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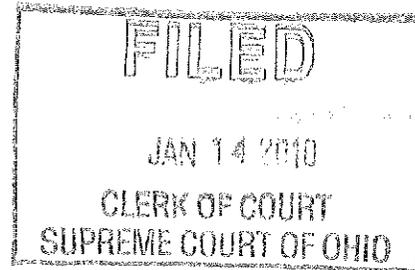
IN THE SUPREME COURT OF OHIO

ROBERT F. DIETL, ET AL)
)
 Appellees)
)
 -VS-)
)
 CATHERINE A. SIPKA)
)
 Appellant)

CASE NO. 10- 10-0070
On Appeal from the Trumbull County
Court of Appeals Eleventh Appellate
District
Court of Appeals
Case No. 2009-TR-25

APPELLANT'S MEMORANDUM SUPPORTING JURISDICTION

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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

This case presents an issue which has not been decided by this Court, and as best Appellant can determine, has not been decided by any Ohio Court of Appeals, save the Court of Appeals for Trumbull County, Eleventh Appellate District, from whose decision this Appeal is brought.

The issue is whether the reservation of a marital equity interest in a recorded quit claim deed given, by one spouse to another pursuant to the terms of a Dissolution of Marriage Separation Agreement, is sufficient to create a valid property interest for record notice purposes.

Division of Marital Property is a common event in nearly all Domestic Relations cases. Marital Residence Real Estate, and the equity therein, is often the most valuable asset to be divided between the parties. Many times the parties in Dissolution of Marriage Cases agree that one of them will retain the Marital Residence and either immediately buy out the other's equity interest, or secure that equity interest for payment in the future. That Marital Equity interest can be reserved and preserved in the form of a Judgment Entry granting same and recorded with the County Recorder, can be in the form of a certificate of judgment, or can be memorialized by a mortgage. Frequently, however, the deed of conveyance from one spouse to the other will contain a reservation of an interest in an amount equal to the Grantor's equity interest in the property. Whether this latter, frequently used method, is a valid means to preserve and protect the Grantor Spouse's equity interest is a question not heretofore decided by this Court and one in which the public has an interest because of its widespread affect in Domestic Relations cases in the State of Ohio.

STATEMENT OF THE CASE AND FACTS

On April 16, 2008, Plaintiff-Appellee Robert F. Dietl (hereafter "Dietl") filed a lawsuit in the Trumbull County Common Pleas Court seeking a declaratory judgment as to the validity and priority of Defendant-Appellant Catherine A. Sipka's (hereafter "Sipka") interest in a parcel of real property formerly owned by her at 8598 Hunter's Trail S.E., Warren, Ohio, and then titled to Dietl. Sipka answered and counterclaimed seeking a declaration that she had a valid first and best interest in the property. Dietl replied to the Counter Claim. Dietl and Sipka each filed Motions for Summary Judgment. On March 23, 2009 the Trial Court granted summary judgment in favor Dietl and against Sipka on both Motions. Sipka appealed that judgment to the Court of Appeals for Trumbull County, Ohio, Eleventh Appellate District. On November 30, 2009 the Court of Appeals affirmed the Trial Court's grant of Summary Judgment in a split decision.

Prior to July 8, 2002, Sipka and her ex-husband, Albert R. Sipka, were the owners, as tenants in common, of the residence and real estate located at 8598 Hunters Trail SE, Warren, Ohio ("hereafter the "real estate"). On May 8, 2002 the parties entered into a Separation Agreement in conjunction with a Petition for Dissolution of their Marriage. On July 1, 2002, in contemplation of their marriage being dissolved, Albert Sipka refinanced the real estate with Countrywide Home Loans, Inc., and Sipka signed the mortgage which was recorded July 8, 2002 with the Trumbull County Recorder. On July 8, 2002 Sipka was granted a Decree of Dissolution of Marriage in case number 2002-DS-174 of the Trumbull County Common Pleas Court, Domestic Relations Division. Sipka's Dissolution Separation Agreement provided that if her ex-husband was unsuccessful within ninety (90) days of the date of the Separation Agreement in obtaining refinancing in order to pay Sipka the sum of Twenty-five Thousand Dollars

(\$25,000.00) representing her marital interest in the real estate, then she would retain an interest (lien) in the real estate for Twenty-five Thousand Dollars (\$25,000.00) representing her share of the marital real estate. While Albert Sipka did refinance, he was unable to do so in a sum sufficient to pay Sipka the Twenty-five Thousand Dollars (\$25,000.00) for her interest in the real estate.

