

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Alan Kirshner

Court of Appeals No. L-11-1027

Appellant

Trial Court No. CI0201002088

v.

Fannie Mae, et al.

DECISION AND JUDGMENT

Appellees

Decided: January 27, 2012

* * * * *

Allan J. Chabler, for appellant.

Eric T. Deighton, for appellee Fannie Mae.

Richard J. Lolli and Justin S. Greenfelder, for appellees Timothy
and Deborah Schumann and Fifth Third Mortgage Company

* * * * *

SINGER, J.

{¶1} Appellant, a judgment creditor to an heir, appeals a summary judgment issued by the Lucas County Court of Common Pleas to the purchasers of real property

who bought property that passed through the heir's decedent's estate. Appellant also appeals the dismissal for failure to state a claim upon which relief may be granted to the decedent's lender. Because we conclude that appellant's judgment lien against the non-party heir did not attach to real property passing through the estate, we affirm.

{¶2} On April 17, 2000, Bertha Fink executed a reverse mortgage on her Toledo, Ohio home to lender Unity Mortgage Corporation. Ownership of the loan and its security eventually came to appellee Federal National Mortgage Corporation, commonly known as Fannie Mae.

{¶3} Bertha Fink died intestate on February 18, 2005, survived only by her three children; daughter Brenda Franklin and sons Philip and Matthew Fink. On March 1, 2005, and again on July 27, 2005, appellant, Alan Kirschner, filed judgment liens against Matthew Fink in the amount of \$5,128.37 with the clerk of the Lucas County Court of Common Pleas.

{¶4} On September 13, 2005, Philip Fink, as administrator of his mother's estate filed an inventory and appraisal, listing as the estate's only two assets a 1991 Buick and the Toledo house which was appraised at \$200,000. The balance outstanding on the reverse mortgage at the time was \$194,911.75. The administrator of the estate, with the consent of all beneficiaries, sought and was granted permission from the probate court to execute a deed in lieu of foreclosure to Fannie Mae. On February 15, 2006, the administrator conveyed the real estate to Fannie Mae by administrator's deed.

{¶5} On December 28, 2006, Fannie Mae conveyed the property to appellees Timothy and Deborah Schumann by special warranty deed. Appellee Fifth Third Mortgage Company is the Schumanns' lender and claims first lien on the property.

{¶6} On February 18, 2010, appellant sued Fannie Mae, the Schumanns and Fifth Third Mortgage Company to foreclose on the Fink/Schumann property. Appellant claims an interest in the land by virtue of his 2005 judgment liens against Matthew Fink.

{¶7} In the trial court, Fannie Mae moved to dismiss the case against it for failure to state a claim for which relief may be granted pursuant to Civ.R. 12(B)(6). When the trial court granted the motion, appellant attempted an interlocutory appeal. The appeal was dismissed for want of a final appealable order.

{¶8} Subsequently, the Schumanns and Fifth Third Mortgage Company moved for summary judgment, arguing that appellant's liens never attached to any interest in the property because Matthew Fink, the person against whom the liens were directed, never had a vested interest in the property. Appellant filed a counter-motion for summary judgment, arguing that his liens had attached to Matthew Fink's interest in the property. When the trial court denied appellant summary judgment and granted appellees' motion, appellant perfected this appeal.

{¶9} Appellant sets forth three assignments of error:

I. The trial court erred in granting summary judgment to Timothy and Deborah Schumann and Fifth Third Mortgage Company.

II. The trial court erred in granting Fannie Mae's motion for judgment on the pleadings. [sic]

III. The trial court erred in not granting plaintiff's motion for summary judgment.

{¶10} Civ.R. 56(C) provides that summary judgment may be granted only if (1) no genuine issue of material fact remains to be litigated, (2) it appears from the evidence that reasonable minds can reach but one conclusion and that conclusion is adverse to the nonmoving party, and (3) the moving party is entitled to summary judgment as a matter of law. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶11} "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). "In order for a court to dismiss a complaint [pursuant to Civ.R. 12(B)(6)], it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

{¶12} The facts of this matter are simple, straightforward and uncontested. The resolution to all of appellant's assignments of error lies in whether, as a matter of law, appellant's judgment lien attached to Bertha Fink's real property after she died. Appellant insists that it did; appellees maintain that it did not.

{¶13} Appellant argues that it has been settled law for 900 years that, when one who is seized of real property dies, the property devolves by descent to his or her heirs who are immediately invested with legal title and complete ownership in their own right. While the interest in property may be defeasible to satisfy encumbrances on the property, it nonetheless becomes the property of the heirs and at that point becomes subject to attachment. Since Matthew Fink was a statutory beneficiary when his mother died, he and his siblings became owners of the real property in parcenary. *See* R.C. 2105.06. The lien against Matthew Fink attached to the property while he owned it, appellant insists, and remains viable and subject to foreclosure in the underlying lawsuit.

{¶14} As might be expected, appellees do not agree. They argue that the salient feature of a reverse mortgage is that it defaults on the mortgagor's death. Consequently, when Bertha Fink died, the reverse mortgage defaulted and legal title of her property went to the mortgagee. All that went to the Fink siblings or the estate was an equitable right of redemption. Since attachment may only be had on property held at law and Matthew Fink never held legal title to the property at issue, appellees assert that appellant's judgment lien did not attach. As a result, appellant has no interest on which to foreclose.

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 * * *. R.C. 2329.02.

{¶15} Ordinarily lands of an intestate descend at once to the intestate's heirs and legal title vests in such heirs, "subject to the right of the administrator to sell the same for the payment of the debts of the intestate * * *." *Overturf v. Dugan*, 29 Ohio St. 230 (1876), paragraph one of the syllabus. Liens against real estate extant at the time of death of the decedent or acquired on the share of an heir prior to application for sale of the property are an interest in the property and the lienholder becomes a necessary party to the sale. *Keenan v. Wilson*, 19 Ohio App. 499, 509 (9th Dist.1925). If a lienholder is not made a party, however, the sale is not affected, but the lien remains attached. *Holloway v. Stuart*, 19 Ohio St. 472 (1869), syllabus.

{¶16} When a mortgage is attached to real estate, ownership of the property is more complicated. The law recognizes two types of ownership: equitable and legal.

An "equitable owner" is one who is recognized in equity as the owner of the property, because the real and beneficial use and title belong to him, although the bare legal title is invested in another.

A "legal owner" is one in whom the legal title to real estate is vested, but subject to the rights of any equitable owner. *Levin v. Carney*, 161 Ohio St. 513, 518, 120 N.E.2d 92 (1954).

{¶17} A mortgagor in possession has both legal and equitable title. *Id.* Certain principles exist to aid in the determination of the exact ownership of property, depending on the circumstances. Those principles relevant to this appeal are:

1. A mortgage of real property in the usual form is a mere security for a debt, or for the performance of some other condition.

2. The legal and equitable title to mortgaged real estate remains in the mortgagor so long as the condition of the mortgage remains unbroken.

3. After condition broken, the legal title as between the mortgagee and mortgagor is vested in the mortgagee, subject to the equity of redemption. *Id.* at 520, followed by *Hausman v. Dayton*, 73 Ohio St.3d 671, 653 N.E.2d 1190 (1995), paragraph one of the syllabus.

{¶18} Equitable interests in real estate cannot be levied upon or sold under execution. *Basil v. Vincello*, 50 Ohio St.3d 185, 191, 553 N.E.2d 602 (1990).

{¶19} Appellant complains that the reverse mortgage document in the present matter was not before the court. Appellant, however, does not contest the inherent features of a reverse mortgage.

{¶20} A reverse mortgage is a loan available to a person over the age of 62 who has equity in real property, typically the borrower's home. The loan provides a lump sum or multiple payments and is secured by the equity in the real property. The loan must be repaid when the borrower sells the home or no longer lives in the home as a principal

residence. Default on the note is also triggered by the death of the borrower. *Ellison v. Wells Fargo* E.D.Michigan No. 09-CV-14175, 2010 WL 3998091 (Oct. 12, 2010). See also Federal Trade Commission, *Reverse Mortgages: Get the Facts Before Cashing in on Your Home's Equity*, <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/real13.shtm> (accessed Dec. 5, 2011).

{¶21} Bertha Fink had a reverse mortgage. As with any mortgage, on default of a condition the legal interest in the real property, as between the mortgagor and the mortgagee, passed to the mortgagee. A reverse mortgage defaults upon the death of the mortgagor. On Bertha Fink's death, legal interest in her home passed to her lender, subject to an equitable right of redemption. It is this equitable right of redemption that passed in parcenary to Bertha Fink's heirs, who assumed the status of mortgagor in place of their mother. Only legal interests in real estate are subject to levy or execution. Matthew Fink possessed only an equitable interest in the property at issue. Consequently, Matthew Fink possessed no legal interest in the property to which appellant's liens could attach. Since appellant's liens did not attach, he was a stranger to this property and the trial court did not err in granting appellee Fannie Mae's Civ.R. 12(B)(6) motion and appellees Schumann and Fifth Third Bank's motions for summary judgment on his attempt to foreclose. Accordingly, all of appellant's assignments of error are not well-taken.

{¶22} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.