

RENDERED: MARCH 23, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000870-MR

CAVE HILL, LLC;
BRUCE ELLIOTT FEIN
REVOCABLE TRUST RESTATED
3/17/04; BRUCE FEIN;
MARGY ANN HOJJATI A/K/A
MAHTAUB LOLAVAR, MATUAB SABRINA
FEIN, MATTIE FEIN; and
MARGY ANN HOJJATI,
TRUSTEE UNDER THE MARGY
ANN HOJJATI REVOCABLE
TRUST AMENDED 6/15/05

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 08-CI-01834

LOGAN ASSET BACKED FUND, L.P.;
McMAHAN COMPANY, INC.,
D/B/A COLDWELL BANKER
McMAHAN COMPANY; and
UNKNOWN TENANT(S)/
OCCUPANT(S) OF 2601 CAVE HILL,
LEXINGTON, KENTUCKY 40511

APPELLEES

AND

NO. 2010-CA-000905-MR

McMAHAN COMPANY, INC.,
D/B/A COLDWELL BANKER
McMAHAN COMPANY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 08-CI-01834

LOGAN ASSET BACKED FUND,
L.P.; CAVE HILL, LLC;
BRUCE ELLIOTT FEIN,
TRUSTEE UNDER THE
BRUCE ELLIOTT FEIN REVOCABLE
TRUST RESTATED 3/17/2004;
MARGY ANN HOJJATI, TRUSTEE
(A/K/A MOHTAUB LOLAVAR,
MATAUB SABRINA FEIN,
MATTIE FEIN) UNDER THE
MARGY ANN HOJJATI REVOCABLE
TRUST AMENDED 6/16/2005;
MATTIE FEIN (A/K/A MOHTAUB
LOLAVAR, MATAUB FEIN,
MARGY ANN HOJJATI), individually;
and BRUCE FEIN, individually; and
UNKNOWN TENANT(S)/
OCCUPANT(S) OF 2601 CAVE HILL,
LEXINGTON, KENTUCKY 40511

APPELLEES

AND

NO. 2010-CA-000906-MR

McMAHAN COMPANY, INC.,
D/B/A COLDWELL BANKER
McMAHAN COMPANY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
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and BRUCE FEIN, individually; and
UNKNOWN TENANT(S)/
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LEXINGTON, KENTUCKY 40511

APPELLEES

OPINION

- 1) DISMISSING APPEAL NO. 2010-CA-000870;
2) DISMISSING AS MOOT APPEAL NO. 2010-CA-000905; AND
3) AFFIRMING APPEAL NO. 2010-CA-000906

** ** *

BEFORE: ACREE, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: By order entered January 6, 2011, this Court ordered these three appeals consolidated for resolution. Having considered each of the consolidated appeals in light of the record presented, the Court concludes that appeal number 2010-CA-000870 is untimely and that appeal number 2010-CA-000905 must be dismissed as moot. Prior to discussing the merits of appeal number 2010-CA-000906, we briefly address the basis for our dismissal of appeals number 2010-CA-000870 and 2010-CA-000905.

APPEAL NO. 2010-CA-000870

In a final and appealable order of May 12, 2009, the Fayette Circuit Court determined that certain property located at 2601 Cave Hill, Lexington, Kentucky, titled in the names of “Bruce Elliot Fein Revocable Trust Restated 3/17/2004” and the “Margy Ann Hojjati Revocable Trust Amended 6/16/2005,” was subject to an equitable mortgage held by appellee, Logan Asset Backed Fund, L.P. In the same order, the circuit court further determined that Bruce Fein and Margy Ann Hojjati, two guarantors of the note evidencing Logan’s equitable

mortgage, were personally liable for any amount represented in the note not satisfied through proceeds realized from the judicial sale of the property.