Pursuant to the Dissolution Separation Agreement and the Final Decree of Dissolution, Sipka transferred the real estate to her ex-husband by Quit Claim deed dated November 18, 2002 and recorded November 18, 2002 with the Trumbull County Recorder. Consistent with the terms of the Separation Agreement, Sipka's Quit Claim Deed contained the following language:

Excepting and reserving a lien in the amount of Twenty Five Thousand Dollars (\$25,000.00) bearing six percent (6%) interest pursuant to the Separation Agreement filed in the Court of Pleas, Division of Domestic Relations, Trumbull County, Ohio

On February 13, 2004, Countrywide Home Loans, Inc., filed a mortgage foreclosure action in the Trumbull County Common Pleas Court against the real estate subject to Sipka's lien, but did not name Sipka as a party, or give her any notice of the proceedings. Further, Countrywide never notified Sipka or the court that it was seeking to adjudicate Sipka's interests and rights as described in the deed. In May, 2006, Countrywide purchased the real estate at Sheriff's Sale for the sum of \$157,000.00 and assigned its bid to Federal National Mortgage Association (hereafter FNMA). The Court confirmed FNMA's purchase of the real estate by Judgment Entry filed June 6, 2006. Subsequently Plaintiffs Dietl (hereinafter "Dietl") bought the real estate from FNMA on October 18, 2007.

The Title Examination Companies and the Title Insurance Companies in the foreclosure case, as well as in the sale to Dietl, failed to identify Sipka's \$25,000.00 interest as specifically reserved and described on the face of the deed.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: A valid and enforceable interest in real property may be created by reserving such in the deed conveying the property when the deed is properly recorded with the County Recorder.

R.C. § 5301.25(a) specifies the procedure for perfecting an interest in or an encumbrance against real estate, and says in pertinent part:

All deeds...and instruments of writing properly executed for the conveyance or encumbrance of lands...shall be recorded in the office of the county recorder of the county in which the premises are situated.

An encumbrance is a “claim or liability that is attached to property...that may lessen its value...[and] remains after the property is transferred.” *Black’s Law Dictionary* 547 (7th Ed. 1999). Ohio is a record notice state so that the first encumbrance recorded upon real property shall have preference over subsequent encumbrances. *Bank of New York v. Stambaugh*, 2003 WL 22844627 (Ohio App. 11 Dist.); R.C. 5301.23; R.C. 5301.25.

In this case Sipka’s quit claim deed to her former husband clearly described and reserved an interest in and encumbrance against the real property described in the deed, in the sum of Twenty-five Thousand Dollars (\$25,000.00). Pursuant to R.C. 5301.25 the deed was properly recorded with the Trumbull County Recorder several years prior to commencement of the foreclosure action by Countrywide, and many years prior to Dietl’s purchase of the property. It is logical, and well settled in this state, that when a recorded deed actually reserves an encumbrance or displays a defect in title, ““what is written on the face of the deed must control.”” *Kohlbrand v. Ranieri* (2005), 159 Ohio App.3d 140 at 144 quoting *Stambaugh v. Smith* (1873), 23 Ohio St. 584.

In *Kohlbrand, supra*, a developer, Monfort, purchased a large tract of land *via* a deed that specifically described on its face an easement for a gas pipeline. Monfort then divided the tract

into parcels and sold a parcel to Ranieri via to a general warranty deed. The deed stated that the parcel was “clear, free and unencumbered”, and failed to note the encumbrance created by the pipeline easement. *Kohlbrand, supra*. Ranieri subsequently sold the parcel to Kohlbrand. Ranieri’s deed to Kohlbrand also failed to mention the easement as an encumbrance. When Kohlbrand later discovered the easement, he filed a lawsuit. *Id.* The First District Court of Appeals held that Monfort had to defend and indemnify Ranieri against the Kohlbrand’s claim for damages arising from the easement. *Id.* The First District said that the parcel in issue was subject to an encumbrance and that the Monfort should have disclosed the encumbrance **the on the face of the deed in plain language** such “that any first-year law student should be able to answer [or interpret whether the property is free and clear or encumbered]” *Id.* at 144.

