

RENDERED: NOVEMBER 2, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000432-MR

KENTUCKY TAX BILL SERVICING, INC

APPELLANT

v. APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE JAY B. DELANEY, JUDGE
ACTION NO. 15-CI-00154

DONALD R. NAGEL AKA DONALD NAGEL;
UNKNOWN SPOUSE OF DONALD R. NAGEL
AKA DONALD NAGEL; FORCHT BANK, NA
SUCCESSOR BY MERGER WITH GRANT COUNTY
DEPOSIT BANK; SHONDA K. NAGEL; AND
COUNTY OF PENDLETON, KENTUCKY

APPELLEES

OPINION
DISMISSING

** ** * * * * *

BEFORE: JOHNSON, D. LAMBERT, AND J. LAMBERT, JUDGES.

JOHNSON, JUDGE: Kentucky Tax Bill Services, Inc. appeals an order of the Pendleton Circuit Court setting aside a prior supplemental judgment and a judgment and order of sale of certain property owned by appellee Donald R. Nagel.

Because this appeal is prosecuted from a judgment which is not final, it must be dismissed as interlocutory.

BACKGROUND

Nagel owned certain property located at 291 Rogers Road, Demossville, Kentucky (“Property 1”). The Pendleton County Clerk issued Certificates of Delinquency for unpaid *ad valorem* taxes on Nagel’s Property 1 for the years 2003, 2004, 2006, and 2007. In October 2015, Kentucky Tax Bill filed a complaint in the Pendleton Circuit Court seeking to foreclose on Property 1, as well as for a judgment in the amount of \$8,040.98, interest on the judgment lien, reasonable attorney fees, and its costs. In addition to Nagel, Kentucky Tax Bill named Forcht Bank, N.A., Nagel’s unknown spouse, Shonda K. Nagel, and Pendleton County as co-defendants.

Although Kentucky Tax Bill originally brought the action seeking a personal judgment against Nagel, the actual judgment it prepared, and which was entered of record on April 10, 2012, was an *in rem* judgment and order of sale.

Kentucky Tax Bill proceeded to enforce the April 10, 2012 judgment. Property 1 was offered for sale by a Master Commissioner on July 19, 2012. However, no bids were received and Kentucky Tax Bill’s judgment remained unsatisfied. On August 3, 2015, Kentucky Tax Bill filed a notice of judgment lien against all of Nagel’s property in Pendleton County.

On October 14, 2015, Kentucky Tax Bill filed a second complaint against Nagel seeking a supplemental personal judgment against him and foreclosure on a second property he owned (“Property 2”). On April 25, 2016, the trial court found Nagel to be in default, but denied Kentucky Tax Bill’s motion for a supplemental judgment.

In July 2016, Kentucky Tax Bill once again sought a supplemental judgment against Nagel. On August 9, 2016, the trial court granted Kentucky Tax Bill’s motion and entered a supplemental judgment. That judgment stated:

KTBS [Kentucky Tax Bill] shall recover a supplemental *in personam* judgment against Donald R. Nagel a/k/a Donald Nagle and *in rem* judgment against the property which is the subject of this action in the sum of Six Thousand Five Dollars and Seventy Cents (\$6,005.70) together with interest at the statutory rate of 12% per annum from date of entry of judgment until paid plus any continuing costs or attorneys’ fees and shall have a lien against the subject property to secure said Judgment.

The trial court also issued a judgment and order of sale, listing the description of Nagel’s Property 2 which is located at 9710 Highway 467, Williamstown, Kentucky.

On August 19, 2016, Forcht Bank filed a motion to set aside the August 9, 2016 judgment and order of sale. Forcht averred that although it held a mortgage on the property, the order did not state that the property was to be sold subject to its superior mortgage as required by Kentucky Revised Statutes (“KRS”)

426.690. On August 26, 2016, Nagel filed a motion to set aside the judgment and order of sale based upon his contention that the April 10, 2012 order was an *in rem* judgment against Property 1, not a judgment against him personally. On February 7, 2017, the trial court entered an opinion and order granting Forcht’s and Nagel’s motions, setting aside both its previously entered supplemental judgment and the judgment and order of sale concerning Property 2.

This appeal follows.

STANDARD OF REVIEW

“A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under [Kentucky Rules of Civil Procedure (“CR”)] 54.02.” CR 54.01. “This court on its own motion will raise the issue of want of jurisdiction if the order appealed from lacks finality.” *Francis v. Crouse Corp.* 98 S.W.3d 62, 64 (Ky. App. 2002) (quoting *Huff v. Wood Mosaic Corp.*, 454 S.W.2d 705, 706 (Ky. 1970)).

ANALYSIS

Although the issue has not been raised, we address the question of our jurisdiction *sua sponte*. Pursuant to KRS 22A.020(1), the jurisdiction of the Court of Appeals is limited to appeals from final judgments or orders of the circuit courts. Our review of the order on appeal convinces us that it lacks finality.

The order from which Kentucky Tax Bill appeals is an order which merely sets aside two previously entered judgments. The rationale of this Court in *Black Forest Coal, LLC v. GRC Dev., LLC*, 483 S.W.3d 378 (Ky. App. 2015), guides our analysis in discerning whether such an order can be considered final for purposes of review:

In this Commonwealth, the general rule is “that an order setting aside a judgment and reopening the case for trial is not final or appealable.” *Asset Acceptance [LLC v. Moberly]*, 241 S.W.3d 329 (Ky. 2007) at 332. The only exception to this general rule was set forth in *Asset Acceptance* and is applicable where: (1) the “disrupted” judgment is more than one year old, and (2) the reason offered by the circuit court is an “extraordinary circumstance” under CR 60.02(f). *Asset Acceptance*, 241 S.W.3d at 334.

Id. at 380. Clearly, the exception addressed in *Asset Acceptance* is not applicable in this case and therefore we are bound to apply the general rule that an order setting aside a judgment is not final.

Although the trial court did not attempt to do so, we note that the appealability of the trial court’s order setting aside its previous judgments could not be saved by use of the CR 54.02 recitations because it is, by its very nature, interlocutory. This principle was fully explained by the former Court of Appeals in *Hale v. Deaton*, 528 S.W.2d 719 (Ky. 1975):

Before the processes of CR 54.02 may be invoked for the purpose of making an otherwise interlocutory judgment final and appealable, **there must be a final**

adjudication upon one or more of the claims in litigation. The judgment must conclusively determine the rights of the parties in regard to that particular phase of the proceeding. While Deaton, in an effort to recover funds and property belonging to George Hubert Hale, demanded an accounting, this procedure was a corollary aspect of the principal claim. The judgment directing that the Hales account for property of George Hubert Hale that came into possession of Minnie Hale under the power of attorney executed by him **did not finally fix the rights of any of the parties but was at the most an intermediate step in the proceeding.**

Id. at 722 (emphasis added).

An order which merely sets aside a previously entered judgment does not conclusively determine the rights of any party. It is but “at most an intermediate step” as the trial court proceeds to reconsider its previously entered judgments. Because the order Kentucky Tax Bill attempted to appeal falls squarely within these criteria, it is inherently interlocutory and is not within our jurisdiction to review.

CONCLUSION

Because of our conclusion that this appeal has been prosecuted from an order which lacks finality, it must be dismissed as interlocutory.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joshua M. Bilz
David A. Schulenberg
Cold Spring, Kentucky

BRIEF FOR APPELLEE
FORCHT BANK, NA:

Scott T. Rickman
Lexington, Kentucky

NO BRIEF FILED FOR
APPELLEE DONALD R. NAGEL