

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-002095-MR

TAX EASE LIEN SERVICING, LLC

APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE DANIEL L. BALLOU, JUDGE
ACTION NO. 12-CI-00001

WILLIAM L. SMITH;
MCCREARY COUNTY, KENTUCKY;
AND U.S. BANK, AS CUSTODIAN FOR
SASS MUNI-V, DTR

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: Appellant, Tax Ease Lien Servicing, LLC (hereinafter “Tax Ease”) appeals from an award of various costs and fees associated with its efforts to collect the tax debt of Appellee, William Smith. Tax Ease also appeals from the

trial court's denial of its Motion to Alter, Amend, or Vacate pursuant to CR¹ 59. After a thorough review of the trial court's order and the record in this case, we find no abuse of discretion in the trial court's orders. Hence, we affirm.

Background

In 2009, at a cost of \$745.67, Tax Ease acquired the certificate of delinquency on Smith's tax bill from Jamos Fund 1, LP, which had acquired it from the McCreary County Clerk earlier the same year. Tax Ease filed its Complaint in the underlying case on January 3, 2012, and requested, *inter alia*, recovery of the cost of the certificate of delinquency and interest at a rate of twelve percent *per annum*. Tax Ease also sought an administrative fee of \$100.00, pre-litigation attorneys' fees of \$521.97, and future attorneys' fees and costs.

Following service of the Complaint upon Smith, Tax Ease filed a Motion for Default Judgment along with documentation of the costs for which it was requesting an award. The affidavit attached to the motion, sworn by Tax Ease's attorney, itemized those costs as follows:

- a. \$205.00 for issuance of a Warning Letter and Title Examination
- b. \$552.00 for drafting and filing of the Complaint, review and responses to Answers and other pleadings filed by Defendants in Response to Complaint and attendance of the hearings thereof, if requested,
- c. \$395.00 for drafting and filing of the Default Judgment and Order of Sale and attendance of the hearing there of, if requested.
- d. Further, simultaneously with the Court's granting of its Default Judgment and Order of Sale, ... \$148.00 to attend the Master Commissioner sale herein.

¹ Kentucky Rules of Civil Procedure

Tax Ease also claimed “filing fees, court costs and service costs” of \$774.77 and \$400.00 for a title search, an abstract of title, and vetting of title. Smith avoided a default judgment by agreeing to pay Tax Ease in installments; however, after paying a total of \$964.00, Smith ceased payments and hired an attorney.

In May 2013, Smith’s counsel tendered a check to Tax Ease for an additional \$1,353.59 as a proposed settlement of all remaining debt. This payment purported to pay \$745.67 for the tax bill, \$357.92 in interest, and \$250.00 in attorneys’ fees. Tax Ease rejected Smith’s check and returned it to him with a letter to that effect dated May 31, 2013. Also attached to this letter was an invoice listing various expenses and a remaining balance due of \$3,324.74.

Smith requested additional documentation of certain expenses claimed by Tax Ease. In response, he received a virtually unchanged version of the same invoice which showed a balance due of \$3,344.42 as of June 4, 2013. Smith’s attorney again requested additional documentation of certain expenses. This request seems to have gone unfulfilled as further attempts to negotiate a settlement were unsuccessful. On August 26, 2013, at the request of counsel, the trial court heard brief argument and took the matter of the exact amount of costs and fees under submission based upon documents already in the record.

A month later, the trial court entered an Order holding that Tax Ease “failed to show that all of its attorney fees and costs are actual, reasonable fees as is required under KRS[²] 134.452[.]” The trial court awarded \$745.67 for

² Kentucky Revised Statutes

acquisition of the certificate of delinquency and \$357.92 in interest accrued “up to the month of April, 2013 which is the date Defendant Smith ... tendered a settlement check to Plaintiff.” The trial court found only \$1,214.00 of the more than \$3,300.00 Tax Ease sought³ in additional costs and attorneys’ fees was “actual and reasonable.”

Tax Ease filed a Motion to Alter, Amend, or Vacate the September 25 Order, averring that the trial court awarded “inadequate damages[.]” Tax Ease attached to its motion an invoice for legal expenses dated July 12, 2013⁴ and copies of checks payable from its counsel’s account totaling just over \$700.00 for what it referred to as “actual costs in filing fees, court costs and service costs in these proceedings.” In support of its motion, Tax Ease asserted that it provided these documents to Smith’s counsel at the August 26 hearing; however, counsel does not appear to have provided these documents to the trial court prior to the CR 59.01 motion. The trial court denied Tax Ease’s motion, and this appeal follows.

Standard of Review

As a general rule of Kentucky law, an award of attorneys’ fees is not allowable in the absence of a statute or a contract expressly providing for such an award. *Flag Drilling Co., Inc. v. Erco, Inc.*, 156 S.W.3d 762, 766 (Ky. App. 2005) (quoting *Kentucky State Bank v. Ag Services, Inc.*, 663 S.W.2d 754, 755 (Ky. App.

