RENDERED: JULY 5, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000885-MR

BALL HOMES, INC.; LOCHMERE
DEVELOPMENT CORPORATION;
AND TROY THOMPSON, ASSIGNEE — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL JR., JUDGE
ACTION NO. 17-CI-00640

ANDOVER GOLF AND COUNTRY CLUB, INC.;
COMMONWEALTH OF KENTUCKY,
COUNTY OF FAYETTE; THE RANGE, INC.;
COMMUNITY TRUST BANK, INC.;
GREATAMERICA FINANCIAL SERVICES CORPORATION;
WHITAKER BANK, INC.; ANDOVER FOREST
HOMEOWNERS ASSOCIATION, INC.;
ANDOVER NEIGHBORHOOD ASSOCIATION, INC.;
THE GOLF TOWNHOMES AT ANDOVER
HOMEOWNERS ASSOCIATION, INC.;
THE GOLF TOWNHOMES AT ANDOVER
HOMEOWNERS ASSOCIATION, INC., PHASE II;
THE GOLF TOWNHOMES OF ANDOVER,
ESTATE SECTION, HOMEOWNERS ASSOCIATION, INC.;
THE RESERVE AT ANDOVER RESIDENTIAL
HOMEOWNERS ASSOCIATION, INC.; BRIGHTON EAST
HOMEOWNERS ASSOCIATION, INC.; AND AGCC, LLC,
ASSIGNEE OF WHITAKER BANK, INC. — APPELLEES

OPINION
DISMISSING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

GOODWINE, JUDGE: This appeal arises out of a foreclosure action. Appellants appeal the Fayette Circuit Court's judgment and order of sale, as well as the order confirming sale. Appellees assert Appellants lack standing. After careful review, we dismiss.

Before discussing the procedural posture of this case, we must provide some context to explain why the Appellants, Ball Homes, Inc.; Lochmere Development Corporation; and Troy Thompson (collectively the "Developers"), claim an interest in the case. Beginning in the late 1980s, the Developers separately purchased land on the northeast and southwest sides of Todds Road and Man O' War Boulevard in Lexington to develop the Andover neighborhood area. The Developers leased a portion of the land to Corman-McQueen Golf, Inc. ("Corman-McQueen") for the construction of a golf course and country club, which Corman-McQueen was required to purchase upon expiration of a five-year lease. Ownership of the golf course and country club was later transferred to Andover Golf and Country Club, Inc. ("AGCC"). The Developers also transferred ownership rights of all common areas to the homeowners' associations of the

neighborhoods in the area and transferred complete control of the associations to the homeowners.

When the Developers sold the golf course property to Corman-McQueen, the contract between the parties contained two restrictive covenants the Developers now seek to enforce: (1) the property must be continuously operated as a golf course and country club; and (2) the Developers have the right of first refusal to purchase the property for thirty years from the date of closing. However, the Developers admit they "waived their right of first refusal in order for the golf course entity to obtain appropriate tax status in the early years after development of the course." Later, ownership of the property was transferred to AGCC. The Developers, Corman-McQueen, and AGCC entered into an amendment to the contract in which AGCC agreed the restrictive covenants would survive the closing.

AGCC financed the property through Whitaker Bank, Inc. ("Whitaker Bank") but later defaulted on the loan. On February 17, 2017, Whitaker Bank filed a foreclosure action against AGCC and other lienholders. In a separate action, which is not before this Court, Whitaker Bank sought a declaratory judgment against the Developers to adjudicate whether they had a legitimate interest in enforcing the restrictive covenants. The Developers then filed a separate declaratory judgment action to enforce the restrictive covenants.

On March 23, 2017, the Developers moved to intervene in the foreclosure action to enforce the restrictive covenants. Whitaker Bank objected to the Developers' motion, arguing they lacked standing to intervene in the foreclosure action because they had no interest in the sale of the property. Whitaker Bank further argued if the Developers had any right to enforce the restriction, they could exercise that right against the purchaser of the property.

On April 17, 2017, the trial court entered: (1) an order granting the Developers' motion to intervene in the foreclosure action; and (2) a judgment and order of sale. The judgment indicated that the property would be sold subject to the Developers' rights, if any. The trial court also consolidated the foreclosure action and the two declaratory judgment actions. The Developers moved to cancel the sale, but the motion was denied. The Developers then filed a timely notice of appeal of the judgment and order of sale. On April 24, 2017, the Fayette Master Commissioner sold the property, and the trial court entered an order confirming sale on May 25, 2017. The Developers filed a timely amended notice of appeal to include this order.

