

RENDERED: MAY 13, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2010-CA-000351-MR

DARRELL G. REDMOND

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE ROBERT COSTANZO, JUDGE  
ACTION NO. 09-CI-00191

ARH FEDERAL CREDIT UNION

APPELLEE

AND

NO. 2010-CA-000528-MR

ARH FEDERAL CREDIT UNION

CROSS-APPELLANT

CROSS-APPEAL FROM BELL CIRCUIT COURT  
HONORABLE ROBERT COSTANZO, JUDGE  
ACTION NO. 09-CI-00191

DARRELL G. REDMOND AND  
RALPH W. HOSKINS

CROSS-APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,<sup>1</sup> CHIEF SENIOR JUDGE.

STUMBO, JUDGE: This appeal and cross-appeal concern the application of KRS 382.365. Darrell Redmond argues that he was erroneously denied statutory damages. ARH Federal Credit Union argues that the trial court correctly denied the damages, but erroneously awarded Redmond attorney fees. We find the trial court made no error and affirm.

KRS 382.365 states in pertinent part:

(1) A holder of a lien on real property, including a lien provided for in KRS 376.010, shall release the lien in the county clerk's office where the lien is recorded within thirty (30) days from the date of satisfaction.

. . . .

(3) A proceeding may be filed by any owner of real property or any party acquiring an interest in the real property in District Court or Circuit Court against a lienholder that violates subsection (1) or (2) of this section. A proceeding filed under this section shall be given precedence over other matters pending before the court.

(4) Upon proof to the court of the lien being satisfied by payment in full to the final lienholder or final assignee, the court shall enter a judgment noting the identity of the final lienholder or final assignee and authorizing and directing the master commissioner of the court to execute

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<sup>1</sup> Chief Senior Judge Joseph E. Lambert, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

and file with the county clerk the requisite release or assignments or both, as appropriate. The judgment shall be with costs including a reasonable attorney's fee. If the court finds that the lienholder received written notice of its failure to release and lacked good cause for not releasing the lien, the lienholder shall be liable to the owner of the real property or to a party with an interest in the real property in the amount of one hundred dollars (\$100) per day for each day, beginning on the fifteenth day after receipt of the written notice, of the violation for which good cause did not exist. This written notice shall be properly addressed and sent by certified mail or delivered in person to the final lienholder or final assignee as follows:

(a) For a corporation, to an officer at the lienholder's principal address or to an agent for process located in Kentucky; however, if the corporation is a foreign corporation and has not appointed an agent for process in Kentucky, then to the agent for process in the state of domicile of the corporation;

(b) For an individual, to the individual at the address shown on the mortgage, at the lienholder's residence or place of business, or at an address to which the lienholder has directed that correspondence or payoff be sent;

(c) For a trust or an estate, to a fiduciary at the address shown on the mortgage or at an address to which the lienholder has directed that correspondence or payoff be sent; and

(d) For any other entity, including but not limited to limited liability companies, partnerships, limited partnerships, limited liability partnerships, and associations, to an officer, partner, or member at the entity's principal place of business or to an agent for process.

(5) A lienholder that continues to fail to release a satisfied real estate lien, without good cause, within

forty-five (45) days from the date of written notice shall be liable to the owner of the real property or to a party with an interest in the real property for an additional four hundred dollars (\$400) per day for each day for which good cause did not exist after the forty-fifth day from the date of written notice, for a total of five hundred dollars (\$500) per day for each day for which good cause did not exist after the forty-fifth day from the date of written notice. The lienholder shall also be liable for any actual expense including a reasonable attorney's fee incurred by the owner or a party with an interest in the real property in securing the release of real property by such violation and in securing an award of damages. Damages under this subsection for failure to record an assignment pursuant to KRS 382.360(3) shall not exceed three (3) times the actual damages, plus attorney's fees and court costs, but in no event less than five hundred dollars (\$500).

In the case at hand, Redmond is the owner of real property located in Pineville, Kentucky. On November 3, 2005, he obtained a mortgage on said property in favor of ARH. This mortgage was duly recorded in the Bell County Clerk's Office. On January 30, 2006, Redmond obtained a second mortgage on the property from ARH. That mortgage was also recorded.

