RENDERED: DECEMBER 16, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001889-MR

BLUEGRASS TAX LIEN BUREAU, LLC — APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM EVANS LANE, JUDGE
ACTION NO. 13-CI-90248

WILLIAM P. GRISE, B&P APARTMENTS, INC.,
COMMUNITY TRUST BANK, INC.,
PEOPLES EXCHANGE BANK,
MONTGOMERY COUNTY KENTUCKY,
CITY OF MOUT STERLING, KENTUCKY, AND
84 LUMBER COMPANY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND J. LAMBERT, JUDGES.

CLAYTON, JUDGE: This case presents a nuanced issue regarding a third-party purchaser of a certificate of delinquent ad valorem taxes. Before we lay out the issue before us, a brief chronological history of the instant facts is necessary.

B&P Apartments, Inc. ("B&P") owned numerous commercial properties, including real property located at 128 West Main Street, Mt. Sterling, Kentucky ("128 Property"). B&P appears to have had difficulties paying its ad valorem taxes, and, pursuant to Kentucky Revised Statutes ("KRS") 134.452, Montgomery County sold some of the certificates of delinquency to third parties. In 2009, one of those purchasers filed a civil action in Montgomery Circuit Court (the "First Action") to enforce the ad valorem taxes against the 128 Property and other properties owned by B&P. It does not appear any *lis pendens* was filed in the First Action. Montgomery County, a named party to the First Action, filed an Answer in that case asserting delinquent property taxes for years 2007 and 2008.

While the First Action was pending, Montgomery County sold the 2008 ad valorem certificate of delinquency to Southern Tax Services, LLC ("Southern"). Southern was never made a named party to the First Action. Southern eventually assigned its interest in the 2008 certificate of delinquency to Bluegrass Tax Lien Bureau, LLC ("Bluegrass"), the appellant herein. Both Southern and Bluegrass timely recorded their tax lien in the Montgomery County Clerk's office.

Multiple parties to the First Action resolved their claims in mediation in 2011. Forcht Bank, one of the parties to the First Action, did not reach a satisfactory agreement, and in 2011 the Montgomery Circuit Court granted Forcht Bank summary judgment and ordered a sale of some of B&P's properties. The proceeds from the sale were insufficient to cover the amounts B&P owed Forcht

Bank, so a deficiency judgment was later entered in 2012 against B&P in favor of Forcht Bank.

In 2013, an action by William P. Grise was initiated regarding the 2005 and 2006 certificates of delinquency for the 128 Property. Bluegrass filed an answer and asserted as a crossclaim the 2008 ad valorem taxes assessed against the 128 Property. Two years later, B&P was granted summary judgment against Grise. Grise's summary judgment order is not at issue in this case.

B&P and Community Trust Bank, both parties to the Grise action, also filed for summary judgment against Bluegrass. Bluegrass also moved for summary judgment. The Circuit Court granted summary judgment in favor of B&P and Community Trust Bank on the theory that Bluegrass's claim was barred by the *res judicata* doctrine. Specifically, the trial court held that there was commonality of party, property, and lien during the First Action, as Montgomery County was a named party to the First Action, Montgomery County defended the 2008 tax bill, and the tax bill was the same in both actions. Due to this commonality of party, property, and lien, the trial court found Bluegrass's claim was barred by the doctrine of *res judicata*. Bluegrass filed a motion to alter, amend, or vacate, which was denied. This appeal follows.

Bluegrass presents two alleged errors with the trial court's grant of summary judgment. First, Bluegrass claims that because a *lis pendens* was not filed in the First Action, Bluegrass's cause of action is not barred. *See* KRS 382.440. Second, Bluegrass claims *res judicata* does not apply because Bluegrass

was not a party to the first suit and Montgomery County did not share a commonality of interest in the litigation.

B&P argues in response that Bluegrass either knew or should have known about the First Action when it acquired its interest in the delinquent tax bill. Furthermore, B&P asserts Bluegrass is barred by the *res judicata* doctrine. Appellee Community Trust Bank also argues the *res judicata* doctrine bars Bluegrass's cross-claims.

Following a recitation of the standard of review, we address Bluegrass's claims.

STANDARD OF REVIEW

A trial court considering a summary judgment motion must view "[t]he record . . . in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citing *Dossett v. New York Mining and Manufacturing Co.*, 451 S.W.2d 843 (Ky. 1970)). "Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists." *Shelton v. Kentucky Easter Seals Society, Inc*., 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). "So we operate under a de novo standard of review with no need to defer to the trial court's decision." *Id*.