In October 2017, while this appeal was pending, the trial court found the Developers did not have the right to enforce the restrictive covenants and dismissed the Developers' asserted claims in all three civil actions, including the

foreclosure action that is the subject of this appeal. The Developers did not appeal from that judgment.

Because standing is a question of law, we review *de novo*. *Tax Ease Lien Investments 1, LLC v. Commonwealth Bank & Tr.*, 384 S.W.3d 141, 143 (Ky. 2012) (citing *Nash v. Campbell Cty. Fiscal Court*, 345 S.W.3d 811, 816 (Ky. 2011). "Under this standard, we afford no deference to the trial court's application of the law to the facts found." *Laterza v. Commonwealth*, 244 S.W.3d 754, 756 (Ky. App. 2008).

The Appellees argue the Developers lack standing to appeal the judgment and order of sale and the order confirming sale. The Appellees properly preserved this issue by objecting to the Developers' motion to intervene below. *See Elwell v. Stone*, 799 S.W.2d 46 (Ky. App. 1990). Even if the issue of standing was unpreserved, the Supreme Court of Kentucky recently held "that all Kentucky courts have the constitutional duty to ascertain the issue of constitutional standing, acting on their own motion, to ensure that only *justiciable causes* proceed in court, because the issue of constitutional standing is not waivable." *Commonwealth Cabinet for Health and Family Services, Department for Medicaid Services v. Sexton by and through Appalachian Regional Healthcare, Inc.*, 566 S.W.3d 185, 192 (Ky. 2018). In *Sexton*, the Supreme Court of Kentucky adopted the Supreme

Court of the United States' test for a plaintiff's standing to sue announced in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Notably, the Developers were not plaintiffs in the underlying foreclosure action. The Developers moved to intervene in the action to enforce restrictive covenants, even though they lack any ownership interest in or lien on the property. Under federal precedent, "[a]lthough intervenors are considered parties entitled, among other things, to seek review by this Court, . . . an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68, 106 S. Ct. 1697, 1706, 90 L. Ed. 2d 48 (1986).

Although the Kentucky Constitution does not contain the "case or controversy" language found in Art. III of the United States Constitution, Section 112(5) "places *original jurisdiction* over a case in the circuit court," which "shall have original jurisdiction of all *justiciable causes*." *Sexton*, 566 S.W.3d at 196. "[E]stablishing the requisite ability to sue in circuit court is a necessary predicate for continuing that suit in appellate court. In this way, the *justiciable cause* requirement applies to cases at all levels of judicial relief." *Id.* at 197.

Because an intervening party must have constitutional standing to appeal an underlying judgment, we apply the *Lujan* test. The Developers must prove "injury, causation, and redressability" to have standing. *Id.* at 196.

> First, the [Appellants] must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]' " Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61, 112 S. Ct. at 2136 (citations omitted).

The Developers failed to prove they suffered any injury, so they do not have standing to appeal the issues raised. "[Appellants] cannot manufacture standing merely . . . based on their fears of hypothetical future harm that is not certainly impending." *Sexton*, 566 S.W.3d at 197 (Ky. 2018). Here, the Developers are not owners of the property or lienholders, so they had no financial interest in the sale of the property. Instead, their claim arose out of a fear the property may not be used as a golf course at some point in the future. There has been no allegation that the purchaser tried to use the property for another purpose.

The Developers have not shown they would suffer any financial loss if the use restriction was violated. Additionally, the Developers admit they did not

suffer a concrete injury; their brief states the alleged defects of the sale "*may* have materially affected any *prospective purchasers* and the overall sale of the property." As the Developers suffered no concrete or particularized injury resulting from the sale of the golf course property, they lack standing to appeal the issues raised.[1]

Even if the Developers had standing to raise the issues set forth in this appeal, the judicial sale was conducted in accordance with state and local rules. The judgment and order of sale stated that the property would be sold subject to the rights, restrictions and claims, if any, of the Developers. The advertisement prior to the judicial sale contained similar language, and the Master Commissioner read the pertinent language of the judgment and order of sale in its entirety prior to the bids commencing at the time of sale. The Developers attended the sale but did not object to what was read nor bid on the property.

