

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000982-MR

JOYCE SMITH, UNKNOWN SPOUSE
OF JOYCE SMITH; UNKNOWN HEIRS OF
BARBARA WALTON; ANTHONY JONES;
UNKNOWN SPOUSE OF ANTHONY JONES;
UNKNOWN HEIRS OF GAYLORD JONES;
ARTHURINE WALKER; UNKNOWN
SPOUSE OF ARTHURINE WALKER;
MARISSA JONES, N/K/A MARISA DUARTE

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 11-CI-01665

TAX EASE LIEN INVESTMENTS 1, LLC; AND
KLAS PROPERTIES, LLC

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, NICKELL, AND VAN METER, JUDGES.

MAZE, JUDGE: Appellants, the devisees and distributees of the Estate of Alma Dowell (hereinafter collectively “the Estate”), appeal from an order granting summary judgment and ordering the sale of an item of real property owned by the Estate. The Estate challenges the trial court’s award of Appellee’s, Tax Ease Lien Investments 1, LLC (“Tax Ease”),¹ assessed litigation attorneys’ fees; and it asserts that notice of the proceedings was defective as a result. We conclude that Tax Ease was entitled, under then-applicable statutes, to assert litigation attorneys’ fees in its notice letter; and that notice was therefore effective. Hence, we affirm.

Background

On January 13, 2010, for a cost of \$187.98, Tax Ease purchased a 2005 delinquent tax bill owed by the Estate. More than ten months later, a law firm representing Tax Ease sent a letter to Ms. Dowell, who had passed away in September 2004. The letter announced Tax Ease’s purchase of the tax bill and that

[a]lthough the matter has already been referred to this office for litigation, KRS 134.490(2) requires that we notify you at least forty-five (45) days before actually filing a law suit. This letter will serve as notice that we intend to file such an action if this tax bill is not paid in full or an acceptable arrangement is not made on or before December 14, 2010. Please be aware that if legal action becomes necessary, you will be responsible for significantly higher legal fees and court costs.

In addition to this, the letter listed the total amount due as \$1,131.24 including fees and costs. Among these were “prelitigation attorneys’ fees” of \$187.98, interest of

¹ The Estate included KLAS Properties, LLC as an Appellee on this Appeal. While the Complaint identified KLAS Properties, LLC as a lien holder against the same property which was the subject of the foreclosure action, its interests are unaffected by this appeal, and it did not participate in briefing.

\$105.28, and “litigation fees” of \$550.00. Tax Ease filed a complaint in Warren Circuit Court on October 6, 2011.

In response to the complaint, the Estate asserted a defense of “illegality and/or fraud” against Tax Ease for its demand of \$550.00 in litigation fees prior to suit. The Estate argued that Kentucky Revised Statutes (KRS) 134.452 sets an absolute limit on such fees incurred prior to litigation. On October 7, 2013, Tax Ease filed a motion for summary judgment in which it revealed that the basis for the \$550.00 litigation fee was “a flat fee of \$400.00 for this and all other title work that will be performed in this case. Additionally, the undersigned firm charged [Tax Ease] a flat fee of \$150.00 for file set up and the drafting and mailing of the October 29, 2010 final demand letter.” The Estate filed its own motion for summary judgment ten days later, arguing that Tax Ease improperly asserted the litigation fee prior to actual litigation, and that notice to the Estate was defective as a result. The Estate sought dismissal of the complaint against it as well as reimbursement of its attorneys’ fees and costs.

The trial court entered a February 2014 interim order denying the Estate’s motion and requesting that Tax Ease provide documentation of the title search fee, file set-up fee, and other pre-litigation fees imposed upon the Estate. The trial court held Tax Ease’s motion for summary judgment in abeyance until Tax Ease could provide the requested information. Counsel for Tax Ease filed a detailed affidavit asserting unchanged pre-litigation fees of \$187.98 and litigation fees which had now reached \$1,700.00. Tax Ease explained that its counsel did

not bill hourly, but by flat rate and in stages based upon the progression of litigation. Attached to the affidavit were spreadsheets detailing the legal services performed and the date and cost of each service. The Estate responded to Tax Ease's affidavit by arguing, in part, that the services which comprised the original \$550.00 litigation fee were impermissible because they were performed before litigation had commenced.