Despite the plain language of Sipka’s quit claim deed, specifically reserving to herself a \$25,000.00 interest in the property, the Trial Court found that Sipka’s deed did not encumber the property in issue. The Trial Court ignored that the \$25,000.00 encumbrance was explicitly stated, reserved and recorded in compliance with R.C. 5301.25. The Trial Court improperly focused its analysis upon R.C. 2329.02, which provides that “[a]ny judgment or decree...within this state shall be a lien upon lands and tenements of each judgment debtor within any county of this state...[upon the filing of]...a certificate of such judgment,” which sets forth the details of the judgment. The Trial Court said that Sipka’s deed did not encumber the property because there was no “perfection” of the \$25,000.00 claim, since no certificate of judgment memorializing the \$25,000.00 debt was filed against Albert Sipka, separate and apart from the recorded deed. The Trial Court therefore concluded that no formal “lien” existed against the premises.

The Trial Court's reliance on Section R.C. §2329.02 was misplaced because Sipka specifically encumbered the property via the reservation of a Twenty-five Thousand Dollar (\$25,000.00) interest in her properly recorded deed. The Trial Court relied on R.C. §2329.02 because it did not comprehend that the basis of Sipka's interest of Twenty-five Thousand Dollars (\$25,000.00) in the real estate arose, not from Sipka's "Decree of Dissolution of Marriage", but from her original ownership interest in the property and the underlying Separation Agreement which provided for how that ownership interest was to be paid for or preserved.

The Separation Agreement between Sipka and her ex-husband is governed by R.C. § 3103.05 permitting spouses to contract with one another and R.C. § 3103.06 dealing with immediate separation. In this case, it is the written Separation Agreement, and not the final Decree of Dissolution of Marriage, which governs the transactions and obligations between Sipka and her ex-husband and provides how Sipka's existing interest in the real estate will be paid for or preserved. Had there never been a Dissolution of Marriage, the Separation Agreement would still have been enforceable as between Sipka and her ex-husband. While the decree of Dissolution of Marriage adopts and incorporates the Separation Agreement as part of the decree, it does not create any new or different obligations between the parties, nor does Sipka claim to rely upon it as the basis for her interest in the real estate. An analysis of R.C. § 2329.02 may have been appropriate if Sipka desired to place a "judgment lien" upon any and all other lands owned by her former husband in Trumbull County without specifically altering the face of the deeds to those lands and pursuant to the actual Decree of Dissolution. However, that is not the case, and an analysis under R.C. 2329.02 was improper and inapplicable.

Following the logic of the Trial Court and the Court of Appeals, a grantor could never, *via* a Quit Claim Deed: transfer her home to her children and reserve a life estate to herself;

could never reserve an easement to herself over property she conveys to another; or could never retain mineral rights in property she sells---things that are done hundreds, if not thousands, of times a day all across the State of Ohio. None of these transactions requires a certificate of judgment, a recorded judgment or a mortgage to be valid and acknowledged. In the case *sub judice*, Sipka did nothing more than reserve to herself, *via* the Quit Claim Deed, a Twenty-five Thousand Dollar (\$25,000.00) interest in the real estate she owned and was transferring to her ex-husband, just as the parties had contracted for in their Separation Agreement.

Several cases may be distinguished from the case *sub judice*. *Dressler v. Bowling* (1986), 24 Ohio St.3d 14, for instance, is discernable, as it involved a party who attempted to place a judgment lien against real estate by filing a certified copy of a foreign judgment entry with the clerk of the Preble County, Ohio, Common Pleas Court without first undertaking an action to reduce the foreign judgment to an Ohio judgment from which a certificate of judgment could then be issued as a judgment lien. Likewise, *Vickory v. Vickory* (1988), 44 Ohio App.3d 210 involved an attempt to enforce an unrecorded mortgage arising under a divorce decree which was also unrecorded. The Court held that if the mortgage or a certified copy of the judgment is not recorded with the county recorder there is no lien nor public notice of such. Again, not the case *sub judice*.