³ We estimate based upon the most recent remaining balance listed in the record, \$3,344.42 as of June 4, 2013, and because additional interest would have accrued between that date and the date of the Order.

⁴ This invoice listed Smith’s total balance due as of July 12, 2013 as \$4,055.25.

1984)). Where such a provision is made, however, the questions of whether to award attorneys' fees and how much that award should be are left to the discretion of the trial court and will depend upon the facts and circumstances of each case. *Id.* (citing *Dorman v. Baumlisberger*, 113 S.W.2d 432, 433 (Ky. 1938)).

Thus, we review the trial court's award of costs and actual and reasonable attorneys' fees for an abuse of discretion, reversing only if confronted with an award that 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). We apply the same standard to Tax Ease's CR 59.01 motion. *See, e.g., Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001).

Analysis

On appeal, Tax Ease contends that the trial court erred in reducing the amount of fees and costs it argues it was entitled to in full under KRS 134.452.

The statute reads, in pertinent part,

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

- (a) The amount actually paid for the certificate of delinquency;
- (b) 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
- (c) 1. Prelitigation attorneys' fees, which may include amounts incurred for collection efforts and costs related to notification, processing, research, communication, compliance, legal costs, documentation, and similar expenses, from the

date the third-party purchaser purchases the certificate of delinquency from the county clerk, to the date on which the notice required by KRS 134.490(2) is mailed by the third-party purchaser.

2. The amount that may be collected by the third-party purchaser as prelitigation attorneys' fees shall be subject to the following limitations:

.....

iii. 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)[.]

.....

(3) (a) In addition to the fees established by subsections (1), (2), and (4) of this section, a third-party purchaser may collect actual, reasonable attorneys' 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. Fees and costs permitted under this subsection include fees and costs incurred from the first day after the notice required by KRS 134.490(2) is sent through the day any litigation is finally concluded.

(b) For purposes of this subsection:

1. Actual attorneys' litigation fees up to two thousand dollars (\$2,000) may be reasonable if the fees are based upon documented work performed at a rate commensurate with hourly rates customarily charged by private attorneys in that jurisdiction for similar services. A flat rate, without hours documented for work performed, may be reasonable if the flat fee is determined to be discounted from the usual and customary rates for comparable work; and

2. Any attorneys' litigation fee in excess of two thousand dollars (\$2,000) shall be

allowed if authorized by the court upon a finding that the third-party purchaser incurred actual attorneys' litigation fees in excess of two thousand dollars (\$2,000) and that those attorneys' litigation fees were warranted based upon the complexity of the issues presented in the litigation.

(4) The third-party purchaser may collect 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 fifteen dollars (\$115).

The General Assembly adopted KRS 134.452 in 2007 and has amended it on four occasions since. Accordingly, we begin by acknowledging that there is little, if any, citable authority regarding the proper application of KRS 134.452 in resolving the issues Tax Ease raises on appeal. Nevertheless, with the statute as our sole guide, we examine the trial court's award of costs and fees.

I. Award for Cost of Tax Bill and Interest

Consistent with KRS 134.452(1)(a), the trial court awarded Tax Ease the full amount it paid for the certificate of delinquency. This is undisputed on appeal. Rather, Tax Ease first takes exception to the trial court's award of interest pursuant to subsection (1)(b) of the same statute. The trial court calculated and awarded interest through April 2013, "the date Defendant Smith, through counsel, tendered a settlement check to Plaintiff." Tax Ease contends that the language of the statute mandated an award of interest through the date of the judgment. Given the plain language of the statute, we cannot disagree with the trial court.

KRS 134.452(1)(b) provides for an award of “[i]nterest 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*.” (Emphasis added). Prior to April 2013, Smith had paid Tax Ease a total of \$964.00 in installments. On May 2, 2013, he sent a check to Tax Ease for the exact amount of the tax bill and interest to that date. This was payment for purposes of KRS 134.452(1)(b), and we cannot hold that the trial court abused its discretion in so finding.

While Tax Ease was under no obligation to accept \$250.00 for attorneys’ fees it calculated at well in excess of that amount, after Smith made his May 2, 2013 offer, he had paid or offered to pay a considerable amount above the debt owed on the tax bill. For this reason, we cannot disagree that the tax bill was “paid” as of the day of Smith’s offer, and the accrual of interest ceased.

