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Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-002422-MR

BANK OF AMERICA — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE STANLEY BILLINGSLEY, SPECIAL JUDGE
ACTION NO. 02-CI-00223

BOONE NATIONAL BANK,
RONNIE L. COOK AND
LINDA D. COOK — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

KNOPF, JUDGE: In August 2001, Ronnie and Linda Cook refinanced the mortgage on their Burlington, Kentucky, residence. They acquired a new loan from Boone National Bank (BNB) and with proceeds from that loan paid off their existing loan from Bank of America (BOA). When, two months later, Bank of America's mortgage on the Cooks' property remained unreleased, a Boone

National Senior Vice President wrote to Bank of America's "Payoff Accounting Department 12" in Louisville and demanded that Bank of America release the lien promptly. The release still was not forthcoming, so in February 2002, Boone National brought the present action pursuant to KRS 382.365, which requires that satisfied liens be released within thirty days. It sought a release of the lien, costs, attorney fees, and a statutory penalty. On April 5, 2002, Bank of America's release was entered by the Boone County clerk. In August 2003, apparently at the behest of Boone National and represented by Boone National's attorney, the Cooks intervened. They too claimed entitlement to the statutory penalty. Finally, by order entered October 22, 2004, the Boone Circuit Court upheld the Cooks' claim and awarded them penalties in the amount of $54,000.00. It is from that order that Bank of America has appealed. It contends that the trial court erred by finding that Bank of America lacked good cause for not releasing the Cooks' lien sooner than it did. It also contends that KRS 382.365's potential to result in excessive penalties renders that statute unconstitutional.[1] Convinced that the trial court

[1] At oral argument Boone National submitted "supplemental" authority—Cross v. Jones, No. 2003-CA-001224-MR (August 5, 2005)--to the effect that under KRS 418.075 Bank of America's constitutional challenge should not be reviewed because the bank failed to notify the Attorney General that the issue was being appealed. As Bank of America notes in its response, Cross does

did not misapply the statute and that the penalty in this case was not unconstitutionally excessive, we affirm.

KRS 382.365 provides in pertinent part as follows:

> (1) A holder of a lien on real property . . . shall release the lien in the county clerk's office where the lien is recorded within thirty (30) days from the date of satisfaction.
> (2) A proceeding may be filed by any owner of real property or any party acquiring an interest in the real property in District or Circuit Court against a lienholder that violates subsection (1) of this section. . . .
> (3) Upon proof to the court of the lien being satisfied, the court shall enter a judgment releasing the lien. The judgment shall be with costs including a reasonable attorney's fee. If the court finds that the lienholder received written notice of its failure to release and lacked good cause for not releasing the lien, the lienholder shall be liable to the owner of the real property in the amount of one hundred dollars ($100) per day for each day, beginning on the fifteenth day after receipt of the written notice, of the violation for which good cause did not exist.
> (4) A lienholder that continues to fail to release a satisfied real estate lien, without good cause, within forty-five (45) days from the date of written notice shall be liable to the owner of the real property for an additional four hundred dollars ($400) per day for each day for which good cause did not exist after the forty-fifth day from the date of written notice, for a total of five hundred dollars ($500) per day for each day for which good cause did not exist after the

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not in fact supplement the arguments raised in Boone National's brief, but raises a new issue. We agree with Bank of America that this issue was not timely raised and has not been adequately vetted. For those reasons, and because Bank of America did properly notify the Attorney General of its constitutional challenge at the trial court level, but the Attorney General declined to participate because the present parties could "adequate[ly] represent[] all interests," we believe that reliance upon Cross at this point would be inappropriate and so shall review Bank of America's constitutional claims.

> forty-fifth day from the date of written notice. The lienholder shall also be liable for any actual expense including a reasonable attorney's fee incurred by the owner in securing the release of real property by such violation.

The Cooks satisfied their debt to BOA on August 10, 2001. Under the statute, therefore, BOA was obliged to release its lien within thirty days, or by September 10, 2001. The lien was not timely released, and the trial court found that on October 22, 2001, BOA received notice of its default from the BNB vice president. Fifteen days thereafter BOA became liable for penalties, which accrued until the release was filed on April 5, 2002, a period of 144 days, according to the trial court, thirty days at the rate of $100.00 per day and 114 days at the rate of $500.00 per day. The trial court assessed a total penalty of $54,000.00.[2]

Against this result BOA presented evidence tending to show that it processes an enormous volume of satisfied loans each year, over 540,000 nationwide in 2001 alone and over 5400 in Kentucky, and that its procedures include a successful system for releasing satisfied liens. Bank records indicated that in accordance with that system a release was generated for the

[2] The trial court mistakenly applied the $100.00 per day rate for forty-five days instead of thirty and the $500.00 per day rate for ninety-nine days instead of 114. The total penalty should have been (30 x $100.00 = $3,000.00) + (114 x $500.00 = $57,000.00) = $60,000.00. The Cooks have not cross-appealed to challenge the trial court's miscalculations, however, so the judgment must stand as entered.