Further, *First Federal S & L Ass'n of Lakewood v. Dus*, 2003 WL 21545126; *Zalewski v. Chalasta*, 1994 WL 449560; and *Campbell v. Campbell*, 1992 WL 56794 all involve facts and legal principles distinct from those *sub judice*. *First Federal S & L Ass'n of Lakewood, supra* held that a judgment lien filed against only one spouse, who owns real estate as tenants by the entirety with the other spouse, does not attach to the real estate and is not a lien. Further, the court held that in order for a judgment to constitute a lien against real estate it must be properly

recorded and describe who the judgment creditors and debtors are, the amount of the judgment, etc. In as much as Sipka's interest arises from her original ownership of the real estate and the Separation Agreement, and not from her Decree of Dissolution of Marriage, the First Federal case is irrelevant to the issues here.

Campbell and *Zalewski* are not applicable as they deal with unfiled judgment liens and not liens arising from contract, which are memorialized by a recorded Quit Claim Deed.

Fundamentally, the Trial Court failed to understand or to properly define the term "lien", when it construed the term to only include "judgment liens." *Black's Law Dictionary* on the other hand defines the term as "a charge or encumbrance upon property for the payment of some debt, obligation or duty; it is a generic term and standing alone, includes liens acquired by contract or by operation of law". *Black's Law Dictionary* 1072 (Rev'd 4th Ed., 1968); see also, *Ohio Jurisprudence* 3d, Liens, § 1. The Trial Court failed to distinguish between Sipka's Separation Agreement and the Final Decree of Dissolution of Marriage. In this case, Sipka's interest is not a judgment lien and never has been, but arises from her original ownership of the real estate. Sipka's interest, is in fact, a retained interest in the property she conveyed to her now ex-husband as opposed to a lump sum money judgment.

As a matter of law Sipka, retained and still has a valid and enforceable interest in the real estate in issue, and the Trial Court was in error to find otherwise, and the Court of Appeals erred in affirming the Trial Court's decision. Contrary to the Trial Court's analysis, where the intent of the parties may be gleaned from the face of the deed, the express language thereof must be given effect and further interpretation is rendered unnecessary. *In re Estate of Shelton* (2003), 154 Ohio App. 3d 188.

Conclusion

In this case, Sipka properly recorded a deed which on its face encumbered the real estate in issue, thereby satisfying all procedural and substantive requirements for maintaining her interest in the land arising out of her original ownership and her Separation Agreement with her former spouse. For the reasons discussed above, this case involves an issue of great public interest in the fields of Domestic Relations and Real Estate practice. Appellant requests that this court accept jurisdiction in this case so that the issue presented will be reviewed on the merits.

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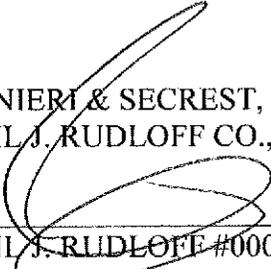
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Proof of Service

Defendant served a copy of the foregoing Memorandum Supporting Jurisdiction by ordinary U. S. Mail this 12th day of January, 2010 upon the following:

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THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

FILED
COURT OF APPEALS
NOV 30 2009
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

ROBERT F. DIETL, et al., : **OPINION**
Plaintiffs-Appellees, :
- vs - : **CASE NO. 2009-T-0025**
CATHERINE A. SIPKA, :
Defendant-Appellant. :

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2008 CV 1185

Judgment: Affirmed.

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DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Catherine A. Sipka, appeals the Judgment Entry of the Trumbull County Court of Common Pleas, in which the trial court granted Plaintiff-appellee, Robert F. Dietl's, Motion for Summary Judgment. For the following reasons, we affirm the decision of the trial court.

{¶2} Prior to July 2002, Sipka and her husband, Albert R. Sipka, were co-owners and residents of real estate located at 8598 Hunter's Trail, in Warren, Ohio. On July 8, 2002, Sipka and Albert ended their relationship by way of dissolution and a separation agreement. The separation agreement provided that Sipka "shall receive Twenty-Five Thousand Dollars (\$25,000.00) as her interest in the marital residence. [Albert] shall attempt to refinance the property to immediately pay [Sipka] her equity. If [Albert] is unsuccessful in obtaining the refinancing within ninety (90) days [Sipka] shall retain a lien for Twenty Five Thousand (\$25,000.00) on the property, bearing six percent (6%) interest. The Twenty Five Thousand Dollars (\$25,000.00) must be paid to [Sipka] no later than thirty six (36) months from the date of the dissolution."

