41,250."

On March 30, 2023, a hearing was held on Bloomfield's motion to approve decree of sale. On April 5, the district court issued an order which found that Gregg and Macrino were appealing the court's rulings and had filed a supersedeas bond to stay the executions and collections related to the court's judgments. As it found that Gregg and Macrino filed a supersedeas bond, the district court denied Bloomfield's motion to approve decree of sale but ordered Macrino and Gregg to add an additional \$10,000 for the supersedeas bond. There is no indication that Gregg and Macrino ever complied with this order.

On July 12, 2023, Gregg, still acting pro se, submitted an appellate brief seemingly on behalf of himself and Macrino.

We have consolidated review of the lien and tort cases for purposes of our review.

III. ASSIGNMENTS OF ERROR

Restated, Gregg and Macrino assign the district court abused its discretion by (1) denying their motion for default judgment in the tort case; (2) not invalidating the lien in the lien case; and (3) awarding attorney fees in the tort case.

On cross-appeal, Bloomfield assigns the district court erred in the lien case by (1) setting the bond amount more than 30 days after final judgment was entered and (2) not allowing the foreclosure of their lien.

IV. STANDARD OF REVIEW

Whether a default judgment should be entered because of a party's failure to timely respond to a petition rests within the discretion of the trial court, and an abuse of discretion must affirmatively appear to justify a reversal on such a ground. *Buttercase v. Davis*, 313 Neb. 1, 982 N.W.2d 240 (2022), *opinion modified on denial of rehearing* 313 Neb. 587, 985 N.W.2d 588 (2023).

A court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *Sellers v. Reefer Systems*, 305 Neb. 868, 943 N.W.2d 275 (2020).

V. ANALYSIS

1. GREGG AND MACRINO'S APPEAL

We begin by addressing whether Gregg engaged in the unauthorized practice of law by submitting an appellate brief on behalf of Macrino and the impact that resolution has on Macrino's appeal. We then address the merits of Gregg's appeal.

(a) Gregg's Unauthorized Practice of Law

Bloomfield asserts Gregg and Macrino's appeals should be dismissed because Gregg engaged in the unauthorized practice of law. While an appellate brief was submitted on behalf of Gregg and Macrino, only Gregg's name appears on the appellate brief's title and signature pages. Macrino's name is absent in these areas and there is no indication that Macrino submitted the brief on her own behalf. Therefore, by including Macrino as one of the appellants in the brief, it appears Gregg was attempting to represent Macrino's legal interests. Gregg is not a lawyer and, therefore, is not authorized to practice law in Nebraska.

Neb. Rev. Stat. § 7-101 (Reissue 2022) provides that, except for one limited exception not applicable here:

[N]o person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state.

Because Gregg filed a brief that purported to represent Macrino's interests, we determine that he has engaged in the unauthorized practice of law.

(b) Impact on Macrino's Appeal

We now must address the impact that Gregg's unauthorized practice of law has on Macrino's appeal. We first note that although Macrino did not file an appellate brief on her own behalf, she did file a pro se notice of appeal. As such, pursuant to Neb. Ct. R. App. Prac.

§ 2-110(A), upon her failure to file a brief on her own behalf, the Clerk’s office should have issued a default notice that gave her 10 days to file her own pro se brief. Section 2-110(A) states:

If appellant fails to file its brief within the time allowed and no extension of brief date has been granted, the Clerk shall provide notice to all self-represented litigants and all attorneys of record that appellant is in default for failure to file a brief and is required to file a brief within 10 days after receipt of such notice. Appellant’s failure to file a brief within the 10-day period subjects the appeal to dismissal.

As proscribed in this rule, it would have only been after Macrino was notified that she was in default that her appeal could be dismissed. Instead, no notice was issued and Gregg, a nonlawyer, filed a pro se brief on behalf of himself and Macrino. While Gregg is allowed to file a pro se brief on his own behalf, he cannot file one on behalf of Macrino.

As a result of Gregg’s unauthorized practice of law, Macrino’s purported brief does not conform to our rules. Consequently, it is as if no brief was ever filed on her behalf. When an appellant fails to comply with the format for briefing, the appellate court may proceed as though the appellant had failed to file a brief or, alternatively, may examine the proceedings for plain error, and the decision to proceed on plain error is at the discretion of the appellate court. See *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014). Given the unauthorized practice of law by Gregg, which we deem a serious matter, we decline to address Macrino’s appeal and it is dismissed in its entirety

(c) Merits of Gregg’s Appeal

With the dismissal of Macrino’s appeal, we next address the merits of Gregg’s assigned errors.

