

**SUPREME COURT OF KENTUCKY
CASE NO. 2011-SC-000277-DG**

TAX EASE LIEN INVESTMENTS 1, LLC

APPELLANT

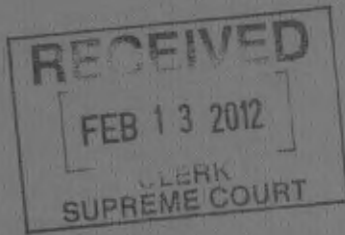
v.

**APPEAL FROM COURT OF APPEALS
CASE NO 2010-CA-000595-MR
AND SHELBY CIRCUIT COURT NO. 09-CI-00823**

COMMONWEALTH BANK &
TRUST COMPANY AND
TERETHA M. MURPHY

APPELLEES

**BRIEF OF APPELLANT,
TAX EASE LIEN INVESTMENTS 1, LLC**



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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of this Brief of Appellant, Tax Ease Lien Investments 1, LLC, were served by Federal Express overnight delivery to the Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, Kentucky 40601, and by first class mail, postage prepaid, this 10th day of February, 2012, upon the following: Teretha M. Murphy, 925 College Street, Shelbyville, Kentucky 40065; Donald T. Prather, 500 Main Street, Suite 5, Shelbyville, Kentucky 40065, Counsel for Commonwealth Bank & Trust Company; Honorable Charles R. Hickman, Shelby Circuit Court, 501 Main Street, Suite 15, Shelbyville, Kentucky 40065; Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.


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INTRODUCTION

This appeal involves an issue of first impression for this Court concerning whether there is third-party standing for a mortgage lien holder to object to an agreed judgment entered into between the property owner and the purchaser of the property owner's delinquent property tax liens, and raises important questions about the Commonwealth's statutory scheme for the collection of delinquent property taxes.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to CR 76.12(4)(c)(ii), Appellant, Tax Ease Investments 1, LLC, requests that the Court grant oral argument because it will assist the Court in considering the issue of first impression presented in this case, concerning whether there is third-party standing for a mortgage lien holder to object to an agreed judgment entered into between the property owner and the purchaser of the property owner's delinquent property tax liens, as well as the important questions raised about the Commonwealth's statutory scheme for the collection of delinquent property taxes.

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STATEMENT OF THE CASE

This case presents an interesting question concerning whether there is third-party standing for a mortgage lien holder to object to an agreed judgment entered into between the property owner and the purchaser of the property owner's delinquent property tax liens, and raises important questions about the Commonwealth's statutory scheme for the collection of delinquent property taxes.

Local governments depend heavily on property taxes as their primary source of revenue. Indeed, "[e]very citizen of the Commonwealth of Kentucky has an enforceable duty to pay taxes properly levied. In an effort to protect its tax base and to aid in the collection of past due tax revenue, the Kentucky General Assembly created certain 'tax liens' with the passage of KRS 134.420." Wells Fargo Bank, Minnesota, N.A. v. Com., Finance and Admin., Dept. of Revenue, 345 S.W.3d 800, 804 (Ky. 2011). To help enforcement of this duty to pay property taxes, the General Assembly put into place a statutory scheme in KRS Chapter 134 to encourage private entities, such as Tax Ease Lien Investments 1, LLC ("Tax Ease"), to purchase uncollected, delinquent ad valorem property taxes at full value from local governments. The sale of delinquent taxes removes a nonperforming asset from the local government's balance sheet by transferring the collection risk to a private entity with more expertise in collections and property management. Interest on the delinquent taxes at the post-judgment rate and the right to collect attorney's fees in connection with enforcement of tax liens are two of the most powerful incentives for third-party purchasers to buy delinquent taxes in the Commonwealth.

