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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001152-MR

CITIFINANCIAL, INC. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 09-CI-03236

EDNA BRATTON INDIVIDUALLY
AND AS EXECUTRIX OF THE ESTATE
OF R. G. BRATTON — APPELLEE

OPINION AND ORDER
REVERSING AND REMANDING;
AND DENYING MOTION TO DISMISS

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: CitiFinancial, Inc. has appealed from several rulings of the Fayette Circuit Court culminating in a $93,163.73 judgment in favor of the property owners in a lien release suit. On appeal, CitiFinancial contends that because the property owners did not comply with the statutory notice requirements

contained in Kentucky Revised Statutes (KRS) 382.365, the circuit court erred in entering a judgment in their favor and should have entered a judgment in CitiFinancial's favor. Because we agree that the property owners failed to comply with the mandatory notice requirements set forth in KRS 382.365, we must hold that the circuit court committed reversible error. Therefore, we reverse the judgment.

The underlying lawsuit began with the filing of a complaint on June 22, 2009, by R. G. Bratton and Edna Bratton (collectively, "the Brattons"),[1] owners of three tracts of real estate in Fayette County on Liberty Road, Tomahawk, and Campbell Lane. The Brattons sold the Campbell Lane property in April 2008 to Boyd W. Brooks and Nannie Pearl Brooks (collectively, "the Brookses"). The Brookses gave a mortgage on the Campbell Lane property to CitiFinancial to finance the purchase; however, the deed and mortgage listed all three of the Brattons' properties, rather than only the Campbell Lane property that had been sold to them. In November, CitiFinancial recorded a deed of correction but did not release the original mortgage or reconvey the other two properties back to the Brattons. On January 8, 2009, counsel for the Brattons sent a letter to CitiFinancial Services in Lexington, Kentucky requesting a release of the improper mortgage and demanded the *per diem* rate if the lien was not released. The lien had not been released by the time the suit was filed in June; therefore, the Brattons requested

[1] R.G. Bratton died on September 18, 2009, and Edna Bratton, as executrix of his estate, was substituted in his place by order entered November 2, 2009. For ease of understanding, we shall continue to refer to the plaintiffs/appellees as "the Brattons" throughout this opinion.

$100.00 per day from January 9 to February 23, 2009 ($3,000.00) and $500.00 per day from February 22, 2009, until the mortgage was released. The Brattons also requested costs and a reasonable attorney's fee. CitiFinancial answered the complaint and affirmatively argued that the Brattons' claims were barred by the requirements of KRS 382.365. The mortgage was released on the three properties on July 10, 2009.

The circuit court held a pretrial conference on June 10, 2010, where the parties agreed that there were no issues of material fact. The parties stipulated that the Brattons did not send written notice to CitiFinancial pursuant to the procedure called for in KRS 382.365, and the Brattons provided the court with several cases to support their case. After the conference, CitiFinancial filed a motion for summary judgment on the Brattons' claims as a matter of law, citing the Brattons' failure to follow the notice requirements set forth in KRS 382.365(4) by delivering, to the correct person, a properly addressed, written notice by certified mail or in person. It also argued that KRS 382.365 did not apply because the mortgage in question was erroneous and had never been satisfied. The Brattons replied to the motion for summary judgment, citing CitiFinancial's actual knowledge of the January 8, 2009, letter.

On September 1, 2010, the court issued an order ruling on what it described as the parties' cross-motions for summary judgment. The court found that counsel for the Brattons had sent several letters to CitiFinancial at the Lexington address, although none were sent via certified mail, and that

CitiFinancial acknowledged receipt of the January 8th letter in a letter dated April 8, 2009. The court then ruled in favor of the Brattons, stating: "Despite the language of the statute requiring service by certified mail or hand delivery before the statutory penalties can be imposed, the Court finds that the legislative intent of the statute is to ensure that a lienholder had notice of its improperly filed lien before penalties can be levied against it for failing to release a lien." The court determined that CitiFinancial had such notice and granted a judgment in favor of the Brattons on liability. Because it could not ascertain when CitiFinancial had notice of the improperly filed mortgage, the court was unable to assess the penalty and permitted the Brattons to move for a hearing date.

