

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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000833-MR

DANIEL SHOUSE; AND
LISA SHOUSE

APPELLANTS

v. APPEAL FROM HENRY CIRCUIT COURT
HON. KAREN A. CONRAD, JUDGE
ACTION NO. 14-CI-00023

THE FARMERS BANK OF
MILTON; KENTUCKY LIEN
HOLDINGS, LLC; TAX EASE
LIEN SERVICING, LLC; AND
HAZEL ENTERPRISES, LLC

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Daniel Shouse and Lisa Shouse (the Shouses) bring this appeal from a Henry Circuit Court judgment and order of sale in favor of Farmers Bank of Milton (Farmers Bank) and a summary judgment and order of sale in

favor of Tax Ease Lien Servicing, LLC (Tax Ease) entered March 9, 2016. We affirm.

On September 11, 2009, the Shouses executed a promissory note in the principal sum of \$117,000 in favor of Farmers Bank of Milton, and they also granted Farmers Bank a mortgage upon certain real property located in Henry County to secure repayment of the note. The mortgage was recorded in the Henry County Clerk's Office on September 17, 2009 (2009 mortgage).

The Shouses eventually defaulted under the repayment terms of the 2009 promissory note. To satisfy this indebtedness, the Shouses executed another promissory note in the principal sum of \$120,864.83 in favor of Farmers Bank on November 28, 2011. The 2011 promissory note specifically provided that its purpose was the "renewal of matured loan." The 2011 promissory note also provided that it was secured by the 2009 mortgage. The Shouses ultimately defaulted under the repayment terms of the 2011 promissory note.

Consequently, Farmers Bank filed a complaint against, *inter alios*, the Shouses and Tax Ease seeking to foreclose upon the real property encumbered by the 2009 mortgage. Farmers Bank alleged that the Shouses defaulted upon the 2011 promissory note and sought foreclosure upon the real property subject to the 2009 mortgage. Tax Ease filed an answer, counterclaim, and cross-claim. In its counterclaim and cross-claim, Tax Ease specifically asserted:

Tax Ease purchased certain delinquent taxes on the real property that is the subject matter of this suit (the "Property") from the Henry County Clerk for the years

and upon dates hereinafter set forth and is owed the following amounts:

The 2009 tax bill, purchased on July 28, 2010[,] for an acquisition cost of \$342.18 plus interest of twelve percent (12%) per annum upon the acquisition cost from the date of [Farmers Bank] acquisition until paid; an administration fee of \$100.00, pre-litigation attorney fees of \$342.18; plus, reasonable attorney's fees and court costs herein expended in the collection of said amounts.

March 4, 2014, Answer to Complaint, Counterclaim and Cross Claim of Defendant, Tax Ease Lien Servicing, LLC, at 1-2. The Shouses also filed an answer and counter-claims against Farmers Bank and Tax Ease.

Subsequently, Farmers Bank and Tax Ease filed motions for summary judgment. Farmers Bank argued that it was undisputed that the Shouses defaulted under the repayment terms of the 2011 promissory note and that a valid mortgage existed upon the Shouses' real property. Tax Ease maintained that it purchased a Tax Certificate of Delinquency upon the subject real property for delinquent property taxes from the Henry County Clerk and was entitled to an order of sale to satisfy same.

The circuit court granted the motions for summary judgment filed by Farmers Bank and Tax Ease. By order of sale entered March 9, 2016, the circuit court ordered the real property subject to the 2009 mortgage sold by the master commissioner to satisfy the indebtedness owed to Farmers Bank and to satisfy the overdue amount of taxes, fees, and interest owed to Tax Ease. This appeal follows.

To begin, summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). All facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Steelvest, Inc.*, 807 S.W.2d 476.

The Shouses contend that the 2009 mortgage held by Farmers Bank upon their real property is invalid as it violated the mandates of Kentucky Revised Statutes (KRS) 382.330. The Shouses point out that the 2009 promissory note provided for a September 11, 2010, maturity date and that the 2011 promissory note provided for a November 28, 2018, maturity date. However, the 2009 mortgage provides for a September 11, 2024, maturity date. Relying upon KRS 382.330, the Shouses maintain that the 2009 mortgage is statutorily mandated to provide the correct maturity date of the debt secured thereby, and the mortgage's failure to do so renders it invalid and unenforceable. We disagree.

