

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001625-MR

KIMBERLY MILLER AND
PIERRE MILLER

APPELLANTS

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 09-CI-00766

REPUBLIC BANK AND TRUST COMPANY AND
DOREEN S. GOODWIN, MASTER COMMISSIONER,
OLDHAM COUNTY CIRCUIT COURT

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER, STUMBO, AND VANMETER, JUDGES.

KELLER, JUDGE: Kimberly and Pierre Miller (the Millers) appeal from the circuit court's denial of their motion to set aside a master commissioner's sale and the court's order that the Millers forfeit their \$5,000.00 down payment.¹ On

¹ We note that both of the Millers signed the notice of appeal and the prehearing statement. However, only Kimberly Miller signed the briefs that were filed. As a *pro se* litigant, Ms. Miller cannot represent anyone other than herself; therefore, the briefs she filed only apply to her.

appeal, the Millers argue that the master commissioner's notice of sale did not meet statutory and local rule requirements because it did not contain information regarding the federal government's tax lien and right of redemption. Furthermore, the Millers argue that the court erred by not holding a hearing on their post-sale motions. Republic Bank and Trust Company (Republic) argues that the master commissioner's notice of sale complied with the statutory and local rule requirements and that the Millers had actual notice of the federal tax lien and constructive notice of the right of redemption. Having reviewed the record and the arguments of the Millers and Republic, we affirm.

FACTS

The essential facts are not in dispute. Jeffrey Daup (Daup) borrowed in excess of \$435,000 from Republic, which he secured through mortgages on real property located in Crestwood, Kentucky. Daup failed to make the required loan payments and Republic filed a foreclosure action, noting that the property was also encumbered with a federal tax lien in the amount of \$51,947.15. Thereafter, Republic filed a motion for summary judgment, which the trial court granted.

In pertinent part, the court's judgment ordered the master commissioner to sell the property subject to a right of redemption in favor of the United States. The master commissioner then advertised the sale stating that it was being held "[p]ursuant to terms of a judgment rendered in" *Republic Bank & Trust v. Jeffrey Daup, et al.*, a case out of Oldham Circuit Court with case number 09-CI-

Because the issues the Millers have are the same issues and because the parties have referred to the Millers throughout their briefs, we do so as well.

00766 and that the sale would take place on May 25, 2010. Furthermore, the advertisement stated that the property would be

sold free and clear of all liens, encumbrances and interest of the parties hereto, except sold subject to: A) All unpaid real estate taxes and all taxes due thereafter, for which the purchaser shall not have a credit against the purchase price; B) Easements, restrictions, stipulations and agreements of record; C) Assessments for public improvements levied against the property; D) Any facts which an inspection and accurate survey of the property may disclose. However, neither the Plaintiff, its Counsel, the Court, nor the Commissioner, shall be deemed to have warranted title to any purchaser.

The advertisement did not mention the federal government's right of redemption.

Prior to the judicial sale, the Millers, through a realtor, engaged in negotiations with Republic to purchase the property. During those negotiations, the realtor advised the Millers that there was a federal tax lien in the amount of approximately \$15,000.00. The Millers, armed with that knowledge, made an offer to purchase the property before the judicial sale, which Republic rejected. Therefore, the Millers decided to take part in the judicial sale.

Kimberly stated that, the day before the judicial sale, she contacted the county clerk's office to ask about the federal tax lien. Whoever Kimberly spoke with at the clerk's office referred her to the master commissioner's office. According to Kimberly, whoever she spoke with in the master commissioner's office stated that "if a Federal Tax Lien was not included in the sale documents, it would not carry over to affect" the property. Because the master commissioner's notice did not mention the federal tax lien or the federal right of redemption, the

Millers apparently assumed that these issues would be disposed of by the judicial sale. Therefore, the Millers participated in the judicial sale and, as successful bidders, made the required \$5,000.00 down payment. According to Kimberly, she and Pierre did not learn of the federal right of redemption until after the sale. That right of redemption impeded their ability to obtain financing; therefore, on June 4, 2010, the Millers filed exceptions to the master commissioner's report of sale asking the court to set aside the sale and for return of their down payment. In support of their exceptions, the Millers stated that they had been misinformed about the amount of the federal tax lien and had not been informed of the federal right of redemption.