On June 4, 2014, the trial court entered an order which granted summary judgment in favor of Tax Ease, ordered the property sold, and awarded Tax Ease costs and fees. The trial court found the \$1,700.00 litigation fee reasonable “[d]ue to the complexity of the issues and time spent[.]” The trial court also awarded Tax Ease the acquisition costs, administration fee, and pre-litigation fees sought in the 2010 demand letter as well as \$807.90 in additional costs and fees. The Master Commissioner later withdrew the property from public sale after the Estate filed a timely appeal of the trial court's order.

Analysis

As a general rule, attorneys' fees are impermissible 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. 1984). KRS 134.452²

² Since 2009, the General Assembly has amended KRS 134.490 and KRS 134.452 substantially from the respective versions in effect at the time Tax Ease purchased the delinquent tax bill in

provides for the reimbursement of a third-party purchaser's attorneys' fees. *See Flag Drilling Co., Inc.*, 156 S.W.3d at 767. This stems from the statute's placement of third-party purchasers "in the shoes of the state, county, or city taxing district in whose name the lien has been imposed[.]" and from KRS 134.420(1) which states that any such lien shall include "reasonable attorney's fees[.]" *Id.*

KRS 134.452 more specifically states the nature and amount of the fees and costs a third-party purchaser may collect as part of its lien. The statute provides that third-party purchasers "shall be entitled to collect ... (1) The amount actually paid for the certificate of delinquency; (2) Interest as provided in KRS 134.125...; and (3) [A]ttorneys' fees...." KRS 134.452(1)-(3). Under subsection (3), the statute as it existed in 2010 provided for recovery of "[a]ttorneys' fees incurred for collection efforts prior to litigation[.]" KRS 134.452(3)(a). The statute capped such fees on a tax bill worth less than \$350.00 at 100% of the amount of the certificate of delinquency.

KRS 134.452 went on to permit other attorneys' fees which are not tied to the amount of the tax bill. KRS 134.452(3)(c) stated,

In addition to the fees established by paragraphs (a) and (b) of this subsection, 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.

this case. These changes affected both to the substance and the numeration of both statutes. Therefore, citations to both statutes shall refer to the text of each which became effective January 1, 2010, after the approval of HB 262. *See* 2009 Ky. Acts ch. 10, §§ 14-15.

It is upon these statutes that the Estate relies for its argument that Tax Ease was not permitted to assess \$550.00 in additional attorneys' fees, or "litigation fees," prior to commencing litigation.

I. Permissibility of the "Litigation Fee" Under KRS 134.452

To be clear, the Estate does not dispute Tax Ease's assessment of acquisition costs, interest, an administration fee, or pre-litigation attorneys' fees. Rather, the Estate argues that KRS 134.452 did not permit Tax Ease to demand a \$550.00 litigation fee at the time of the notice letter and that notice was defective as a result of this "erroneous information." This presents a question of statutory interpretation, and hence, it is a question of law. Accordingly, we review *de novo* the trial court's decision concerning the permissibility of the "litigation fee." See *Bob Hook Chevrolet Izuzu, Inc. v. Transp. Cabinet*, 983 S.W.2d 488, 491 (Ky. 1998).

KRS 134.452, as it was written in 2010, permitted the assessment of litigation attorneys' fees for services provided or charged to Tax Ease prior to the mailing of the notice letter in October 2010. The statute expressly allowed such fees for efforts toward "the prosecution of collection remedies or the protection of a certificate of delinquency that is involved in litigation." KRS 134.452(3)(a). The Estate focuses heavily upon the second of these two provisions, contending that it required that a matter be "involved in litigation" before litigation attorneys' fees could be assessed. This argument looks past the first provision which permitted attorneys' fees for "the prosecution of collection remedies[.]" In the

absence of the more definitive, temporal limitations the General Assembly added in 2012, we conclude that the engagement of an attorney as well as that attorney's title search, file set-up, and drafting of a notice letter fit within the broad bounds of "the prosecution of collection remedies[.]" Under then-existing statutory authority, Tax Ease was entitled to assert litigation attorneys' fees in addition to its pre-litigation attorneys' fees at the time of the notice letter.

