

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000595-MR

COMMONWEALTH BANK &
TRUST COMPANY AND
TERETHA M. MURPHY

APPELLANTS

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 09-CI-00823

TAX EASE LIEN INVESTMENTS 1, LLC AND
PERRY & SICKMEIER, INC., D/B/A KENTUCKY
PROPERTY TAX INVESTMENTS

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Commonwealth Bank & Trust Company and Teretha M.

Murphy appeal a judgment and orders of the Shelby Circuit Court's granting Tax

Ease Lien Investments 1, LLC, a monetary judgment and attorney's fees. For the reasons stated, we affirm in part, reverse in part, and remand.

Tax Ease and Perry & Sickmeier, Inc., d/b/a Kentucky

Property Tax Investments, purchased delinquent real estate tax bill certificates of delinquency (tax bills) against real estate owned by Murphy. During October 2009, Tax Ease filed a foreclosure action against Murphy's home pursuant to its ownership of tax bills. Because of its mortgage lien against Murphy's real estate, Commonwealth Bank was named a defendant in the action. Subsequently, Murphy and Tax Ease executed an agreed judgment settling the tax bills. There was no notice sent to Commonwealth Bank regarding the agreed judgment.

After discovering the December 28, 2009, entry of the agreed judgment, Commonwealth Bank filed motions to vacate the agreed judgment and for the review of the attorney's fees included in the tax bill settlements. In its motion to vacate, Commonwealth Bank argued that the agreed judgment was defective because the Bank did not receive notice of the proceedings. In its second motion, the Bank contended that Tax Ease's and Kentucky Property Tax's attorney's fees were excessive and should not be permitted.

During the hearing, Commonwealth Bank and Murphy argued that Tax Ease's \$1,887 claim for attorney's fees was grossly excessive. They argued that the record established no action had occurred in the case as of the date the agreed order was filed, except for the filing of the foreclosure complaint and two answers. Considering this scant record, they argued that Tax Ease had submitted a

high claim for attorney's fees, including \$735 in pre-litigation fees and \$1,152 in litigation fees. Commonwealth Bank and Murphy also argued that Kentucky Property Tax's \$1,261.13 claim for attorney's fees was excessive. Pointing out that the tax bill was only \$720.19, they argued that Kentucky Property Tax's claim was for \$511.13 in pre-litigation fees and \$750 in litigation fees was excessive.

Tax Ease argued that Commonwealth Bank, the mortgage holder for Murphy's home, did not have standing to dispute the agreed judgment. It further argued that Commonwealth Bank did not represent Murphy, the taxpayer; and that the attorney's fees were to be paid by Murphy, not Commonwealth Bank. Finally, Tax Ease argued that the entry of the parties' agreed order made any issue moot.

On February 25, 2010, the trial court denied Commonwealth Bank's motions, finding that Commonwealth Bank had no standing to contest the agreed judgment. The court further found that Murphy's request to review the attorney's fees listed in the agreed judgment was outside the ten-day period of CR 59.05, which requires that a motion to modify or vacate a judgment must be made within ten days of the entry of the judgment. Therefore, the trial court ruled that it had no authority to grant Murphy any relief from the agreed judgment.

Subsequently, Commonwealth Bank, on behalf of Murphy and her spouse, moved the trial court to reconsider the amount of attorney's fees. It argued that the trial court could address Kentucky Property Tax's claim for attorney's fees because the issue was not addressed in Tax Ease and Murphy's agreed judgment. Additionally, Commonwealth Bank requested the trial court to reconsider its prior

order denying relief and set aside the agreed judgment. It contended that it had standing to contest and, thus, was entitled to notice regarding the agreed judgment. Commonwealth Bank argued that the agreed judgment constituted an adjudication reducing its security interest in Murphy's property by the amount of the lien. Its second argument was premised on an improper *ex parte* communication.

On March 11, 2010, the trial court denied Commonwealth Bank's motions on multiple grounds. The trial court first found that Kentucky Property Tax's claim for attorney's fees could not be adjudicated because it had not moved the court for a judgment or award or delineated its fees or costs. Thus, the trial court ruled that this issue was not ripe for adjudication. The trial court next ruled that there had been no improper *ex parte* communication. The trial court found that Commonwealth Bank was attempting to get a "second bite of the apple."

