

RENDERED: January 9, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-00693-MR

PRICHARD REALTY, INC.

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE KELLEY R. ASBURY, JUDGE
ACTION NO. 94-CI-00488

KIM BURSE, SECRETARY OF
THE KENTUCKY REVENUE CABINET;
BOYD COUNTY, KENTUCKY;
D & B REAL ESTATE & MANAGEMENT, INC.;;
and CITY OF ASHLAND, KENTUCKY

APPELLEES

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: GUDGEL, CHIEF JUDGE; EMBERTON and JOHNSON, Judges.

JOHNSON, JUDGE: Prichard Realty, Inc. (Prichard) appeals from an order of the Boyd Circuit Court entered on February 12, 1996, which set aside a January 19, 1996 foreclosure sale where Prichard had purchased the property at issue in this case. The trial court set aside the sale after D & B Real Estate and Management, Inc. (D&B) tendered checks for payment of the debts and asserted its right of redemption as to the property. Prichard argues that an amendment to Kentucky Revised Statutes (KRS) 134.490, effective July 15, 1994, which states that property sold pursuant to a judgment of foreclosure shall be appraised and there shall be a right of

redemption¹ did not apply to this sale since this action was commenced upon the filing of the complaint on June 6, 1994. Prichard also argues that even if the amendment did apply, D&B "waived" any argument as to the amendment's application since it did not appeal from the December 11, 1995 order of sale which stated that the property shall not be appraised and there shall be no right of redemption. We conclude that the issue concerning right of redemption was determined by the December 11, 1995 order of sale and D&B's failure to appeal from that order caused that order to become the law of the case. Thus, the trial court was without grounds to set aside the foreclosure sale. We reverse the trial court and remand for further proceedings consistent with this Opinion.

On June 6, 1994, the Kentucky Revenue Cabinet (Cabinet) commenced an action against D&B to recover unpaid taxes on real estate owned by D&B. The Cabinet demanded \$629.60 for 1992 ad valorem taxes and \$1,306.38 for 1993 ad valorem taxes, plus interest, penalty, and costs. The City of Ashland filed a cross-claim for \$3,289.67 in past due ad valorem taxes, plus interest and costs.

D&B did not file any responsive pleadings and on October 24, 1995, the Cabinet moved for a default judgment and order of sale. On December 11, 1995, the trial court entered a default

¹ The 1994 amendment to KRS 134.490 is actually a complete change from the prior section (3). Section (3) now states, in pertinent part: "If property is sold pursuant to a judgment of foreclosure, it shall be appraised pursuant to the provisions of KRS 426.520 and there shall be a right of redemption as provided in KRS 426.530." The old Section (3) stated that there was no appraisal required and no right of redemption.

judgment and order of sale of the real estate. In the order, the trial court stated: "Pursuant to KRS 134.490, this property shall not be appraised as in other foreclosure proceedings, and there shall be no right of redemption except as provided in KRS 134.510." The trial court further stated that the order was "final and appealable"; however, D&B did not appeal that order. The Boyd County Master Commissioner advertised the property and sold it to Prichard on January 19, 1996, for \$46,000. Prichard paid the full price. The Master Commissioner filed his report of sale on January 26, 1996, but did not convey a deed to Prichard.

On January 30, 1996, D&B filed a motion to set aside the sale of the real estate, stating that it was tendering checks to "redeem the aforesaid real property pursuant to KRS 134.490(3). . . ." D&B made no reference to Kentucky Rules of Civil Procedure (CR) 55.02 or CR 60.02, and there were no attached affidavits. Prichard objected to the motion on the grounds that D&B should have appealed from the December 11, 1995 default judgment and order of sale which had ruled that the property was to be sold without appraisal and without the right of redemption. Prichard further argued that since the action was filed prior to the effective date of the KRS 134.490(3) amendment, the amendment did not apply.

On February 12, 1996, the trial court entered an order setting aside the sale of the property to Prichard "due to the fact that the owners of the property herein, defendant, D&B Real Estate & Management, Inc. . . . have tendered checks in favor of the Boyd Circuit Clerk and the Ashland City Cashier to redeem said prop-

erty." The trial court ordered that the \$46,000 be reimbursed to Prichard. This appeal followed.

The initial issue that we must address is whether the trial court had proper grounds to set aside the December 11, 1995 order of sale. It is well settled "that an order directing property to be sold in satisfaction of a judgment [is], in fact, a final judgment and that the only purpose of retaining the case on the docket [is] to enforce the judgment." Cerwin v. Taub, Ky.App., 552 S.W.2d 675, 678 (1977). This Court in Cerwin elaborated on this point as follows:

"That judgment not only 'definitely settled the issues between the parties, * * [*] but also specifically ordered the property sold in satisfaction of the * * * judgment.' Johnson v. Beattie et al., 265 Ky. 264, 96 S.W.2d 762. It was a final judgment since it determined the rights and authorized enforcement. McCormack v. Moore, 273 Ky. 724, 117 S.W.2d 952. There was nothing more for the Court to adjudicate, therefore, the judgment put an end to the controversy between the parties. Adkins v. Carol Mining Company, 281 Ky. 328, 136 S.W.2d 32. The order to the Sheriff to sell the property was a direction to perform an administrative act. The necessity to enter his report did not prevent the judgment from being final and appealable."

Id., quoting Elam v. Acme Well Drilling Co., Ky., 411 S.W.2d 468 (1967). Thus, the December 11, 1995 order of sale was a final judgment, and when it was not appealed from, it became the law of the case. The only conceivable grounds upon which the trial court could set aside this final order would be pursuant to CR 60.02 or CR 55.02, which applies the same criteria as CR 60.02. However, it is impossible for D&B to rely upon the criteria set forth in CR 60.02 since it did not allege such grounds for relief in its motion

to set aside, nor did the trial court articulate any such grounds in its order setting aside the sale. Rather, D&B relied upon and the trial court accepted the argument that the right of redemption requirement in KRS 134.490 had not been met. However, the question of whether the trial court may have misapplied the law in regards to the right of redemption in the order of sale was a question that should have been addressed by an appeal of the December 11, 1995 order. Since the trial court had no basis to set aside the order of sale, we reverse its order and remand for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Hon. Roger W. Hall
Ashland, KY

BRIEF FOR APPELLEE, D&B:

Hon. Charles R. Holbrook, III
Ashland, KY