



**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
THERETHA M. MURPHY

APPELLEES

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

R. Eric Craig
P. Blaine Grant
HAYDEN CRAIG & GRANT, PLLC
718 West Main Street, Suite 202
Louisville, Kentucky 40202
(502) 638-2836

COUNSEL FOR APPELLANT,
TAX EASE LIEN INVESTMENTS 1, LLC

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 5th day of June, 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.

COUNSEL FOR APPELLANT,
TAX EASE LIEN INVESTMENTS 1, LLC

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I. Commonwealth's Due-Process Argument is Not Properly Preserved for Appeal.

Appellee, Commonwealth Bank & Trust, Co. ("Commonwealth Bank"), did not file a cross motion for discretionary review on the first issue raised in its brief: whether Commonwealth Bank had a due process right to notice and opportunity to be heard before the entry of the Agreed Judgment. Commonwealth Bank argued the due process issue on appeal. While the Court of Appeals concluded that that Commonwealth Bank was entitled to notice under the civil rules, the Court of Appeals did not hold that Commonwealth Bank's Constitutional due process rights had been violated. That is, the Court of Appeals decided the due process issue against Commonwealth Bank. So Commonwealth Bank's due process argument is not properly before the Court. Fischer v. Fischer, 348 S.W.3d 582, 597 (Ky. 2011).

More importantly, as explained in Tax Ease Lien Investments 1, LLC's ("TELI") main brief, Commonwealth Bank did not have third-party standing to assert Ms. Murphy's rights. Moreover, as explained below, because Ms. Murphy had no legal right to attack or appeal the Agreed Judgment, Commonwealth Bank had no derivative rights to attack or appeal the Agreed Judgment. Consequently, notice of entry of the Agreed Judgment would not have allowed Commonwealth Bank to challenge the amount of attorney's fees or costs in the Agreed Judgment. Therefore, Commonwealth Bank did not have "a property interest entitled to due process protection." Romero v. Administrative Office of Courts, 157 S.W.3d 638, 643 (Ky. 2005).

II. Commonwealth Bank has no Greater Rights than Ms. Murphy.

In arguing that it has standing to challenge the attorney's fees and costs in the Agreed Judgment, Commonwealth Bank relies on cases that hold under Kentucky law "in a contest between parties asserting liens upon the same property owned by a common debtor, either party

may make any defense which the common debtor could make.” Kaye v. MacMillan, 60 F.2d 7, 10 (6th Cir. 1932) (citing Banta v. Louisville Savings, Loan & Building Co., 59 S. W. 501, 22 Ky. Law Rep. 1045 (1900)(emphasis added)).

Specifically, Commonwealth Bank claims the right to step into Ms. Murphy’s shoes and assert her rights. Under Commonwealth Bank’s argument, its right to challenge the amount of attorney’s fees and costs in the Agreed Judgment derives from Ms. Murphy’s rights. Accordingly, as a matter of law, Commonwealth Bank has no greater rights than Ms. Murphy. Cf. Whayne Supply Co. v. Morgan Const. Co., 440 S.W.2d 779, 782-83 (Ky. 1969) (holding that “an assignee . . . acquires no greater right than was possessed by his assignor . . . but simply stands in the shoes of the latter, subject to all equities and defenses which could have been asserted against the chose in the hands of the assignor at the time of the assignment.”).

Because Ms. Murphy agreed to the amount of attorney’s fees as part of a consensual agreement with TELI to stop the foreclosure on her home, as under Kentucky law, “there can be no appeal” from “an agreed order or judgment.” Faust v. Louisville Trust Co., 192 Ky. 3, 232 S.W. 58, 59 (1921). Kentucky’s then highest court held that “a judgment entered by agreement or consent of the parties leaves nothing in controversy.” Friedman v. Friedman, 307 Ky. 439, 440, 211 S.W.2d 403, 403 (1948), and that “the rule [is] that a party will not be permitted to complain on an appeal of a judgment to which he consented, unless it is on the ground of fraud or mistake.” Little v. Mann, 302 Ky. 661, 195 S.W.2d 321, 323 (1946).

Thus, long standing Kentucky jurisprudence prohibits Ms. Murphy from attacking or appealing the Agreed Judgment. If Ms. Murphy is so prohibited, Commonwealth Bank, whose rights derive from and are limited to Ms. Murphy’s rights, are also clearly barred from attacking or appealing the Agreed Judgment between Ms. Murphy and TELI.

This makes Kaye and Banta, supra, distinguishable from the case before this Court, as both concerned the ability of one lienholder to challenge imposition of illegally excessive interest contained in a note securing the property held by another lienholder. The common debtor clearly had the legal right to challenge usurious interest contained in a consensual note or agreement. Under Kentucky law, a party to a note is not estopped from challenging usurious interest in a note:

It may be accepted as an uncontrovertible proposition that agreements between a debtor and creditor, while the debt exists, by which the debtor undertakes to waive objections to usurious rate of interest, or obligates himself not to claim the benefits of the statutes against usury, are void.

Gudgel v. Kaelin, 551 S.W.2d 803, 805-06 (Ky. App. 1977) (quoting Cynthiana Building & Savings Association v. Ecklar, 112 Ky. 164, 65 S.W. 335 (1901)).

As demonstrated above, unlike usurious interest, Ms. Murphy could not attack or appeal the Agreed Judgment, which renders Commonwealth Bank's argument that it could raise the issue impotent. Accordingly, Commonwealth Bank's argument that it has standing to object to the agreed judgment is incorrect.

III. Commonwealth Bank's Altered Reality.

Commonwealth Bank urges this Court to "appropriately consider and address the reality of what occurred in this case," and proceeds to attempt to paint an extraordinarily bleak picture of the "reality" of this case. In sum, Commonwealth Bank puts forward that Ms. Murphy was in "terror" facing the "loss of her home and the expense of hiring a lawyer." Further, that Ms. Murphy "was contacted, without the benefit of counsel" by a representative of TELI and afforded the opportunity to enter into an agreement to "save her house from foreclosure."

The reality is that Ms. Murphy, at all times, had the uncontroverted right to retain legal counsel to respond to TELI's foreclosure action. She chose not to retain counsel and sought to enter into the Agreed Judgment to forgo the loss of her home in foreclosure. To argue now that she was not afforded the right to counsel is specious at best.

Commonwealth Bank, as the mortgage holder, had every right and opportunity to step in and pay the taxes on Ms. Murphy's behalf, purchase the Certificate of Delinquency from the County Clerk itself to protect its own interest, or to enter into negotiations with TELI to satisfy the lien once the foreclosure lawsuit had been filed. Commonwealth Bank took none of these steps to protect its interest.

At the stroke of midnight, Commonwealth Bank suddenly decided that it must object to the Agreed Judgment, arguing that the attorney's fees and costs incurred by a third party purchaser were, perhaps, too high. Commonwealth Bank ignores the fact that the trial court below reviewed the Agreed Judgment and entered it. Commonwealth Bank has not raised any argument that the court below abused its discretion in its award of the fees and costs in the instant action.

Commonwealth Bank's arguments here that Ms. Murphy was prejudiced by lack of legal representation ring hollow. Nothing in the record indicates that this assertion is true. Ms. Murphy had the same right and opportunity to retain counsel that any other citizen of the Commonwealth has, but simply chose not to exercise that right, just as Commonwealth Bank failed to exercise its right to protect its interest repeatedly prior to TELI's purchase of the Certificate of Delinquency.

Respectfully submitted,



R. Eric Craig
P. Blaine Grant
HAYDEN CRAIG & GRANT, PLLC
718 West Main Street, Suite 202
Louisville, Kentucky 40202
(502) 638-2836

COUNSEL FOR APPELLANT,
TAX EASE LIEN INVESTMENTS 1, LLC