The above-captioned appellants moved the circuit court to alter, amend, or vacate its order, per Civil Rule (CR) 59.05, arguing that the circuit court had erred by determining that 1) it had personal jurisdiction over Bruce and Mattie Fein; 2) Logan had an equitable mortgage and lien against the property at issue in this matter; and that 3) pursuant to the guaranty agreements executed by Bruce and Mattie Fein, Logan was entitled to a judgment against Bruce and Mattie Fein, individually, representing any amount of Logan's judgment not satisfied through the foreclosure of its lien. (Record on Appeal at 516-518.) The circuit court considered the entirety of the appellants' CR 59.05 motion, but entered an order on June 8, 2009, overruling it.

When the appellants filed their notice of appeal on May 6, 2010, their notice designated six orders that the circuit court entered in this matter as the subjects of their appeal, including the circuit court's May 12, 2009 and June 8, 2009 orders.¹ However, on January 6, 2011, this Court entered a separate order

¹ Through a final and appealable agreed order of April 20, 2010, Logan and the above-captioned appellants determined that the remaining balance owed to Logan was \$1,021,986.30. This order was not made a subject of this appeal. The property at issue also sold for \$800,000 at a judicial sale and the balance of these proceeds were applied toward the satisfaction of Logan's equitable mortgage, but a deficiency remained and Fein and Hojjati, by virtue of their roles as guarantors, were liable for paying that deficiency.

dismissing this appeal as untimely to the extent that it relates to the circuit court's May 12, 2009 and June 8, 2009 orders.

Subsequently, the appellants filed a collective brief which, nevertheless, solely contained arguments directly and exclusively relating to the circuit court's May 12, 2009 order of summary judgment and June 8, 2009 order overruling their motion to vacate summary judgment. Specifically, the appellants take issue with the circuit court's determinations in those respective orders that 1) it had personal jurisdiction over Bruce and Mattie Fein; 2) Logan had an equitable mortgage and lien against the property at issue in this matter; and that 3) pursuant to the guaranty agreements executed by Bruce and Mattie Fein, Logan was entitled to a judgment against Bruce and Mattie Fein, individually, representing any amount of Logan's judgment not satisfied through the foreclosure of its lien.

It appears that the parties may have misconstrued this Court's January 6, 2011 order deciding that the appeal of the 2009 orders was untimely. Nevertheless, having reviewed this matter and the entirety of the record, it remains clear that any arguments brought before the circuit court regarding the above-referenced May 12, 2009 and June 8, 2009 orders are untimely. Moreover, the appellants offer no argument of error regarding any other order entered by the circuit court in this matter. Consequently, this appeal is hereby dismissed.

APPEAL NO. 2010-CA-000905

McMahan Company, Inc. d/b/a Coldwell Banker McMahan Company (“Coldwell”) appeals an order and judgment of the Fayette Circuit Court determining that an equitable mortgage held by appellee, Logan Asset Backed Fund, L.P. (“Logan”), entitled Logan to all of the proceeds realized from a foreclosure and sale of property located in Fayette County, Kentucky. Upon review, however, this appeal is duplicative of a separate appeal Coldwell filed wherein Coldwell named itself appellant, named the same parties as appellees, appealed the same orders, and raised exactly the same arguments; indeed, the only difference in this appeal is that here, unlike its other appeal, Coldwell attempts to characterize itself as a “cross-appellant” and the appellees as “cross-appellees.” Having already addressed the merits of this appeal in our opinion relating to Coldwell’s other appeal, *see, e.g., McMahan Co., Inc. v. Logan Asset Backed Fund, L.P.*, 2010-CA-000906-MR, we need not do so again. This appeal is therefore DISMISSED as moot.

APPEAL NO. 2010-CA-000906

As noted above, Coldwell challenges the circuit court’s determination that an equitable mortgage held by Logan entitled it to all of the proceeds realized from a foreclosure and sale of property located in Fayette County, Kentucky. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