Tax Ease responded to the economic incentives created by the General Assembly in Chapter 134 by purchasing certificates of delinquency¹ in the Commonwealth. In the ordinary course of its business, Tax Ease purchased certificates of delinquency for unpaid taxes for the years 2006 and 2007 for real property owned by Appellee, Teretha M. Murphy. [T.R. at 1-13]. By statute, these certificates of delinquency had “priority over any other obligation or liability for which the property is liable.” KRS 134.420. That is, Tax Ease became the senior lien holder on the property upon purchase of the certificates of delinquency.

In October of 2009, Tax Ease brought suit to enforce its lien on Ms. Murphy’s property. See KRS 134.546. [T.R. at 1-13]. In so doing, Tax Ease fully complied with the procedure for enforcement of certificates of delinquency set forth in KRS 134.490.

As required by KRS 426.002, Tax Ease named Respondent, Commonwealth Bank & Trust, Co. (“Commonwealth Bank”), a defendant in the action because it was a mortgage lien holder on the property. [T.R. at 1-13]. After suit was filed, Tax Ease and Ms. Murphy settled Tax Ease’s claim against her and her property. [T.R. at 28-30]. Pursuant to the settlement agreement, they executed an Agreed Judgment, which was entered by the trial court on December 23, 2009. [T.R. at 28-30].

In the Agreed Judgment, Ms. Murphy agreed to pay the principal amount due for the tax years 2006 and 2007 plus interest and reasonably attorney’s fees. [T.R. at 28-30]. In exchange for entering into the Agreed Judgment, Tax Ease agreed to stop foreclosure proceedings on Ms. Murphy’s home and further agreed not to pursue its foreclosure rights under KRS 134.452 as long as Ms. Murphy paid as agreed. [T.R. at 28-30]. The

¹ An unpaid real property tax claim becomes a “certificate of delinquency” when filed with the County Clerk’s office. KRS 134.122.

Agreed Judgment states in pertinent part:

5. Should the Defendant(s) abide by all of the terms and conditions set forth herein, then Plaintiff agrees that it will not execute on this Judgment or take any additional steps to enforce its lien in and to Defendants' real property.

[T.R. at 30].

Stopping the foreclosure action was valuable consideration for and to Ms. Murphy.

On December 28, 2009, Commonwealth Bank moved under CR 59.05 to vacate the Agreed Judgment. [T.R. at 45-47]. In the motion, Commonwealth incorporated their December 24, 2009, motion, and argued that the portion of the Agreed Judgment providing for Tax Ease's attorney's fees was excessive. [T.R. at 34-35 45]. Tax Ease objected to the motion on grounds that Commonwealth Bank lacked standing to challenge the Judgment. [T.R. at 48-49]. The trial court agreed with Tax Ease and denied Commonwealth Bank's CR 59.05 motion on standing grounds. [T.R. at 74-75]. Commonwealth Bank appealed. [App. 1]. The Court of Appeals reversed in a 2-to-1 decision, with Judge Clayton writing extensively in dissent. [App. 1].

In reversing, the Court of Appeals held that Commonwealth Bank had standing to assert Ms. Murphy's rights in its CR 59.05 motion to set aside the Agreed Judgment. [App. 1 at 4-7]. In its recitation of the facts, the Court of Appeals states that "Commonwealth Bank, *on behalf of Murphy and her spouse*, moved the trial court to reconsider the amount of attorney's fees." [App. 1 at 3]. (emphasis added). So as framed by Commonwealth Bank and the Court of Appeals, the issue here is whether Commonwealth Bank had standing to assert the rights of a third party in its CR 59.05

motion to set aside the Agreed Judgment. The Court of Appeals held that entry of the Agreed Judgment impaired Commonwealth Bank's lien on Ms. Murphy's property, and thus, gave Commonwealth third-party standing to assert Ms. Murphy's rights. [App. 1 at 4-7]. The Court of Appeals did not apply any test other than injury in fact in support of its holding. This was not, however, the appropriate test for third-party standing.