Under that review, summary judgment should only be granted "when, as a matter of law, it appears that it would be impossible for the respondent to

produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest*, 807 S.W.2d at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest*, 807 S.W.2d at 482). "'[I]mpossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

ANALYSIS

We begin our analysis with the *lis pendens* issue. Bluegrass argues that because no *lis pendens* was filed in the First Action, Bluegrass's cause of action cannot be dismissed as it was never on notice that the first foreclosure action had been filed. Indeed, a *lis pendens* filed with the county clerk "give[s] notice to subsequent purchasers of a cloud on the title and . . . warn[s] creditors of the need to seek other sources of security for their debts." *Strong v. First Nationwide Mortg. Corp*, 959 S.W.2d 785, 788 (Ky. App. 1998). The *lis pendens* statute, KRS 382.440, states in relevant part:

> No action . . . commenced or filed in any court of this state, in which the title to, or the possession or use of, or any lien, tax, assessment or charge on real property, or any interest therein, is in any manner affected or involved, nor any order nor judgment therein, nor any sale or other proceeding, nor any proceeding in, nor judgment or decree rendered, in a district court of the

> United States, shall in any manner affect the right, title or interest of any subsequent purchaser, lessee, or encumbrancer of such real property, or interest for value and without notice thereof, except from the time there is filed, in the office of the county clerk of the county in which such real property or the greater part thereof lies, a [*lis pendens*]

This statute has been interpreted to provide "that a judgment holder who files a judgment lien following the filing of a lis pendens notice in connection with a foreclosure action is bound by the foreclosure judgment." *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536, 541 (Ky. App. 2007) (citing *Cumberland Lumber Company v. First and Farmers Bank of Somerset, Inc.*, 838 S.W.2d 403 (Ky. App. 1992)).

However, one must file the *lis pendens* in addition to the foreclosure suit in order to bind subsequent lien holders. If a party only files a foreclosure action without a *lis pendens*, those who acquire liens subsequent to the action's initiation are not subject to the initial action, as the "filing of a foreclosure petition alone is insufficient to bind pendente lite lien filers to the judgment." *U.S. Bank*, 232 S.W.3d at 541 fn. 7.

In the instant case, the First Action was initiated prior to Bluegrass obtaining its lien interest in the 2008 ad valorem taxes. From the facts averred by the instant parties, it appears no *lis pendens* was ever filed in the First Action. Thus, KRS 382.440 was not satisfied inasmuch as Bluegrass's lien interest is concerned. To that extent, we agree with Bluegrass that the failure to file the *lis pendens* rendered the First Action not binding on Bluegrass.

However, that holding does not end the analysis, as the First Action did name Montgomery County as a party in interest, and Montgomery County at the point in time that the First Action was filed held the interest in the unpaid 2008 ad valorem taxes. It was not until after the action was initiated, and before the action was completed, that Montgomery County sold the tax bill. A judgment on the First Action, with Montgomery County still a named defendant, was entered prior to the instant action's initiation. As the *res judicata* doctrine bars parties and their privies from re-litigating an action, there remains a question of whether Bluegrass is barred from initiating this present action. Accordingly, we now address Bluegrass's second issue.

Res judicata states that an existing final judgment that has been rendered upon the merits "is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 464 (Ky. 1998) (citing 46 *AmJur* 2d § 514). The doctrine has two subparts – claim preclusion and issue preclusion. For claim preclusion to apply, three elements are necessary: "(1) there must be an identity of parties between the two actions; (2) there must be an identity of the two causes of action; and (3) the prior action must have been decided on the merits." *Miller v. Administrative Office of the Courts*, 361 S.W.3d 867, 872 (Ky. 2011) (citing *Harrod v. Irvine*, 283 S.W.3d 246, 250 (Ky. App. 2009)). For issue preclusion to apply, four elements are necessary: (1) the issue must be identical in both cases;

(2) the issue must have been actually litigated; (3) the issue must have been actually decided; and (4) the issue must have been necessary to the court's judgment. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 374 (Ky. 2010).