{¶3} Prior to the finalization of the divorce, Albert refinanced the mortgage; however, the refinanced amount was not enough to pay Sipka her interest in the residence. After the divorce on November 18, 2002, Sipka executed a quit claim deed to Albert containing the following language: "[e]xcepting and reserving a lien in the amount of Twenty Five Thousand Dollars (\$25,000) bearing six per cent (6%) interest pursuant to the Separation Agreement filed in the Court of Common Pleas, Division of Domestic Relations, Trumbull County, Ohio."

{¶4} On February 13, 2004, Albert's mortgage was foreclosed. The foreclosure failed to name Sipka as a party and the title work did not disclose any potential defects as to the title. In May of 2006, the property sold at public auction for \$157,000, an amount less than the first mortgage on the house, to Countrywide Home Loans, Inc. Countrywide assigned its bid to Federal National Mortgage Association (Fannie Mae).

{¶5} Robert Dietl and his wife, Angela, purchased the property from Fannie Mae on October 18, 2007.¹ The instant action stems from the Dietls' response to Sipka's claim that she retains a lien on the house.

{¶6} On April 16, 2008, the Dietls filed a Complaint for Declaratory Judgment and to Quiet Title. Both the Dietls and Sipka filed Motions for Summary Judgment. On March 23, 2009, the trial court granted the Dietls' Motion for Summary Judgment on their Complaint for Declaratory Judgment and to Quiet Title. The trial court held that "no certificate of judgment was filed against Albert Sipka, and therefore, no lien attached, even though one was referenced by way of the dissolution case in the quit claim deed. *** The unperfected lien of [Sipka] *** would have had no legally recognizable attachment to Albert's property until such time as it was properly perfected." Consequently, the court found that "as a matter of law *** Sipka has no lien on the parcel of land commonly known as 8598 Hunters Trail."

{¶7} Sipka timely appeals and raises the following assignment of error:

{¶8} "The trial court erred in granting Dietl summary judgment against Sipka and in denying Sipka's motion for summary judgment against Dietl."

{¶9} "Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, at ¶12, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. "In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party." *Id.*, citing Civ.R. 56(C). Further,

1. Sipka admits that she "knew [the house] had been foreclosed on prior to [the Dietls] purchasing it."

the standard by which we review the granting of a motion for summary judgment is de novo. *Id.*, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336.

{¶10} Accordingly, "(s)ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. The moving party bears the initial burden of informing the trial court of the basis of the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Brunstetter v. Keating*, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, at ¶12, citing *Dresher*, 75 Ohio St.3d at 292. "Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Id.*, citing *Dresher*, 75 Ohio St.3d at 293.

{¶11} The Dietls contend that the "alleged lien is a nullity because it is not a lien under R.C. 2329.02 or a mortgage under R.C. 5302.12." "Sipka lost any right to priority when she signed the refinancing mortgage without making sure that she would get paid." Moreover, "[g]iven the plethora of choices available to her to perfect her claim, the decision to reserve her claim in the Quit Claim Deed was fatal."

{¶12} Sipka asserts that she "specifically encumbered the property via her properly recorded deed" and "as a matter of law [she] retained and still has a valid and enforceable lien or encumbrance against the real estate in issue and *** the trial court was in err to find otherwise." She argues that the lien was not an unfiled judgment lien, it was a lien "arising from contract *** memorialized by a recorded Quit Claim Deed."

{¶13} Sipka claims her reservation in the quit claim deed is an encumbrance under R.C. 5301.25(A), which provides that “[a]ll deeds, land contracts ***, and instruments of writing properly executed for the conveyance or encumbrance of lands, *** shall be recorded in the office of the county recorder of the county in which the premises are situated. Until so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument.” We disagree.

