

RENDERED: OCTOBER 9, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001103-MR

BILLY GARDNER;
MARVIN GARDNER;
and BETTY GARDNER

APPELLANTS

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NOS. 11-CI-00146 AND 11-CI-00156

PBI BANK, INC.;
SASS MUNI-V, LLC;
COMMONWEALTH OF
KENTUCKY, DIVISION OF
COLLECTIONS; COUNTY OF
MARION; JAMES KEITH THOMAS;
and TAX EASE LIEN SERVICING, LLC

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KRAMER, JUDGES.

KRAMER, JUDGE: The above-captioned appellants contend that the Marion Circuit Court erred in entering a judgment of foreclosure with respect to certain real property situated in Marion County, Kentucky. Finding no error, we affirm.

On September 10, 2004, James Keith Thomas executed a promissory note to appellee PBI Bank, Inc., (PBI) in the principal amount of \$100,826.72. As security, Thomas gave PBI a mortgage that encumbered three parcels of his real property located in Marion County, Kentucky. The various deeds and filings in this matter refer to the three parcels in question as (1) “Thomas Garage,” (2) the “Crossroads,” and (3) “Tract I and Tract II.” As additional security, Thomas also acknowledged and delivered an “Assignment of Rents and Leases” to PBI, which further encumbered the three properties. PBI recorded both the mortgage and the assignment in the official records of the Marion County Clerk on September 15, 2004.

Since April 29, 2011, Thomas has been in default of his obligations under the promissory note.

Approximately two years prior to Thomas’s default (May 11, 2009), appellee Tax Ease Lien Investments, LLC, filed a foreclosure action in Marion Circuit Court with respect to the Crossroads property. Tax Ease failed to name PBI as a party, and PBI otherwise had no notice of Tax Ease’s action. Nevertheless, a judgment was entered in favor of Tax Ease and the Crossroads property was consequently sold by the Master Commissioner on May 13, 2010, to

Mark Gardner for \$10,000. Afterward, Mark Gardner conveyed the Crossroads property to Billy Gardner and Marvin Gardner via general warranty deed.

On May 16, 2011, Tax Ease filed a different action to enforce another tax lien against property held by Thomas. This time Tax Ease's action concerned the Thomas Garage property, and Tax Ease added PBI as a defendant. In response, PBI counterclaimed to enforce its mortgage. PBI also filed a separate action on May 20, 2011, to assert its mortgage and foreclose upon not only the Thomas Garage property, but also the Tract I and Tract II and Crossroads properties. Upon discovering the Crossroads property had been sold and successively conveyed to Mark Gardner, Billy Gardner and Marvin Gardner, PBI also added these individuals (as well as Marvin's wife, Betty Gardner) as defendants. Afterward, Tax Ease's and PBI's respective actions were consolidated.

Following a period of motion practice, PBI was granted a judgment of foreclosure with respect to the Thomas Garage and Tract I and Tract II properties, subject to the tax liens held by Tax Ease.

Regarding the Crossroads property, PBI's action was opposed by the Gardners, who collectively filed a cross-motion for summary judgment. As to why, the Gardners pointed out that the chain of title to the Crossroads property had listed "Keith Thomas" as grantee. Conversely, PBI's mortgage had been executed and filed under "James Keith Thomas," Thomas's full legal name. The Gardners further noted that a title examination using the database provided at the Marion

County Clerk's office would not have uncovered PBI's mortgage under a search of the name "Keith Thomas" (rather than "James Keith Thomas").

In short, the Gardners argued that because Mark Gardner had indeed conducted a title examination using the database provided at the Marion County Clerk's office regarding the Crossroads property prior to purchasing the Crossroads property at the master commissioner's sale, and because Mark Gardner's title examination (which had been based entirely upon the name "Keith Thomas") had not disclosed PBI's mortgage, Mark Gardner had effectively purchased the Crossroads property and conveyed it to Billy and Marvin Gardner free and clear of PBI's mortgage.

The thrust of the litigation below eventually concerned two overarching issues: (1) whether Mark Gardner had been constructively on notice of PBI's mortgage with "James Keith Thomas" when he purchased the Crossroads property at the master commissioner's sale; and (2) whether, by virtue of a separate procedural issue, PBI had waived its right to assert its mortgage against the Crossroads property at all. Ultimately, the circuit court granted summary judgment in favor of PBI on both of these issues, and this appeal followed. Additional details relating to this case will be discussed over the course of our analysis, below.

To begin, our standard for reviewing summary judgments and other pure issues of law is *de novo*. *Davis v. Scott*, 320 S.W.3d 87, 90 (Ky. 2010).

With that said, the first part of the Gardners' appeal is more appropriately categorized as a collateral attack; that is, the Gardners argue that the

circuit court's judgment, which is the subject of their appeal, is void. By way of background, the circuit court disposed of this case over the course of two separate orders. The first order, entered November 7, 2012, determined that PBI was entitled to assert its mortgage and foreclose against the Thomas Garage and Tract I and Tract II properties, and that both of these properties should be accordingly sold. In closing, the order stated:

17. This is a final and appealable Judgment and Order of Sale, and there is no just reason for delay in its entry or execution.

18. This action is retained for such further orders and proceedings as may be necessary, including, reserving the issue of additional attorney's fees incurred by [PBI] subsequent to the filing of the Motion upon which this Judgment and Order is based and in accordance with the terms of the note and mortgage and pursuant to [Kentucky Revised Statute] KRS 411.195.

The circuit court's November 7, 2012 order did not include any language with respect to either the Crossroads property or the Gardners. PBI did not timely move to amend the order to include any kind of adjudication relative to the Crossroads property or the Gardners. Moreover, PBI did not appeal this order.

With this in mind, the Gardners argue (as they did below) that either PBI's failure to have the November 7, 2012 order amended in that respect, or PBI's failure to appeal it, thereby deprived the circuit court of jurisdiction to enter a subsequent order on June 13, 2013, which, as discussed below, addressed the Gardners' argument regarding lack of constructive notice, determined their

argument had no merit, and instead enforced PBI's mortgage against the Crossroads property.

The underlying assumption of the Gardners' argument is that the circuit court's November 7, 2012 order determined the full extent of the security encompassed by PBI's mortgage, and that by failing to contest the order PBI waived any right to enforce its mortgage against any other property—including the Crossroads.

But, nothing in the circuit court's November 7, 2012 order indicates it was intended to adjudicate the full extent of the security encompassed by PBI's mortgage. It merely adjudged liens against and ordered the sale of the Thomas Garage and Tract I and Tract II properties, but conspicuously retained jurisdiction “for such further orders and proceedings as may be necessary[.]” Thus, the circuit court's use of the finality language of Kentucky Civil Rule (CR) 54.02¹ in its November 7, 2012 order only made that order final and appealable, if at all, in those respects. Clearly, the circuit court retained jurisdiction over the matter of whether PBI's mortgage could also be satisfied from the Crossroads property. As

¹ In relevant part, CR 54.02 provides:

(1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

such, the circuit court did not, as the Gardners argue, proceed outside of its jurisdiction by entering a subsequent order relative to the Crossroads property on June 13, 2013.

The second part of the Gardners' appeal concerns the enforceability of PBI's mortgage vis-à-vis the Crossroads property. The Gardners do not contest that if PBI's mortgage had been validly recorded prior to when Mark purchased the Crossroads property then, as a general principle of law, Mark and his subsequent grantees (Billy and Marvin) had constructive notice and thus took the property subject to the mortgage. *See State Street Bank and Trust Co. of Boston v. Heck's, Inc.*, 963 S.W.2d 626, 630 (Ky. 1998). As indicated, the Gardners' argument is that Mark purchased the Crossroads property free and clear of PBI's mortgage because PBI's recorded mortgage was in the name of "James Keith Thomas," rather than "Keith Thomas," and was therefore incapable of imputing constructive notice.

The Gardners' argument is without merit. As to why, this is not a case where a nickname, an incorrect name, or a misspelled name was listed on a mortgage; PBI's mortgage included Thomas's full legal name. The Gardners present no authority indicating anything more was required. The applicable statutes do not indicate anything more was required. *See, e.g.*, KRS 382.200(1) (requiring the county clerk to "place the names of the parties to the instrument upon the cross-index in his office"). Furthermore, the insufficiency of a county clerk's index, or even a county clerk's outright failure to index a given instrument,

“does not affect the validity of the constructive notice which is given by placing such an instrument on record.” *Seat v. Louisville & Jefferson County Land Co.*, 219 Ky. 418, 293 S.W. 986, 990 (1927).

In conclusion, the Gardners have failed to demonstrate the Marion Circuit Court erred in this matter. We therefore AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE, PBI BANK,
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