The Court of Appeals incorrectly used the test for first-party standing, *i.e.* the test used to determine when a party has standing to assert in his or her own right and in his or her own name. That is, the Court of Appeals applied the test for first-party standing in reaching its conclusion that Commonwealth Bank had third-party standing to assert Ms. Murphy's rights.

Undersigned counsel could not locate a Kentucky case that specifically sets forth a test for third-party standing. But Federal courts apply a three-part test to determine whether third-party standing exists. This test puts the burden on the proponent of third-party standing to show: 1) that the litigant was in fact injured; 2) that the litigant and the third party have a "close relationship"; and 3) that the third party faces an obstacle from litigating the claim in his or her own name. This Court should adopt this test and apply it in this case.

Under the above test for third-party standing, and as set forth more fully below, Commonwealth Bank failed to meet its burden of demonstrating any of these three elements. There is absolutely no proof in the record that there was insufficient equity in Ms. Murphy's home to cover both Commonwealth Bank's lien and the amount of the Agreed Judgment. Hence, there is no proof that Commonwealth Bank was injured in fact. Commonwealth Bank and Ms. Murphy did not have a unity of interest in connection with

the Agreed Judgment. Hence, there is no “close relationship” between the two. And there was no legal impediment to Ms. Murphy asserting her own rights. Hence, the last two essential requirements for third-party standing fail as well. And not only did the Court of Appeals err by applying the test for first-party standing to a third-party-standing question, the Court of Appeals also ignored compelling facts and circumstances of this case that strongly militate against granting third-party standing to Commonwealth Bank. In particular, the Court of Appeals gave no weight or consideration to the fact that Commonwealth Bank had the right and ample opportunity to litigate this issue in its own name but simply chose not to do so.

ARGUMENT

I. Standard of Review.

Because the claimed error here involves a question of law (whether a party has standing to assert a claim), the standard of review is *de novo*. William C. Eriksen, P.S.C. v. Kentucky Farm Bureau Mut. Ins. Co., 336 S.W.3d 909, 911 (Ky. App. 2010).

II. The Issues Before this Court Were Properly Preserved for Review.

In accordance with CR 76.12(3)(c)(v), the foregoing issues set forth in the Argument section were properly preserved for review on appeal by the Agreed Judgment [T.R. at 28-31], Tax Ease’s Response to Commonwealth Bank’s CR 59.05 Motion [T.R. at 48-49], the trial court’s February 25, 2010 Opinion and Order [T.R. at 73-75], and the Court of Appeals’ April 15, 2011 Opinion. [App. 1].

III. Commonwealth Bank has no Standing Based on the Particular Facts of this Case.

“In order to have standing in a lawsuit a party must have a judicially recognizable interest in the subject matter of the suit. The interest of a plaintiff must be a present or

substantial interest as distinguished from a mere expectancy. The issue of standing must be decided on the facts of each case.” City of Ashland v. Ashland F.O.P. No. 3, Inc., 888 S.W.2d 667, 668 (Ky. 1994) (internal citations and quotations omitted). Here, there are a number of particular facts and policy reasons why the Court of Appeals erred in holding that Commonwealth Bank had standing to bring the CR 59.05 Motion on behalf of Ms. Murphy.

In the CR 59.05 Motion, Commonwealth Bank argued that the amount of attorney’s fees and costs that Tax Ease and Ms. Murphy agreed upon were excessive. [T.R. at 45]. But this was far from the only opportunity or means available to Commonwealth Bank to litigate this issue. Indeed, Commonwealth Bank had the right and opportunity to prevent *any* attorney’s fees being added to the certificates of delinquency on Ms. Murphy’s home simply by purchasing the certificate of delinquencies before they were offered to Tax Ease. Commonwealth Bank also had ample opportunity to challenge the amount of attorney’s fees and costs incurred by Tax Ease by exercising its right to purchase the certificates of delinquency from Tax Ease and challenge same. Thus, under the facts of this case, there is no compelling or even a particularly good reason to allow Commonwealth Bank to assert Ms. Murphy’s rights.

