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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001456-MR

CHARLES ROBERT STUMP AND
PAULINE STUMP — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 05-CI-01397

PIKEVILLE INDEPENDENT SCHOOL
DISTRICT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CAPERTON, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellants, Charles Robert Stump and Pauline Stump, appeal the July 11, 2008, Judgment of the Pike Circuit Court, adjudicating a lien on real property purchased by Stump at a judicial auction. After a thorough review of the record, the arguments of the parties, and the applicable law, we affirm.

The Pikeville Independent School District taxes property within its district and subsequently purchases any tax bills which are not paid by the landowner or purchased at the tax sale by a third party. A list of taxes which are delinquent and purchased by the School District are maintained in the Pike County Clerk's Office, on a printout which is provided to the County Clerk on a monthly basis.

The printout is maintained on a shelf in the County Clerk's Office, which is denoted, "City Taxes/School Taxes". Those lists indicate the name of the property owner, the address of the property, the amount due, any accrued penalties, and the amount due the following month. The Pikeville Independent School District pays a fee to the County Clerk each month for each delinquent tax collected.

The dispute in the matter *sub judice* arose when the Stumps paid delinquent property tax bills to the School District on behalf of the previous owner of the property. The Stumps purchased the property at a Master Commissioner's foreclosure sale in 1999. Although the School District's lien was maintained on record at the Pike County Clerk's Office, the law firm handling the foreclosure action did not list the School District as a party.[1]

Subsequent to the time that they placed their bid, but prior to the finalization of the sale, the Stumps had the opportunity to conduct a title search, but did not do so. During the course of the bench trial below, Pauline Stump

[1] The law firm handling the foreclosure action was a party to this action for legal malpractice as a result of this failure.

testified that she hired an attorney to do a title search on the property sometime after the Master Commissioner's sale was finalized.

That attorney located the School District's liens recorded at the Pike County Clerk's Office. Accordingly, the attorney placed the taxes on his title opinion and advised the Stumps that the taxes were owed. The Stumps paid the taxes, and subsequently initiated a lawsuit against the School District and the aforementioned law firm which handled the foreclosure action.

On appeal to this Court, the Stumps argue first, that the lien of the School District was not validly recorded and, that as such, it should be defeated by bona fide purchasers. While acknowledging that KRS 135.420 permits taxing districts to have liens for delinquent tax bills, they nevertheless argue that in this case, the manner in which the county clerk recorded the liens provided neither actual nor constructive notice to bona fide purchasers. Thus, in reliance upon *Midland-Guardian Co. v. McElroy*, 563 S.W.2d 752 (Ky.App. 1978), they assert that the general principle of "first in time, first in right" should apply.[2]

Our standard of review in this matter is two-fold. First, the trial court's "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. Secondly, any "interpretation of a statute is a matter of law", *Commonwealth v. Gaitherwright,* 70 S.W.3d 411, 413 (Ky. 2002). Thus, the

[2] Kentucky Supreme Court held that while the validity of an instrument or lien does not normally depend upon its proper recordation, recordation becomes a factor where the rights of innocent purchasers or creditors have an interest within the meaning of KRS 382.270.

construction and application of statutes are interpreted "de novo, without deference to the interpretations adopted by lower courts." *Wheeler & Clevenger Oil Co. v. Washburn,* 127 S.W.3d 609, 612 (Ky. 2004). We review this matter with these standards in mind.

First, we note that there is no question that the School District has the statutory right to tax real property within its district boundaries pursuant to KRS 134.420(1)(a). Unquestionably, in this instance, the school district had a lien on the property at issue. Thus, pursuant to KRS 426.690, it should have been named as a party to the original foreclosure action. Unfortunately, it was not, through no fault of the School District itself.

It was the responsibility of the School District to see that its liens were properly recorded. In the matter *sub judice*, we believe the School District fulfilled that duty. Although the Stumps argue that the School District did not deliver anything to the County Clerk's office in recordable form as required by KRS 382.335, our review of the record convinces us otherwise.[3] Having reviewed both KRS 134.420, and KRS 382.335, we are of the opinion that the liens were properly recorded in this instance.[4]

[3] *See* Plaintiff's Ex. No. 1.

