

RENDERED: FEBRUARY 8, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-001785-MR

SOUTH CENTRAL BANK  
OF BARREN COUNTY, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BRIAN C. EDWARDS, JUDGE  
ACTION NO. 10-CI-403590

COMMONWEALTH BANK & TRUST CO.;  
SANCTUARY BLUFF, LLC; STEPHEN T. COX;  
FIRST FEDERAL SAVNGS BANK  
OF ELIZABETHTOWN, INC.; and  
KENTUCKY TAX LIEN FUND, LLC

APPELLEES

OPINION AND ORDER  
AFFIRMING AND DENYING

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BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND COMBS, JUDGES.

CLAYTON, JUDGE: South Central Bank of Barren County, Inc. (“South Central”) appeals from the August 30, 2011, order of the Jefferson Circuit Court.

That order denied South Central’s motion to intervene in the foreclosure action

initiated by Commonwealth Bank & Trust Co. (“Commonwealth”) against Sanctuary Bluff, LLC (“Sanctuary Bluff”). Because we hold that the trial court did not abuse its discretion when it denied South Central’s motion, we affirm. Additionally, we deny Commonwealth’s motion to strike South Central’s brief and dismiss the appeal.

On July 6, 2007, Commonwealth issued a loan to Sanctuary Bluff for the development of a subdivision. The loan was secured by a personal guarantee and by a first mortgage on the property where the subdivision was to be constructed. Thereafter, on October 1, 2007, Commonwealth and South Central entered into a participation agreement whereby South Central purchased a participation interest in the loan to Sanctuary Bluff. The agreement provided that South Central would recover 34 percent of any amounts collected on the original promissory note between Commonwealth and Sanctuary Bluff, but that Commonwealth would remain the sole enforcer and collector of the note. It was further agreed, in part, that any legal action against Sanctuary Bluff would be pursued in the name of Commonwealth only; that Commonwealth would promptly notify South Central of any default by Sanctuary Bluff; and that Commonwealth would not proceed with any legal action without first consulting with, and obtaining written approval from, South Central. Subsequently, Commonwealth made three additional loans to Sanctuary Bluff. However, after considering the subject of this appeal and the breadth of our review, we do not believe the details of those loans to be relevant herein.

On June 15, 2010, Sanctuary Bluff defaulted on its July 6, 2007, loan. Commonwealth filed its underlying foreclosure action on September 15, 2010. The record reflects that an e-mail was sent from Commonwealth to South Central on September 17, 2010, informing of the foreclosure action and affirming intent to update as to the action's progress. Another email, sent on October 19, 2010, again referenced the lawsuit and notified Commonwealth's attorney, via copy on the e-mail, that a copy of the action should be forwarded to South Central. Thereafter, counsel for Commonwealth sent a copy of the complaint to South Central.

The foreclosure action proceeded and, on June 6, 2011, the trial court entered a Judgment and Order of Sale, set to occur on August 31, 2011. On August 17, 2011, South Central filed a motion to intervene and a motion for leave to file a cross-claim. Following a hearing, the trial court issued an order denying South Central's motion. Therein, the trial court found that South Central was on notice of the underlying action well in advance of the June 6, 2011, judgment and also that South Central had failed to demonstrate irreparable prejudice if its motion to intervene were denied. This appeal followed.

South Central first argues that the trial court's denial of the motion to intervene is appealable. We agree. *See City of Henderson v. Todd*, 314 S.W.2d 948 (Ky. 1958). South Central's main argument, however, is that the trial court abused its discretion when it denied South Central's motion to intervene. It is with this argument that we disagree.

Intervention by right is governed by Kentucky Rules of Civil

Procedure (“CR”) 24.01, which reads, in relevant part:

Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless that interest is adequately represented by existing parties.

CR 24.01(1). Thus, the threshold question a trial court must ask when considering a motion pursuant to CR 24.01 is whether the motion was timely. Because timeliness is an issue of fact, such a determination is typically at the discretion of the trial court. *Ambassador College v. Combs*, 636 S.W.2d 305, 307 (Ky. 1982). Thus, we will not reverse a trial court’s determination of timeliness absent an abuse of this discretion. *Carter v. Smith*, 170 S.W.3d 402, 408 (Ky. App. 2004).

Traditionally, a motion to intervene filed prior to trial or case disposition is presumptively timely. *Government Employees Ins. Co. v. Winsett*, 153 S.W.3d 862 (Ky. App. 2004). However, we are herein faced with a situation in which the motion to intervene was filed post-judgment. Under such circumstances, the movant “has a special burden of justifying the apparent lack of timeliness.” *Monticello Elec. Plant Bd. v. Board of Ed. of Wayne County*, 310 S.W.2d 272, 274 (Ky. 1958). In support of its argument that its motion to intervene was timely, South Central maintains that it did not learn of the contents of the judgment until after its entry, namely, the priority of the three later-made

loans over the July 6, 2007, loan; and that Commonwealth breached its duty by failing to comply with the coordination requirements found in the participation agreement between the parties. Consequently, South Central likens itself to the movant in *Carter v. Smith*. *Carter*, 170 S.W.3d 402.

We do not agree that the situation herein is comparable to that in *Carter*. The movant in *Carter* filed his motion to intervene four months after the filing of the original complaint but, more importantly, only two months after the amended complaint, which first raised the interest which Carter sought to protect. There is no amended complaint in the present action. The Court in *Carter* also placed great emphasis on the fact that the suit was in its early stages, stating “that at the time intervention was sought, no final judgment had been entered and the parties had completed little, if any, discovery.” *Carter*, 170 S.W.3d at 409. South Central waited almost a year after the filing of Commonwealth’s complaint and more than two months after entry of the trial court’s judgment. CR 24.01 does not function as a means for interested parties to idly await a lawsuit’s conclusion in an attempt to predetermine the advantages of intervention. Given South Central’s concession<sup>1</sup> that they received a copy of the complaint on October 20, 2010, we see no abuse of discretion in the trial court’s refusal to permit intervention. South Central’s arguments regarding Commonwealth’s breach of duty, while relevant for restitution purposes, have no bearing on a finding of timeliness. Commonwealth

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<sup>1</sup> South Central conceded this point in its August 14, 2012, motion to file substitute briefs. Although that motion was denied, the Court took notice of South Central’s concession.

presented evidence that South Central was aware of the lawsuit and the trial court chose to accept that evidence. Such a conclusion is well within its discretion.

South Central also argues that the trial court erred in finding that South Central would not be prejudiced if it were not allowed to intervene. However, we find this argument to be irrelevant. Because South Central's motion has already been found untimely, there is no purpose in addressing the merits of its motion, including arguments regarding prejudice. Because South Central failed to meet the threshold burden of justifying its untimeliness, any arguments pertaining to its interest in the lawsuit are immaterial. Additionally, any arguments pertaining to a second lawsuit, in which Commonwealth sought a declaration of rights with respect to South Central, are not presently before the Court.

For the foregoing reasons, the August 30, 2011, order of the Jefferson Circuit Court is affirmed. Additionally, Commonwealth's February 15, 2012, motion to strike South Central's brief and dismiss the appeal is denied.

ALL CONCUR.

ENTERED: \_\_\_\_\_

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Judge, Court of Appeals

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE,  
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