

RENDERED: AUGUST 18, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-001459-MR  
&  
NO. 2015-CA-001016-MR

KENTUCKY TAX BILL  
SERVICING, INC.

APPELLANT

v. APPEALS FROM PENDLETON CIRCUIT COURT  
HONORABLE JAY B. DELANEY, JUDGE  
ACTION NO. 10-CI-00221

LISA SULLIVAN, MICHAEL  
SULLIVAN, AND  
UNION SAVINGS BANK

APPELLEES

OPINION  
AFFIRMING

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BEFORE: JOHNSON, JONES, AND THOMPSON, JUDGES.

JOHNSON, JUDGE: Kentucky Tax Bill Servicing, Inc. (“KTBS”) brings these appeals from two Pendleton Circuit Court (“circuit court”) orders in a foreclosure action. KTBS purchased a delinquent property tax bill after a *lis pendens* had been

filed showing that the property was subject to foreclosure. The circuit court's first order, entered on July 28, 2014, denied KTBS's motion to intervene in the foreclosure action. The second order, entered on June 10, 2015, released the tax lien from the property and placed funds in escrow should KTBS be found to have a valid and enforceable lien. Having reviewed the record and applicable law, we AFFIRM.

### **BACKGROUND**

On August 4, 2010, Union Savings Bank ("Bank") filed a foreclosure complaint in Pendleton Circuit Court against Lisa and Michael Sullivan, seeking a sale of real property at 346 Jara Lane, in Foster, Kentucky ("the Property"). On the same day, the Bank filed a *lis pendens* with the Pendleton County Clerk, which was recorded.

While the foreclosure action was pending, taxes were not paid on the Property for the 2012 tax year. Pursuant to Kentucky Revised Statutes (KRS) 134.122 et seq., the delinquent tax bill was transferred to the Pendleton County Clerk and subsequently became available for third parties to purchase. On July 24, 2013, KTBS purchased the 2012 Certificate of Delinquency, representing the 2012 delinquent *ad valorem* taxes assessed against the Property. The certificate was recorded in the Pendleton County *lis pendens* book.

On February 10, 2014, the circuit court entered a final judgment in the Bank's favor in the foreclosure action and ordered the Property to be sold. Prior to

the judicial sale, KTBS discovered the underlying foreclosure suit. On April 8, 2014, it filed a motion to intervene pursuant to Kentucky Rules of Civil Procedure (CR) 24.01(1)(b). The motion sought to amend the judgment to reflect KTBS's priority as an *ad valorem* tax lienholder.

Following a hearing on April 16, 2014, the circuit court entered an order on July 28, 2014, denying KTBS's motion to intervene. KTBS filed an appeal (2014-CA-001459-MR).

While the appeal in 2014-CA-001459 was pending, Bill and Teresa Flaughner ("Flaughers") purchased the Property at the Master Commissioner's sale on January 29, 2015. They paid a ten percent deposit and signed as surety for the remaining balance. The Flaughers thereafter discovered KTBS's lien and filed exceptions. They filed a motion to release KTBS's lien, or in the alternative, for the Pendleton County Clerk's office to refund the purchase price of the certificate of delinquency to KTBS and release the lien. The circuit court denied the motion to release the lien. KTBS then filed a motion to credit purchase price or compel payment from proceeds. While that motion was pending, the Flaughers filed a motion to place funds in escrow pending the outcome of KTBS's appeal or, in the alternative, to withdraw the bid they placed at the Master Commissioner's sale and refund their deposit payment.

On June 10, 2015, the circuit court entered an order directing funds to be retained by the Master Commissioner to satisfy the claim of KTBS should it be

determined to have a valid and enforceable lien. The circuit court further directed the Master Commissioner to release KTBS's lien so that the Flaughers could obtain clear title to the property. A second appeal by KTBS followed (2015-CA-1016-MR).

### **STANDARD OF REVIEW**

In its first appeal, KTBS argues that the circuit court erroneously decided that KTBS's intervention in the foreclosure suit was barred because KTBS acquired its interest in the property after the *lis pendens* was recorded.

The pertinent portion of CR 24.01 provides that:

[u]pon timely application anyone shall be permitted to intervene in an action . . . 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.

An applicant is permitted to intervene in an action if the following four elements are met: (1) the motion to intervene must be timely filed, (2) the applicant has an interest relating to the subject of the action; (3) the applicant's ability to protect that interest may be otherwise impaired or impeded; and (4) none of the existing parties could adequately represent the applicant's interests. *See* CR 24.01(1)(b); *Carter v. Smith*, 170 S.W.3d 402, 409–10 (Ky. App. 2004). The circuit court's denial of a motion to intervene is reviewed for clear error, except as to the court's evaluation of the timeliness of the motion, which is reviewed under

an abuse of discretion standard. *Hazel Enterprises, LLC v. Community. Fin. Servs. Bank*, 382 S.W.3d 65, 67 (Ky. App. 2012) (citing *Carter v. Smith*, 170 S.W.3d 402, 408-09 (Ky. App. 2004)). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 *Am.Jur.2d Appellate Review* § 695 (1995)).

### ANALYSIS

KTBS argues that the circuit court committed clear error in denying the motion to intervene because it failed to consider KTBS’s substantial interest in the proceedings, its inability to protect that interest if not permitted to intervene, and the Bank’s inability to represent KTBS’s interest in the property. We are unable to review for clear error, however, because these factors were not expressly addressed by the circuit court. Consequently, it did not make factual findings regarding these factors, nor were such findings requested pursuant to CR 52.04. Under the circumstances, we may not review these issues on appeal. “[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court.” *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986) (internal citation omitted). “It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court.” *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011) (internal citation omitted).