CitiFinancial moved to vacate the court's order, stating that the Brattons had never moved for summary judgment and that it had not had the opportunity to respond. By order entered October 4, 2010, the court granted CitiFinancial's motion to vacate and vacated the summary judgment in the Brattons' favor. However, it continued to deny CitiFinancial's motion for summary judgment. The Brattons then moved for summary judgment, and CitiFinancial responded. On October 19, 2010, the court granted the Brattons' motion for summary judgment on liability and scheduled a hearing on damages.

Following the hearing on damages, the circuit court entered an order on May 24, 2011, awarding the Brattons a judgment as follows: a $100.00 *per diem* penalty for 167 days (January 24 through July 10, 2009) for a total of $16,700.00; a $400.00 *per diem* penalty for 137 days (February 23 through July 10,

2009) for a total of $54,800.00; pre-judgment interest at a rate of 8% on the total amount of $71,500.00 from July 10, 2001 through May 11, 2011; and court costs and attorney's fees, which were to be determined. In a later filing, the Brattons sought $10,482.50 in attorney's fees, $681.50 in costs, and $10,882.10 in pre-judgment interest,[2] bringing the total of the judgment to $93,546.10.

CitiFinancial moved to alter, amend, or vacate the circuit court's summary judgment and its order setting damages pursuant to Kentucky Rules of Civil Procedure (CR) 59.05 and CR 60.02, continuing to argue that the Brattons could not prevail on their claim under KRS 382.365 and citing the court's manifest error of law. In addition, CitiFinancial objected to the amount of attorney's fees the Brattons requested. On June 27, 2011, the court denied CitiFinancial's motion and entered a final judgment in favor of the Brattons in the amount of $93,163.73, representing the statutory penalty, pre-judgment interest, attorney's fees, and costs. That amount was subject to post-judgment interest pursuant to Kentucky law. This appeal now follows.

On appeal, CitiFinancial continues to argue that KRS 382.365 does not apply in this case and that the Brattons failed to follow the mandatory statutory requirements regarding notice. Accordingly, it argues that the Brattons were not entitled to summary judgment or an award of damages. In conjunction with this argument, CitiFinancial contends that it is entitled to a summary judgment in its favor. In their response, the Brattons argue that CitiFinancial's reading of the

[2] CitiFinancial calculated the interest amount to be $10,499.73, which the Brattons indicated they would adopt.

statutory language is too narrow and that CitiFinancial had actual knowledge of the correspondence and the problems with the deed and mortgage. They further argue that CitiFinancial is estopped from raising lack of notice as a defense.

An appellate court's standard of review from a summary judgment is well-settled in the Commonwealth:

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." . . . Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*.

Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001) (footnotes omitted). Generally, a party may not appeal from an order denying a motion for summary judgment, as such orders are inherently interlocutory. However, there is an exception to this rule, as this Court explained in *Roman Catholic Bishop of Louisville v. Burden*, 168 S.W.3d 414, 419 (Ky. App. 2004):

> It is well settled in this Commonwealth that the denial of a motion for summary judgment is interlocutory and is not appealable. In [*Transportation Cabinet, Bureau of Highways, Com. of Ky. v. Leneave*, 751 S.W.2d 36 (Ky. App. 1988)], this Court held: "The general rule under CR 56.03 is that a denial of a motion for summary judgment is, first, not appealable because of its interlocutory nature and, second, is not reviewable on appeal from a final judgment where the question is whether there exists a genuine issue of material fact." There is, however, an exception to this general rule, which was also addressed in *Leneave*: "The exception applies where: (1) the facts are not in dispute, (2) the only basis of the ruling is a

> matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom." [Footnotes omitted.]

Here, CitiFinancial's appeal from the order denying its motion for summary judgment meets this exception and is properly before this Court for review; the facts are not in dispute, the basis for the circuit court's ruling was an issue of law, CitiFinancial's motion was denied, and a final judgment has been entered from which CitiFinancial has appealed.

The sole question before this Court relates to the interpretation of KRS 382.365.