{¶14} This court has previously defined “encumbrance” to mean “[a]ny right to, or interest in, land which may subsist in another to diminution of its value, but consistent with the passing of the fee by conveyance. *** A claim, lien, charge, or liability *attached to and binding* real property; e.g. a mortgage; judgment lien; mechanics lien; lease; security interest; easement or right of way; accrued and unpaid taxes. If the liability relates to a particular asset, the asset is encumbered.” *Liddy v. Studio*, 11th Dist. No. 96-G-2009, 1997 Ohio App. LEXIS 1465, at *7, quoting Black’s Law Dictionary (6 Ed. 1991) 527 (emphasis added). Since the lien was not perfected at the time of the quit claim deed, it does not qualify as an encumbrance. See *Liddy*, 1997 Ohio App. LEXIS 1465, at *9 (“[I]f the tap-in fee had been mandatory and in effect at the time of the sale, then it would have qualified as an encumbrance entitling appellants to relief. However, under the facts as they existed, the trial court properly granted summary judgment in favor of appellee based upon its determination that the tap-in fee was not an encumbrance.”).

{¶15} R.C. 2329.02 provides that “[a]ny judgment or decree rendered by any court of general jurisdiction *** within this state shall be a lien upon lands and tenements of each judgment debtor within any county of this state *from the time there is filed* [sic] *in the office of the clerk of the court of common pleas of such county a certificate of such judgment, setting forth the court in which the same was rendered, the title and number of the action, the names of the judgment creditors and judgment debtors, the amount of the judgment and costs, the rate of interest, if the judgment provides for interest, and the date from which such interest accrues, the date of rendition of the judgment, and the volume and page of the journal entry thereof.*” (Emphasis added).

{¶16} “R.C. 2329.02 outlines the procedure for converting judgments into liens. *** [N]o judgment lien is created or enforceable against real property unless a certificate of judgment is filed in accordance with R.C. 2329.02.” *Campbell v. Campbell*, 4th Dist. No. 91 CA 17, 1992 Ohio App. LEXIS 1315, at *10; *First Fed. S. & L. Assn. v. Dus*, 8th Dist. Nos. 79018 and 79039, 2003-Ohio-3639, at ¶28 (“[i]t is well settled that unless a certificate of judgment is filed in accordance with R.C. 2329.02, no judgment lien is *created or enforceable* against real property”) (emphasis added).

{¶17} “Judgment liens are creatures of statute. From its earliest decisions, this court has recognized that the creation, existence and validity of judgment liens are strictly dependent upon statutory provisions. [See] *Davis v. Messenger* (1867), 17 Ohio St. 231; *Kilbreth v. Diss* (1873), 24 Ohio St.2d 379; *Tucker v. Shade* (1874), 25 Ohio St. 355; *Gorrell v. Kelsey* (1883), 40 Ohio St. 117.” *Campbell*, 1992 Ohio App. LEXIS 1315, at *10 (citation omitted).

{¶18} Sipka obtained the lien interest in the marital property pursuant to the separation agreement. The lien was the result of a legal proceeding to dissolve the marriage of Albert and Sipka. Although the lien stems from Sipka's separation agreement, which is a contract between the parties, the lien was never binding upon them until further action was taken. Thus, at the time of the reservation of the lien in the quit claim deed, there was not a perfected lien to reserve, since Sipka failed to perfect the judicial lien according to R.C. 2329.02². Additionally, the reservation in the Quit Claim Deed would only put title examiners and purchasers on notice that there was a "lien" on the property, which, upon further investigation, would reveal there was not a perfected lien recorded on the property.

{¶19} Even though Sipka never perfected her lien, it can be argued that she still had an interest of \$25,000 in the property. In spite of this, after the foreclosure and the parties to the foreclosure had been paid their interests, Sipka's interest was extinguished and mooted.

{¶20} Although Sipka was not provided notice to the foreclosure, this is a moot point. Even if Sipka had been a party to the foreclosure, there were not sufficient funds for Sipka to be paid her interest. The foreclosure Judgment Entry stated that "the sum of \$160,259.45, with interest at the rate of 7.5 percent per annum from August 1, 2003, together with advances for taxes, insurance and otherwise expended, plus costs" were to be paid to the co-plaintiffs, Countrywide Home Loans, Inc., and Mortgage Electronic Registration Systems, Inc., as nominee for lender. The Journal Entry Confirming Sale ordered the Sheriff to pay the claims from the sale price in the order of their priority, and

2. Alternatively, Sipka could have filed a corresponding mortgage deed pursuant to R.C. 5302.12 to secure her interest in the marital residence.