In denying KTBS's motion to intervene, the circuit court focused primarily on the timeliness of the motion and the effect of the *lis pendens*. The circuit court stated that it had always been of the opinion that if a *lis pendens* had been filed, as it was in this case, the purchaser of a lien was put on notice at that time, and that it was not appropriate to come into the case "after the fact". The circuit court found that KTBS's motion was untimely, stating that all the decisions made during the course of the case were made without any indication that KTBS would have a claim.

KTBS argues that, as a third-party purchaser of a certificate of delinquency against the Property, and therefore a first priority lienholder, it has exceptional status. KRS 134.420 (3) provides that tax liens "have priority over any other obligation or liability for which the property is liable." Simply because *ad valorem* tax liens have first priority does not, however, entitle an intervenor in a foreclosure action to special consideration, nor does it evince an overt intent on the part of the legislature to extend extra protections to third-party purchasers. The legislature has expressly encouraged third-party purchasers through the provision of statutory fees and charges. As KRS 134.452(5) states,

[t]he General Assembly recognizes that third-party purchasers play an important role in the delinquent tax collection system, allowing taxing districts to receive needed funds on a timely basis. The General Assembly has carefully considered the fees and charges authorized by this section, and has determined that the amounts established are reasonable based on the costs of collection and fees and charges incurred in litigation.

“Given the state's fundamental interest in collecting taxes, *Talbott v. Burke*, 287 Ky. 187, 152 S.W.2d 586, 587 (1941), there is a rational basis for providing financial incentives to purchase tax certificates.” *Farmers Nat’l Bank v. Commonwealth Dep’t of Revenue*, 486 S.W.3d 872, 882 (Ky. App. 2015).

By refusing to grant the motion to intervene, KTBS further contends that the circuit court bestowed additional rights and greater protections on the party filing the *lis pendens* than is permitted in Kentucky. KTBS argues that the *lis pendens* had no other effect on its lien than giving KTBS notice to intervene in the present action, whereas the circuit court implied that the *lis pendens* invalidated all claims arising later than the filing of the *lis pendens*.

*Lis pendens* is defined as “[a] notice, recorded in the chain of title to real property, ... to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.” *Greene v. McFarland*, 43 S.W.3d 258, 260 (Ky. 2001) (quoting BLACK’S LAW DICTIONARY 943 (7th ed. 1999)).

The *lis pendens* provided notice to any third-party purchaser, including KTBS, before its purchase of the certificate, that the Property at issue was the subject of a foreclosure action. KTBS was placed on constructive notice of the pending foreclosure and consequently, responsible to know that the interest it was planning to acquire was contingent on the outcome of that proceeding.

However, the notice provided by the *lis pendens* did not provide KTBS with an automatic right to intervene in the foreclosure action. Intervention is governed by CR 24.01. In any event, KTBS did not attempt to intervene until after final judgment was entered in the foreclosure action and the Property was ordered to be sold. “While intervention after judgment may be permitted under some circumstances, . . . we think that in making a motion for intervention after judgment the applicant has a special burden of justifying the apparent lack of timeliness.” *Monticello Elec. Plant Bd. v. Bd. of Ed. of Wayne Cty.*, 310 S.W.2d 272, 274 (Ky. 1958) (internal citation omitted). KTBS failed to demonstrate how it met this special burden.

The circuit court’s decision that the motion to intervene was untimely, in part because it was made after the entry of a final judgment, was in accordance with the doctrine of *lis pendens*:

The effect of the *lis pendens* is to keep the subject-matter of the litigation within the control of the court, and to render the parties powerless to place it beyond the reach of the final judgment.

One acquiring an interest *pendente lite* is sometimes on his application permitted to appear in the action and defend or prosecute in the place of the person to whose interest he has succeeded. The court is not, however, bound to permit him to do so, in the absence of a statute conferring upon him this right.

**Whether, however, he appears in the cause or not, and whether he has any actual notice of its pendency or not, the judgment, when rendered, must be given the same effect as if he had not acquired his interest, or as if he had been a**



**party before the court from the commencement of the proceeding.** His interests are absolutely concluded by the final determination of the suit. (Citations omitted.) (Emphasis added.)

*Cumberland Lumber Co. v. First & Farmers Bank of Somerset, Inc.*, 838 S.W.2d 403, 405 (Ky. App. 1992) (quoting *Roberts v. Cardwell*, 154 Ky. 483, 157 S.W. 711 (1913)).

KTBS has pointed out that some of the blame for the situation rests with the Bank for failing to name Pendleton County as a defendant in the foreclosure action. If the county had been named and filed an answer, the certificate of delinquency would have qualified for the protected list under KRS 134.504(10)(b)(2) and would probably not have been sold. Since it was sold, KTBS may obtain a refund pursuant to KRS 134.551(2)(a)(2), but it is not entitled to its costs or interest pursuant to KRS 134.549. Nonetheless, the *lis pendens* provided notice to KTBS that it could avoid the current situation altogether by not purchasing the lien.

Although KTBS argues that actual notice should supersede constructive notice in evaluating timeliness, it is well-established that “one who acquires an interest in property, whether by purchase, lien or other encumbrance, after the filing of a *lis pendens* notice, takes that interest subject to the results of the litigation. Actual knowledge of the pending action is not necessary to bind the *pendente lite* purchaser.” *Id.* at 405.

Under the circumstances, the circuit court did not misinterpret or overstate the effect of the *lis pendens* in determining that KTBS's motion to intervene after the entry of the final judgment was untimely. Its decision to deny the motion on the grounds of untimeliness was not an abuse of discretion.

Because of our opinion above, the second appeal is moot.

### **CONCLUSION**

The order of July 28, 2014, denying KTBS's motion to intervene is **AFFIRMED**. The money placed in escrow shall be released from escrow consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE UNION  
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