

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000357-MR

BLUEGRASS TAX LIEN BUREAU, LLC

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
ACTION NO. 10-CI-00564

FORCHT BANK, NA; PAUL W. BLAIR; CLARK
COUNTY, KENTUCKY; COMMONWEALTH
OF KENTUCKY, FINANCE AND ADMINISTRATION
CABINET; COOL BREEZE, INC.; FIRST STATE, FSB,
(D/B/A THE LEXINGTON BANK; JUSTIN HOTELS,
INC.; RAMESH PATEL; TANUJA PATEL; M. ALEX
ROWADY, CLARK COUNTY MASTER COMMISSIONER;
UNITED STATES OF AMERICA, INTERNAL REVENUE
SERVICES

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: D. LAMBERT, THOMPSON, AND VANMETER, JUDGES.

D. LAMBERT, JUDGE: Bluegrass Tax Lien Bureau, LLC (“Bluegrass”)

appeals a judgment of the Clark Circuit Court denying its motion to intervene

post-judgment, to enforce a delinquent county property tax bill (the “Tax Certificate”). The circuit court denied Bluegrass’ motion and extinguished Bluegrass’ interest in the property. After review, we affirm the circuit court.

On July 27, 2010, Forcht Bank, NA (the “Bank”) filed a complaint in the Clark Circuit Court to foreclose on certain real property (the “Subject Property”) located at 1110 Interstate Drive, Winchester, Kentucky. The Bank named the parties with an interest in the Subject Property as defendants. Clark County, Kentucky held a tax lien against the Subject Property and thus was a defendant. The Bank also filed a *lis pendens* notice in the Clark County Clerk’s office on August 2, 2010.

On February 17, 2011, the circuit court entered a judgment and ordered the sale of the Subject Property. The judgment provided that the defendants’ interests against the Subject Property would attach in the following priority:

1. Clark County, Kentucky – Tax lien;
2. [The Bank] – Mortgage lien

The circuit court also directed the Clark County Master Commissioner (the “master commissioner”) to deduct all city and county property taxes from the proceeds of the judicial sale before satisfying the Bank’s judgment.

On June 13, 2012, the master commissioner sold the Subject Property for \$700,000.00. In its report of sale, the master commissioner specifically stated that the circuit court’s February 17, 2011 judgment

governed the sale. The circuit court later confirmed this report and instructed the master commissioner to pay the costs of the sale.

After accounting for a month of accrued interest and paying \$3,348.90 in post-sale expenses,¹ the master commissioner calculated that \$697,686.70 in net proceeds were available to distribute among the creditors. On July 27, 2012, the circuit court entered a final order directing the master commissioner to pay the entire \$697,686.70 to the Bank. There were no objections to this order.

On May 5, 2013, over nine months after the circuit court entered its final order, Cool Breeze, Inc. (“Cool Breeze”) filed a motion to intervene in the action. Cool Breeze also sought to join both Southern Tax Services, LLC (“STS”) and Bluegrass as party defendants. Cool Breeze had purchased the Subject Property at the master commissioner’s sale and subsequently received notice that Bluegrass claimed a lien on the Subject Property. After investigating Bluegrass’ claim, Cool Breeze discovered STS had purchased the Tax Certificate on August 2, 2011, and afterward assigned its interest to Bluegrass. Bluegrass filed its interest on November 5, 2012.

On June 20, 2013, Bluegrass filed a motion to intervene in the action under CR² 24. In its motion, Bluegrass explained that it had an interest in the Subject Property and in the proceeds of the foreclosure sale

¹ One post-sale expense was a city of Winchester tax bill for \$1,982.57.

² Kentucky Rules of Civil Procedure.

based on the language of the circuit court's February 17, 2011 judgment and the operation of KRS³ 134.420. Bluegrass also asserted that its continued absence from the action would impede this interest. The Bank countered that Bluegrass' motion was untimely.

The circuit court agreed with the Bank and denied Bluegrass' motion in an order dated August 22, 2013. The circuit court also released the Tax Certificate and had the master commissioner prepare a deed reflecting the release. According to the circuit court, this rendered Cool Breeze's motion to intervene moot.

Bluegrass subsequently filed a motion to alter, amend or vacate the August 22, 2013 order and a joint motion with the Clark County Attorney to substitute Bluegrass for Clark County⁴ as a party, enforce the Tax Certificate, and satisfy the Tax Certificate from the proceeds of the sale. In these motions, Bluegrass added new arguments that the circuit court's decision was contrary to public policy and unjustly enriched the Bank.

In response, the Bank maintained that Bluegrass' motion was untimely. The Bank also denied that it was unjustly enriched or that the circuit court's decision violated public policy because the *lis pendens* apprised Bluegrass of the Subject Property's involvement in a judicial

³ Kentucky Revised Statutes.

⁴ Though Clark County was named as a defendant and properly served, no formal answer was filed on behalf of the County. The record does show the Clark County Attorney was included on the certificates of service of many documents throughout the litigation, however.

proceeding and provided Bluegrass with ample notice to protect its interest. The circuit court agreed with the Bank and overruled both of Bluegrass' motions. This appeal followed.

On appeal, Bluegrass obliquely claimed that its motion was timely because it filed its motion as soon as it had actual knowledge of the Bank's lawsuit and because KRS 134.420 only requires a purchaser of a certificate of delinquency to file a motion to intervene once it has actual knowledge of a proceeding involving its interest. Bluegrass also argued along the lines of its motion to alter, amend or vacate that the Bank was unjustly enriched and that the circuit court's decision would set an inefficient precedent by affirmatively requiring parties to perform a title search before buying a certificate of delinquency. For the following reasons, we disagree.

In order to intervene under CR 24, a party must file a "timely application." What is "timely" is left to the trial court and is reviewed for an abuse of discretion on appeal. *Carter v. Smith*, 170 S.W.3d 402, 408 (Ky. App. 2004). However, a party seeking to intervene post-judgment must generally meet a "special burden" to be timely. *Monticello Elec. Plant Bd. v. Board of Ed.*, 310 S.W.2d 272, 274 (Ky. 1958). Furthermore, the settled law of this Commonwealth is that

one who acquires an interest in property, whether by purchase, lien or other encumbrance, after the filing of a *lis pendens* notice, takes that interest subject to the results of the litigation. Actual

knowledge of the pending action is not necessary to bind the *pendente lite* purchaser.

Cumberland Lumber Co. v. First & Farmers Bank of Somerset, Inc., 838 S.W.2d 403, 405 (Ky. App. 1992).

The facts of the present case are similar to those of *Hazel Enterprises, LLC v. Cmty. Fin. Servs. Bank*, 382 S.W.3d 65 (Ky. App. 2012). In *Hazel*, a bank foreclosed on a parcel of real property and filed a *lis pendens* notice in the land records. The property was later sold to a third party via master commissioner's sale, and the circuit court entered an order confirming the sale and distributed the proceeds. A third party then purchased a certificate of delinquency affecting the property the day after the circuit court entered its order, and within a month, filed a motion to intervene under CR 24 to protect its interest. This Court then upheld the circuit court's denial of the motion, opining that the third party had notice of the pending action and that re-opening the litigation would prejudice the parties whose rights had already been decided.

Here, Bluegrass similarly did not acquire any rights to the Tax Certificate until after the circuit court confirmed the master commissioner's sale and supplemented its February 17, 2011 order to conclusively determine Clark County was not entitled to any of the proceeds. Bluegrass also filed its motion to intervene more than seven months later than the third party in *Hazel*. By that time, a valid *lis pendens* had been recorded for more than two

and one-half years. As such, under the *lis pendens* doctrine explained in *Cumberland Lumber Co.*, Bluegrass had constructive knowledge of the proceeding for more than two and one-half years and had the responsibility to discover the pending litigation as the *pendente lite* lienholder; the Bank did not have a duty to conduct a subsequent title search once its *lis pendens* notice was filed.

Though Bluegrass asserts that the circuit court's ruling would cause purchasers of certificates of delinquency to pass their costs along to the taxpayers and thereby frustrate the state's overall interest in collecting property taxes, to hold otherwise would unjustly reward those who haphazardly fail to conduct a title examination or intervene in a suit by allowing their liens to survive "[while] those creditors who did intervene and whose liens were extinguished came away empty-handed." *Cumberland Lumber Co.*, 838 S.W.2d at 406. Accordingly, because the circuit court properly applied existing law, it did not abuse its discretion in characterizing Bluegrass' motion as untimely. The judgment of the Clark Circuit Court is hereby AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

William Miles Arvin, Jr.
Nicholasville, Kentucky

BRIEF FOR APPELLEE FORCHT
BANK, NA:

Emily H. Cowles
Lexington, Kentucky

