

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000404-MR

HAZEL ENTERPRISES, LLC

APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 12-CI-00114

JOSEPH FULTON; KENTUCKY DEBT AND LIEN
SERVICING; COUNTY OF MASON, KENTUCKY;
MASON COUNTY FISCAL COURT; TAX EASE LIEN
INVESTMENTS 1, LLC; AND THE UNKNOWN SPOUSE
OF JOSEPH FULTON

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Hazel Enterprises, LLC appeals from an Order of the Mason
Circuit Court in a foreclosure action brought by Appellee Tax Ease Lien
Investments 1, LLC. The Order vacated in part the court's prior contradictory

Orders and denied other relief sought by Hazel Enterprises. Hazel Enterprises argues that the Mason Circuit Court erred in failing to conclude that a *lis pendens* must be in strict compliance with Kentucky Revised Statute (KRS) 382.440 in order to give constructive notice to a subsequent purchaser of a lien. Hazel Enterprises also contends that the court should have concluded that its Fourteenth Amendment right to Due Process was violated by the circuit court's ruling extinguishing its lien interest in the subject property. After a careful review of the record and the law, we find no error and AFFIRM the Order on appeal.

The facts are not in controversy. On April 23, 2012, Tax Ease Investments 1, LLC ("Tax Ease") filed a foreclosure action in Mason Circuit Court on a parcel of unimproved real property. The *lis pendens*, which was filed concurrently with the circuit court proceeding, displayed the correct property address, tax ID, source of title, and metes and bounds description. The lot number and circuit court case number, however, were incorrect.

About three weeks later on May 15, 2012, Mason County sold to Hazel Enterprises a 2010 Certificate of Delinquency on the parcel for \$295.14. Hazel Enterprises would later argue that because the *lis pendens* was defective, it did not have proper notice of the pending foreclosure litigation at the time it purchased the Certificate of Delinquency.

On October 29, 2012, the circuit court rendered a Judgment and Order of Sale. The subject parcel was then sold at a Master Commissioner's sale on November 30, 2012. Greg and Shawnie Bone ("Purchasers") purchased the parcel.

On December 7, 2012, the Purchasers filed an Objection to Sale. On December 18, 2012, the court rendered an Order Addressing Exceptions and Confirming Sale. The court ordered that the property description be corrected, and it stated that

[t]he owner of the 2010 tax bill #3341 [Hazel Enterprises] filed a lien on May 15, 2012 with the County Clerk but such filing was after the *lis pendens* was filed in this action on April 30, 2012 and is therefore deemed ineffectual as to the real property in this action, and while the purchaser may seek redress of same under the provisions of KRS 134.128(c)(2), such tax bill has no effect on the sale in this action.

The substance of the ruling was that because the lien of Hazel Enterprises was filed after the *lis pendens*, the lien had no effect on the sale. Hazel Enterprises was not yet a party to the litigation.

On February 7, 2013, the circuit court rendered an Amended Order to Pay Costs and for Distribution. The Order directed the Master Commissioner to distribute funds to Hazel Enterprises in the amount of \$52.45. Hazel Enterprises returned the check upon claiming that it was exploring other options for relief. It appears from the record that the parties and circuit court are in apparent agreement that the December 18, 2012 Order and the February 7, 2013 Order are in conflict

because the former Order held Hazel Enterprises' lien as ineffective because it was filed after the *lis pendens*, whereas the latter ordered a distribution of funds to Hazel Enterprises. Hazel Enterprises then sought and was denied a refund from Mason County for \$295.14, representing its cost of the Certificate of Delinquency.

On July 29, 2013, the circuit court rendered another Order apparently confirming that Hazel Enterprises' lien against the subject parcel was valid and enforceable. Two months later, it rendered an Order again directing the clerk to issue a check to Hazel Enterprises in the amount of \$52.45, and holding that the funds could escheat to the state if not negotiated by November 30, 2015. Hazel Enterprises would later state that it did not receive the check until December 31, 2015.

Finally, on January 25, 2016, Hazel Enterprises filed a Motion to relieve it of the Orders affecting its interest in the subject parcel, and in the alternative to add it as a party to the action. After a hearing on the Motion, the circuit court rendered an Order on March 2, 2016, which forms the basis of the instant appeal. The court vacated any prior contradictory Orders, and held that Hazel Enterprises' lien was extinguished. In support of the Order, the court determined that the *lis pendens* substantially complied with KRS 382.440 and was sufficient to put Hazel Enterprises on notice that there was pending litigation involving the parcel. This appeal followed.