[4] In so finding, we briefly address the arguments of the parties concerning, KRS 134.420(1)(f), and the trial court's conclusion that only tax liens of cities in the third, fourth, fifth, and sixth class must record notice in the same manner as notices of *lis pendens*. Having reviewed the record and the statute at issue, we are in agreement with the trial court's statutory interpretation. Clearly, if the statute intended that *all* classes file their notices in the same manner as required for a *lis pendens*, it would have so stated. Certainly, it would not have specified certain classes, while leaving others out, if it intended all classes to be included. Accordingly, we need not address this issue further herein.

Notwithstanding the foregoing analysis, we reiterate that we are a court of review. In addressing this issue below, the circuit court made a finding of fact that the manner in which the School District files its delinquent tax list in the County Clerk's office provides sufficient notice. The School District argues, and we are compelled to agree, that this finding of fact was supported by substantial evidence.

Certainly, CR 52.01 provides that findings of fact shall not be set aside unless clearly erroneous. Further, our case law is clear that findings of fact will not be found to be erroneous if they are supported by substantial evidence, which is evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

Having reviewed the record, we are in agreement with the School District that the question of whether or not the notice was sufficient in this particular instance was a finding of fact to be made by the trial court. In this instance, on the basis of the evidence before it, the trial court made a finding that the notice was in fact sufficient. Upon our review of the record, we cannot find that the trial court's decision was unsupported by the evidence. Accordingly, we affirm the court's finding that the notice in this matter was sufficient.

In so finding, we note that the Stumps are correct in arguing that, pursuant to KRS 134.420(1), a sale to a bona fide purchaser will defeat a lien. Indeed, as our Court previously held in *Liberty National Bank & Trust v.*

Vanderkraats, 899 S.W.2d 511 (Ky.App. 1995), unless notice of a lien is filed, a bona fide purchaser is given priority. However, our law is equally clear that in the absence of actual or constructive knowledge, the proper recording of a lien statement constitutes perfection of the lien, and establishes its priority over subsequently recorded liens or statements. *See Fay S. Sams Money Purchase Pension Plan v. Jansen*, 3 S.W.3d 753 (Ky.App. 1999).

The Stumps argue first, that they are bona fide purchasers, and secondly, that they had neither actual nor constructive notice of the School District's lien in this instance. Upon review, we can agree with neither of those assertions, in particular, the assertion with respect to the issue of constructive notice, which we believe to be determinative of this matter. Having found that the School District properly recorded and provided sufficient notice of its lien, we conclude that at the very least, it can be found that the Stumps had constructive notice of its existence.

We are persuaded by the School District's argument, which we believe to be in accordance with the law of this Commonwealth, that in order to be a bona fide purchaser, one must make a reasonable attempt to determine whether or not any liens were present. In the matter *sub judice*, the Stumps certainly had the opportunity, post-bid but pre-sale, to conduct a title search to determine whether or not any liens were present. They chose not to do so. Without making any attempts to conduct a search, the Stumps were certain not to discover the lien, regardless of whether or not it was properly recorded. As we have previously

stated, "Equity aids the vigilant, not those who slumber on their rights." *See Fightmaster v. Leffler*, 556 S.W.2d 180, 183 (Ky.App. 1977).

Subsequent to the finalization of sale, the Stumps retained their own personal attorney to conduct a title search. That attorney was able to locate the liens of the School District via the Pike County Clerks' Office, and indeed, placed the taxes on his title opinion. Had the Stumps chosen to conduct a title search prior to the finalization of the sale, they would presumably have discovered the existence of the lien at that time. While it is unfortunate that they did not do so, that is not a matter which can effectively be remedied by this Court on review.

Wherefore, for the foregoing reasons, we hereby affirm the July 15, 2008, Findings of Fact, Conclusions of Law, and Judgment of the Pike Circuit Court, the Honorable Eddy Coleman, presiding.

ACREE, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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BRIEF FOR APPELLEE:

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