

RENDERED: SEPTEMBER 13, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001382-MR

KENTUCKY HOUSING CORPORATION

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 11-CI-00579

NITA COOTS A/K/A NITA O'BRIAN;
UNITED STATES DEPARTMENT OF
AGRICULTURE RURAL HOUSING SERVICE;
COMMONWEALTH CREDIT UNION;
AND CHARLES AND FAYE DANIELS

APPELLEES

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: The Kentucky Housing Corporation ("KHC") appeals from an order of the Johnson Circuit Court which approved the sale of a parcel of land.

That order sustained and approved the Report of Sale filed by the Johnson County

Master Commissioner. KHC argues that the foreclosure sale at issue was violative of the court's Order of Sale because the sale was conducted outside the presence of a KHC representative. At issue is KHC's contention that because the Order of Sale was a final judgment, a provision contained therein requiring the sale to be postponed if a KHC representative was not present could not subsequently be amended by the trial court. For the reasons stated below, we Reverse the Order Approving Sale and Remand the matter for further proceedings.

On December 22, 2011, KHC filed a Complaint in Johnson Circuit Court seeking to foreclose on a note and mortgage in favor of KHC and executed by Nita Coots a/k/a Nita O'Brian ("Ms. O'Brian"). The real property at issue is situated in Johnson County, Kentucky. KHC's Complaint alleged that it held a first lien on the subject parcel that was superior to all other liens and encumbrances, and sought Judgment against Ms. O'Brian in the amount of \$37,084.63 plus interest and fees.

Ms. O'Brian did not file a responsive pleading, and thereafter KHC filed a Motion for Default Judgment and Order of Sale on February 10, 2012. A hearing on the Motion was conducted on March 2, 2012, resulting in a Judgment and Order of Sale being rendered on that date.

The matter was referred to the Johnson County Master Commissioner. Contained in the Judgment and Order of Sale at Paragraph 15 was the caveat that, "The Master Commissioner shall cancel any sale if a representative of the Plaintiff is not present at the time of the scheduled sale[.]" The Judgment and Order of Sale stated that it was made final and appealable by operation of Civil Rule 54.

On March 23, 2012, the Master Commissioner filed and served a Notice of Sale, stating that the property would be offered for sale on May 31, 2012, at 9:40 a.m. in accordance with the Johnson Circuit Court's Judgment and Order of Sale. When the time and date of the sale arrived, no representative of KHC was present.¹ Nevertheless, the Master Commissioner proceeded with the sale, and the parcel was purchased by Appellees herein Charles and Fay Daniels.

On May 31, 2012, the Master Commissioner filed a Report of Sale. On June 8, 2012, KHC filed Exceptions and a Motion to Set Aside the sale on the ground that the sale did not comply with the trial court's Judgment and Order of Sale. The Daniels responded that they were good faith purchasers entitled to purchase the parcel and move forward with the sale, and should not be bound by the Judgment and Order of Sale to which they were not parties. A hearing on the matter was conducted on July 6, 2012, after which the circuit court overruled and denied KHC's Exceptions and Motion to Set Aside Sale. An Order Approving Sale was rendered on July 9, 2012.

On July 18, 2012, KHC filed a Motion to Reconsider the circuit court's Order Approving Sale, in which it reasserted its contention that the Master Commissioner conducted the sale in violation of Paragraph 15 of the Judgment and Order of Sale. The court denied the motion by way of an Order Overruling rendered on August 8, 2012. KHC appeals from the July 9, 2012 Order Approving Sale, and the August 8, 2012 Order Overruling KHC's Motion to Reconsider.

¹ It appears from the record that KHC's outside counsel arrived about 20 minutes late.

KHC now maintains that the Johnson Circuit Court erred in overruling KHC's Exceptions and Motion to Set Aside Sale. As a basis for this argument, KHC first notes that the underlying Judgment and Order of Sale was expressly made a final and appealable Judgment. KHC contends that while the court retained the authority to enforce the Judgment, it lost the jurisdiction to amend the Judgment by operation of the Civil Rules 10 days after entry of the Judgment. By failing to give effect to Paragraph 15 of the Judgment and Order of Sale, KHC argues that the circuit court effectively - and improperly - amended the Judgment. KHC maintains that it was entitled to have the sale set aside and that the circuit court erred in failing to so rule.

In response, the Daniels assert that they are good faith purchasers of the parcel offered for sale by the Master Commissioner of the Johnson Circuit Court, who are entitled to possess both equitable and legal title to the property. They note that nothing in the Judgment and Order of Sale required that all of the terms and conditions of the Judgment and Order of Sale must be placed in the notice to the general public, and they had no knowledge of the provisions of the Judgment and cannot be bound by its terms. Additionally, the Daniels argue that the Judgment and Order of Sale contain conflicting provisions which are against public policy, in that Paragraphs 6 - 8 order the property sold, whereas Paragraph 15 is a self-serving provision inserted by KHC contradicting the normal terms and conditions of the sale set out in the preceding paragraphs. In sum, the Daniels contend that they are good faith purchasers who were not given notice of the Judgment's

provisions, that those provisions are self-serving and contradictory, and that the circuit court properly denied KHC's Exceptions and Motion to Set Aside Sale.