(i) Tort Case

Gregg assigns the district court abused its discretion in the tort case by denying the motion for default judgment and awarding attorney fees.

Gregg asserts that his motion for default judgment should have been granted as it took Bloomfield 12 weeks after being served to motion for leave to file answers out of time. Whether default judgment should be entered because of a party’s failure to timely respond to a petition rests within the discretion of the trial court, and an abuse of discretion must affirmatively appear to justify a reversal on such a ground. *Buttercase v. Davis*, 313 Neb. 1, 982 N.W.2d 240 (2022), *opinion modified on denial of rehearing* 313 Neb. 587, 985 N.W.2d 588 (2023). An abuse of discretion occurs when a trial court’s decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

We determine that the district court did not abuse its discretion in denying Gregg’s motion for default judgment. The Supreme Court has stated that “even if the defendant fails to plead or answer after a court-ordered deadline, the plaintiff is not necessarily entitled to a default judgment.” *Id.* at 17, 982 N.W.2d at 255. The court has also indicated that a party in default may be permitted to answer at any time before judgment is issued. *Id.* With this framework, the court upheld a denial of default judgment even when a defendant had not answered 7 months after the filing of a complaint. *Id.* (citing *Anest v. Chester B. Brown Co.*, 169 Neb. 330, 99 N.W.2d 615

(1959). The record shows that Gregg filed the motion for default judgment almost a week after Bloomfield had already put in requests to file answers out of time. Based on this and the absence of evidence to the contrary, we conclude that the district court did not abuse its discretion in denying Gregg's motion for default judgment.

Gregg also asserts the district court abused its discretion by allowing Bloomfield to collect attorney fees in the lien case that were charged in relation to work done in the tort case. As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Echo Group v. Tradesmen Internat.*, 312 Neb. 729, 980 N.W.2d 869 (2022). Neb. Rev. Stat. § 52-2001 (Reissue 2021) mandates the award of attorney fees for the prevailing party in actions where an HOA places a lien against a member's property. However, Neb. Rev. Stat. § 25-824(6) (Reissue 2016) states that "No party who is appearing without an attorney shall be assessed attorney's fees unless the court finds that the party clearly knew or reasonably should have known that his or her action or defense or any part of such action or defense was frivolous or made in bad faith." A court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *Sellers v. Reefer Systems*, 305 Neb. 868, 943 N.W.2d 275 (2020).

Gregg essentially argues that even though Bloomfield was entitled to attorney fees in the lien case, a portion of the awarded fees should have been excluded because they were assessed in relation to the tort case. Douglas Ruge was Bloomfield's attorney in the lien case and Joel Nelson was Bloomfield's attorney in the tort case. Gregg asserts that when the district court found that Bloomfield was entitled to reasonable attorney fees in the lien case, included in Ruge's fees were charges from him discussing the tort case with Nelson. Gregg argues the inclusion of this time in Ruge's attorney fees was prohibited by § 25-824(6).

We find Gregg's assignment to be flawed because it is essentially attempting to collaterally attack the award of attorney fees in the lien case by appealing the matter in the tort case. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *State v. Wood*, 310 Neb. 391, 966 N.W.2d 825 (2021). The district court only awarded attorney fees in the lien case. However, Gregg only assigns error concerning the attorney fees in the tort case. As there was no award of attorney fees in the tort case, his assignment of error fails. Moreover, because he does not specifically assign error in the lien case regarding the calculation of attorney fees, we do not consider that issue on appeal.

(ii) Lien Case

Gregg's only assignment of error in the lien case assigns that the district court abused its discretion in not invalidating the lien levied against Macrino's property. Gregg asserts the district court should have utilized the doctrine of equitable estoppel to invalidate the lien because he and Macrino were led to believe that a lien would not be placed on their property by Bloomfield. In this assertion, Gregg cites multiple conversations with the president of Bloomfield where he told Gregg that he was working on sending him the contract, but never mentioned that Bloomfield was placing the lien on the property.