Commonwealth Bank contends that the trial court erred by ruling that it did not have standing to contest Tax Ease and Murphy's agreed judgment. The Bank argues that it, as a lien holder against Murphy's property, had standing to contest any legal action where its property interests could be affected. We agree.

Standing is established when a party has a judicially recognizable interest in the subject matter of the suit. *City of Ashland v. Ashland F.O.P. No. 3, Inc.*, 888 S.W.2d 667, 668 (Ky. 1994). The party must allege a personal stake in the outcome of the controversy and there must be a connection between the alleged harm and the activity complained of. *St. Luke Hospitals, Inc. v. Com., Cabinet for Health and Family Services, Office of Certificate of Need*, 254 S.W.3d 830, 833

(Ky.App. 2008). The party's interest must be real and substantial rather than a mere expectancy. *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 202 (Ky. 1989). Standing is determined based on the unique facts of each case. *Id.*

In its order, the trial court ruled that Commonwealth Bank was not a party to the agreed judgment, was not responsible for paying the delinquent taxes, and could not cite a case supporting its argument and, thus, did not have standing. Despite the trial court's findings, Commonwealth Bank was a named party in the action in which the agreed judgment was entered, was negatively impacted by the agreed judgment, and has standing under well-established constitutional analysis.

While the trial court was dismissive of Commonwealth Bank's party status in this action, it was a named party, which usually entitles a party to notice of the proceedings transpiring in the litigation. Moreover, common courtesy and proper ethical practice of law would require notification to all parties as to substantial activities which occur within that litigation. *Kentucky Bar Ass'n v. Bodell*, 838 S.W.2d 395, 396 (Ky. 1992) (attorneys have high ethical duties).

After applying standing analysis, we conclude that Commonwealth Bank suffered a direct financial injury when its security interest in Murphy's real property was reduced by the amount listed in the agreed judgment. This occurred by virtue of KRS 134.420(3), which provides that an ad valorem real estate tax bill shall be superior to a previously recorded mortgage lien. This statute further states that the tax bill shall include all interest, costs, and attorney's fees associated with the collection of the tax bill. Thus, when Tax Ease purchased Murphy's delinquent

tax bills and obtained a judgment for attorney's fees, the amount of the judgment became superior to Commonwealth Bank's previously recorded mortgage lien.

Although the trial court disregarded the superseding of the bank's security interest, we conclude that the reduction of a party's security interest in property is a real and substantial injury and is sufficient to merit standing to sue. *Warren County Citizens for Managed Growth, Inc. v. Board of Com'rs of City of Bowling Green*, 207 S.W.3d 7, 13 (Ky.App. 2006). Generally, a security interest gives a creditor the right to receive the proceeds from the sale of collateral securing a debt up to the amount of the outstanding balance. *General Motors Acceptance Corp. v. Lincoln Nat. Bank*, 18 S.W.3d 337, 339 (Ky. 2000). Therefore, if a creditor's security interest is supplanted by the entry of an agreed judgment, it necessarily follows that its ability to recoup its prior loan is diminished and, in some cases, may even be rendered impossible. Accordingly, reducing a party's security interest is a real and substantial harm warranting constitutional standing.

As a result of our conclusion, we affirm the trial court's judgment regarding the principal (purchase) amount of Tax Ease's two tax bills. No party has disputed these amounts and there is no need to revisit this issue. However, we reverse its judgment and orders with respect to the matter of attorney's fees. On remand, the trial court shall permit Commonwealth Bank to dispute Tax Ease's claims for attorney's fees during an evidentiary hearing.