On January 30, 2006, and December 19, 2008, respectively, the obligations secured by the mortgages were paid and satisfied in full. ARH, however, failed to release the mortgages within thirty days as prescribed by KRS 382.365(1). On March 13, 2009, Redmond, via counsel, addressed a letter to ARH to inform it that the mortgages had not been released. The letter was sent to Shelly Michael at a P.O. Box address found on the company's website. Ms. Michael was

a loan officer at the company. After receipt of the letter, the mortgages were still not released.

On June 8, 2009, Redmond filed suit against ARH seeking the statutory damages set forth in KRS 382.365. Specifically, he was seeking \$52,000 plus attorney fees and costs. The lawsuit was served upon Kim Helton, the acting CEO of ARH. Immediately upon receiving notice of the suit, ARH released the two mortgages at issue. The case proceeded in order to determine if statutory damages were available to Redmond.

The trial court found that Redmond had not strictly complied with the provisions of KRS 382.365 in that he did not send written notice to an appropriate officer of ARH. The court found that Ms. Michael was a loan officer, but not an officer, partner, or member for purposes of the statute. The court found that Ms. Helton, who was served with the underlying complaint, was an officer for purposes of the statute and should have been the one to receive the written notice. The court also found that the written notice was not sent to the correct address. The statute requires that it be sent to the lienholder's principal place of business, which in this case was an actual street address. The court found that the P.O. Box was not the principal address. The trial court then dismissed Redmond's claims. The trial court later amended its order dismissing the claims. It allowed Redmond to collect \$1,151 for attorney fees and court costs. This appeal and cross-appeal followed.

Redmond argues that his written demand for release of the mortgages was sent to an address given to the public on the company's website. He also

argues that addressing it to loan officer Ms. Michael was sufficient for purposes of the statute because she had authority to release mortgages. In essence, he argues that he substantially complied with the statute and should be awarded the statutory damages. We disagree.

KRS 382.365(4)(d) states that the written notice “shall be properly addressed . . . to an officer, partner, or member at the entity’s principal place of business or to an agent for process.” As the trial court correctly found, an officer is “a person elected or appointed by the board of directors, such as a CEO, president, secretary, or treasurer.” *Black’s Law Dictionary*, 1117 (8<sup>th</sup> ed. 2004). Contained in the record is an exhibit from the National Credit Union Administration, which is the independent federal agency that charters and supervises federal credit unions. That exhibit lists all the officers and members of ARH. Ms. Michael is not on that list. Ms. Helton, however, is. Additionally, a P.O. Box is not ARH’s principal place of business.

“When the words of the statute are clear and unambiguous and express the legislative intent, there is no room for construction or interpretation and the statute must be given its effect as written.” *McCracken County Fiscal Court v. Graves*, 885 S.W.2d 307, 309 (Ky. 1994) (citation omitted). The statute states that the notice “shall” be sent to an officer at the principal place of business. The use of the word “shall” makes the provisions mandatory. KRS 446.010(30). Redmond did not adhere to the statutory requirements and the trial court correctly denied his request for statutory damages.

ARH argues that because Redmond was denied statutory damages, he should also have been denied attorney fees and costs. We disagree. The statute makes the award of attorney fees and costs separate and distinct from the award of damages. Let's assume that Redmond had properly sent written notice to ARH, but ARH still did not release the mortgages. Redmond then could bring suit against ARH. If ARH were able to prove that it had good cause not to release the mortgages, then Redmond would not be entitled to damages. He would, however, be entitled to reasonable attorney fees and costs.

Proper written notice is not a requirement to a suit being brought against a lienholder for failure to release the lien. When reading KRS 382.365(3) and (4) together, a person can bring suit and recover attorney fees and costs without ever providing written notice to the lienholder. It is only after providing proper written notice to the lienholder that the statutory damages come into play. Here, Redmond brought suit against ARH for not releasing the liens on his property. By doing so, he was entitled to attorney fees and costs. By not giving proper written notice to ARH before bringing suit, he was not entitled to damages. Had ARH released the liens within thirty days after their satisfaction as required by KRS 382.365, then Redmond would never have brought suit nor incurred attorney fees.

Based on the above, we affirm the trial court's judgment.

ALL CONCUR.

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