

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000831-MR

U.S. BANKS, N.A.

APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 04-CI-00742

BARBARA G. HAMILTON and
TODD B. HAMILTON

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; KNOPF,¹ SENIOR
JUDGE.

KNOPF, SENIOR JUDGE: U.S. Banks, N.A. (USB), appeals the trial court
judgment awarding insurance proceeds to Barbara G. Hamilton and Todd B.
Hamilton. We affirm.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On July 16, 2004, USB filed a complaint against the Hamiltons in Floyd Circuit Court seeking foreclosure for default on a note and mortgage for the purchase of their home. After a motion was made by USB, a default judgment was entered against the Hamiltons with an order of sale of the property and the matter was referred to the master commissioner (MC). During the proceedings and prior to the MC's sale, the home was partially destroyed by fire. The home was covered by an insurance policy through American Commerce Insurance Company (ACIC). On February 27, 2006, the trial court granted a motion by ACIC to intervene in the foreclosure action. ACIC then paid the insurance fire loss funds, \$66,172.82, to the trial court. Those funds were subsequently ordered to be held by the court until further order.

On May 18, 2006, the MC held a sale of the property and the Hamiltons placed the winning bid of \$60,000. However, the Hamiltons were unable to secure the funds to execute the sale and thus it was never completed. As a result, the MC held another sale on October 19, 2006, and USB became the purchasers of the property for \$167,233.04, which represented the full value of its judgment against the Hamiltons plus accrued interest and costs.

On January 25, 2007, the trial court ordered the parties to submit memorandum in support of their argument as to who should receive the insurance

policy proceeds being held by the court. Both parties did so and on March 29, 2007, the Court entered an order awarding the funds to the Hamiltons. This appeal followed.

On appeal, USB argues that the trial court committed reversible error when it awarded the fire loss insurance proceeds to the Hamiltons because: 1) it was a violation of the mortgage contract between the parties; and 2) it created an inequitable result for all parties. In support of this argument, USB references a section of the Hamilton's mortgage entitled "Hazard or Property Insurance." This section states, in relevant part:

[u]nless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, if the restoration and repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower.

Contractual provisions are subject to *de novo* review. *Morganfield Nat'l Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky.1992). Statutory construction is also subject to *de novo* review. *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007) citing *Morganfield Nat'l Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992).

In support of its decision to award the insurance proceeds to the Hamiltons, the trial court stated, in part:

[u]pon review of the record, the [c]ourt finds no order or any other evidence which would entitle the [p]laintiff to any offset in their bid amount for the sums previously paid into the [c]ourt. The [p]laintiff had actual notice of the condition of the property and chose the amount of their bid.

Plaintiff points out in its memorandum that any excess of any insurance proceeds pursuant to the mortgage agreement not used to repair the property will be applied to the sum secured by the security instrument, with any excess to be paid to the borrower. Kentucky [l]aw is equally clear that in the event of a [c]ourt sale any excess monies over the amount necessary to satisfy the [p]laintiff's judgment would be the property of the original land, i.e. the [d]efendants herein.

Therefore, for the above reasons, the Court finds that the [p]laintiff having bid at auction the sum sufficient to satisfy its judgment, including interest and costs herein and further that the sums paid into be [sic] the intervening [p]laintiff due to the fire loss are excess to said judgment, IT IS HEREBY ORDERED that said funds should be awarded to the [d]efendants, Barbara and Todd Hamilton. . . .

We agree with the trial court's conclusion that the insurance proceeds are excess to USB's judgment and that, therefore, they pass to the Hamiltons. The same would be true if any other party had placed the winning bid of \$167,233.04. USB is not entitled to special treatment because of its dual status of judgment-holder and bidder. USB could have better protected itself by inquiring of the master commissioner at the time of the sale whether their bid included the proceeds or making their bid for less than the amount of their judgment. USB made a mistake by failing to take such protective measures, the result of which was a windfall for the Hamiltons. While we appreciate USB's argument that such a

windfall is inequitable, that windfall is attributable solely to USB's own negligence and inattention to the details of their bid.

For the foregoing reasons, the March 29, 2007, order of the Floyd Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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