

RENDERED: JULY 10, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000288-MR

MD WOOD

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 13-CI-00084

CENTRAL BANK & TRUST CO.;
HOUSEHOLD RECOVERY SERVICES;
LARRY CAUDILL and REBECCA CAUDILL;
FORD MOTOR CREDIT COMPANY, LLC; and
CENTRAL KENTUCKY MANAGEMENT
SERVICES, INC.

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, KRAMER, AND NICKELL, JUDGES.

KRAMER, JUDGE: MD Wood appeals from the Scott Circuit Court's order confirming the master commissioner's sale of foreclosed real estate. On appeal

Wood contests the circuit court's order denying statutory attorney's fees and its order requiring Wood to pay Central Bank and Trust's costs and attorney's fees as sanctions pursuant to Kentucky Civil Rule of Procedure (CR) 11. After careful review, we reverse the circuit court's order denying Wood's statutory attorney's fees and remand for proceedings consistent with our opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant MD Wood purchased a 2011 *ad valorem* certificate of delinquency for \$45.87 from the Scott County Sheriff and recorded a copy of the certificate with the county clerk, creating a valid lien in his favor on real estate owned by Appellees Larry Dean Caudill and Rebecca Jo Caudill. Appellee Central Bank & Trust held a mortgage on the Caudill's real estate, and on February 20, 2013, filed a complaint in foreclosure against the Caudills. Prior to initiating the foreclosure suit, Central Bank & Trust contacted each lien holder of record, including Wood, and requested each lien holder provide a payoff amount for the lien. Wood, however, did not provide Central Bank & Trust with a payoff calculation and instead indicated his intent to pursue his own collection remedy and protect the certificate of delinquency. Wood timely answered Central Bank & Trust's complaint and filed cross-claims and a counterclaim for foreclosure of his tax lien on the Caudills' real estate.

Five weeks after filing suit and after additional, unsuccessful attempts to settle the adversarial proceedings with Wood and obtain a release of Wood's tax lien, Central Bank & Trust moved the circuit court to sanction Wood pursuant to

CR 11; to determine the payoff amount of Wood's lien; to disallow Wood's statutory litigation costs and attorney's fees; and to order Wood to release the lien upon Central Bank & Trust tendering of the payoff amount.¹ On April 29, 2013, the circuit court granted Central Bank & Trust's motion to require Wood to release the lien. The circuit court calculated the payoff amount of the *ad valorem* tax lien by adding together the amount paid for the certificate, and statutory interest, administrative costs and pre-litigation attorney's fees; ordered Central Bank & Trust to tender the calculated value of the lien to the clerk; and ordered Wood to exchange a release of the lien for Central Bank & Trust's tendered payoff. However, the circuit court reserved judgment with respect to sanctioning Wood or awarding attorney's fees. It ordered the parties to brief both issues within ten days.

Central Bank & Trust briefed both issues as ordered by the circuit court. However, in response to the circuit court's April 29, 2013 order Wood filed two motions: the first seeking to strike certain pleadings filed by Central Bank &

¹ Wood responded to Central Bank & Trust's motion, arguing that pursuant to statute he was entitled to protect the lien and pursue his own collection remedies. Additionally, Wood argued that third-party purchasers could refuse payoff from the mortgagee based on the language of KRS 134.127. Wood submitted that although KRS 134.127(1)(a)(2) explicitly provides the mortgagee with the right to payoff taxes *prior* to the clerk's sale of the certificate of delinquency, because KRS 134.127(3)(a)—which defines the class of persons with a right to payoff the tax lien *subsequent* to the sale of the certificate—excludes mortgagees from the class, his refusal to provide a settlement amount, protect the lien, and pursue his own collection remedies was permissible. In its reply Central Bank & Trust argued that its mortgage constituted an equitable and/or legal estate in the Caudills' property, and that pursuant to KRS 134.127(3)(a) it remained entitled to payoff the lien subsequent to the sale of the certificate of delinquency. Wood responded that because Kentucky was a lien theory state, the mortgage lien did not create an equitable or legal estate in favor of Central Bank & Trust, but was simply security for the debt and its interest in the real estate was limited to the proceeds of any judicial sale. Further, Wood asserted that Central Bank & Trust was not entitled to stand in the shoes of the Caudills under the terms of the mortgage and that there was no contractual privity between Wood and Central Bank & Trust.

