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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001639-MR

MATTHEW L. DARPEL, EXECUTOR
OF THE ESTATE OF PATTI BYRL
STEFFEN; THE PATTI BYRL STEFFEN
LIVING TRUST; AND RICHARD A.
JARVIS, TRUSTEE — APPELLANTS

APPEAL FROM CAMPBELL CIRCUIT COURT
v. HONORABLE FRED A. STINE V, JUDGE
ACTION NO. 09-CI-00949

COLUMBIA SAVINGS BANK; THE ESTATE
OF ANTHONY P. STEFFEN, JEFFREY
C. ARNZEN, ADMINISTRATOR; SUSAN
PEARMAN; ROGER STEFFEN; US BANK
CUST/SASS MUNI V; KENTUCKY
PROPERTY TAX INVESTMENTS;
AMERICAN TAX FUNDING, LLC;
NEBRASKA ALLIANCE REALTY;
KENTUCKY TAX BILL SERVICING, INC.;
MOORIING TAX ASSET GROUP, LLC;
THE CITY OF COLD SPRING, KENTUCKY;
AND COUNTY OF CAMPBELL — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Appellants Matthew L. Darpel, executor of the estate of Patti Byrl Steffen; the Patti Byrl Steffen living trust; and Richard A. Jarvis, trustee of the Patti Byrl Steffen living trust, appeal from a judgment and order of sale entered in a foreclosure action filed by Appellee Columbia Savings Bank. Appellants primarily contend that the judgment and order of sale were improper because the circuit court failed to conduct an evidentiary hearing beforehand to determine the interests and priorities of the multiple parties and lienholders involved in the action. However, after careful review, we conclude that the circuit court did not commit reversible error. Thus, we affirm.

The factual background of this case is extensive, often convoluted, and has produced multiple appeals between a number of the parties. Byrl and Anthony Steffen were married in 1941 and separated on August 17, 1998. During their marriage, they acquired several tracts of real property, including a fifteen-acre tract located on Murnan Road in Cold Spring, Campbell County, Kentucky, that was the site of their marital residence. This property was held via a tenancy by the entirety.

Byrl filed a petition for dissolution of marriage on April 28, 1999. In March 2000, Anthony, realizing his death was imminent, filed a motion to enter a

final decree of dissolution but reserving issues regarding the division of marital property. He also filed a separate action requesting partition of the marital realty. On March 22, 2000, the circuit court entered an order reserving a ruling on Anthony's motion to enter a final decree, stating that it would rule on the motion after the domestic relations commissioner heard evidence and reported his findings to the court. The circuit court added that, if necessary, it would enter a decree *nunc pro tunc* effective as of March 17, 2000.

However, Anthony died on April 2, 2000, before the circuit court could enter a final decree or partition the marital property. On November 14, 2000, Byrl filed a motion to dismiss the partition action, arguing that title to the marital property vested automatically to her upon Anthony's death. Appellee Susan Pearman, Anthony's daughter and the residual beneficiary under his will, intervened and asserted an interest in the real property. Byrl subsequently renounced Anthony's Last Will and Testament, and her renunciation was upheld on appeal on July 6, 2001.

On September 24, 2001, Byrl executed and delivered to Columbia Savings a promissory note in the amount of $265,000.00 dollars, with interest thereon at the rate of 9% per annum. The note was secured by a mortgage on the subject Murnan Road property, with Columbia Savings designated as the mortgagee. The note was due and payable in full on or before September 1, 2006.

However, on May 8, 2002, the circuit court entered a *nunc pro tunc* decree of dissolution effective as of March 17, 2000 – or before Anthony's death.

This decree also addressed the partition action by dividing the marital property equally between Anthony's estate and Byrl – including the subject property named in the mortgage with Columbia Savings – and ordering the property to be sold and the proceeds divided equally.[1] A *lis pendens* was subsequently filed on the property to preserve the interest of Anthony's estate. Byrl died shortly thereafter on July 29, 2002. Appellant Darpel, on behalf of Byrl's estate,[2] instituted appeals of the *nunc pro tunc* order of dissolution and the division of the property. They were both unsuccessful for reasons unrelated to the merits.[3] Consequently, by virtue of the decree, Anthony's estate and Pearman claim a one-half interest in the subject realty.

