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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000325-MR

AMERICAN SAVINGS BANK, FSB — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 09-CI-00028

CITIZENS NATIONAL BANK — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: American Savings Bank, FSB ("Appellant") appeals from an order of the Greenup Circuit Court denying its motion to intervene

[1] 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. Senior Judge Lambert authored this opinion prior to the completion of his senior judge service effective November 2, 2012. Release of the opinion was delayed by administrative handling.

in a foreclosure action in which the subject real property had been sold more than a year earlier. After reviewing the record and the parties' briefs, we conclude that the circuit court did not err in denying Appellant's motion as untimely. Thus, we affirm.

Facts and Procedural History

Citizens National Bank ("Appellee") filed a foreclosure action against David and Linda Sipple on January 15, 2009. Appellee held a first and superior mortgage in the principal sum of $300,000.00 against real property owned by the Sipples. The complaint also listed "American Savings Bank" as a defendant because the title work indicated that this bank held a second mortgage on the property.[2] The specific paragraph naming "American Savings Bank" as a defendant provided, in its entirety, as follows:

> 13. That the Defendant, American Savings Bank, is made a party to this action to assert any interest it may have in the subject real property, and said Defendant should come forth and assert any claim or interest in and to the subject real property that it might have, or forever be barred.

No address for "American Savings Bank" was disclosed.

Appellee attempted to serve "American Savings Bank" through the office of the Kentucky Secretary of State via the long-arm statute (KRS 454.210) on February 17, 2009. According to Appellee, a search of the Secretary of State's records revealed a listing for "American Savings Bank" showing that it had a

[2] The Sipples entered into their mortgage with Appellee on July 12, 2004, and their mortgage with Appellant on July 25, 2005. Therefore, there is no dispute that Appellee's mortgage had first priority.

registered agent for service of process at 335 Broadway, New York, New York 10013.[3] A summons was served at that address through the Secretary of State but was returned unopened and marked as undelivered. The reason for this was that the second mortgage was held not by "American Savings Bank" but by American Savings Bank, *FSB* – apparently an entirely different entity. Consequently, service was attempted on the incorrect party, and Appellant had no legal notice of the foreclosure action.[4]

On March 30, 2009, Appellee filed a "Motion for Default Judgment, Summary Judgment and Order of Sale" against several defendants, including Appellant. After receiving no response from Appellant, the circuit court found that Appellee had a first and superior lien and entered a default judgment in Appellee's favor on April 16, 2009. The case was then referred to the Greenup County Master Commissioner for a judicial sale.[5] On June 22, 2009, the Greenup County Master Commissioner sold the property to Appellee for a credit bid of $231,000.00.[6] The sale was confirmed, and the Master Commissioner executed a deed to Appellee on August 28, 2009.

In October or November 2009, Hon. Jill Hall Rose, counsel for Appellee, was made aware of Appellant's concern that it had not been properly

[3] Those records also reflect that "American Savings Bank" is listed as "inactive" and that its last annual report was filed on July 1, 1981.

[4] Appellant has no agent for service of process in Kentucky and is not required to maintain such an agent. *See* KRS 286.2-670(1)(a).

[5] The judgment was in the amount of $288,107.78 plus interest, costs, and attorneys' fees.

[6] The appraised value of the property was $350,000.00.

served in the foreclosure action and that its interest regarding its second mortgage had not been fully protected as a result. In response to this concern, Rose contacted Appellant directly on November 10, 2009, and spoke to Tom Wamsley, whom she understood was an officer at the bank. Wamsley advised Rose that he was familiar with the case and was aware that a foreclosure action had been filed. Wamsley also indicated that the Sipples had not paid their mortgage with Appellant for many months. Wamsley further advised Rose that the bank had retained Hon. John Thatcher, an attorney in Portsmouth, Ohio, to look into the matter.

On November 12, 2009, Rose contacted Thatcher regarding the foreclosure action and the issue of Appellant's mortgage interest. He advised her that he would get back with her about the case. On November 23, 2009, Rose again contacted Thatcher and was told that Appellant was considering paying off the first mortgage and taking deed to the subject property. Thatcher also told Rose that he would get back to her promptly.

However, after not hearing from Thatcher, Rose sent an email on December 4, 2009, asking for a status update. The email specifically provided as follows:

> John
>
> My client is getting upset that I don't have an answer for them on the American Savings Bank mortgage issue. Apparently, they want to sell the property & take their loss.