Countrywide Home Loans only received partial satisfaction of its judgment, \$156,194.127. Thus, even if Sikpa had received notice of the foreclosure and asserted her purported interest, she would not have had priority over the mortgage lender and would not have received any proceeds, as there were no proceeds left to collect. R.C. 5301.23 (“[t]he first mortgage presented shall be the first recorded, and the first mortgage recorded shall have preference”).

{¶21} Additionally since all the proceeds have been distributed, this renders the case moot. *Bankers Trust Co. of California, N. A. v. Tutin*, 9th Dist. No. 24329, 2009-Ohio-1333, at ¶16 (“[i]n foreclosure cases, as in all other civil actions, after the matter has been extinguished through satisfaction of the judgment, the individual subject matter of the case is no longer under the control of the court and the court cannot afford relief to the parties to the action. Because there is no live controversy before this Court, the appeal is dismissed as moot”) and ¶15 (“R.C. 2329.45 does not even suggest that the appealing party also has a remedy after the distribution of the proceeds of the sheriff’s sale, and it cannot reasonably be construed to preserve a controversy that has been extinguished”); *Aurora Loan Servs. v. Kahook*, 9th Dist. No. 24415, 2009-Ohio-2997, at ¶3 and ¶7 (Appellants claimed that they “had not been personally served with the foreclosure action” after a decree of foreclosure was entered and a writ of possession was issued. The appellants subsequently filed a motion to quash the writ and stay the execution of judgment. The court held that since the trial court had

disbursed the funds, “the judgment in this case has been satisfied and, as no live controversy exists, we must dismiss the appeal as moot”).³

{¶22} For the foregoing reasons, the Judgment Entry of the Trumbull County Court of Common Pleas, granting the Dietls’ Motion for Summary Judgment, quieting title, is affirmed. Costs to be taxed against appellant.

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion,

MARY JANE TRAPP, P. J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

{¶23} The majority opinion in this matter rests upon whether or not a judgment lien was filed here. I concur but for a different reason, not wholly inconsistent with the majority’s approach.

{¶24} The quit claim deed acts upon filing pursuant to R.C. Chapter 5301 to transfer the title of the property between the grantor and the grantee without any warranties. Conversely, if the grantor wishes to issue a warranty deed, R.C. 5302.05

3. The instant case is distinguishable from *Swanbeck v. Sheaves*, 6th Dist. No. L-85-237, 1986 Ohio App. LEXIS 5819, a case the dissent cites maintaining that the deed should be treated as an equitable mortgage. In *Swanbeck*, the trial court concluded the parties had an equitable mortgage because appellant had an agreement to “reconvey the land upon payment of [an] outstanding debt.” *Id.* at *10. In the instant case, Sipka did not have an equitable mortgage. Sipka did not transfer her interest in the property as security for a debt; she was never required or ordered to transfer her interest to Albert. The separation agreement merely permitted, but did not mandate, Albert to refinance in order to pay Sipka her interest in the marital residence. Additionally, in *Swanbeck*, the new owner of the property admitted that he had actual notice that the party asserting the equitable mortgage had invested funds in improving the property. There is no evidence that the Dietls knew that Sipka had any interest in the marital property.

requires all clouds to the title must be researched and cleared prior to issuing the deed which guarantees the property free from clouds upon the title. The question in the case at bar is whether a notation of money owed upon a contract or divorce settlement written upon the actual quit claim deed is sufficient to cloud the title. I assert it is not. The proper way to secure a single financial obligation between the grantor and grantee upon a piece of real property is by filing a corresponding mortgage deed pursuant to R.C. 5302.12.

{¶25} A judicial or judgment lien under R.C. 2329.02 is normally filed by third party creditors who do not have a property interest in the subject property nor would they have privity to require a promissory note and a secured mortgage as between the original parties, the grantor or the grantee, to the transaction. The third party is merely a creditor to one of the original parties to the transaction and does not as such have a connection or property interest in the real property.