We conclude Gregg's assignment of error fails. Equitable estoppel is an affirmative defense and must be raised in the pleadings to be considered by a trial court and on appeal. *Weyers v.*

Community Memorial Hosp., 30 Neb. App. 520, 971 N.W.2d 155 (2022). An affirmative defense not raised or litigated in the trial court cannot be urged for the first time on appeal. *Linscott v. Shasteen*, 288 Neb. 276, 847 N.W.2d 283 (2014). Gregg never raised equitable estoppel in his pleadings and the issue was not considered by the district court so it cannot be considered on appeal.

Therefore, we conclude that Gregg’s assignments of error fail and we affirm the decisions of the district court.

2. BLOOMFIELD’S CROSS-APPEAL

On cross-appeal, Bloomfield assigns the district court erred in the lien case by setting the bond amount more than 30 days after final judgment was entered and not allowing the foreclosure of their lien. Bloomfield argues Gregg and Macrino failed to provide the requisite assurances necessary for a supersedeas bond, failed to provide certification by the district court clerk for any bond, and failed to make the additional \$10,000 deposit as directed by the district court.

Neb. Rev. Stat. § 25-1916(1) (Reissue 2016) provides that

No appeal in any case shall operate as a supersedeas unless the appellant or appellants within thirty days after the entry of such judgment, decree, or final order execute to the adverse party a bond with one or more sureties, make a deposit of United States Government bonds with the clerk, or in lieu thereof make a cash deposit with the clerk for the benefit of the adverse party as follows:

(1) When the judgment, decree, or final order appealed from directs the payment of money, the bond, deposit of United States Government bonds, or cash deposit shall be the lesser of (a) the amount of the judgment, decree, or final order and the taxable court costs in the district court, plus the estimated amount of interest . . . (b) fifty percent of the appellant’s net worth, or (c) fifty million dollars. . . .

Such bond . . . shall be conditioned that the appellant or appellants will prosecute such appeal without delay and pay all condemnation money and costs which may be found against him, her, or them on the final determination of the cause in the Court of Appeals or Supreme Court.

The bond filed by Gregg and Macrino fails to contain the requisite conditions to be a supersedeas bond. Their filing fails to assure “that [they] will prosecute such appeal without delay and pay all condemnation money and costs which may be found against [them].” See § 25-1916(1). Although this is sufficient to find that their bond was not a supersedeas bond, Gregg and Macrino also failed to supplement their bond with an additional \$10,000 as ordered by the district court. Further, even if they had supplemented their bond by that amount, it would have occurred beyond the 30-day time limit from the entry of the judgment as described in § 25-1916. Consequently, Gregg and Macrino’s bond should not have been regarded as a supersedeas bond that stayed the district court’s judgments against them. In that sense, the district court erred in determining Gregg and Macrino’s bond was a supersedeas bond and by denying Bloomfield’s motion to approve decree of sale that sought to foreclose on the lien against Macrino’s property.

However, despite this finding, we determine the resolution of the issues brought forward on appeal render the supersedeas bond issue moot. Macrino and Gregg filed their bond to stay the

judgments against them while an appellate review was completed. Now that we have completed our review of their appeals and affirmed the underlying decisions of the district court, their appeals are resolved. Therefore, there is no longer a reason to stay the judgments against them and consequently no reason for a supersedeas bond. See *McCullough v. McCullough*, 299 Neb. 719, 736, 910 N.W.2d 515, 528 (2018) (“Because we have resolved the appeal the order sought to be stayed, the setting of the supersedeas bond is a moot issue at this point.”). See, also, *Buffalo County v. Kizzier*, 250 Neb. 180, 548 N.W.2d 757 (1996) (noting that although district court erred in refusing to set amount for supersedeas bond, error was moot); *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994) (finding that because underlying order was affirmed, court did not need to consider assignment of error regarding lower court’s refusal to set supersedeas bond). As such, we determine the supersedeas bond issue is moot and do not further address the issue.

VI. CONCLUSION

In the absence of a brief filed by Macrino that conforms to our rules of appellate practice, we dismiss Macrino’s appeal. For Gregg’s appeal, we conclude the district court did not abuse its discretion in denying Gregg’s motion for default judgment and that Gregg’s assignments of error concerning the invalidation of the lien and the award of attorney fees fail.

On Bloomfield’s cross-appeal, we conclude that although the district court erred in finding that Gregg and Macrino’s bond was a supersedeas bond, the resolution of Gregg and Macrino’s appeals render the issue moot.

AFFIRMED.