

Procedural History

{¶ 2} In June 2018, plaintiff-appellee Huntington National Bank (“Huntington”) initiated this foreclosure action against defendant-appellant Halle Rex (“Rex”) and “John Doe, real name unknown, the unknown spouse, if any, of Halle Rex.” After the defendants were served and failed to answer, the bank moved for default judgment in October 2018. On October 23, 2018, a hearing was held on Huntington’s motion, at the conclusion of which the trial court granted the motion in favor of the bank and against Rex and her unknown spouse.

{¶ 3} In January 2019, Conner filed a motion to intervene, which the bank opposed. In April 2019, Conner filed a motion for declaration of priority of lien. On May 15, 2019, the trial court denied Conner’s motions to intervene and for declaration of priority of lien. Conner did not file a motion to stay the proceeding, and Huntington continued its efforts to foreclose on the subject property. The foreclosure sale occurred in the summer of 2019, and the sale was confirmed in the fall of 2019.

Factual History

{¶ 4} Conner is Rex’s former husband; their divorce was finalized in 2009. During the course of their marriage, Rex was the owner of property located in Solon, Ohio, and which consisted of two parcels of land. In 2002, during the divorce proceeding, Conner obtained an ex parte restraining order against Rex relative to the subject property. Specifically, the order restrained Rex from “encumbering,

transferring, selling, or otherwise hypothecating her interest in the real property.”
Conner filed the order with the county recorder and auditor on August 15, 2002.

{¶ 5} In 2017, Rex and Conner filed an agreed judgment in their divorce case. Apparently, Rex sought to sell one parcel of land. Under the agreed judgment, the 2002 restraining order was dissolved against Rex as to the one parcel of land in exchange for Rex paying a fixed amount out of the proceeds of the sale to Conner. The agreement stated that the 2002 restraining order “is specifically **NOT** dissolved as it relates to [the other] parcel * * * owned by Plaintiff, Halle Rex.” (Emphasis sic.) The remaining parcel is the one the bank foreclosed on and subject to this appeal.

Conner’s Motion to Intervene

{¶ 6} In his motion, Conner contended that he had a valid lien against the subject property and that his lien had priority over the bank’s lien. According to Conner, Huntington had been aware of his lien prior to its filing the foreclosure action. In support of his contention, Conner attached a copy of the restraining order from the domestic relations court that he filed with the county recorder and auditor on August 15, 2002.

{¶ 7} In its opposition to Conner’s motion to intervene, the bank contended that Conner had “no valid lien against the real property. Instead, Richard T. Conner has, at best, a contempt of court order claim against Defendant, Halle Rex, in the Domestic Relations division of this Court.”¹ Huntington contended that, because it

¹Neither the preliminary nor the final judicial reports filed by the bank listed Conner as a lienholder against the property.

was not a party to Rex and Conner's divorce case, it was not bound by any judgments in that case.

{¶ 8} Further, according to Huntington, the recorded document filed with the recorder in 2002 did not "constitute evidence that title to the subject real estate is affected." Rather, Huntington maintained that, under R.C. 5301.252, Conner was required to "record a proper affidavit as to Defendant, Halle Rex's[,] lack of legal capacity in order to provide constructive notice and evidence of same."

Trial Court's Judgment

{¶ 9} The trial court found that Rex held title to the property since 1997, and that Conner "failed to establish that he has any right, title, or interest in the subject property or possesses a lien that attached to the subject property." Thus, the trial court found that Conner was not a necessary party to the foreclosure action and denied his motions to intervene and for declaration of priority of lien.

Law and Analysis

{¶ 10} The sole assignment of error reads, "The trial court erred in denying Richard T. Conner's motion to intervene."

{¶ 11} Intervention is governed by Civ.R. 24; intervention can be "of right" or "permissive." In his motion at the trial-court level, Conner did not state which avenue he was attempting to intervene under, but here on appeal he contends that it was "of right." Under Civ.R. 24(A), which governs intervention of right,

upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the

property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

{¶ 12} Conner contends that subsection (2) applied to him.