> The interpretation of a statute is a matter of law. *Commonwealth v. Garnett*, 8 S.W.3d 573, 575–6 (Ky. App. 1999). The primary purpose of judicial construction is to carry out the intent of the legislature. In construing a statute, the courts must consider "the intended purpose of the statute-and the mischief intended to be remedied." "A court may not interpret a statute at variance with its stated language." *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky. App. 2001). The first principle of statutory construction is to use the plain meaning of the words used in the statute. *See Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815 (Ky. 2005); KRS 446.080(4). "[S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). We lend words of a statute their normal, ordinary, everyday meaning. *Id*. "We are not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used." *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000). The courts should reject a construction that is "unreasonable and absurd, in preference for one that is 'reasonable, rational, sensible and intelligent [.]'" *Commonwealth v. Kerr*, 136 S.W.3d

783, 785 (Ky. App. 2004); *Commonwealth v. Kash*, 967 S.W.2d 37, 43–44 (Ky. App. 1997).

Monumental Life Ins. Co. v. Department of Revenue, 294 S.W.3d 10, 19 (Ky. App. 2008). Statutory interpretation represents an issue of law, which is reviewed on a *de novo* basis. *Monumental Life Ins. Co. v. Dept. of Revenue*, 294 S.W.3d 10, 16 (Ky. App. 2008), citing *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005).

We shall first set forth, in pertinent part, the current version of KRS 382.365, which has been in effect since 2006, well before the events of this case took place, and in which the General Assembly expanded the notice requirement to include the method of service:

> (1) A holder of a lien on real property, including a lien provided for in KRS 376.010, 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) An assignee of a lien on real property shall record the assignment in the county clerk's office as required by KRS 382.360. Failure of an assignee to record a mortgage assignment shall not affect the validity or perfection, or invalidity or lack of perfection, of a mortgage lien under applicable law.
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> (3) A proceeding may be filed by any owner of real property or any party acquiring an interest in the real property in District Court or Circuit Court against a lienholder that violates subsection (1) or (2) of this section. A proceeding filed under this section shall be given precedence over other matters pending before the court.
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> (4) Upon proof to the court of the lien being satisfied by payment in full to the final lienholder or final assignee, the court shall enter a judgment noting the identity of the final lienholder or final assignee and authorizing and

directing the master commissioner of the court to execute and file with the county clerk the requisite release or assignments or both, as appropriate. 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 or to a party with an interest in 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. This written notice shall be properly addressed and sent by certified mail or delivered in person to the final lienholder or final assignee as follows:

> (a) For a corporation, to an officer at the lienholder's principal address or to an agent for process located in Kentucky; however, if the corporation is a foreign corporation and has not appointed an agent for process in Kentucky, then to the agent for process in the state of domicile of the corporation;
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> . . . .

(5) 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 or to a party with an interest in 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 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 or a party with an interest in the real property in securing the release of real property by such violation and in securing an award of damages. Damages under this subsection for failure to record an assignment pursuant to KRS 382.360(3) shall not exceed three (3)

> times the actual damages, plus attorney's fees and court costs, but in no event less than five hundred dollars ($500).
>
> . . . .

Based upon the plain language of the statute, we must hold that the Brattons failed to satisfy the mandatory notice requirements as set forth in the statute.

As CitiFinancial states in its brief, "[s]o long as the language of the act is plain and unambiguous, it is not subject to interpretation nor open to construction, but must be accepted and enforced as it is written." *Commonwealth v. Glover*, 132 Ky. 588, 116 S.W. 769, 774 (1909). The *Glover* Court also recognized that "where a statute gives a right or provides a remedy, the manner provided in said statute whereby the right may be acquired must be strictly followed[.]" *Id*., at 773. And more recently, the Supreme Court of Kentucky has stated that "[p]enal statutes are not to be extended by construction, but must be limited to cases clearly within the language used." *Woods v. Commonwealth*, 793 S.W.2d 809, 814 (Ky. 1990), citing *Commonwealth v. Malone*, 141 Ky. 441, 132 S.W. 1033 (1911).

In KRS 382.365(4), the General Assembly listed the elements necessary to effect proper notice in order for a claim for the *per diem* penalty to arise. To establish the right to claim the penalty, the notice must 1) be in writing; 2) be properly addressed; and 3) be sent by certified mail or delivered in person to the final lienholder or assignee: "This written notice [of the lienholder's failure to release] shall be properly addressed and sent by certified mail or delivered in person to the final lienholder or final assignee[.]" KRS 382.365(4). In the case of

a corporation, as here, the General Assembly required that the notice be sent "to an officer at the lienholder's principal address or to an agent for process located in Kentucky; however, if the corporation is a foreign corporation and has not appointed an agent for process in Kentucky, then to the agent for process in the state of domicile of the corporation[.]" KRS 382.365(4)(a). There is no dispute that the only requirement the Brattons met was that the notice was in writing. The notice was not delivered by certified mail, nor delivered in person, and it was not sent to an officer at CitiFinancial's principal place of business in Baltimore, Maryland, or its registered process agent. This is fatal to the Brattons' claim.