On June 28, 2010, the Millers' counsel filed a motion to withdraw. On July 2, 2010, Republic filed a motion seeking permission to re-sell the property and an order forfeiting the Millers' down payment and foreclosing them from bidding at the re-sale. On July 6, 2010, the court entered an order giving the Millers seven days to obtain new counsel. That order notes that Republic's motion to re-sell the property was scheduled for a hearing on July 9, 2010, and also apparently gave the Millers until July 9 to obtain counsel. On July 8, 2010, the court received correspondence from the Millers asking for an additional week to obtain counsel. In that correspondence, the Millers noted that they did not receive Republic's motion to re-sell until July 6 and did not receive the order permitting counsel to withdraw until July 7. On July 12, 2010, the court entered an order granting Republic's motion to re-sell and reserving the down payment forfeiture issue. We

note that, although this order was entered on July 12, 2010, it is dated by the judge as July 9, 2009. On July 26, 2010, a new attorney entered an appearance on behalf of the Millers and, on July 28, 2010, the court heard arguments on the down payment forfeiture issue.² Finally, on August 2, 2010, the court ordered the Millers' down payment forfeited. In doing so, the court found that the master commissioner had no duty to advise the Millers of the federal right of redemption. It is from this order that the Millers appeal.

ANALYSIS

At the outset, we note that, in their exceptions, the Millers asked the court to: (1) set aside the sale; and (2) order the return of their down payment. There were some procedural glitches with scheduling a hearing on the first issue. Furthermore, it is not clear from the record if a hearing on that issue actually took place. Nevertheless, the court set aside the sale in its July 12, 2010, order, thus granting the Millers the relief they sought on the first issue. Therefore, it is not necessary for us to address whether the trial court properly gave the Millers notice of or held a hearing on that issue.

As to the second issue, we discern no error in the trial court's order denying the Millers' request for a return of their down payment. In finding in favor of Republic, the court determined that the master commissioner had no duty to advise potential buyers, including the Millers, of a federal right of redemption. The Millers argue that, under local rules and the applicable statute, the master

² The Millers have not provided us with a copy of this hearing; therefore, we have not reviewed it.

commissioner was required to notify them of that right. However, the local rule which the Millers cite sets forth the requirements for "Judgments and Orders of Sale," not for notices of sale by the master commissioner. Local Rules of the Twelfth (12th) Judicial Circuit, Rule VI §6.3. Therefore, the Millers' reliance on that local rule is misplaced.

Furthermore, we note that the master commissioner's notice stated that the sale was pursuant to the court's judgment and order of sale, thereby putting all potential buyers on notice that they should look to that judgment and order for the exact terms of sale. The judgment and order of sale clearly set forth the federal government's right of redemption, which the Millers could have discovered had they exercised due diligence prior to the sale.

The Miller's reliance on KRS 426.700 to support their argument is also misplaced. KRS 426.700 provides that

[e]very sale made under an order of court must be public, either for cash or upon reasonable credits to be fixed by the court; and shall be made after such notice of the time, place and terms of sale as the order may direct; and, unless the order direct otherwise, shall be made at the door of the courthouse of the county in which the property, or the greater part thereof, may be situated; and the notice of sale must state for what sum of money it is to be made.

The master commissioner's notice of sale contained the required information and referred interested parties to the judgment and order of sale. That is all the statute required. Therefore, the trial court did not err in overruling the Millers' exceptions related to the sufficiency of the master commissioner's notice.

Finally, the Millers argue that the trial court did not hold a hearing on their exceptions. As noted above, the trial court granted the Millers' request to set aside the sale, a request echoed by Republic. No other party objected to the court's order setting aside the sale; therefore, a hearing on that issue would have been an exercise in futility. Furthermore, the trial court, as reflected in its August 2, 2010, order, did hear oral arguments from counsel on July 28, 2010. Although the court apparently did not hold an evidentiary hearing, it had received evidence and heard arguments from the parties regarding the issues. The Millers have not indicated what other evidence would have or could have been presented had the court held an evidentiary hearing. Therefore, we perceive no error in the court's failure to do so.

CONCLUSION

For the foregoing reasons, we affirm the trial court.

ALL CONCUR.

BRIEFS ON BEHALF OF
APPELLANT, KIMBERLY
MILLER:

Kimberly Miller, *Pro Se*
Crestwood, Kentucky

BRIEF FOR APPELLEE REPUBLIC
BANK AND TRUST COMPANY:

Helene Gordon Williams
Louisville, Kentucky

BRIEF FOR APPELLEE DOREEN S.
GOODWIN, MASTER
COMMISSIONER, OLDHAM
COUNTY CIRCUIT COURT

None