{¶ 13} Although motions to intervene should be liberally construed, the standard of review of a ruling on a motion to intervene, whether as of right or by permission, is whether the trial court abused its discretion. *Grogan v. T.W. Grogan Co.*, 143 Ohio App.3d 548, 560, 758 N.E.2d 702 (8th Dist.2001), citing *Peterman v. Pataskala*, 122 Ohio App.3d 758, 761, 702 N.E.2d 965 (5th Dist.1997).

{¶ 14} A party seeking intervention of right must show: (1) the application is timely; (2) the intervenor claims an interest relating to the subject of the action; (3) the intervenor is so situated that the disposition of the action may as a practical matter impair or impede his or her ability to protect that interest; and (4) the existing parties do not adequately represent his or her interest. *Grogan at id.*, citing *Widder & Widder v. Kutnick*, 113 Ohio App.3d 616, 624, 681 N.E.2d 977 (8th Dist.1996).

{¶ 15} As it pertains to the ground upon which the trial court denied Conner's motion — the requirement that the proposed intervenor claims an interest relating to the property or transaction that is the subject of the action — the proposed intervenor's interest must be "direct, substantial, and legally protectable." *Fairview Gen. Hosp. v. Fletcher*, 69 Ohio App.3d 827, 832, 591 N.E.2d 1312 (10th Dist.1990);

Grover Court Condominium Unit Owners' Assn. v. Hartman, 8th Dist. Cuyahoga No. 94910, 2011-Ohio-218, ¶ 16.

{¶ 16} In a foreclosure action, the mortgaged property is the subject matter of the action. *Women's Fed. Sav. Bank v. Akram*, 33 Ohio App.3d 255, 256, 515 N.E.2d 939 (8th Dist.1986). "Parties who claim an interest in the property * * * include mortgage holders, parties who have judgment liens, or parties who may have signed contracts to purchase or lease the property." *KeyBank Natl. Assn. v. Liberty Holding Group, L.L.C.*, 8th Dist. Cuyahoga No. 93888, 2011-Ohio-923, ¶ 18, quoting *Green v. Lemarr*, 139 Ohio App.3d 414, 431, 744 N.E.2d 212 (2d Dist.2000). Conner first contends that he had an interest in the property because he had a lien on the property under the 2002 filing with the auditor and recorder's offices. We disagree.

{¶ 17} The 2002 restraining order, and Conner's filing of it, did not create a lien. R.C. 2329.02 governs judgment liens, and provides in relevant part as follows:

Any judgment or decree rendered by any court of general jurisdiction, including district courts of the United States, 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 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.

{¶ 18} The restraining order that Conner relies on for his contention that he had a lien against the subject property does not meet the criteria for a judgment lien under R.C. 2329.02. The order does not set forth a judgment creditor, judgment

debtor, the amount of judgment, and interest, if any. Rather, it restrains Rex from “encumbering, transferring, selling, or otherwise hypothecating her interest in the real property.” Further, no lien was created merely because he filed it with the recorder and auditor’s offices.

{¶ 19} As mentioned, Huntington contends that Conner could have filed an affidavit under R.C. 5301.252, which is titled “affidavits on facts relating to title.” Subsection (A) of the statute provides as follows:

An affidavit stating facts relating to the matters set forth under division (B) of this section that may affect the title to real estate in this state, made by any person having knowledge of the facts or competent to testify concerning them in open court, may be recorded in the office of the county recorder in the county in which the real estate is situated. When so recorded, such affidavit, or a certified copy, shall be evidence of the facts stated, insofar as such facts affect title to real estate.

{¶ 20} Under subsection (B)(3), an affidavit filed under this section may provide information relating to the “happening of any condition or event that may create or terminate an estate or interest.” R.C. 5301.252(B)(3). Conner did not file an affidavit under the statute. But even had he done so, such an affidavit would not have created an equitable lien or encumbrance on the property. *See Bradford v. Reid*, 126 Ohio App.3d 448, 453, 710 N.E.2d 761 (1st Dist.1998) (“The filing [of an affidavit] itself creates no interest in the property or encumbrance on the title. The filing can only be *evidence* of an adverse interest, not an interest itself.”) (Emphasis sic.)

{¶ 21} Conner next contends that his interest in the property was protected under the doctrine of lis pendens. R.C. 2703.26 generally explains the doctrine:

When a complaint is filed, the action is pending so as to charge * * * third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title.