As a lien holder on the property, Commonwealth Bank had the right under KRS 134.127 to purchase the certificate of delinquencies 90 days before they were offered for sale to Tax Ease. KRS 134.127(1)(a) provides that a lien holder may purchase certificates of delinquency at any time. And KRS 134.127(1)(b) provides that “[a]ny other person” may purchase a certificate of delinquency “after ninety (90) days have passed from the filing of tax claims with the county clerk. . . .” Thus, the statute provides

a three-month safe harbor that provides property owners and lien holders one last chance to purchase a certificate delinquency before it is offered for sale to third-party purchasers such as Tax Ease. So Commonwealth Bank could have purchased the certificates of delinquency on Ms. Murphy's home and prevented any attorney's fees or costs from accruing on the certificates.

Next, Commonwealth Bank had the absolute right and opportunity to purchase the certificates of delinquency from Tax Ease at any time under KRS 134.127(3)(a), which provides in pertinent part:

The delinquent taxpayer or any person having a legal or equitable estate in the property covered by a certificate of delinquency may, at any time, pay the total amount due to a third-party purchaser of a certificate of delinquency.

The "total amount due" includes reasonable attorney's fees and administrative fees permitted by KRS 134.452. This is made clear by KRS 134.420 (3), which provides:

The lien [for delinquent taxes] shall include all interest, penalties, fees, commissions, charges, costs, attorney fees, and other expenses as provided by this chapter that have been incurred by reason of delinquency in payment of the tax claim certificate of delinquency, personal property certificate of delinquency, or in the process of collecting any of them, and shall have priority over any other obligation or liability for which the property is liable.

So exercising its right to purchase the certificates of delinquency requires Commonwealth Bank to pay statutory interest on the certificates, plus Tax Ease's reasonable attorney's and costs. By so doing, Commonwealth Bank could have challenged, in its own name, the amount of attorney's fees and costs incurred by Tax Ease. For example, Commonwealth Bank could have brought an action for declaratory relief that the fees and costs were excessive or brought an action for an accounting. But

Commonwealth Bank essentially slept on its statutory right to purchase the certificates of delinquency on Ms. Murphy's property and its right to challenge in its own name the amount of attorney's fees and cost incurred by Tax Ease.

Thus, based on the facts of this case, Commonwealth Bank should not be allowed to raise an issue in Ms. Murphy's name that it declined to raise in its own name. And allowing it to do so creates uncertainty in the process of negotiating settlements between third-party purchasers of delinquent taxes and delinquent tax payers. By holding that a purported impairment of a lien is sufficient to create third-party standing, the Court of Appeals has opened the door to attack on settlement agreements between third-party purchasers and delinquent tax payers to anyone holding a lien on the property. The list of such persons who would be imbued with third-party standing by the Court of Appeals' opinion includes second-mortgage holders, judgment lien holders, and statutory lien holders such as a mechanic's liens. The practical effect of this holding then will be to make it less likely for third-party purchasers to settle with delinquent tax payers and, hence, increase the number of foreclosures in the Commonwealth. Therefore, the Court of Appeals erred in holding that Commonwealth Bank had standing to assert Ms. Murphy's rights based on the particular facts of this case. The Court of Appeals also erred by holding that injury in fact is the only requirement necessary to bestow third-party standing on Commonwealth Bank.

IV. Commonwealth Bank does Not Have Third-Party Standing to Assert Ms. Murphy's Rights.

"The assertion of one's own legal rights and interests must be demonstrated and the claim to relief will not rest upon the legal rights of third persons." Commonwealth v. Louisville Atlantis Community/Adapt, Inc., 971 S.W.2d 810, 817-18 (Ky. App. 1997)

(quoting Associated Industries of Kentucky v. Commonwealth, Ky., 912 S.W.2d 947, 951 (1995)); accord 59 Am. Jur. 2d *Parties* § 38 (updated November 2011) (“A party generally must assert his or her own legal rights and interests and cannot rest his or her claim to relief on the rights or interests of third parties.”).

There does not appear to be any case law in the Commonwealth setting forth the test to use to determine when a person has standing to assert the rights of third parties.

But federal courts, including the U.S. Supreme Court, have laid out this specific test:

third-party standing requires the satisfaction of three preconditions: 1) the plaintiff must suffer injury; 2) the plaintiff and the third party must have a “close relationship”; and 3) the third party must face some obstacles that prevent it from pursuing its own claims.

Pennsylvania Psychiatric Soc. v. Green Spring Health Services, Inc., 280 F.3d 278, 288-89 (3d Cir. 2002) (citing Campbell v. Louisiana, 523 U.S. 392, 397 (1998); Powers v. Ohio, 499 U.S. 400, 411 (1991)); see also Smith v. Jefferson County Bd. of School Com’rs, 641 F.3d 197, 208 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 103, 181 L. Ed. 2d 31 (2011).

Under the above test, injury in fact is not sufficient in and of itself to grant standing to a litigant to assert the third-party rights of another. But this was the sole basis on which the Court of Appeals concluded that Commonwealth Bank had standing to assert Ms. Murphy’s rights.

In explaining its holding, the Court of Appeals stated:

After applying standing analysis, we conclude that Commonwealth Bank suffered a direct financial injury when its security interest in Murphy’s real property was reduced by the amount listed in the agreed judgment. This occurred by virtue of KRS 134.420(3), which provides that an ad valorem real estate tax bill shall be superior to a

previously recorded mortgage lien. This statute further states that the tax bill shall include all interest, costs, and attorney's fees associated with the collection of the tax bill. Thus, when Tax Ease purchased Murphy's delinquent tax bills and obtained a judgment for attorney's fees, the amount of the judgment became superior to Commonwealth Bank's previously recorded mortgage lien.

[App 1 at 4-5].

The test used by the Court of Appeals is the test for first-party standing. It is not the appropriate test for third-party standing. Third-party standing raises concerns that are simply not present when addressing the question of whether a party has standing to assert his or her own rights in his or her own name. The first-party test of injury in fact used by the Court of Appeals failed to take into account the reasons for the general prohibition against third-party standing. The rationale for the general rule against allowing persons assert the rights of third parties is based on a number of prudential concerns. "First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." Singleton v. Wulff, 428 U.S. 106, 113-14 (1976). Next "third parties themselves usually will be the best proponents of their own rights." *Id.* at 114. This is because "courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them." This is important for a number of reasons not the least of which is that the non-participating third parties may be "bound by the courts' decisions under the doctrine of Stare decisis." *Id.* Thus, the general rule against third-party standing "serves to foster judicial restraint and ensure the clear presentation of issues." Pennsylvania Psychiatric Soc. v. Green Spring Health Services,

Inc., 280 F.3d 278, 288 (3d Cir. 2002) (citing Secretary of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 955 (1984)).

Making injury in fact the only criteria for third-party standing fails to take these concerns into account. The Court of Appeals holding ignores the fact that Ms. Murphy was the best proponent of her rights and interests, which are clearly different from Commonwealth Bank's. And the Court of Appeals holding opens the door for not only Commonwealth Bank to step into the shoes of third parties, but to raise collateral issues and change and expand the focus of the case at hand.

This Court should adopt the three-part test for third-party standing used in the federal courts. Under this test, Commonwealth Bank clearly did not have standing to assert Ms. Murphy's rights in the CR 59.05 motion.

V. Commonwealth Bank meets none of the Three Requirements for Third-Party Standing.

A. No Injury in Fact.

In concluding that Commonwealth Bank had been injured in fact, the Court of Appeals explained that Commonwealth Bank "suffered a direct financial injury when its security interest in Murphy's real property was reduced by the amount listed in the agreed judgment." [App. 1 at 6].² But the Court of Appeals was wrong for two reasons: (1) there is absolutely no evidence in the record to support a finding that entry of the Agreed Judgment impaired Commonwealth Bank's security interest, and (2) the Court of Appeals ignored the plain language and legal effect of the Agreed Judgment.

² To be clear, the only possible injury to Commonwealth Bank could have been to its security interest in Ms. Murphy's home. In its Motion filed on December 28, 2009, however, Commonwealth Bank clearly stated its intent to purchase the certificates of delinquency and add the amount of the delinquencies to the unpaid balance of the note secured by the mortgage. [T.R. at 33].

i. No Evidence that Commonwealth Bank's Security Interest was impaired.

Commonwealth Bank has a mortgage lien on Ms. Murphy's property. [App. 1 at 2]. The mortgage is the security interest for the note on the property. Consequently, Commonwealth Bank's security interest in the property is limited to the amount due on the note. As noted by the Court of Appeals, Commonwealth Bank's lien is inferior to the certificates of delinquency for unpaid taxes held by Tax Ease. Thus, if the property is worth more than what is owed on the note *and* the amount of the Agreed Judgment for the payment of the certificates of delinquency, Commonwealth Bank remains fully secured and entry of the Agreed Judgment did nothing to impair that security. The record does not demonstrate the value of the property, nor does it establish that Commonwealth Bank's security is in any way impaired. Consequently, the Court of Appeals' conclusion that Commonwealth Bank was injured in fact is just pure speculation.³

ii. The Terms of the Agreed Judgment Stop the Foreclosure.

The Court of Appeals completely overlooked or disregarded the fact that the terms of the Agreed Judgment required Tax Ease to cease the foreclosure action on Ms. Murphy's property and provided for the payment of the Agreed Judgment over time with regular monthly payments. [T.R. at 28-30]. This had the practical effect of making Commonwealth Bank more secure and not less. This is because judicial foreclosure sales typically bring far less than the actual or fair-market value of the property.

³ In any event, when Tax Ease acquired the certificates of delinquency for Ms. Murphy's property, Commonwealth Bank was in the exact same position as when the taxes were owed to the government and its relative position did not change. The priority of Commonwealth Bank's already inferior lien was unchanged as Tax Ease did nothing more than stand in the place of the government.

As explained by the Restatement (Third) of Property, there is a wide body of research showing that “foreclosure sales normally do not generally produce fair market value for the foreclosed real estate.” Restatement (Third) of Property (Mortgages) § 8.3 (1997) (Reporter’s Note). “It is common knowledge in the real world that the potential price to be realized from the sale of real estate . . . usually is considerably lower when sold ‘under the hammer’ than the price obtainable when” sold under arms-length negotiation between a willing seller and willing buying. Resolution Trust Corp. v. Carr, 13 F.3d 425, 430 (1st Cir. 1993).

So by stopping the foreclosure on the property, entry of the Agreed Judgment served to prevent a judicial sale and, in turn, prevented the realization of a winning bid far below the actual value of the property. Also, the amount of the Agreed Judgment would decrease steadily over time as Ms. Murphy met her payment obligation under its terms. Because the degree of Commonwealth Bank’s security in the property is tied to the value of the property, entry of the Agreed Judgment had the practical effect of making Commonwealth Bank more secure, not less secure as held by the Court of Appeals.

B. Commonwealth Bank and Ms. Murphy do not have a “Close Relationship.”

The close-relationship prong of the three-part test for third-party standing turns on the litigant’s and the third-party’s interest in the litigation or issue at hand. See e.g. Smith v. Jefferson County Bd. of School Com’rs, 641 F.3d 197, 208 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 103, 181 L. Ed. 2d 31 (2011).

At issue in Smith was whether teachers had standing to raise an Establishment Clause claim on behalf of their students. *Id.* at 202.