While observing that KRS 134.452 provides maximum limits for pre-litigation attorney's fees in tax collection cases, we note that trial courts retain the

authority to determine what claims for attorney's fees are reasonable within the statutory maximum. *Capitol Cadillac Olds, Inc. v. Roberts*, 813 S.W.2d 287, 293 (Ky. 1991). Additionally, we observe that “. . . a trial court should require parties seeking attorney fees to demonstrate that the amount sought is not excessive and accurately reflects the reasonable value of bona fide legal expenses incurred.” *Id.*

We further observe that the agreed judgment awarded Tax Ease a claim of \$957 in litigation fees and \$400 for conducting a title search. While KRS 134.452(1)(c)(3)¹ permits third-party debt purchasers to collect attorney's fees and costs arising from their prosecution of a certificate of delinquency, the fees and costs claimed must be subjected to proof of reasonableness. *Id.* Accordingly, on remand, every claim for attorney's fees and related costs will be subject to proof and the trial court's consideration for reasonableness. *Id.*

For the foregoing reasons, the agreed judgment and orders of the Shelby Circuit Court are affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

NICKELL, JUDGE, CONCURS IN RESULT ONLY.

CLAYTON, JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

CLAYTON, JUDGE, DISSENTING. Respectfully, I dissent. I believe that the trial court's determination that Commonwealth Bank did not have standing should be affirmed. The majority provides three reasons to support its

¹ This opinion references the statute where it was codified at the time of the proceedings below. However, the statute has been revised and is now codified in KRS 134.452(3)(c).

contention that Commonwealth Bank had standing. The reasons given are that Commonwealth Bank was a named party in the foreclosure action; common courtesy and ethical practice require it; and finally, Tax Ease's purchase of the delinquent tax bills jeopardized Commonwealth Bank's security interest. Further, given the fact that the Bank had standing, the majority maintains that the bank has a right to object to the attorney fees even though these fees had already been agreed to by Teretha M. Murphy.

I believe this reasoning is in error for three reasons. First, KRS 134.420 creates a lien priority for taxes that is superior to any other creditor:

(3) The lien shall include all interest, penalties, fees, commissions, charges, costs, attorney fees, and other expenses as provided by this chapter that have been incurred by reason of delinquency in payment of the tax claim certificate of delinquency, personal property certificate of delinquency, or in the process of collecting any of them, and shall have priority over any other obligation or liability for which the property is liable.

In fact, as stated by the statute, this superior lien encompasses all attendant debts including attorney fees associated with the collection of the tax bill. When Tax Ease purchased the two delinquent tax bills, the priority of the lien was unchanged as Tax Ease did nothing more than stand in the place of the government.

Therefore, Commonwealth Bank's mortgage was already inferior to the tax lien. Furthermore, while Commonwealth Bank may be statutorily entitled to pay the tax bills and fees on Murphy's behalf, and then add them to her outstanding mortgage balance, this ability does not confer standing on Commonwealth Bank to dispute

the agreed judgment entered into between Tax Ease and Murphy. When Commonwealth Bank chose not to do so, its lien priority remained the same as it had been before, and its relative position did not change.

As the majority noted, standing is established when a party has a judicially recognizable interest in the subject matter of the suit. The Kentucky Supreme Court explained standing in *City of Louisville v. Stock Yards Bank & Trust Co.*, 843 S.W.2d 327, 328-29 (Ky. 1992), when it stated:

Prevailing Kentucky authority establishes the standard for standing to sue as “a judicially recognizable interest in the subject matter.” The interest may not be “remote and speculative,” but must be a present and substantial interest in the subject matter. *HealthAmerica Corporation of Kentucky v. Humana Health Plan, Inc.*, Ky., 697 S.W.2d 946 (1985).

The Court goes on to recognize the difficulty of formulating a precise standard to determine whether a party has standing, and citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 202 (Ky. 1989), says that the issue must be “decided on the facts of each case.”

Here, because Commonwealth Bank is able to recoup its payment of the taxes and fees for Murphy by rolling over the amount to the mortgage, it does not have a real and substantial interest in the agreed judgment, and thus, no standing to challenge it. Indeed, Commonwealth Bank never challenged the amount of the tax bill. Commonwealth Bank’s only challenge was to the amount, not the right, to an attorney fee. In the case at hand, Murphy acknowledged in the agreed judgment with Tax Ease that the attorney fees were reasonable. Since the

debtor did not dispute the reasonableness of the fees at the time of the agreed judgment, Commonwealth Bank cannot do so now. Additionally, although Commonwealth Bank argues that \$1,887 in fees to be paid to Tax Ease is too much, it does not dispute that Tax Ease is entitled to some amount as an attorney fee. In relation to the mortgage, \$1,887 in attorney fees does not qualify as a substantial amount.