While these proceedings were making their way through the appellate process, Columbia Savings extended the maturity date of the subject note to September 1, 2008. However, as of June 8, 2009, Byrl's estate had failed to pay off the note and still owed $268,541.38 plus interest. The record also reflects that

[1] The circuit court determined that the survivorship aspect of the title was terminated retroactively to the date of the decree. Therefore, partition was merited.

[2] Byrl's will left the bulk of her estate in trust to her son, Roger Steffen.

[3] Thus, the propriety of the *nunc pro tunc* decree has not been directly adjudicated by this Court and is not before us at this time. With this said, this Court strongly implied in a related appeal that the circuit court's entry of that decree was improper since the court had failed to take any action to enter a decree prior to Anthony's death. Because of this, the *nunc pro tunc* rule did not allow the court to correct that omission after his death. *See Darpel v. Arnzen*, 2003-CA-001411-MR, 2006 WL 29042 at *2 (Ky. App. Jan. 6, 2006); *see also Rhodes v. Pederson*, 229 S.W.3d 62, 66 (Ky. App. 2007). The circuit court's partition determination is equally questionable for these same reasons. *Darpel*, 2006 WL 29042 at *2.

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the ad valorem taxes on the property had not been paid since 2000 and that all tax bills on the property had gone unpaid since 2001. These facts are not in dispute.

Columbia Savings subsequently filed a foreclosure action on June 26, 2009, seeking a judgment for the owed amount, plus interest, and a sale of the property. Appellants and Anthony's estate were named as defendants, along with a number of entities that had purchased or possessed tax bills on the subject property or otherwise had affected liens. On November 20, 2009, Columbia Savings filed a motion for summary judgment on the grounds that Byrl's estate was indisputably in default under the terms of the promissory note and, therefore, foreclosure was appropriate.

Following a hearing on April 9, 2010, the circuit court orally ordered a sale of the property and held Columbia Savings' motion for summary judgment in abeyance pending the sale of the property. In accordance with this decision, Columbia Savings formally filed a "Motion for Judgment and Order of Sale and Order of Referral to Master Commissioner for Sale." On May 14, 2010, Byrl's estate filed a demand for a jury trial along with an objection to the proposed sale.

On July 28, 2010, the circuit court entered a judgment in favor of Columbia Savings on its note and mortgage against Byrl's estate in the amount of $268,541.38, plus interest at 9% from June 8, 2009 onward. The court specifically determined that Columbia Savings' mortgage was "the first and best lien … after all costs of sale herein and ad valorem taxes due on said Property."[4] The court

[4] The court also granted a judgment to those parties owning a lien on "all delinquent ad valorem real estate taxes," and, as noted, gave them priority over all other claims, including that of

further ordered the subject property to be sold and referred the matter to the master commissioner.[5] Notably, while it ordered the property to be sold, the court reserved for a subsequent hearing the issues of priority and the parties' respective interests in the sales proceeds. This specifically included a determination as to whether Columbia Savings' note and mortgage encumbered only part of the property in light of the ownership dispute between the estates of Byrl and Anthony and the court's earlier *nunc pro tunc* decree and partition determination. Appellants subsequently filed a motion to alter, amend, or vacate the judgment and order of sale, but the motion was denied. This appeal followed.

Appellants chiefly argue on appeal that the circuit court erred in entering judgment in favor of Columbia Savings and ordering a sale of the subject property without conducting an evidentiary hearing to determine claims and priorities. However, we fail to see why an evidentiary hearing was needed in this case prior to a sale because there is no factual dispute as to the existence of the subject note and mortgage, their validity, or Columbia Savings' priority. Moreover, it is apparent that the due dates of the note and its extensions had passed without the note being satisfied in full. Therefore, Columbia Savings was entitled to seek foreclosure under the terms of the mortgage and to seek a sale of the subject property. At most, there is a disagreement as to how much of the property

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Columbia Savings.