Can you let me know something asap? Thanks.

Rose followed up with another email explaining that the total payoff on the first mortgage was $348,785.00 but that Appellee was willing to sell the property for $278,000.00, as that amount represented its fair market value. Thatcher replied that he would get back to Rose immediately.

Ultimately, though, neither Thatcher nor anyone else acting on Appellant's behalf followed up on the matter by contacting Rose or by filing any pleadings with the circuit court. Accordingly, on December 10, 2009, Appellee filed a "Motion to Determine Validity of Service or in the Alternative Motion to Set Aside Sale and Void the Deed" based on Appellant's concerns. Appellee asked for an order establishing that service of process upon Appellant was proper under the circumstances because Appellant did not have an agent for service of process in Kentucky and because Appellee was entitled to rely upon the records of the Secretary of State in attempting to effectuate service on an out-of-state party. Appellee additionally contended that Appellant had not been prejudiced in any way because even if the property were resold, there would not be sufficient proceeds from such sale to satisfy Appellee's mortgage, let alone any inferior mortgage. In the alternative, Appellee asked that the sale be set aside and that a warning order attorney be appointed to formally advise Appellant of the action so that the property could be resold. It does not appear that any attempt to serve Appellant with summons was made, and no copy of this motion was mailed to Appellant or anyone purporting to be a representative of the bank.

The circuit court heard the motion on December 17, 2009, and entered an order on January 13, 2010, finding that Appellant had been properly served and that the sale of the subject property should not be set aside. The court specifically found that Appellant had failed to register an agent for service of process in Kentucky and that Appellee consequently had acted appropriately by relying upon the records of the Secretary of State in attempting service. The order was prepared by Rose and reflects that it was mailed to "American Savings Bank" at the incorrect New York address listed above.

On April 16, 2010, Appellee sold the property to what appears to have been an innocent third-party purchaser. Nothing more occurred in the case until December 6, 2010, when Appellant moved to intervene pursuant to Kentucky Rules of Civil Procedure ("CR") 24.01 and to set aside the judicial sale pursuant to CR 60.02 because it had not been properly served in the foreclosure action. Appellant specifically argued that Appellee had attempted to serve the wrong bank since Appellant's actual legal name was "American Savings Bank, FSB." Appellant also noted that its mailing address and physical address were both clearly listed on its mortgage, yet there was no evidence that Appellee had tried to serve the bank at either of these addresses. Appellant further contended that Appellee's reliance upon the records of the Secretary of State was unreasonable since that office's records regarding "American Savings Bank" had not been updated since 1981.

Appellee argued in response that Appellant was not entitled to intervene since it had possessed actual knowledge of the foreclosure action for more than a year and had failed to timely assert its rights. Appellee also noted that Appellant had been aware for more than two years that its mortgage was not being paid. Appellee additionally observed that the face of Appellant's mortgage inconsistently listed both "American Savings Bank" *and* "American Savings Bank, FSB" as the name of the bank. Therefore, Appellee contended that it had handled service in an appropriate manner under the circumstances.

On January 20, 2011, the circuit court entered an order denying Appellant's motion to intervene as untimely. The court explained its decision as follows:

> 1. It is undisputed that the Movant American Savings Bank, fsb was aware of this court action and the foreclosure sale in November 2009. Notwithstanding, the Movant and their counsel at the time took no steps to intervene in this case for over a year. The real estate was thereafter sold to an innocent third party purchaser on April 16, 2010.
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> ***
>
> 3. Upon review of the undisputed facts of this case, the court finds that the Movant American Savings Bank, fsb did not make a timely application to intervene in this action pursuant to CR 24. The Movant waited over a year after it had actual notice that the property was sold at a foreclosure sale. The Movant has no justification for this delay in asserting its right of intervention.
>
> Further, while the court does not need to address the merits of the Movant's argument regarding service, it is noted that the Movant could have better protected its

> interest by registering an Agent for Service of Process in the State of Kentucky and by clearly and unambiguously setting forth its proper legal name on the mortgage.

This appeal followed.

Analysis

On appeal, Appellant's brief is primarily devoted to the merits of setting aside the subject judicial sale because of a lack of proper service. However, as correctly noted by Appellee, the focus of this appeal instead must be upon the circuit court's refusal to allow Appellant to intervene in the proceedings. Since Appellant was a nonparty below, the question of whether it should have been allowed to intervene was a threshold determination that had to be satisfied in Appellant's favor before it could directly challenge the sale. *See Arnold v. Com. ex rel. Chandler*, 62 S.W.3d 366, 368 (Ky. 2001). The right to intervene is governed exclusively by CR 24. *See Murphy v. Lexington-Fayette County Airport Bd.*, 472 S.W.2d 688, 689-90 (Ky. 1971).

KRS 426.006 and 426.690 require a party seeking to foreclose on property to name as defendants all other parties holding a lien on the same property. *See also U.S. Bank, NA v. Hasty*, 232 S.W.3d 536, 541 n.7 (Ky. App. 2007); *PNC Bank, N.A. v. Citizens Bank of Northern Kentucky, Inc.,* 139 S.W.3d 527, 529 (Ky. App. 2003). Therefore, as a mortgage holder with an interest in the property that was the subject of the underlying foreclosure action, Appellant had a right to intervene. CR 24.01(1). This does not appear to be in dispute.

However, even intervention as a matter of right is permitted only upon timely application. *Id.*; *see also Duncan v. First Nat. Bank of Jasper*, 573 So. 2d 270, 274 (Ala. 1990). A circuit court's evaluation of the timeliness of a motion to intervene under CR 24.01 is reviewed under an abuse of discretion standard. *Carter v. Smith*, 170 S.W.3d 402, 408 (Ky. App. 2004). Ultimately, "[t]imeliness is a question of fact, the determination of which should usually be left to the judge." *Ambassador College v. Combs*, 636 S.W.2d 305, 307 (Ky. 1982). In considering whether a motion to intervene was timely, a circuit court may consider the following factors:

> "(1) [T]he point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention."

Carter, 170 S.W.3d at 408, *quoting Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989).

In the case before us, nearly all of these factors support the circuit court's decision to deny Appellant's motion to intervene as untimely. Appellant contends that the circuit court's determination ignored the fact that it had never been served with formal summons in this action and had only learned about the lawsuit after the property had been sold in foreclosure. However, even assuming

that service was faulty or otherwise unsatisfactory, the record is uncontroverted that Appellant was subsequently made fully aware of the foreclosure action and judicial sale yet took no action whatsoever to protect its interest until more than a year later and after the subject property was again sold to a third party.

In *Monticello Elec. Plant Bd. v. Board of Educ.*, 310 S.W.2d 272 (Ky. 1958), the then-Court of Appeals held that a party seeking to intervene in an action after judgment was entered had a "special burden of justifying the apparent lack of timeliness." *Id.* at 274; *see also Arnold*, 62 S.W.3d at 369 (reiterating that "[a] party wishing to intervene after final judgment has a 'special burden' to justify the untimeliness").[7] Notably, the appellant in *Monticello* asserted that it had not received formal notice of the action, but in affirming the denial of the motion to intervene, the Court observed that the appellant "does not claim that it did not have actual notice." *Monticello*, 310 S.W.2d at 274.

In the case at bar, Appellant does not deny that it had actual notice of the foreclosure action and judicial sale well before it moved to intervene, yet it sat on this knowledge and did nothing to protect its interest for more than a year. Moreover, during that time, the subject property was sold to a third party, which would seem to generally militate against intervention in this type of case. Based on these facts, we agree with the circuit court that allowing intervention would have been inequitable and unjustified. We further note that Appellee's mortgage

[7] *Arnold* additionally recognized that "[w]hile the rule does not forbid post judgment intervention, it is broadly within the discretion of the trial judge whether to allow a party to intervene at that stage." *Arnold*, 62 S.W.3d at 369.

lien indisputably had priority over Appellant's. Given that the subject property was sold for less than the amount needed to pay Appellee's mortgage, it could not reasonably be found that Appellant was prejudiced by the sale, especially in light of its delay in taking action. *See Jones v. Chipps*, 296 Ky. 245, 248, 176 S.W.2d 408, 410 (1943).

In sum, we hold that the Greenup Circuit Court did not abuse its discretion in denying Appellant's motion to intervene as untimely. Therefore, the order of the circuit court to that effect is affirmed.

VANMETER, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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