{¶ 22} The following elements are required to invoke the doctrine of lis pendens:

(1) The property must be of a character to be subject to the rule; (2) the court must have jurisdiction over both the person and the res; and (3) the property or res involved must be sufficiently described in the pleadings. It may be added that the litigation must be about some specific thing that must be necessarily affected by the termination of the suit.

Third Fed. Sav. & Loan Assn. v. Hayward, 9th Dist. Summit No. 18561, 1998 Ohio App. LEXIS 3765, 13 (Aug. 19, 1998), quoting *Cook v. Mozer*, 108 Ohio St. 30, 37, 140 N.E. 590 (1923). “The doctrine of lis pendens protects a plaintiff’s interest in real estate *while the case is pending*.” (Emphasis added.) *Bank of New York v. Stambaugh*, 11th Dist. Trumbull No. 2002-T-0184, 2003-Ohio-6416, ¶ 25.

{¶ 23} In *Hayward*, the Ninth Appellate District considered the doctrine of lis pendens in a foreclosure involving divorced spouses. In that case, the husband and wife’s divorce decree ordered the subject property sold and instructed how the proceeds were to be divided. The divorce decree was not recorded but the Ninth District Court of Appeals held that lis pendens protected the wife’s interest in the property.

{¶ 24} But in *Hayward*, unlike here, the divorce decree explicitly stated that the domestic relations court retained jurisdiction over the subject property “until it is sold.” Thus, the Ninth District determined that the “doctrine of lis pendens

continued to protect [the wife's] interest in the * * * property until the sale of that property had been effected as ordered pursuant to the 1993 divorce decree." *Id.* at 14-15. Thus, even though the husband and wife's divorce case was not pending at the time of the foreclosure, the divorce decree at issue relative to the subject property specifically stated that the court retained jurisdiction over the property until it was sold.

{¶ 25} *Hayward* contrasts with *Stambaugh*, 11th Dist. Trumbull No. 2002-T-0184, 2003-Ohio-6416. In *Stambaugh*, the Stambaughs were divorced in 1981, and the wife was awarded the marital residence, which was previously titled in her name. The husband was awarded a \$66,927.50 lien against the property. The husband did not record his lien.

{¶ 26} In 1986, the Stambaughs were in the domestic relations court again litigating various issues. Relative to the property, the court issued a judgment stating that the husband's lien was the first lien of priority. The judgment entry ended with the language "all this until further order of the court." *Id.* at ¶ 3.

{¶ 27} In 1995, the wife executed a mortgage with the Bank of New York. The mortgage was recorded in the county recorder's office. The wife became delinquent and the bank commenced foreclosure proceedings. The husband intervened in the action, and maintained that he had superior interest in the property because of the lien conveyed to him via the 1981 judgment in the divorce action. The issue before the Eleventh Appellate District was whether the husband or the bank's lien had priority.

{¶ 28} The appellate court found that the bank’s lien had priority. The court first noted that regardless of the domestic relations court’s judgment granting the husband an interest in the subject property, it needed to be recorded as mandated by R.C. 5301.23 and 5301.25. The Eleventh District distinguished its case from *Hayward*, finding that in *Hayward*, no lien was granted; rather, the property was ordered sold. The appellate court further distinguished *Hayward* by noting that the domestic relations court’s judgment in *Hayward* specifically stated that it retained jurisdiction over the property, while the judgment in *Stambaugh* merely stated “all this until further order of the court.” *Stambaugh* at ¶ 24.

{¶ 29} Here, not only was Rex and Conner’s divorce case not pending at the time of the foreclosure, the judgment entry in their divorce proceeding did not make any disposition regarding the property and did not state that the domestic relations court had continuing jurisdiction over the property. Moreover, as previously discussed, the judgment did not give Conner a lien against the property.

{¶ 30} In light of the above, *lis pendens* does not apply here, and Conner did not have a lien against the subject property. The trial court did not abuse its discretion by denying Conner’s motion to intervene. His sole assignment of error is therefore overruled.

{¶ 31} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
RAYMOND C. HEADEN, J., CONCUR