For the foregoing reasons, we ORDER the Developers' appeal DISMISSED.

LAMBERT, JUDGE, CONCURS IN RESULT.

[1] The trial court found the Developers did not have the right to enforce the restrictive covenants and dismissed the Developers' asserted claims in all three civil actions, including the foreclosure action that is the subject of this appeal. The Developers did not appeal from that judgment. *See Judgment, October 17, 2017.*

MAZE, JUDGE, CONCURS IN RESULT WITH SEPARATE OPINION.

MAZE, JUDGE, CONCURRING IN RESULT: I join the majority's order dismissing the appeal. But, respectfully, I disagree with the majority's conclusion that the Developers lacked constitutional standing to intervene in the Bank's foreclosure or to bring this appeal. The majority relies heavily on the recent opinion of the Kentucky Supreme Court in *Commonwealth Cabinet for Health & Family Servs., Dep't for Medicaid Servs. v. Sexton by & through Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185 (Ky. 2018). In that case, the Court addressed the issue of constitutional standing as a question of whether there is a justiciable issue presented on appeal. As the majority correctly notes, the initiating party must satisfy three requirements to invoke the court's jurisdiction. The plaintiff must allege: (1) to have suffered an injury in fact; (2) caused by the defendant; and (3) fairly traceable to the caused action of the defendant. *Id.* at 196, *citing Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992).

In the current case, the Developers sought to intervene in the Bank's foreclosure action against the property. The Bank alleged that its right to enforce the restrictive covenants would be prejudiced by a judicial sale made without reference to those restrictive covenants. There were, in fact, two pending actions

concerning that very issue; the Bank's action against the Developers regarding the enforceability of the restrictive covenants, and the Developers' action seeking to bind the Bank or its wholly-owned subsidiary to those covenants. I would conclude that this interest was more than a hypothetical or potential controversy – it concerned an actual and pending dispute between these parties which would be affected by the outcome of the foreclosure proceeding. For purposes of this appeal, therefore, I would hold that the Developers had standing to intervene in the foreclosure action and to file this appeal.

Nevertheless, I agree with the majority that the appeal should be dismissed for lack of a justiciable issue, but for mootness rather than constitutional standing. First, the Developers obtained the relief they requested in the foreclosure action – the property was sold subject to the restrictive covenants. Although the Developers allege defects in the advertising of the Master Commissioner's, they do not allege that they were prejudiced by the process of the sale or that the defects would render the sale void as a matter of law.

Moreover, subsequent proceedings have rendered moot the issues raised in the Developers' appeal. "A 'moot case' is one which seeks to get a judgment ... upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a *then* existing controversy." *Morgan v. Getter*, 441 S.W.3d 94, 98-99 (Ky. 2014), *quoting Benton v. Clay*, 192 Ky. 497, 233 S.W.

1041, 1042 (1921). As noted, the circuit court in the related action subsequently found that the Developers lacked standing to enforce the restrictive covenants. The fact that the circuit court ruled against the Developers on the standing question (after the filing of this appeal) does not mean that they never had standing. Rather, it simply means that their objections to the sale are moot in light of that ruling.[2] Here, the Developers' appeal is clearly moot, since a ruling on the Master Commissioners' sale can have no possible effect on the rights of any party. Therefore, I would dismiss the appeal for this reason.

BRIEF FOR APPELLANTS: Carroll M. Redford, III Lexington, Kentucky	BRIEF FOR APPELLEES, ANDOVER FOREST HOMEOWNERS ASSOCIATION, INC.; ANDOVER NEIGHBORHOOD ASSOCIATION, INC.; THE GOLF TOWNHOMES AT ANDOVER HOMEOWNERS ASSOCIATION INC., PHASE II; THE GOLF TOWNHOMES OF ANDOVER, ESTATE SECTION, HOMEOWNERS ASSOCIATION INC.; THE VILLAS AT ANDOVER, HOMEOWNERS ASSOCIATION, INC.; AND THE RESERVE AT ANDOVER RESIDENTIAL HOMEWOWNERS ASSOCIATION, INC.; WHITAKER BANK; AND

[2] A review of the CourtNet docket also indicates that the Andover Homeowner's Association has intervened in the related action to assert its right to enforce the restrictive covenants. Consequently, those actions are not yet final and appealable.

ANDOVER GOLF AND COUNTRY CLUB, LLC:

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