Our conclusion notwithstanding, we feel compelled to address an argument Tax Ease offers concerning notice which troubles us and which has continuing import despite recent amendments to KRS 134.490. The statute, as it existed in 2010, stated, in pertinent part:

- (d) The notices required by this section shall include the following information:
1. A statement that the certificate of delinquency is a lien of record against the property for which delinquent taxes are owed;
 2. A statement that the certificate bears interest at the rate provided in KRS 134.125;
 3. A statement that if the certificate is not paid, it will be subject to collection as provided by law, and that collection actions may include foreclosure. The notice required by subsection (2) of this section shall also include a statement of the intent to institute legal action to collect the amount due;
 4. A complete listing of the amount due, as of the date of the notice, broken down as follows:
 - a. The purchase price of the certificate of delinquency;
 - b. Interest accrued subsequent to the purchase of the certificate of delinquency;and

- c. Fees imposed by the third-party purchaser; and
5. Information, in a format and with content as determined by the department, detailing the provisions of the law relating to third-party purchaser fees and charges.

KRS 134.490(3)(d).³ Tax Ease argues that the “fees imposed” provision of subsection (3)(d)4 required Tax Ease to include even those fees which “prove to not be ultimately recoverable under KRS 134.452.” We reject this reading of KRS 134.490.

KRS 134.490 does not require, or permit, the demand of every fee a third-party purchaser, at the time of notice, may hope to collect - whether reasonable or unreasonable, legal or illegal. Such a reading would defeat the express and crucial purpose of such notice, which is to provide a debtor with “[a] complete listing of the amount due, *as of the date of the notice...*[.]” KRS 134.490(3)(d)4 (*emphasis added*). We read this provision to require notice of fees assessed by the third-party purchaser, and only such fees to which the third-party purchaser is then entitled under KRS 134.452. The statute expressly prohibits the demand of prospective attorneys’ fees. Rather, it remains true that such fees must be “actual,” and they must be “reasonable.” KRS 134.452(3)(c).

II. Reasonableness of the “Litigation Fee”

Having agreed with the trial court that KRS 134.452 entitled Tax Ease to assess a “litigation fee” at the time of the notice letter, it only remains to

³ It is worth noting that while the General Assembly made substantial changes to KRS 134.490 after 2010, the requirements concerning the content of the notice, including the five elements quoted *supra*, remain very nearly unchanged in the current KRS 134.490(3)(d).

review the trial court's conclusion concerning the reasonableness of that fee. The amount and reasonableness of an award of attorneys' fees is a determination reserved for 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). Therefore, where the issue is merely one of reasonableness of attorneys' fees, we defer to the judgment of the trial court which was in a superior position to evaluate the evidence before it; and we will only reverse in the event that the trial court's ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Tax Ease provided sufficient documentation to support the attorneys' fees the trial court later awarded. In a March 21, 2014 filing, counsel for Tax Ease submitted an affidavit attesting to \$1,700.00 in attorneys' fees, accounting for work on various pleadings, letters, title examination, as well as the flat fee arrangement between Tax Ease and its counsel. Attached to the affidavit was a spreadsheet itemizing the "litigation fees" by date, service, and amount billed. This evidence was sufficient to support the trial court's conclusion concerning the actual and reasonable nature of the attorneys' fees in question.

We further agree with the trial court's holding that the \$1,700.00 in attorneys' fees was reasonable based upon the "complexity and time spent" on the case since the notice letter. Though the Estate's prolonged litigation of the foreclosure action likely only occurred due to the initial and controversial

assessment of the \$550.00 litigation fee, we have concluded that Tax Ease was entitled to the initial fee. It follows that Tax Ease is entitled to the attorneys' fees and interest stemming from prolonged efforts to defend those fees.

Conclusion

As we have referenced throughout this opinion, the General Assembly has amended KRS 134.452 since 2010 to establish a more definitive guideline for what services do and do not qualify for reimbursement of litigation attorneys' fees. In subsequent amendments, the General Assembly has further provided both the amount and the nature of fees it deems presumptively reasonable. *See* 2013 Ky. Acts ch. 103, § 4. We cannot overstate our relief and our optimism that these amendments will make future such controversies easier to decide and unlikely to recur. Indeed, under present law, services performed three weeks prior to mailing of the notice letter would likely not qualify for reimbursement as "litigation attorneys' fees." Rather, these would be labeled and capped as pre-litigation attorneys' fees. Accordingly, Tax Ease would be well advised to comply strictly with the temporal guidelines of the current statute.

Nevertheless, KRS 134.452 and KRS 134.490 as they existed in 2010, permitted Tax Ease to assess the attorneys' fees it listed in the October 2010 notice letter. Furthermore, notice was proper under KRS 134.490, and the fees asserted

both then and since were actual and reasonable. Therefore, the June 4, 2014 order of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE TAX EASE
LIEN INVESTMENTS 1, LLC:

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