The relevant facts of this matter are not in dispute. On April 16, 2008, Logan filed this action to foreclose a mortgage it purported to hold on property located at 2601 Old Cave Road, Lexington, Kentucky. The property at issue was titled in the names of the “Bruce Elliott Fein Revocable Trust restated 3/17/2004” and the “Margy Ann Hojjati Revocable Trust amended 6/16/2005.” Logan’s mortgage, which it had filed of record on November 26, 2007, described the owner of the property and the party to whom it had lent the \$1,350,000 forming the basis of its purported mortgage as “Cave Hill, LLC.” Logan’s complaint acknowledged that the property was titled in the names of the trusts, but alleged that Bruce and Mattie Fein, who were both the trustees of the above-referenced trusts and the managing members of Cave Hill, had nevertheless mortgaged the property to Logan as part of the loan transaction with Cave Hill. Consequently, Logan named Cave Hill, along with Bruce and Mattie Fein in their capacities as individuals and trustees of the two trusts referenced above, as defendants, *i.e.*, parties claiming to have interests in the property (collectively the “Cave Hill appellants”). Moreover, Logan’s complaint asserted a first-in-priority mortgage against the property, and sought “any and all equitable relief to which [it was] entitled[.]”

Also on April 16, 2008, Logan filed a notice of lis pendens with the Fayette County Clerk. The notice contained all of the information required by

KRS² 382.440, including the number and style of Logan's action, the court in which the action was pending, the names of each of the Cave Hill appellants and a statement to the effect that they were named defendants, and a complete description of the property.

On September 25, 2008, Coldwell filed a judgment lien against the same property. Thereafter, Coldwell sought and was granted leave to intervene in Logan's action.

On May 12, 2009, the circuit court determined that Logan had an equitable mortgage on the property after finding that the following facts were undisputed: 1) On April 30, 2007, Logan had loaned Cave Hill, LLC, the amount of \$1,350,000 to pay off a prior mortgage and prior liens attached to the property; 2) Cave Hill was an entity owned and operated by Bruce and Mattie Fein; and 3) although the deed to the property listed the "Bruce Elliot Fein Revocable Trust Restated 3/17/2004" and the "Margy Ann Hojjati Revocable Trust Amended 6/16/2005" as the record owners, and although Logan had purported to have a mortgage on property owned by Cave Hill, rather than the trusts, all of the Cave Hill appellants, including the trusts and Cave Hill, had judicially admitted that they had agreed with Logan that a deed would be executed conveying the property from the trusts to Cave Hill as part of the overall loan transaction.

² Kentucky Revised Statute.

While the circuit court's May 12, 2009 order was final and appealable, it reserved judgment on the issue of the priority of Logan's equitable mortgage with respect to Coldwell's September 25, 2008 judgment lien. The circuit court later determined priority in another order, rendered April 6, 2010, holding in relevant part:

[Logan] filed its original mortgage on November 26, 2007. This Court determined [Logan] had an equitable mortgage on May 12, 2009. The equitable mortgage existed *ab initio*, i.e., November 26, 2007. [Logan] also filed a Lis Pendens on April 16, 2008, to put all parties who may claim an interest in the property on notice of the litigation. [Coldwell] did not file its judgment lien until September 25, 2008, some five (5) months after the filing of the Lis Pendens and almost a full nine (9) months after the plaintiff filed the original mortgage. The Court finds that at the time [Coldwell] filed its judgment lien [Coldwell] had notice of the [sic] both [Logan's] recorded equitable mortgage interest and the plaintiff's recorded Lis Pendens. For these reasons, [Logan's] motion for summary judgment is GRANTED and it shall be entitled to first priority in the sale proceeds.

The property eventually sold at auction for \$800,000. This amount failed to satisfy the entirety of Logan's equitable mortgage, but Logan received the balance of these proceeds. Thus, by virtue of its inferior lien, Coldwell received nothing. Coldwell now appeals the circuit court's determination that Logan's equitable mortgage was entitled to superior priority.

ANALYSIS

The upshot of Coldwell's argument on appeal is that Logan's mortgage interest in the property at issue in this matter was defective, and that a defective albeit recorded mortgage³ is not, in and of itself, sufficient to put any subsequent lienholder (such as Coldwell) on constructive notice of a prior equitable interest. Therefore, Coldwell reasons that it could not have had any notice of Logan's equitable mortgage until the circuit court recognized Logan's equitable mortgage on May 12, 2009, and that Coldwell's own judgment lien, which it filed September 25, 2008, enjoyed priority over Logan's equitable mortgage because Coldwell filed it without notice of Logan's interest.