The office of Master Commissioner is a creation of statute, KRS 31A.010, and those persons duly appointed "shall perform such functions . . . as may be directed by an appropriate order of court." KRS 31A.010(6). All words and phrases in statutory language must be construed according to the common usage of language, KRS 446.080, and the word "shall" is indicative that the statutory language is mandatory and not subject to discretion. *Bowen v. Commonwealth of Kentucky ex rel. Stidham*, 887 S.W.2d 350 (Ky. 1994). It is apparent, then, from the statutory law and case law that the Master Commissioner's authority to act is limited to those acts so ordered by the appointing court. While a Master Commissioner is vested with limited discretion to effectuate court orders, such as setting a date for a judicial sale where the order is otherwise silent as to the date, *Kissell Co. v. Chadwick*, 737 S.W.2d 710 (Ky. App. 1987), his or her authority is otherwise limited to those acts authorized by court order.

In the matter at bar, it is uncontroverted that Paragraph 15 of the Judgment and Order of Sale directed the Master Commissioner to sell the parcel at issue only if KHC's representative was present. It is further uncontroverted that KHC's representative was not present at the time of sale. On the face of the record, then, it is apparent that the Master Commissioner caused the parcel to be sold in violation of the express terms of the Judgment and Order of Sale.

The question then becomes whether the Johnson Circuit Court retained the jurisdiction over the Judgment and Order of Sale such that some four months later it could waive or otherwise excuse the Master Commissioner's non-compliance with a material term of the Judgment. We conclude that it does not. The Johnson Circuit Court's Judgment and Order of Sale was expressly made final and appealable. As such, CR 52.02 operates to divest the court of jurisdiction to amend the Judgment after 10 days of its entry. The Judgment and Order of Sale was rendered on March 2, 2012, causing the Johnson Circuit Court to lose jurisdiction over the Judgment on or about March 12, 2012. While the court retained the jurisdiction "to *enforce* its own judgments and remove any obstructions to such enforcement", *Akers v. Stephenson*, 469 S.W.2d 704, 706 (Ky. 1970) (emphasis added), the court does not retain the jurisdiction to void or otherwise amend material terms of a final judgment. Such a judgment is "one where the last say has been said", *Keffer v. Keffer*, 307 Ky. 831, 832, 212 S.W.2d 314, 315 (Ky. 1948), and this properly characterizes the Judgment and Order of Sale at issue. In applying the foregoing, we conclude that 1) the Master Commissioner exceeded the scope of his authority by conducting a sale in contradiction to the express terms of the Judgment and Order of Sale, and that 2) the Johnson Circuit Court lost jurisdiction to waive or otherwise amend material terms of the Judgment on or about March 12, 2012.

Appellees Charles and Fay Daniels maintain that they are "good faith purchasers" of the real property sold by the Master Commissioner who are, in the

language of *Parton v. Robinson*, 574 S.W.2d 679 (Ky. App. 1978), not “bound to consult an attorney, or to look for the subtle rules of law, or to make a hypercritical analysis of the language of a power[.]” *Id.* at 628 (quoting *Reed v. Welsh*, 11 Bush 450, 74 Ky. 450 (1875)). That is to say, they contend that because they purchased the parcel in good faith and with no notice of the underlying Judgment and Order of Sale, equity should not operate to bind them to the terms of the Judgment. They maintain that it is unreasonable to require every purchaser at a Master Commissioner’s sale to look beyond the notice and sale published by the Master Commissioner to the actual Judgment and Order authorizing the Master Commissioner to conduct the sale. In sum, they argue that they are entitled to possess title to the parcel at issue and that the Johnson Circuit Court properly so ruled.

The Daniels cite to *Meade v. Richardson Fuel Inc.*, 166 S.W.3d 55 (Ky. App. 2005) for the proposition that a good faith purchaser is “one who takes by purchase getting sufficient consideration to support a simple contract, and who is honest in the transaction of the purchase.” *Id.* at 58 (quoting *United Road Mach. v. Jasper*, 568 S.W.2d 242, 244 (Ky. App. 1978)). *Meade*, however, addresses the Uniform Commercial Code and not real estate sales, and we believe does little to bolster the Daniels’ assertion that they are entitled to move forward with the sale irrespective of whether the Master Commissioner complied with the Judgment and Order of Sale. Additionally, *Meade* relies on KRS 355.2-403 which provides that a good faith purchaser acquires only “title which his transferor . . . had power to

transfer[.]” In the matter at bar, the Master Commissioner did not have the power or authority to conduct the sale in the absence of a KHC representative. More importantly, however, *Meade* is factually and legally distinguishable from the issue before us and does not overcome our determination that the Master Commissioner was ordered to cancel the sale if a KHC representative was not present.

Lastly, the Daniels argue that the Judgment and Order of Sale contained conflicting provisions which are against public policy. They contend that Paragraphs 6 - 8 order the parcel to be sold, whereas Paragraph 15 orders the Master Commissioner *not* to sell the property outside the presence of a KHC representative. The Daniels claim that Paragraph 15 is a self-serving provision inserted into the Order prepared by KHC which is in direct conflict with the preceding paragraphs. The implication, which the Daniels do not expressly state, is that Paragraph 15 should not be given effect and should not operate to thwart the sale.

We do not find this argument persuasive, and cannot conclude that Paragraph 15 is at odds with the other provisions of the Judgment and Order of Sale. Paragraph 15 merely limited *when* the parcel could be offered for sale, and did not conflict with the provisions of Paragraphs 6 - 8 requiring *that* it be sold. Additionally, even if Paragraph 15 was included in a draft Order by KHC for purely self-serving reasons - which we do not know to be the case - it was nevertheless adopted and ratified by the circuit court when it signed and rendered the Judgment and Order of Sale. We find no error.

For the foregoing reasons, we Reverse the Order Approving Sale and Order Overruling KHC's motion to reconsider, and remand the matter for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES CHARLES
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