II. Award of Attorneys’ Fees

A. The Permissive Directive of KRS 134.452

KRS 134.452 authorizes, but does not mandate, the award of attorneys’ fees of several varieties. The statute states that a third-party purchaser “shall be entitled to collect” its pre-litigation attorneys’ fees, which “may include amounts incurred for collection efforts and costs . . . from the date the third-party purchaser purchases the certificate of delinquency from the county clerk” to the date the taxpayer was notified of the enforcement action. KRS 134.452(1)(c)1. The statute also provides for an award of “actual, reasonable attorneys’ fees” accrued during litigation of an action to enforce a tax lien. KRS 134.342(3).

We pause to emphasize our above statement that KRS 134.452 authorizes, but does not mandate, the award of attorneys' fees – a conclusion seemingly lost on Tax Ease in its appeal. Though the statute indeed says “a third-party purchaser of a certificate of delinquency shall be entitled” to the fees and costs provided, as it pertains to attorneys' fees, the statute repeatedly employs permissive language, such as “may be collected,” and it expressly requires such fees to be actual and reasonable. This language is imperative in a proper reading of the statute.

Contrary to Tax Ease's contention that KRS 134.452 divests trial courts of their discretion over an award and the amount of that award, the statute as written does not automatically bestow upon a third-party purchaser whatever fees and costs it claims. Rather, the statute expressly authorizes an award for certain fees and costs, but it is reasonably expected that adequate proof of such expenses must still be proffered. Similarly, the statute authorizes an award of attorneys' fees, but it limits any such award to those fees which are found to be actual and reasonable based upon the facts, circumstances, and documentation provided. With this in mind, we address the trial court's award of attorneys' fees and costs.

B. “Actual and Reasonable” Attorneys' Fees and Costs

The level of discretion a trial court exercises over an award of attorneys' fees cannot be overstated. As we have held before, a determination of the reasonableness of attorneys' fees “should be done with a view to common

sense realism[.]” *In re Citizens Fidelity Bank & Trust Co.*, 550 S.W.2d 569, 570 (Ky. App. 1977).

In this case, Tax Ease sought \$521.97 in pre-litigation attorneys’ fees; yet, it provided no documentation as to what those expenses specifically entailed. Tax Ease sought a flat \$1,300.00 litigation fee pursuant to KRS 134.452(3)(a), which states that such a flat fee “may be reasonable is determined to be discounted from the usual and customary rates for comparable work[.]” However, Tax Ease provided no documentation of the hourly rate at which it accrued its considerable litigation fees, let alone that this rate was discounted. The only documentation Tax Ease provided which itemized its fees was its February 2013 affidavit asserting costs for “a Warning Order Letter and Title Examination,” the drafting of various legal documents, court appearances, and a second title search totaling only \$1,700 of the more than \$4,100 it would later claim in total costs.

In light of these facts, we conclude that Tax Ease’s documentation of its attorneys’ fees and costs was fatally lacking. Tax Ease adamantly contends that it repeatedly submitted “itemized costs and litigation expenses” in support of its claim; however, these submissions actually amounted to multiple submissions of a slightly updated one-page statement which listed dollar amounts next to descriptions no more descriptive or itemized than “Administrative Fees” and “Litigation Attorneys Fees.” We agree with the trial court that this single, basic document was insufficient proof of fees and costs claimed at more than \$3,300.

Rather, we defer to the considerable discretion the trial court possessed over the matter of attorneys' fees. While we agree with Tax Ease that KRS 134.452 does not require a third-party purchaser to *justify* its expenses, nor does it expressly require itemization of those expenses and fees, the statute expressly limits the award of attorneys' fees to those which are actual and reasonable; and detailed accounting of expenses, fees, and costs can only help the trial court in the determination of what is and is not "actual and reasonable."

It is neither unreasonable nor unduly burdensome upon third-party purchasers to require that more copious and detailed documentation than that which Tax Ease submitted. Moreover, it was not arbitrary, unfair, or against the weight of the law for this trial court to rule against the actual and reasonable nature of Tax Ease's purported expenses in the absence of such documentation.

Finally, we briefly address, and affirm, the trial court's denial of Tax Ease's motion for a new trial based upon its assertion of inadequate damages under CR 59.01(d) as it pertained to the issue of fees and costs. First, given our ruling above, we obviously see no abuse of discretion in the trial court's denial of the motion. Furthermore, CR 59.01(d) creates recourse for parties who believe that the damages awarded were either excessive or inadequate based on the evidence before the trial court *during trial*. Though it would likely have helped, the documentation Tax Ease attached to its motion, including canceled checks, was not before the trial court when it made its award of fees and costs. It would hardly be

fair or accurate to say the trial court's award was inadequate when so, too, was the supporting documentation in the record at the time of the court's ruling.

Conclusion

For the foregoing reasons, we affirm the McCreary Circuit Court's award of interest, attorneys' fees and certain other costs to Tax Ease.

ALL CONCUR.

BRIEF FOR APPELLANT:

R. Aaron Hostettler
London, Kentucky

BRIEF FOR APPELLEE, WILLIAM
L. SMITH:

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