Cooks' lien on about September 18, 2001, and that a check for the county clerk's filing fee was also prepared. Although no records indicated what became of the release, in the ordinary case it would have been mailed to the county clerk for filing. For some reason, however, in this case the release was not filed and the check to the county clerk was never cashed. BOA contends that the general success of its system demonstrates BOA's good faith in attempting to comply with the law and that the sheer size of its business should be deemed a good cause for its rare, inadvertent failure to process a release as happened in this case. After all, BOA argues, the glitch in the Cooks' case may well have occurred in the county clerk's office, and it is unfair to penalize BOA for a mistake over which it had no control. The trial court erred, therefore, BOA insists, by deeming its failure to release the Cooks' lien to be without good cause.

The obvious rejoinder to this contention is that whatever justification BOA may initially have had to rely on its lien-release system, that justification disappeared when BOA received BNB's October notice that the Cooks' lien had not been released. At that point BOA could no longer presume that its system was working and was obliged to take further steps to ensure prompt compliance with KRS 382.365.

In response, BOA contends that BNB's notice should be deemed inadequate because BNB sent it to the payoff accounting department in Louisville rather than to a national office referred to in the mortgage. As the trial court noted, however, the payoff statement for the Cooks' loan directed them to communicate "only" with the Louisville accounting department and further indicated that that department would initiate, at least, the mortgage cancellation process. It was not unreasonable, therefore, for BNB to send its notice to the Louisville office, where BOA should have anticipated that payoff customers and successor mortgagees with lien release problems were apt to address their concerns. The Louisville office's negligence in failing either to release the Cooks' lien or to refer BNB's notice to someone who could do so can not be deemed a good cause for BOA's statutory noncompliance. The trial court did not err, therefore, by so ruling and by finding that BOA was thus liable for the statutory penalty.

This brings us to BOA's contentions regarding the constitutionality of KRS 382.365. We review such questions of law *de novo*[3] and employ a strong presumption that the statute is constitutional.[4] BOA contends, first, that the penalty

[3] Newell Enterprises, Inc. v. Bowling, 158 S.W.3d 750 (Ky. 2005).

[4] Holbrook v. Lexmark International Group, Inc., 65 S.W.3d 908 (Ky. 2002).

provisions of the statute violate the excessive fines clauses of the Eighth Amendment to the Constitution of the United States and Section 17 of the Constitution of Kentucky. The United States Supreme Court has held, however, that the Eighth Amendment clause applies only to "fines directly imposed by, and payable to, the government," not, as in this case, to civil remedies in suits between private parties.[5] Our Supreme Court has indicated, furthermore, that Section 17 is to be interpreted consistently with its federal parallel.[6] BOA has suggested no reason to depart from that rule. We conclude, therefore, that neither clause applies.

Nor does KRS 382.365 amount to special legislation in violation of Section 59 of the Constitution of Kentucky. That Section provides, in part, that "where a general law can be made applicable, no special law shall be enacted." As our Supreme Court has explained, the primary purpose of Section 59 "is to prevent special privileges, favoritism, and discrimination, and to insure equality under the law. 'A special law is legislation which arbitrarily or beyond reasonable justification discriminates against some person or objects and favors

[5] Browing-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 268, 109 S.Ct. 2909, 2916, 106 L.Ed.2d 219 (1989).

[6] Commonwealth v. Fint, 940 S.W.2d 896 (Ky. 1997).

others.'"[7] To pass muster under this Section, legislation that classifies must (1) apply equally to all in the class, and (2) be based upon classifications for which there are "distinctive and natural reasons."[8]

BOA concedes that KRS 382.365 applies equally to all lienholders, but contends that lienholders have been arbitrarily singled out for excessively harsh penalties. We disagree. To ensure the efficient operation of the Commonwealth's real estate market and to protect property owners, the General Assembly may require that titles be cleared in a timely fashion. Per diem penalties for unjustified delay are a reasonable (and common) means of inducing compliance with such a requirement.[9] Harsher penalties for egregious delay are also reasonable. The General Assembly could reasonably conclude, furthermore, that the $100.00 and $500.00 per day penalties of KRS 382.365 were necessary to induce entities as wealthy as banks, the largest lienholders, to comply. On their face, therefore, the penalties are not arbitrary, and KRS 382.365 does not violate Section 59.

[7] Kentucky Harlan Coal Company v. Holmes, 872 S.W.2d 446, 452 (Ky. 1994) (citation omitted).

[8] *Id.*

[9] *Cf.* KRS 100.991; KRS 131.602(3); KRS 260.990(5); KRS 287.990(8); KRS 304.99-123(1); KRS 367.990(8).