When the General Assembly decided to use the word "shall" in conjunction with the notice requirements, it created a mandatory set of elements that must be established before a cause of action may arise. The Supreme Court considered the use of the word "shall" in *Vandertoll v. Commonwealth*, 110 S.W.3d 789, 795-96 (Ky. 2003):

> We will not commence a lengthy discussion on the definition of "shall." KRS 446.080(4) states that "[a]ll words and phrases shall be construed according to the common and approved usage of language . . . ." "In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command and . . . must be given a compulsory meaning." Black's Law Dictionary 1233 (5th ed. 1979). "If the words of the statute are plain and unambiguous, the statute must be applied to those terms without resort to any construction or interpretation." *Terhune v. Commonwealth*, Ky. App., 907 S.W.2d 779, 782 (1995) (quoting *Kentucky Unemployment Insurance Commission v. Kaco Unemployment Insurance Fund, Inc.*, Ky. App., 793 S.W.2d 845, 847 (1990)). Shall means shall.

Therefore, because the General Assembly used the word "shall" in conjunction with the notice requirements of KRS 382.365, the Brattons were required to comply with all elements of the notice requirements before they could seek a penalty pursuant to the statute.

The Brattons base their argument to the contrary on proof that CitiFinancial actually received the notice as well as their claim that CitiFinancial knew of the problem with the mortgage and deed before receiving the notice. However, due to the mandatory nature of the statutory notice requirement, actual knowledge, standing alone, is simply not enough to establish a claim. In fact, actual receipt of the notice by the lienholder is merely another element the claimant must establish. Liability does not attach unless "the court finds that the lienholder received written notice of its failure to release and lacked good cause for not releasing the lien[.]" KRS 382.365(4). Therefore, we must hold that CitiFinancial was entitled to a judgment as a matter of law and that the circuit court erred both in granting summary judgment in favor of the Brattons and in denying CitiFinancial's motion for summary judgment.

Based upon this holding, we need not address the parties' legislative intent arguments, or whether KRS 382.365 actually applies to the circumstances in this case. Furthermore, we find no merit in the Brattons' estoppel argument.

Finally, we shall address the Brattons' motion to dismiss the appeal as well as CitiFinancial's response and alternative motion for a partial dismissal. The

basis for the Brattons' motion to dismiss was CitiFinancial's alleged failure to name indispensible parties to the appeal – the Brattons' attorneys – because of the circuit court's award of attorney's fees in the final judgment. We note that KRS 382.365(4) and (5) provide for the payment of costs by the lienholder, including reasonable attorney's fees, and that the circuit court in fact awarded the Brattons $10,482.50 in attorney's fees in the final judgment. However, we disagree with the Brattons' argument that their attorneys are indispensible, necessary parties to the appeal. The court did not award the attorneys a judgment; rather, the attorney's fees were awarded to the Brattons. "Absent an award of fees to an attorney by judgment in his or her favor (thus allowing the attorney enforcement of the award by execution), there is no reason for requiring the attorney to be named on appeal as a necessary party." *Knott v. Crown Colony Farm, Inc.*, 865 S.W.2d 326, 331 (Ky. 1993). As in *Knott*, the issue here addressed whether the entry of summary judgment was appropriate, from which the award of attorney's fees flowed. And while CitiFinancial contested the reasonableness of the fee amount claimed before the circuit court, it did not raise this issue on appeal, but instead limited its argument to whether the Brattons met the statutory requirements to establish a claim at all under KRS 382.365. Therefore, the Brattons' motion to dismiss the appeal is DENIED, and CitiFinancial's alternative motion for a partial dismissal is DENIED AS MOOT.

For the foregoing reasons, the judgment of the Fayette Circuit Court is REVERSED, and this matter is remanded for entry of a summary judgment in favor of CitiFinancial, Inc. dismissing the Brattons' complaint.

ALL CONCUR.

ENTERED: August 31, 2012

/s/ James H. Lambert
JUDGE, COURT OF APPEALS

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