The Kentucky Supreme Court has explained that it has long been held that the clause "without notice" in KRS 382.270, Kentucky's mortgage recordation statute, means "without actual knowledge of the existence of a mortgage, either unrecorded or improperly recorded, or knowledge of such facts as would lead a reasonably prudent person under like circumstances to inquire into the matter and discover the existence of that mortgage." *State Street Bank & Trust Co. v. Heck's Inc.*, 963 S.W.2d 626, 630 (Ky. 1998) (citing *Cox v. Guaranty Bank & Trust Co.*, 199 Ky. 115, 250 S.W. 804 (1923)). The *State Street* Court further explained that while the defective mortgage at issue in that case "did not give *constructive* notice

³ As noted by the trial court and referenced above, Logan recorded its mortgage on November 26, 2007, but its mortgage listed Cave Hill, LLC, as the owner of the property, rather than actual owners, *i.e.*, the trusts.

of its existence to a subsequent purchaser or creditor, it retained priority over one whose interest was acquired with *actual* or *inquiry* notice of its existence.” *Id.*

And, the Court found that the subsequent creditor in that matter, First National Bank of Corbin, had at least constructive notice of a properly recorded subordination agreement by which its mortgagors subordinated their fee interest in the property in question to the prior equitable interest holders, and that constructive notice was prima facie evidence of sufficient knowledge to put First National on inquiry notice of the prior equitable interest.⁴ *Id.*

In short, the Supreme Court of Kentucky has clearly stated in *State Street* that other validly recorded instruments, aside from a defective mortgage, may put subsequent purchasers and creditors on inquiry notice of a prior equitable interest, thereby negating a claim of priority over that prior equitable interest.

With that in mind, our resolution of this case primarily rests upon the effect of the *lis pendens* notice Logan filed in this matter.

Generally speaking, a *lis pendens* notice is validly filed in situations where title to real property is at stake (actions for partition, quiet title, and will contests, for example). *Greene v. McFarland*, 43 S.W.3d 258, 260 (Ky. 2001).

Necessarily, these situations include the pendency of a foreclosure action because,

⁴ As in the case at bar, the prior equitable interest at issue in *State Street* was an equitable mortgage. Per *State Street*, an equitable mortgage attaches to the subject real property upon the advancement of the money and continues to exist for the duration of the debt. *Id.* at 631.

by definition, a “foreclosure” is “[a] legal proceeding to terminate a mortgagor’s interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property.” BLACK’S LAW DICTIONARY 658 (7th ed. 1999).

As authorized by Kentucky law (*see* KRS 382.440), a lis pendens is not a lien against the property, nor is it intended to establish priority among creditors; rather, it gives inquiry notice to potential purchasers or encumbrancers of a cloud upon the title of property, and it is intended to warn 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) (citing *Leonard v. Farmers & Traders Bank, Shelbyville*, 605 S.W.2d 770, 772 (Ky. App. 1980)); *see also Ben Williamson & Co. v. Hall*, 290 Ky. 672, 161 S.W.2d 905 (1942). More to the point, a lis pendens is a warning to the whole world that any title to specific real property claimed by a specific seller or debtor is liable to be divested by a pending suit. Whoever purchases the property, or places a lien upon it, does so with constructive notice of this fact. *Breslin v. Gray*, 283 Ky. 785, 143 S.W.2d 452, 456 (1940).

After a valid lis pendens is filed, a “pendente lite” purchaser or lienholder (*i.e.*, a person purchasing or taking a lien on property against which a lis pendens notice has been filed) can have no greater interest in the property than that

of his seller or debtor, and they take their interest “subject to the results of the litigation.” *See Strong v. First Nationwide Mortg. Corp.*, 959 S.W.2d 785 (Ky. App. 1998) (citing *Cumberland Lumber Co. v. First & Farmers Bank of Somerset, Inc.*, 838 S.W.2d 403, 405-06 (Ky. App. 1992)). The phrase, “subject to,” as used by Kentucky courts in this context, is synonymous with “subordinate to.” *See, e.g., McMurray v. McMurray*, 410 S.W.2d 139, 142 (Ky. 1966) (quoting *McClure v. Harris*, 51 Ky. (12 B.Mon.) 261, 264 (1851)) (“The wife’s right of dower, is subordinate to the vendor’s lien for the purchase money, because the lien is coeval with the husband’s right to the land, and he acquires his title subject to the lien.”).