Second, notwithstanding common courtesy, ethical practice is insufficient to confer standing. In the case cited by the majority, *Kentucky Bar Ass'n v. Bodell*, 838 S.W.2d 395 (Ky. 1992), the Kentucky Supreme Court discusses an attorney's duties to keep his or her client informed. It has no significance to the issue of standing. And Tax Ease has no client relationship with Commonwealth Bank.

Further review of the facts herein illustrates that the agreed judgment between Tax Ease and Teretha Murphy was based on a contractual relationship. Ms. Murphy agreed to pay Tax Ease based upon their purchase of her tax bills. Commonwealth Bank was not a party to that contract nor was it an intended third party beneficiary. Commonwealth Bank has no obligation to pay Tax Ease. The courts have discussed the rights of an intended third party beneficiary as opposed to that of an incidental third party beneficiary. In *Sexton v. Taylor County*, 692 S.W.2d 808, 810 (Ky. App. 1985), this Court determined that:

It is the law in this jurisdiction that no stranger to a contract may sue for its breach unless the contract was made for his benefit. *See Long v. Reiss*, 290 Ky. 198,

160 S.W.2d 668 (1942). Parties for whom these contracts are made fall into two classes-donee beneficiaries and creditor beneficiaries. The Court of Appeals in *King v. National Industries, Inc.*, 512 F.2d 29, 33 (6th Cir. 1975), described each class as follows:

One is a donee beneficiary if the purpose of the promisee in buying the promise is to make a gift to the beneficiary. A person is a creditor beneficiary if the promisee's expressed intent is that the third party is to receive the performance of the contract in satisfaction of any actual or supposed duty or liability of the promisee to the beneficiary.

Hence, in order to be either a donee or creditor beneficiary, it must be proven that the contract in question was made for the actual and direct benefit of the third party. There is simply no evidence appearing in the record to show that the parties made the contract for the benefit of Commonwealth Bank or that there was ever any intent, expressed or otherwise, on their part to do so. Furthermore, "a third-party who was intended by the parties to benefit from the contract, namely, a donee or a creditor beneficiary, has standing to sue on a contract; an incidental beneficiary does not acquire such right." *Presnell Const. Managers, Inc. v. EH Const., LLC*, 134 S.W.3d 575, 579 (Ky. 2004). Neither Tax Ease nor Murphy intended for Commonwealth Bank to benefit from the contract, and thus, Commonwealth Bank had no rights or duties pursuant to the contract between Tax Ease and Murphy. The contract was not made for the actual and direct benefit of Commonwealth Bank. Therefore, Commonwealth Bank had no standing to sue or to be heard on the agreed judgment which arose as a result of the contract between

Tax Ease and Murphy. To allow any such creditor the right to interfere with a separate contractual relationship of their debtor, would result in an even more complicated and stressful legal system.

Finally, my third reason for disagreeing with my colleagues about whether Commonwealth Bank had standing to challenge the agreed judgment is that Commonwealth Bank's participation in the foreclosure action was for the protection of its own interest. Commonwealth Bank states on page ten of its brief:

The Court [the trial court], in what Appellants believe was an abrogation of its responsibility to protect defenseless citizens of the Commonwealth of Kentucky, concluded it was not able to determine whether the amount of attorney's fees claimed by Kentucky Property Tax is reasonable.

This argument is disingenuous. Quite reasonably, Commonwealth Bank was concerned about itself not Murphy. It was properly joined in the foreclosure action to protect whatever interest it had, but that does not mean that it had any judicially recognizable interest in a separate contract which may have a slight "ripple effect" on its claim, but to which it was not a party. When Tax Ease acquired the Murphy's tax lien, Commonwealth Bank was in the exact same position as when the taxes were owed to the government.

Since Commonwealth Bank does not have standing, the reasonableness of the attorney fees is moot. Thus, I would affirm the trial court.

BRIEF FOR APPELLANT:

Donald T. Prather
Shelbyville, Kentucky

BRIEF FOR APPELLEE:

No brief filed.