Trust for purportedly failing to satisfy the requirements for citing unpublished case law; and the second, requesting that the circuit court alter, amend or vacate its April 29, 2013 order compelling Wood to release the tax lien. Wood, believing that his CR 59.05 motion had stayed the circuit court's order, did not immediately release the lien or brief the issues ordered by the circuit court.

On July 1, 2013, the circuit court denied Wood's motion to strike and denied Wood's motion to alter, amend or vacate its April 29, 2013 order. Concurrently, the circuit court granted Central Bank & Trust's motion to disallow all of Wood's KRS 134.452(3) attorney's fees and granted Central Bank & Trust's CR 11 motion, awarding Central Bank & Trust its costs and attorney's fees as sanctions. Finally, it ordered Wood to submit "all arguments for why he should not be [further] sanctioned pursuant to CR 11 for disobeying [the circuit court's] April 29, 2013 Order." Wood filed an objection to the circuit court's July 1, 2013 order and tendered a release of his tax lien to the clerk in exchange for the circuit court's calculated payoff.

On July 22, 2013, Central Bank & Trust moved to default the Caudills and for summary judgment on its complaint. With the mortgage as the only outstanding lien on the Caudills' real estate, on September 30, 2013, the circuit court entered a judgment of foreclosure in favor of Central Bank & Trust. The master commissioner sold the Caudill's real estate, and the sale was confirmed by the circuit court on January 22, 2014. Now, Wood appeals from the circuit court's order confirming the sale.

ANALYSIS

On appeal Wood argues that the circuit court erred by disallowing all KRS 134.452(3)² attorney's fees; granting CR 11 sanctions prior to entry of final judgment; and basing its CR 11 sanctions, in part, on conduct that occurred prior to institution of the foreclosure proceeding.³ We review the record *de novo* because resolution of Wood's arguments is dependent upon purely legal issues. *McEwan v. EIA Properties, LLC*, 428 S.W.3d 633, 635 (Ky. App. 2014).

First we turn to Wood's argument that the circuit court erred by denying all attorney's fees. Plainly, KRS 134.452(3) provides for collection of actual, reasonable attorney's fees by the third-party purchaser for prosecuting actions to collect the tax lien **and** for protecting a certificate against the claims of

² KRS 134.452(3) states:

- (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.

³ On appeal Wood does not contest the propriety of the circuit court's order compelling him to release his *ad valorem* tax lien to a subordinate lien holder.

others. Here, Wood's responsive and affirmative pleadings are within the purview of the statutory scheme, and he is entitled to collect reasonable attorney's fees incurred during litigation as part of his priority *ad valorem* tax lien pursuant to statute. *See Flag Drilling Co., Inc. v. Erco, Inc.*, 156 S.W.3d 762, 766 (Ky. App. 2005) (holding that because a tax lien imposed pursuant to KRS 134.420(1) includes reasonable attorney's fees incurred satisfying the lien and because KRS 134.490(2)(b) permits a private, third-party purchaser to stand in the shoes of the entity imposing the tax lien, the private purchaser necessarily has the right to reimbursement of its reasonable attorney's fees).

Because Wood is entitled to collect actual and reasonable attorney's fees incurred during litigation as part of his *ad valorem* tax lien pursuant to KRS 134.420(1) and KRS 134.452(3), the circuit court's order disallowing all attorney's fees incurred during litigation was error as a matter of law. Accordingly, we REVERSE the circuit court's order disallowing Wood's attorney's fees and REMAND for consideration of actual attorney's fees incurred by Wood and whether those fees incurred by Wood were reasonable.⁴

ALL CONCUR.

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE

⁴ Central Bank & Trust moved this Court to dismiss Wood's appeal of the circuit court's denial of statutory attorney's fees as untimely, and Wood's appeal of the order granting CR 11 sanctions as interlocutory. By separate order we have granted the motion in part, finding that because the circuit court failed to impose a specific amount of sanctions, its CR 11 order was interlocutory. Accordingly we have dismissed that part of Wood's appeal and need not address it here.

Joseph S. Elder
Louisville, Kentucky

Tyler Powell
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