[5] The appraisers appointed by the master commissioner ultimately valued the subject property at $375,000.00.

should be encumbered by the mortgage, but the circuit court has specifically reserved that issue for consideration following the sale.[6]

From the record, it appears that the circuit court was concerned that years of unpaid ad valorem taxes would leave little for the other parties claiming an interest in the property to recoup once those taxes were finally satisfied. Thus, the court believed that the property should be sold as soon as possible in order to maximize the amount of proceeds available to those claimants. Once the sale was conducted, the interests and priorities of the parties could then be sorted out. The arguments made by Appellants have failed to convince us that this was not a prudent course of action under the circumstances.

Appellants rely upon *Alexander v. Springfield Prod. Credit Ass'n*, 673 S.W.2d 741 (Ky. App. 1984), for the proposition that the order of sale was improper because the validity and priority of the claims against the subject property had not been fully determined. *See id.* at 743. However, *Alexander* is distinguishable because the record in that case reflected "a substantial issue as to the Alexander's [sic] liability to PCA and, consequently, to the validity of the Alexander's [sic] mortgage lien upon the property." *Id.* In contrast, Appellants do not claim herein that the note and mortgage of Columbia Savings was invalid.

[6] Appellants raise the fact that Anthony's estate claims a one-half interest in the property as a result of the circuit court's *nunc pro tunc* decree as an issue that merited a hearing prior to a sale. However, even assuming that this decree somehow affected Columbia Savings' note and mortgage – which is questionable given that they were produced after Anthony's death and before the decree was entered (*see* footnote 3) – it would not invalidate the debt in its entirety so as to prohibit a sale. At least half of the property would still be subject to the note and mortgage. We further note that Anthony's estate has failed to file a cross-appeal from the court's decision raising this issue on its own behalf.

Moreover, *Alexander* does not necessarily support Appellants' position since that case specifically declined to "hold that a sale before final judgment upon the validity and priority of claims is always impermissible[.]" *Id.*; *see also Murty Bros. Sales, Inc. v. Preston*, 716 S.W.2d 239, 241 (Ky. 1986). With this said, *Alexander* did note "the general rule that such a determination should be made before sale[,]" explaining that "it seems only reasonable that the validity of the indebtedness should be adjudicated before sale of the security." *Alexander*, 673 S.W.2d at 743. Again, however, the validity and priority of Columbia Savings' note and mortgage are not in issue in this case.

Appellants also complain that the circuit court's judgment and order of sale were entered prematurely because Anthony's estate had failed to respond to a number of their discovery requests and because they had filed a cross-claim against Anthony's estate that had not yet been answered. However, these issues have little to do with the action filed by Columbia Savings or its entitlement to foreclosure. Instead, they pertain to the ongoing litigation between Appellants and Anthony's estate. Appellants contend that Appellee Jeffrey C. Arnzen, the administrator of Anthony's estate, holds funds belonging to Appellants that "may well be sufficient to pay the mortgage," but he has refused to make a formal accounting of those funds. However, even if this is true, this does not detract from the fact that the note with Columbia Savings was well past its maturity date and had not been paid in full when Columbia Savings filed its foreclosure action.

Thus, we fail to see why these issues merited a postponement of judgment or the sale.

Appellants further contend that the circuit court erroneously ignored their request for a jury trial. However, that request was first made on May 14, 2010 – after the circuit court orally ordered the property to be sold and nearly a year after Columbia Savings filed its complaint and Appellants their answer. Therefore, this motion was untimely and properly denied. *See* Kentucky Rules of Civil Procedure ("CR") 38.02 & 38.04.

For the foregoing reasons, the decision of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS
MATTHEW L. DARPEL,
EXECUTOR OF THE ESTATE OF
PATTI BYRL STEFFEN, AND
RICHARD A. JARVIS, TRUSTEE:

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BRIEF FOR APPELLEE
COLUMBIA SAVINGS BANK:

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