Regarding claim preclusion, we find the first element is lacking. Claim preclusion requires an identity of parties between the two actions, which has been interpreted to mean the parties are identical or are in privity. *BTC Leasing, Inc. v. Martin*, 685 S.W.2d 191, 198 (Ky. App. 1984). Here, Bluegrass and Montgomery County are not the same parties. Likewise, they were not in privity, as they did not "shar[e] . . . the same legal right[.]" *BTC Leasing*, 685 S.W.2d at 198. Montgomery County sold its right to collect on the 2008 ad valorem taxes during the pendency of the First Action. Thus, it had no interest in the taxes and no real interest in defending its interest in the First Action. Bluegrass, on the other hand, had and has an actual financial interest in collecting the taxes. *See, e.g., id.* (finding no privity between a party who sold his interest in a houseboat and permitted a default judgment to be rendered against him and the purchaser who acquired title during the pendency of the default judgment action). In other words, Montgomery County had no legal right to the foreclosure proceeds after it sold the delinquent tax certificate, thus it did not share the same "legal rights" with Bluegrass. Accordingly, the parties were never in privity.

Additionally, Bluegrass and Montgomery County did not share the same legal interests because Bluegrass, as a third-party purchaser of the delinquent tax certificate, was entitled to collect attorney's fees, interest, administrative fees,

and costs. KRS 134.546(2), 134.452. These additional monies provide an incentive for third-party purchasers that our legislature has deemed necessary:

> The 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.

KRS 134.452(5). Though B&P spends the bulk of its Appellee's Brief casting aspersions on Bluegrass's scheme of purchasing and collecting on delinquent tax certificates, its decision to argue so ignores the statutory mandate and fails to provide this Court with any legal basis for upholding B&P's claims.

Therefore, because there is no identity of parties, the claim preclusion argument fails. The trial court erred by granting summary judgment on this subset of *res judicata*.

The issue preclusion subpart of *res judicata* likewise fails, as the issue was neither identical nor litigated in the First Action. As shown, Montgomery County's interest in the delinquent tax certificate was not the same as Bluegrass's interest. It does not appear from the record provided that Montgomery County defended its interest after it sold the delinquent tax certificate. Indeed, after Montgomery County sold the delinquent tax certificate, we can find no reason why it would continue to defend its interest. Thus, the second subset of *res judicata*

also fails, and the trial court erred by granting the motions for summary judgment on this issue.

Having found the trial court erred by granting the motions for summary judgment, Bluegrass's alternative argument that Community Trust Bank lacks standing is rendered moot. Additionally, as we are reversing and remanding for further proceedings, we do not address Community Trust Bank's argument that Bluegrass's claim is barred by accord and satisfaction or payment or whether KRS 134.128(2)(c)(2) prohibits the sale of certificates of delinquency involved in litigation in which the county attorney has responded or filed a claim. As to the first argument, Bluegrass admits there is no evidence in the record regarding whether Bluegrass was paid in the First Action. Thus, there remains a material issue of fact for the trial court to address. As to the KRS 134.128(2)(c)(2) "argument," which amounts to a stand-alone sentence in Community Trust Bank's brief, we decline to review it as it does not conform with CR 76.12(4)(d)(iv), and the trial court made no ruling on this issue. CR 76.12(8); *Hallis v. Hallis*, 328 S.W.3d 694 (Ky. App. 2010). Finally, we reject Community Trust Bank's argument that Bluegrass's arguments are waived. This complex litigation involved multiple parties, and it is apparent from the record that the trial court was fully and timely briefed of the instant parties' positions regarding the matters currently before us.

CONCLUSION

This case presents a narrow issue: when a foreclosure suit is initiated regarding real property and no *lis pendens* is filed bearing a description of the real property and the County is a named defendant due to a delinquent ad valorem tax certificate and the County sells its certificate of delinquency during the action's pendency and the purchaser of the certificate of delinquency is never made a party to the foreclosure suit and the judgment in the foreclosure suit is silent with respect to the claim on the certificate of delinquency, is the certificate's purchaser barred from initiating a later foreclosure suit under the doctrine of *res judicata*? We answer that specific question, "No."

Accordingly, we reverse the trial court's order granting summary judgment on this issue and remand for further proceedings.

ALL CONCUR

BRIEF FOR APPELLANT:

Shannon Upton Johnson
Zach Webster
Lexington, Kentucky

BRIEF FOR APPELLEE, B&P APARTMENTS, INC.:

Dodd Dixon
Winchester, Kentucky

BRIEF FOR APPELLEE, COMMUNITY TRUST BANK, INC.:

James B. Ratliff
Pikeville, Kentucky