{¶26} A judicial or judgment lien would serve to encumber all property owned by appellee, not just the real estate at issue in the divorce decree. A judgment lien in this humble writer's opinion, although sufficient to stop the transfer of the property is far too blunt an instrument for the task, is not required nor is it best practice given these facts. I assert the parties could have signed a quit claim deed with a promissory note and mortgage deed. Thus, properly perfecting the lien, either scenario would have been sufficient pursuant to the terms of the divorce. In this writer's humble opinion, the dissent's position disregards statutory requirements for encumbering debt upon real property and flies in the face equity to all innocent third party purchasers for value who acquired the property in good faith after the sale.

{¶27} Therefore, I concur, but write separately with the majority opinion in that the quit claim deed altered on its face, though it is properly recorded, is not sufficient to secure the interest of appellant in this matter.

MARY JANE TRAPP, P. J., dissenting.

{¶28} I respectfully dissent. The majority determined that because a lien was not perfected by the recording of the quit claim deed, there was no perfected interest reserved by the quit claim deed. I disagree. I believe the transactions here should not be determined by their labels but by their substance. Mrs. Sipka's property interest predated the separation agreement. The separation agreement is not the *source* of her interest in the subject real estate but a contract in which she agreed to transfer her interest in the property *except for \$25,000*. She originally owned a half interest in the real property. She surrendered this interest, *except for \$25,000*, by way of the quit claim deed, which was properly recorded pursuant to R.C. 5301.25. A deed intended to secure performance of an obligation will be treated as an equitable mortgage whether or not such interest is disclosed by the instrument. See *Swanbeck v. Sheaves* (Mar. 7, 1986), 6th Dist. No. L-85-237, 1986 Ohio App. LEXIS 5819, 8-9.

{¶29} Because of her retained interest in the real property, equity and due process required that she receive notice of the foreclosure. Persons having liens upon land, not being made parties to the proceeding, will not be affected by a decree subjecting such land to sale. *Myers v. Hewitt* (1847), 16 Ohio 449, 451. "When creditors desire to sell lands of their debtor, free from incumbrances, justice to him

requires that the incumbrancers should be made parties to the proceedings, before the order of the sale." *Ketcham v. Fitch* (1862), 13 Ohio St. 201, 209-210. Thus the failure to join as a party one who has an interest in the property necessarily results in the purchaser at judicial sale taking title subject to that interest. Simply put, the claim or interest of the omitted party has not been foreclosed or cut off by the proceeding. See, generally, *Hembree v. Mid-America Fed. Sav. & Loan Ass'n* (1989), 64 Ohio App.3d 144. Thus, Mrs. Sipka's retained interest in the property survived the foreclosure sale, as she was not given notice of the foreclosure proceedings.

{¶30} The doctrine of caveat emptor is applicable to judicial sales of real property. *Society Nat'l Bank v. Wolff* (Apr. 26, 1991), 6th Dist. No. S-90-13, 1991 Ohio App. LEXIS 1821, 8-9, citing *Mechanics Sav. & Bldg. Loan Assoc. v. O'Conner* (1876), 29 Ohio St. 651. The purchaser "buys with his eyes open, at his own risk, and is without [recourse] in case there is a defect in the title of the former owner of the property bought." *Kain v. Weitzel* (1943), 72 Ohio App. 229, 233 (citation omitted).

{¶31} Based on the foregoing, I would hold that Mrs. Sipka's interest remains an encumbrance against the subject property until it is properly extinguished.

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

ROBERT F. DIETL, et al.,

Plaintiffs-Appellees,

- vs -

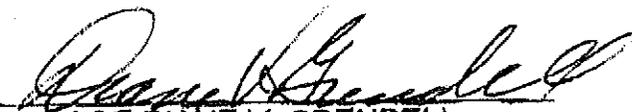
CATHERINE A. SIPKA,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2009-T-0025

For the reasons stated in the Opinion of this court, the sole assignment of error is without merit. The order of this court is that the judgment of the Trumbull County Court of Common Pleas is affirmed. Costs to be taxed against appellant.


JUDGE DIANE V. GREDELL

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

MARY JANE TRAPP, P.J., dissents with a Dissenting Opinion.

FILED
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NOV 30 2009
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK