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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000652-MR

TAX EASE LIEN INVESTMENTS 1, LLC

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 10-CI-00069

WINSTON COTNER HINKLE, A/K/A WINSON
COTNER HINKLE; UNKNOWN SPOUSE OF
WINSTON COTNER HINKLE, A/K/A WINSON
COTNER HINKLE; DEBORAH BROTHERS;
UNKNOWN SPOUSE OF DEBORAH BROTHERS;
WILLIAM HINKLE; UNKNOWN SPOUSE OF
WILLIAM HINKLE; SOUTHERN TAX SERVICES,
LLC; CITY OF LA CENTER; AND COMMONWEALTH
OF KENTUCKY, COUNTY OF BALLARD, BY AND
ON RELATION OF JONATHAN MILLER, SECRETARY
OF FINANCE AND ADMINISTRATION CABINET

APPELLEES

AND

NO. 2011-CA-001162-MR

TAX EASE LIEN INVESTMENTS 1, LLC

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 10-CI-00104

SANDRA LYNN; UNKNOWN SPOUSE
OF SANDRA LYNN AND BALLARD
COUNTY, KENTUCKY APPELLEES

AND

NO. 2011-CA-001173-MR

TAX EASE LIEN INVESTMENTS 1, LLC APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 10-CI-00061

GARY LINDSEY; STARR LINDSEY,
A/K/A STARR MINICH AND BALLARD
COUNTY, KENTUCKY APPELLEES

AND

NO. 2011-CA-001174-MR

TAX EASE LIEN INVESTMENTS 1, LLC APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 10-CI-00088

JEFFERY GRAVES AND BALLARD
COUNTY, KENTUCKY

APPELLEES

AND

NO. 2011-CA-001175-MR

TAX EASE LIEN INVESTMENTS 1, LLC

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 10-CI-00096

EQUITY TRUST COMPANY CUSTODIAN
FBO AND BALLARD COUNTY, KENTUCKY

APPELLEES

AND

NO. 2011-CA-001176-MR

TAX EASE LIEN INVESTMENTS 1, LLC

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 10-CI-00097

WILLIAM G. STANTON; MICHAEL D.
STANTON; JAMES J. STANTON; UNKNOWN
SPOUSE OF JAMES J. STANTON; UNKNOWN
SPOUSE OF WILLIAM G. STANTON;
JAMOS FUND I, LP AND BALLARD COUNTY,
KENTUCKY

APPELLEES

AND

NO. 2011-CA-001177-MR

TAX EASE LIEN INVESTMENTS 1, LLC

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 10-CI-00153

DAVID L. ROBINSON; BALLARD COUNTY,
KENTUCKY AND UNKNOWN SPOUSE OF
DAVID L. ROBINSON

APPELLEES

AND

NO. 2011-CA-001666-MR

TAX EASE LIEN INVESTMENTS 1, LLC

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 10-CI-00064

RONNIE TABER AND
BALLARD COUNTY, KENTUCKY

APPELLEES

OPINION AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * * * * *

BEFORE: COMBS AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

THOMPSON, JUDGE: These eight appeals filed by Tax Ease Lien Investments 1, LLC, a third-party purchaser of tax liens, have been consolidated. The issues presented are whether the trial court abused its discretion when it reduced Tax Ease's request for attorney's fees incurred during foreclosure actions to enforce tax liens and whether a *pro rata* distribution of the foreclosure sale proceeds should have been ordered to all tax lien holders. We hold that the trial court did not abuse its discretion when determining the reasonableness of the litigation fees requested but erred when it did not order a *pro rata* distribution of the sale proceeds.²

Except for the amount of attorney's fees requested and the varying amounts awarded, the substantive facts are the same and the trial court's reasoning regarding the fees and *pro rata* distribution identical. To avoid redundancy, we only recite the facts in *Hinkle v. Tax Ease Lien Investments I, LLC*, 2011-CA-000652-MR.

Tax Ease purchased a certificate of delinquency on April 28, 2008, for \$371.21. On April 30, 2010, it filed a complaint in the Ballard Circuit Court to enforce its rights to collect the amount due for the certificate of delinquency,

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 KRS 21.580.

² The appellees have not filed briefs. However, because of the significant legal issue involved, this Court chooses not to impose any permissible penalties pursuant to CR 76.12(8)(c).

accrued interest, attorney's fees and costs. A default judgment, summary judgment, and an order of sale were entered on March 16, 2011.

Tax Ease's attorney submitted an affidavit for an award of attorney's fees detailing the work performed and the hours expended to enforce the certificate of delinquency and complete the foreclosure process. The affidavit stated a total amount of time expended of fourteen and one-half hours and that the firm had agreed to accept a flat fee of \$1,300, which equated to \$89.66 per hour worked.³

The trial court reduced the amount awarded for litigation fees from \$1,300 to \$130 and reduced the request for prelitigation attorney's fees from \$445.28 to \$300.97.⁴ Finally, the court denied Tax Ease's request that the sale proceeds be distributed *pro rata* to all parties with valid tax liens. Tax Ease challenges only the reduction in litigation fees awarded and the *pro rata* distribution of the sale proceeds.

After Tax Ease filed its notice of appeal and the record was certified, the circuit court, *sua sponte*, issued an order explaining its rationale for the substantial reduction in attorney's fees awarded. We paraphrase the court's findings:

³ Although the amounts requested differed, counsel filed the same requests and affidavits in the other seven cases.

⁴ The court made substantial reductions in litigation fees in the other seven cases: (1) Case No. 2011-CA-001162-MR, the fee was reduced from \$1,700 to \$130; (2) Case No. 2011-001173-MR, the fee was reduced from \$1,700 to \$150; (3) 2011-001174-MR, the fee was reduced from \$1,700 to \$250; (4) Case No. 2011-CA-001175-MR, the fee was reduced from \$1,700 to \$200; (5) Case No. 2011-CA-001176-MR, the fee was reduced from \$1,700 to \$300; (6) 2011-CA-001177-MR, the fee was reduced from \$1,700 to \$625; and (7) 2011-CA-001666-MR, the fee was reduced from \$1,700 to \$80.

- The legislature left discretion with the court to determine what reasonable attorney’s fees may be collected as set forth in KRS 134.452;
- The legislature intended that the reasonableness of the fees be tied to the base tax bill;
- It is inconceivable that the legislature would intend that a tax bill of \$376.21 be the basis for the collection of \$1,300 in attorney’s fees; and
- County attorneys are allowed a fee of approximately 33% of the tax bill which is a reasonable gauge for establishing the amount of attorney’s fees.

The collection of attorney’s fees in an action to prosecute collection remedies or protect certificates of delinquency is controlled by statute and part of the statutory scheme relating to the collection of taxes by local governmental units and third-party purchasers of certificates of delinquency. KRS 134.420 creates a lien for taxes owed to any governmental unit of the Commonwealth, which includes:

[A]ll interest, penalties, fees, commissions, charges, costs, attorney fees, and other expenses as provided by this chapter that have been incurred by reason of delinquency in payment of the tax claim certificate of delinquency, personal property certificate of delinquency, or in the process of collecting any of them[.]

KRS 134.420(3). The statute further provides that the lien “shall have priority over any other obligation or liability for which the property is liable.” *Id.*

Because of the importance of *ad valorem* taxes to local governments and that delinquent tax bills frequently cause budget and cash flow problems, the legislature enacted a statutory scheme permitting counties to sell delinquent tax

bills to third-party purchasers. KRS 134.127; KRS 134.128. Included in that scheme is a provision that third-party purchasers of certificates of delinquency may enforce the liens as provided for by KRS 134.420(1) and KRS 134.490. As an incentive to purchasers, KRS 134.125 permits third-party purchasers to recover 12% interest on the amount actually paid for the certificate of delinquency. However, when originally enacted, the statutory scheme made no provision for the payment of attorney's fees in the event collection litigation was necessary.

In *Flag Drilling Co., Inc. v. Erco Inc.*, 156 S.W.3d 762 (Ky.App. 2005), the Court held that despite the omission, a third-party purchaser of a certificate of delinquency could recover reasonable attorney's fees and costs of collection. This Court held that the recovery of fees and costs was the only feasible means to effectuate the legislative intent that a purchaser recovers its investment.

[B]y giving a private purchaser of a delinquent tax claim a means to enforce the lien, KRS 134.490(2)(b) allows that purchaser to stand in the shoes of the state, county, city, or taxing district in whose name the lien has been imposed. By doing so, the statute gives the private owner of a certificate of delinquency a feasible means of recovering its tax claims.

Id. at 767.

KRS 134.452 was enacted in response to *Flag Drilling*, and the recognition that an award of fees and costs provides the only feasible means for third-party purchasers to recover its tax claims. Consistent with the Court's opinion, the statute was enacted to establish that reasonable attorney's fees and costs may be collected by third-party purchasers and to prevent private purchasers from exacting

unconscionable attorney's fees and costs from individuals paying certificates of delinquency.

The applicable version of KRS 134.452 provides in relevant part:⁵

Notwithstanding any other provisions of this chapter, a third-party purchaser of a certificate of delinquency shall be entitled to collect only the following:

- (1) The amount actually paid for the certificate of delinquency;
- (2) Interest as provided in KRS 134.125, calculated on the amount actually paid to the county clerk from the date the certificate of delinquency was purchased until paid; and
- (3) Attorneys' fees as provided in this subsection.
 - (a) Attorneys' fees incurred for collection efforts prior to litigation as follows:
 1. If the amount paid for a certificate of delinquency is between five dollars (\$5) and three hundred fifty dollars (\$350), actual reasonable fees incurred up to one hundred percent (100%) of the amount of the certificate of delinquency, not to exceed three hundred fifty dollars (\$350);
 2. If the amount paid for a certificate of delinquency is between three hundred fifty-one dollars (\$351) and seven hundred dollars (\$700), actual reasonable fees incurred up to eighty percent (80%) of the amount of the certificate of delinquency, not to exceed five hundred sixty dollars (\$560); and

⁵ In 2012, KRS 134.452 was amended. Few substantive changes were made and the prelitigation and litigation attorney's fees provisions were not amended except for enumeration. Subsection 5 was added to express the General Assembly's belief that third-party purchasers play an important role in the delinquent collection system and that the fees and costs permitted by the statute are reasonable based on the collection costs and fees and charges incurred in the litigation.

3. If the amount paid for a certificate of delinquency is above seven hundred one dollars (\$701), actual reasonable fees incurred up to seventy percent (70%) of the amount of the certificate of delinquency, not to exceed seven hundred dollars (\$700).

(b) If a third-party purchaser is the owner of more than one (1) certificate of delinquency against the same taxpayer, actual and reasonable prelitigation attorneys' fees for all certificates of delinquency against the same taxpayer shall not exceed one and one-half (1.5) times the maximum amount permitted in paragraph (a) of this subsection for the largest tax bill owed by the taxpayer.

(c) In addition to the prelitigation attorneys' fees established by paragraphs (a) and (b) of this subsection, a third-party purchaser may collect actual, reasonable attorney's fees and costs that arise due to the prosecution of collection remedies or the protection of a certificate of delinquency that is involved in litigation; and

(4) Administrative fees incurred for preparing, recording, and releasing an assignment of the certificate of delinquency in the county clerk's office, not to exceed one hundred dollars (\$100).

The statute clearly distinguishes three different types of attorney's fees awarded. First, prelitigation fees are related to a graduated percentage of the tax bill, depending on the amount of the bill. KRS 134.452(3)(a). Second, KRS 134.452(3)(b) provides for prelitigation fees to a third-party purchaser owning more than one certificate of delinquency relating to a single taxpayer. Thus, both relate to prelitigation fees. The third type, and that at issue, is an award for enforcement or protection of a certificate of delinquency through litigation or other collection remedies. KRS 134.452(3)(c).

Unlike prelitigation fees, litigation fees are not expressly linked to the amount of the underlying tax bill and there is no precise formula for determining the amount. KRS 134.452(3)(c) only states that the fees must be actual and reasonable. As there is no dispute that Tax Ease is entitled to an award for attorney's fees, the question is whether the trial court erred when it did not award the entire amount requested.

Unless otherwise directed by statute, the amount of an award of attorney's fees is within the trial court's discretion. *King v. Grecco*, 111 S.W.3d 877, 883 (Ky.App. 2002). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). "When a trial court is considering whether to award attorney fees and costs and/or how much to award, the trial court's decision should be guided by the purpose and the intent of providing an award of attorney fees and costs[.]" *Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303, 305 (Ky. 2000).

Tax Ease argues that the legislature omitted a formula linking litigation attorney's fees and a certificate of delinquency because frequently the expense to foreclose on the property exceeds the certificate's face value. Because third-parties would not purchase the certificates, it points out that the cumulative effect of a set limitation on the amount of attorney's fees would be contrary to the purpose of providing immediate funds to local governments. We agree with Tax Ease that litigation attorney's fees under KRS 134.452(3)(c) are not subject to the

rigid formula applicable to prelitigation attorney's fees for the reason cited. However, the attorney's fees are limited by amount actually and reasonably incurred in the collection or protection of certificates of delinquency by third-party purchasers. Therefore, the pertinent inquiries are the meanings of the terms actually and reasonably.

The common use of the word actual is straight-forward: The attorney's fees and costs cannot be fabricated. Tax Ease's attorney submitted affidavits detailing the hours worked and services performed. No evidence suggested that the attorney was less than truthful. However, as confirmed by the statutory language, hours actually worked are not necessarily reasonable under the circumstances.

In *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992), in the context of an attorney's fee award under the Kentucky Civil Rights Act, the Court was confronted with the issue regarding the reasonableness of an attorney's fee and adopted the "lodestar" method explained in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). It explained:

Thus the total award for attorneys' fees, \$150,662.85, was substantially more than the plaintiff's total recovery, \$101,316.24, but explainable, as stated in the trial court's opinion on grounds that the purpose of this statute is "to insure 'effective access to the judicial process' for persons with civil rights grievances" who would not otherwise "have the funds to employ an attorney," and if restricted by the size of the claim (albeit that is a factor to consider) there would be no incentive to pursue many worthwhile cases. The trial court states, "the court should not undertake to adopt some arbitrary proportionate relationship between the amount of

attorney fees awarded and the amount of damages awarded.”

Both sides agree that the controlling case in deciding upon an appropriate award of attorneys’ fees where authorized by statute to insure effective access to the judicial process for persons with civil rights grievances is *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). This case was decided under the Civil Rights Attorney’s Fees Awards Act of 1976 (42 U.S.C.S. Sec.1988), patterned in part on Title VII of the Federal Civil Rights Act. Under the United States Supreme Court’s analysis in *Hensley v. Eckerhart*, the attorney’s fee awarded should consist of the product of counsel’s reasonable hours, multiplied by a reasonable hourly rate, which provides a “lodestar” figure, which may then be adjusted to account for various special factors in the litigation.

Id. at 825-826.

Special factors that may be considered are set forth in *Axton v. Vance*, 207 Ky. 580, 269 S.W. 534 (1925). These factors include:

- (a) Amount and character of services rendered.
- (b) Labor, time, and trouble involved.
- (c) Nature and importance of the litigation or business in which the services were rendered.
- (d) Responsibility imposed.
- (e) The amount of money or the value of property affected by the controversy, or involved in the employment.
- (f) Skill and experience called for in the performance of the services.
- (g) The professional character and standing of the attorneys.
- (h) The results secured.

Id. at 536-537.

What can be gleaned from the factors set forth long ago in considering the reasonableness of attorney's fees is that a determination should be made based on the trial court's knowledge, experience, and common sense. As the Court in *In re Citizens Fidelity Bank & Trust Co.*, 550 S.W.2d 569, 570 (Ky.App. 1977), cautioned: "(It) should be done with a view to common sense realism, that is to say, it should pose an amount that public standards will approve for the work done, time consumed and the skill required." (quoting *Brickell v. Di Pietro*, 152 Fla. 429, 431, 12 So.2d 782, 783 (1943)). When the instant case is subjected to the lodestar method and to a common sense analysis, we cannot say that the trial court abused its discretion.

Our initial observation is that the eight cases involved were simple foreclosures uncontested by the debtors. Few court appearances were required and the pleadings were no more than form-type documents requiring only the insertion of names, property descriptions, dates, and amounts owed. Additionally, the amount to be recovered was minimal. Although the trial court recognized that it serves a legitimate public purpose to permit the expedient purchase of tax liens by third-party purchasers, it also considered the additional hardship inflicted on taxpayers by those same purchasers who incur substantial attorney's fees relative to the amount of the underlying certificate of delinquency. Further, it found that the usual and customary fee charged for similar services was 33% of the tax bill,

established by the amount received by county attorneys enforcing the same types of liens. Although Tax Ease contends that the trial court erred when it considered the amount of the underlying tax bill and the attorney's fees permitted to be recovered by county attorneys when enforcing tax liens, we disagree. Those, and other special factors, are properly considered under the lodestar method. *Axton*, 269 S.W. at 536-537.

We conclude that the proper method for determining actual and reasonable attorney's fee pursuant to KRS 134.452(3)(c) is set forth in *Meyers*. Using the "lodestar" method, the Court may consider the complexity or simplicity of a proceeding to collect or protect the certificate, the skill required, the fee customarily charged in the locality for similar proceedings, and the flat fee agreement. In summary, it is the trial court's role to follow the statutory language to provide a third-party purchaser of a certificate of delinquency with a feasible means to recover and protect its tax lien *and* to safeguard the public against possible abuses of the judicial process by not allowing excessive attorney's fees and costs to be imposed upon economically burdened citizens.

The final issue we address is whether the trial court erred when it refused to order *pro rata* distribution of the sale proceeds. We agree with Tax Ease that the trial court erred.

In *U.S. Bank National Association v. Tax Ease Lien Investments I, LLC*, 356 S.W.3d 770 (Ky.App. 2011), it was held that the priority given liens resulting from unpaid *ad valorem* taxes in KRS 134.420(3) may be exercised by third-party

purchasers of certificates of delinquency and a *pro rata* distribution of the sale proceeds is required. We reaffirm this Court’s reasoning:

Though *Flag Drilling* centered on attorney fees, by noting that third-party purchasers “stand in the shoes of the state, county, city, or taxing district in whose name the lien has been imposed[,]” it edifies the conclusion that liens resulting from the non-payment of *ad valorem* taxes do not lose superiority by virtue of the underlying certificates of delinquency having been sold to third parties.

Id. at 772 (quoting *Flag Drilling Company, Inc.*, 156 S.W.3d at 767).

Based on the foregoing, the orders of the Ballard Circuit Court are affirmed as to the awards of attorney’s fees and reversed and the cases remanded for the distribution of the proceeds of any judicial sales *pro rata* among all tax lien holders.

ALL CONCUR.

BRIEF FOR APPELLANT:

R. Eric Craig
P. Blaine Grant
Daniel P. Cherry
Louisville, Kentucky

BRIEF FOR APPELLEE:

No brief filed for appellees.