KRS 382.330 reads:

No county clerk shall record a deed or deed of trust or mortgage covering real property by which the payment of any indebtedness is secured unless the deed or deed of trust or mortgage states the date and the maturity of the obligations thereby secured which have been already issued or which are to be issued forthwith. In the case of obligations due on demand, the requirement of stating the maturity thereof shall be satisfied by stating that such obligations are "due on demand."

Under KRS 382.330, the General Assembly set forth the statutory prerequisites of a recordable mortgage. *Trio Realty Co., Inc. v. Queenan*, 360

S.W.2d 747 (Ky. 1962). To qualify as a recordable instrument, KRS 382.330 mandates that the mortgage must set forth “the date and maturity of the obligations thereby secured.” It must be emphasized that KRS 382.330 only deals with the recording of a mortgage with the county clerk. The statute was not intended and does not pertain to the underlying validity of a mortgage between the parties thereto. It is well-established that a mortgage is valid and enforceable between the parties even though it is unrecorded or deficiently recorded. *5 Tiffany Real Property* § 1391 (3d. ed. 2016.) The recordation of a mortgage simply serves as notice to third parties of a lien encumbering the real property.

In this case, the Shouses’ argument that the 2009 mortgage is rendered unenforceable because it contravenes KRS 382.330 is without merit. The mortgage is valid and enforceable between the Shouses and Farmers Bank. Thus, the circuit court properly rendered summary judgment in favor of Farmers Bank.

The Shouses also assert that Tax Ease failed to prove ownership of the Certificate of Delinquency for delinquent taxes upon their real property. Specifically, the Shouses point out that Tax Ease failed to provide a copy of the Certificate of Delinquency in the appellate record.

Tax Ease attached to its motion for summary judgment the affidavit of a manager of Tax Ease. The manager averred that Tax Ease purchased Certificate of Delinquency #7102 from Henry County on July 28, 2010. As of April 21, 2015, the manager stated that the total amount owing was \$1,437.65, including fees, costs, and interest. Also, the manager stated that the Certificate of Delinquency

was for 2009 unpaid taxes upon the Shouses' real property. We note that the Shouses have not denied the veracity of the affidavit. Accordingly, the affidavit constitutes sufficient evidence of Tax Ease's ownership of the Certificate of Delinquency upon the Shouses' real property for the 2009 tax year.¹

The Shouses finally maintain that Tax Ease purchased the Certificate of Delinquency at a time when an automatic stay was effective under 11 U.S.C. § 362 of the United States Bankruptcy Code, due to the Shouses' filing a Chapter 13 Bankruptcy in the United States Bankruptcy Court for the Eastern District of Kentucky. Consequently, the Shouses argue that the Certificate of Delinquency is void as it was acquired by Tax Ease in violation of the automatic stay.

The record indicates that the Shouses filed a petition for Chapter 13 bankruptcy on May 28, 2010. Thereafter, on July 28, 2010, Tax Ease purchased the Certificate of Delinquency as to past due 2009 taxes on the Shouses' real property from the Henry County Clerk. The Shouses' bankruptcy petition was eventually dismissed on July 22, 2013. While it appears that the Certificate of Delinquency was sold during the period that the automatic stay was in effect, the Shouses' remedy was to seek relief in the bankruptcy court, which they failed to do. Additionally, we would note that tax liens for outstanding property taxes in this case are priority claims that are not dischargeable in a Chapter 13 bankruptcy. 11 U.S.C. § 507(a)(8). There is nothing in the record of this case indicating that

¹ We observe that Tax Ease Lien Servicing, LLC, attached to its brief a copy of Certificate of Delinquency #7102. Although this Certificate is not found in the record on appeal, it is a public record that was recorded in the Henry County Clerk's Office; consequently, this Court may take judicial notice thereof. Kentucky Rules of Evidence 201.

the lien was avoided by the bankruptcy court. The tax lien in this case attached in 2009 for 2009 ad valorem taxes, prior to the filing of bankruptcy in 2010.

Therefore, we are of the opinion that the circuit court property granted Tax Ease's motion for summary judgment.

For the foregoing reasons, the summary judgments of the Henry Circuit Court are affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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