Hazel Enterprises now argues that the Mason Circuit Court erred in failing to conclude that the *lis pendens* did not strictly comply with KRS 382.440 and was ineffective. It maintains that because the *lis pendens* did not place it on actual or constructive notice of the pending litigation, its subsequent lien should be given full force and effect. Hazel Enterprises also asserts that because the circuit court improperly extinguished the lien, Hazel Enterprises' Fourteenth Amendment right to Due Process was violated. It seeks an Opinion reversing the holding of the Mason Circuit Court and remanding the matter with instructions to enter an Order declaring that the lien survived the Master Commissioner's sale.

KRS 382.440(1) provides that no action affecting the title to real property, nor any lien, tax or other encumbrance thereon, shall be effective unless a memorandum is filed with the County Clerk stating

- (a) The number of the action, if it is numbered, and the style of such action or proceeding and the court in which it is commenced, or is pending;
- (b) The name of the person whose right, title, interest in, or claim to, real property is involved or affected; and
- (c) A description of the real property in the county thereby affected.

The purpose of the *lis pendens* is to give to any prospective or subsequent purchaser of real property notice of a cloud on its title. *Strong v. First Nationwide Mortgage Corp.*, 959 S.W.2d 785 (Ky. App. 1998).

There is little case law in the Commonwealth addressing the effect of a defective *lis pendens* on subsequent purchasers of interests in real property. Hazel Enterprises directs our attention to *Cumberland Lumber Company v. First and Farmers Bank of Somerset, Inc.*, 838 S.W.2d 403 (Ky. App. 1992). *Cumberland Lumber*, however, does not address the efficacy of a defective *lis pendens*. *Hazel Enterprises, LLC v. Tax Ease Lien Investments 1, LLC*, 2014-CA-001821-MR, 2016 WL 5497303 (Ky. App. Sept. 30, 2016), however, does provide insight. In that case, a panel of this Court held that because Hazel Enterprises was eventually added as a party to the action, it suffered no prejudice even though the *lis pendens* did not fully comply with KRS 382.440 and was filed after Hazel Enterprises purchased the lien. While the facts before us are not identical, the 2016 *Hazel Enterprises* case does stand for the proposition that an alleged injury suffered from a defective *lis pendens* can be cured where the aggrieved party was added as a party to the action and suffered no prejudice. Such is the matter before us.

Hazel Enterprises sought leave to intervene below. Though the Mason Circuit Court did not expressly rule upon Hazel Enterprises' request, it did thereafter treat Hazel Enterprises as an intervening party. We characterize the court's treatment of Hazel Enterprises as implicitly sustaining Hazel Enterprises' request to intervene. Further, Hazel Enterprises suffered no prejudice from the

defective *lis pendens*. It had actual notice of the action as early as March 4, 2013, but possibly as early as December of 2012 when the Purchasers sent Hazel Enterprises a copy of their exceptions. Hazel Enterprises never moved to intervene nor objected to the proceedings until January of 2016 – some three years after the sale of the parcel. Further, any harm to Hazel Enterprises was cured by Mason County’s pro rata distribution of proceeds to Hazel Enterprises in the amount of \$52.45.

In sum, we conclude that though the *lis pendens* had the wrong lot number and case number, the property address, Tax ID, source of title, and metes and bounds were correct. In addition to this constructive notice, which was filed as public record prior to Hazel Enterprises’ purchase of the Certificate of Delinquency, Hazel Enterprises had actual notice as early as December of 2012, and as late as March 4, 2013. Further, any prejudice was ameliorated when Hazel Enterprises joined the action as a party and was tendered a distribution of proceeds.

This issue presents a mixed question of law and fact. We review the trial court's findings of fact for clear error, but legal determinations we examine *de novo*. *Medley v. Board of Educ., Shelby County*, 168 S.W.3d 398, 402 (Ky. App. 2004). Having closely examined the record and the law, we conclude that the Mason Circuit Court’s characterization of the facts are supported by the record and are not erroneous. Further, a *de novo* review of the law reveals that Hazel

Enterprises had actual or constructive notice of the pending action, and that prejudice, if any, was cured by Hazel Enterprises' intervention and Mason County's distribution of proceeds. Having found no error, we further conclude that Hazel Enterprises' Due Process rights were not infringed.

For the foregoing reasons, we AFFIRM the Order on Motion of Hazel Enterprises, LLC rendered by the Mason Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEES

Alan Pritchard
Memphis, Tennessee