In concluding that the teachers had “a sufficiently close relationship to their

students to satisfy the first prong of the test for third-party standing,” the Smith Court explained:

The teachers may have. The Supreme Court “has found an adequate ‘relation’ ... when nothing more than a buyer-seller connection was at stake.” Kowalski, 543 U.S. at 139, 125 S.Ct. 564 (Ginsburg, J., dissenting) (citing cases). In Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), the Court allowed a licensed beer vendor to assert the equal-protection rights of young men in challenging a law that allowed women aged eighteen to twenty-one years old, but not men of the same ages, to purchase low-alcohol beer. *Id.* at 195, 97 S.Ct. 451. In Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), the Court found that a retail seller of contraceptive devices had standing to raise the due-process rights of its potential customers to challenge a statute variously limiting and prohibiting the distribution of contraceptives and barring their advertisement. *Id.* at 683–84, 97 S.Ct. 2010.

Smith, 641 F.3d at 208.

The discussion in Smith and the cited cases strongly indicate that a “close relationship” is determined based on a showing of unity of interest in the issue that the litigant wants to litigate on behalf of the third party. No such of unity interest exist here.

Commonwealth Bank’s only interest in the CR 59.05 Motion was to attack and challenge the amount of attorney’s fees and costs in the Agreed Order. [T.R. at 45]. But Ms. Murphy’s interest in entering into the Agreed Order was not to fix or limit the amount of attorney’s fees. Rather, her interest, and Tax Ease’s consideration for the agreement, was to stop the foreclosure proceeding on her home. As shown below, if Ms. Murphy’s interest was challenging the amount of attorney’s fees and costs, she had other and better avenues to litigate this issue.

C. Ms. Murphy had No Legal Impediment to Challenging the Amount of Attorney's Fees Included in the Amount Due for the Certificates of Delinquency on her home.

Ms. Murphy had the absolute right under KRS 134.127(3)(a) to pay off the certificates of delinquency on her home at any time. When and if she exercised this right, she was obligated to pay the "total amount due" under KRS 134.420(3). As explained above, the "total amount due" under KRS 134.420(3) includes reasonable attorney's fees and costs allowed under KRS 134.452. Like Commonwealth Bank, she was free to litigate the question of whether those fees and costs were reasonable should she and Tax Ease fail to reach an agreement on the amount. Thus, there was no legal impediment to Ms. Murphy challenging the amount of attorney's fees and costs incurred by Tax Ease. She did not need Commonwealth Bank to litigate the issue for her.

VI. Commonwealth Bank was not a Third-Party Beneficiary to the Agreed Judgment.

"Settlement agreements are a type of contract and therefore are governed by contract law." Frear v. P.T.A. Industries, Inc., 103 S.W.3d 99, 105 (Ky. 2003) (quoting 15 Am. Jur. 2D *Compromise and Settlement* § 9 (2000)). Consequently, Judge Clayton's conclusion in her dissent that Cumberland was not a third-party beneficiary to the agreed judgment is highly relevant to the issue before the Court.

While Ms. Murphy had the absolute right to purchase the certificates of delinquency from Tax Ease, she had no right to pay the certificate of delinquencies off in installment payments as provided by the Agreed Judgment. And while Tax Ease was required by statute to allow Ms. Murphy to purchase the certificates, it had no obligation to reach an agreement that permitted Ms. Murphy to pay off the certificates in installments over time. Tax Ease could have chosen to continue the foreclosure

proceeding to sale. Nonetheless, the parties did reach agreement to pay the certificates of delinquency in installments. [T.R. at 29]. Under this agreement, Tax Ease promised not to proceed with the foreclosure action as memorialized in the Agreed Judgment and Ms. Murphy agreed to pay the attorney's fees and costs recited in the judgment in addition to paying of the principle and interest on the certificates of delinquency. [T.R. at 28-29]. Hence, each party should be bound by the Agreed Judgment, which is controlled by contract law. Commonwealth Bank should not be allowed to interfere with the valid and binding agreement struck between Ms. Murphy and Tax Ease. Commonwealth Bank does not and should not have standing to litigate the terms of the Agreed Judgment.

Judge Clayton correctly reasoned that Commonwealth Bank was not a third-party beneficiary to the Agreed Judgment, and hence had no standing to challenge its terms in the trial court.

[R]eview of the facts herein illustrates that the agreed judgment between Tax Ease and Teretha Murphy was based on a contractual relationship. Ms. Murphy agreed to pay Tax Ease based upon their purchase of her tax bills. Commonwealth Bank was not a party to that contract nor was it an intended third party beneficiary. Commonwealth Bank has no obligation to pay Tax Ease [under the terms of the agreed judgment]. The courts have discussed the rights of an intended third party beneficiary as opposed to that of an incidental third party beneficiary. In Sexton v. Taylor County, 692 S.W.2d 808, 810 (Ky.App.1985), this Court determined that:

It is the law in this jurisdiction that no stranger to a contract may sue for its breach unless the contract was made for his benefit. See Long v. Reiss, 290 Ky. 198, 160 S.W.2d 668 (1942). Parties for whom these contracts are made fall into two classes-donee beneficiaries and creditor beneficiaries. The Court of Appeals in King v. National Industries, Inc., 512 F.2d 29, 33 (6th Cir.1975), described each class as follows:

One is a donee beneficiary if the purpose of the promisee in buying the promise is to make a gift to the beneficiary. A person is a creditor beneficiary if the promisee's expressed intent is that the third party is to receive the performance of the contract in satisfaction of any actual or supposed duty or liability of the promisee to the beneficiary.

Hence, in order to be either a donee or creditor beneficiary, it must be proven that the contract in question was made for the actual and direct benefit of the third party. There is simply no evidence appearing in the record to show that the parties made the contract for the benefit of Commonwealth Bank or that there was ever any intent, expressed or otherwise, on their part to do so. Furthermore, "a third-party who was intended by the parties to benefit from the contract, namely, a donee or a creditor beneficiary, has standing to sue on a contract; an incidental beneficiary does not acquire such right." Presnell Const. Managers, Inc. v. EH Const., LLC, 134 S.W.3d 575, 579 (Ky.2004).

Neither Tax Ease nor Murphy intended for Commonwealth Bank to benefit from the contract, and thus, Commonwealth Bank had no rights or duties pursuant to the contract between Tax Ease and Murphy. The contract was not made for the actual and direct benefit of Commonwealth Bank. Therefore, Commonwealth Bank had no standing to sue or to be heard on the agreed judgment which arose as a result of the contract between Tax Ease and Murphy. To allow any such creditor the right to interfere with a separate contractual relationship of their debtor, would result in an even more complicated and stressful legal system.

[App 1 at 10-11 (Clayton, J. dissenting)].

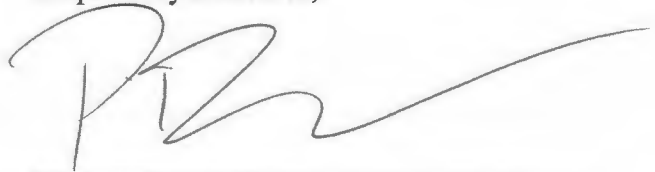
Commonwealth Bank was and is a stranger to the Agreed Judgment. It is not bound by terms of the Agreed Judgment. The Agreed Judgment was not intended to benefit Commonwealth Bank. The fact that Commonwealth Bank could have theoretically been harmed by the entry of the Agreed Judgment (which is not established in the record) did not give it standing to interfere with or challenge the terms of the

Agreed Judgment in its CR 59.05 Motion. The Court of Appeals erred in holding otherwise.

CONCLUSION

Because Commonwealth Bank fails any and all tests for third-party standing, and because it was not a third-party beneficiary to the Agreed Judgment between Tax Ease and Ms. Murphy, this Court should REVERSE the Court of Appeals and AFFIRM the judgment of the Shelby Circuit Court.

Respectfully submitted,



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