BOA next argues that the per diem penalty provisions of KRS 382.365 are grossly excessive and amount to arbitrary deprivations of property in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. Likening these penalties to punitive damages, BOA urges us to assess their validity in light of punitive damages cases recently decided by the United States Supreme Court. This we decline to do. As the Supreme Court itself observed in one of the punitive damages cases, "The review of a jury's award for arbitrariness and the review of legislation surely are significantly different."[10] The concerns over the imprecise manner in which punitive damages are often awarded are not present here. Unlike the inherent uncertainty associated with punitive damages, we are concerned here with a statute that gives precise notice of the penalties to be faced for noncompliance, and that leaves the lienholder in control of the extent of the penalty.[11] Not only are the punitive damages cases a bad fit for these circumstances, but there is no need to resort to them, for there is other persuasive precedent

[10] TXO Production Corporation v. Alliance Resources Corporation, 509 U.S. 443, 456, 113 S.Ct. 2711, 2719, 125 L.Ed.2d 366 (1993).

[11] *Cf.* In re Marriage of Chen, 820 N.E.2d 1136 (Ill.App. 2004) (declining to apply punitive damages cases to a statutory penalty).

addressing directly the due process ramifications of statutory penalty provisions.

In Hale v. Morgan,[12] the Supreme Court of California overturned on due process grounds a $17,000.00 statutory per diem penalty assessed against an unsophisticated landlord for violation of an anti-eviction statute. Notwithstanding the legislature's broad discretion to regulate in the economic realm, and notwithstanding its authority to impose reasonable penalties to secure obedience to statutes enacted under the police power, the Court noted that "[c]ourts have consistently assumed that 'oppressive' or 'unreasonable' statutory penalties may be invalidated as violative of due process."[13] In assessing the oppressiveness of the penalty provision, the Court examined the following factors: (1) whether the amount of the penalty was mandatory; (2) whether the duration of the penalty is potentially unlimited; (3) whether the prohibited acts encompass a broad range of culpable conduct and widely divergent injuries; (4) whether the penalty is imposed equally on those with different levels of sophistication and financial strength; and (5) whether the penalty is potentially more severe than that provided by the legislature for other more serious

[12] 584 P.2d 512 (1978).

[13] 584 P.2d at 519 (citations omitted).

transgressions.[14] A penalty provision that is suspect for these reasons may nevertheless be facially upheld if under some circumstances the application of the penalty would be constitutional. In that case the constitutionality of any given penalty would need to be determined on a case-by-case basis.

We agree with BOA that in light of the Hale v. Morgan factors, the penalty provisions of KRS 382.365 are constitutionally suspect. Unlike many penalty provisions that give the court discretion to impose an appropriate amount up to a fixed maximum, this statute makes the full amount of the penalty mandatory. The duration of the penalty, and hence its total amount, is potentially unlimited. The prohibited acts encompass everything from the apparent negligence of a regional field office, as in this case, to deliberate misrepresentations by corporate officers. The provision makes no allowance, nor permits the court to make allowance, for differences between large corporate lienholders and mere individuals. And because the amount of the penalty is potentially unlimited, it is potentially more severe than fixed penalties for more serious transgressions.

We do not agree, however, that the penalty provisions of KRS 382.365 are unconstitutional on their face, for clearly

[14] *See also* Starving Students, Inc. v. Department of Industrial Relations, 23 Cal. Rptr. 3d 583 (Cal.App. 2005) (applying the same factors).

most penalties under the statute will not be oppressive. Nor do we agree that application of the penalty provisions to BOA was unconstitutional. Unlike Hale v. Morgan, in which an unsophisticated individual landlord was subjected to a cumulative penalty that had become confiscatory and potentially ruinous, this case involves one of the country's most powerful and sophisticated lienholders. The large volume of its business means that its careless failure to release liens in a timely manner in even a small percentage of cases would affect numerous owners and could have a significantly deleterious effect on Kentucky's title system. A substantial penalty for carelessness, therefore, is not inappropriate. The $54,000.00 penalty, moreover, though substantial, is miniscule compared to BOA's resources and so can hardly be deemed oppressive or unreasonable as a means to induce BOA's compliance. The trial court did not err, therefore, by upholding the constitutionality of KRS 382.365 as applied to BOA.

We note, finally, that we have considered BOA's other arguments and find them to be without merit. In particular, whatever BNB's standing with respect to the statutory penalties the Cooks' standing to claim them is clear. BOA does not contend that the trial court abused its discretion by permitting the Cooks' intervention. Their penalty claim, therefore, was properly before the trial court. Further, KRS 382.365 provides

for penalties in addition to, not conditioned upon, a judgment releasing the lien. Otherwise, as the Cooks note, even the most obdurate lienholder could refuse to release the lien until sued, release the lien prior to judgment, and escape the statutory consequences. That clearly was not the General Assembly's intention.

In sum, although the penalty provisions of KRS 382.365 lack the safeguards against excessiveness that other penalty statutes employ, the statute on its face does not impose an excessive penalty. Nor did its application result in an excessive penalty in this case. The trial court did not err, furthermore, by finding that BOA received notice of its failure to release the Cooks' lien and that its negligent lack of response to the notice did not qualify as "good cause" for persisting in that failure. Accordingly, we affirm the October 22, 2004, order of the Boone Circuit Court.

ALL CONCUR.

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