Thus, if the litigation ultimately results in a seller or debtor’s complete divestiture of title, then any interest in that property that the seller or debtor purported to convey during the pendency of the litigation fails as a matter of law.

See, e.g., Rice v. Merritt, 310 S.W.2d 529, 531 (Ky. 1958):

All of these parties defendant participated at their peril in the several intermediate conveyances of the property pending the litigation. The lis pendens notice gave them warning that they would take conveyances of the property pending the litigation. The lis pendens notice gave them warning that they would take conveyance of the legal title from the bank subject to Rice’s equitable estate should he be successful in establishing it. *Speiss v. Martin*, 192 Ky. 211, 232 S.W. 615; *Asher v. Roberts*, 206 Ky. 186, 266 S.W. 1089. The change in the conditions after Rice’s rights accrued were brought about by the parties with their eyes open. They stand in no better position than does their vendor[.]

Similarly, if the litigation ultimately results in the diminishment of a seller or debtor's title, then any lien attaching to the property during the pendency of the litigation, filed by the creditors of the seller or debtor, is limited to whatever remains of the seller or debtor's title after the litigation concludes.⁵ See, e.g., *Strong*, 959 S.W.2d at 787:

It is abundantly clear to this Court that Teresa is entitled to one-half of the proceeds of the sale of the realty because of the determination in the dissolution proceedings that she had a one-half ownership interest in the property—not a mere lien. The trial court had the duty, in the dissolution action, to divide the marital property in “just proportions,” regardless of how the property was titled. Kentucky Revised Statutes (KRS) 403.190. To protect her equitable interest in the property, Teresa filed the *lis pendens* and those who obtained a lien in the property after the filing of that notice, including Strong and Hampton, did so “subject to the results of the litigation.” *Cumberland Lumber Company v. First and Farmers Bank of Somerset, Inc.*, Ky. App., 838 S.W.2d 403, 405 (1992). Significantly, the trial court did not determine that the debts to Strong and Hampton constituted marital debts. Indeed, the trial court specifically provided that Teresa would not be liable for these debts. Thus, Teresa's ownership interest is not affected by any claims of Jack's creditors in the property. Stated differently, the liens of Strong and Hampton were extinguished to the extent of the interest awarded to Teresa in the dissolution.

(Internal footnotes omitted.)

⁵ The word “encumbrancer,” used in the context of KRS 382.440(1), includes an attaching creditor, such as Coldwell. See, e.g., *Commercial Transport Corp. v. Robinson Grain Co.*, 345 F.Supp. 342 (W.D. Ky. 1972).

Here, Coldwell merely questions the effect of a lis pendens notice in general, but makes no assertion that Logan's lis pendens notice was improperly filed or otherwise defective. As we previously stated in *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536, 541 (Ky. App. 2007), "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." In light of the above, it makes no difference that Logan's foreclosure action was based upon an equitable mortgage, rather than a mortgage based upon non-defective documentation, because the result is the same: Coldwell had constructive notice of Logan's lis pendens, the lis pendens gave Coldwell inquiry notice of Logan's equitable mortgage at the time Coldwell filed its judgment lien, and Coldwell could, therefore, only hope to attach its judgment lien to whatever remained of its debtors' interest in the property or proceeds of the sale at the conclusion of Logan's foreclosure suit. And, in that regard, Coldwell's debtor's interest in the property and proceeds, following Logan's foreclosure action and judicial sale, was nothing.

CONCLUSION

For these reasons, the Judgment of the Fayette Circuit Court is AFFIRMED in appeal number 2010-CA-000906. Appeal number 2010-CA-000897 is hereby DISMISSED and appeal number 2010-CA-000905 is hereby DISMISSED AS MOOT.

ALL CONCUR.

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