

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DALE W. KLEINHEKSEL and KATHLEEN M.  
KLEINHEKSEL,

UNPUBLISHED  
July 19, 2005

Plaintiffs-Appellees-Cross-  
Appellants,

and

PRIME TITLE SERVICES, L.L.C.,

Plaintiff-Counterdefendant-Cross-  
Appellant,

v

DELTA PROPERTIES, INC.,

No. 254114  
Kent Circuit Court  
LC No. 02-011275-CH

Defendant-Appellant-Cross-  
Appellee,

and

JOHN P. RIDER,

Defendant-Counterplaintiff-Cross-  
Appellee,

and

EDMOND R. WOLVEN,

Defendant.

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Before: Murphy, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant Delta Properties, Inc. (“Delta”), appeals as of right the trial court’s judgment, which provided that Delta’s judicial or judgment lien on a condominium once owned by defendant Rider, and now owned by plaintiffs Kleinheksels, was enforceable, but only to the extent of Rider’s equity in the property at the time of his bankruptcy several years earlier, minus the Michigan homestead exemption. The Kleinheksels were required to pay \$4,794 in order to redeem the property following a sheriff’s sale, at which Delta had bid \$32,392, which figure represented the full amount of the judgment lien (\$25,183), plus costs and interest. Plaintiff Prime Title Services, LLC (“Prime Title”), made the redemption payment on behalf of the Kleinheksels. The judgment also ordered Rider to compensate the Kleinheksels for the redemption payment predicated on the court’s finding that Rider breached the warranty against encumbrances under the warranty deed transferring the condo from Rider to the Kleinheksels, where Delta’s judgment lien existed at the time of closing. Judgment was entered against defendant Wolven pursuant to his acceptance of the case evaluation. Prime Title’s claims were dismissed in their entirety for lack of standing. The trial court declined to award any sanctions in favor of the Kleinheksels and against Delta and Rider on the basis of the case evaluation and MCL 565.151. Delta argues that the trial court erred in essentially bifurcating the lien into secured and unsecured components dating to the time of bankruptcy and basing the redemption amount on this bifurcation or “strip down” of the lien. The Kleinheksels and Prime Title cross-appeal, arguing that the execution against property, notice of levy, and sheriff’s sale, all arising out of the judgment against Rider, were plagued with irregularities and statutory violations, rendering the lien and sale invalid. The Kleinheksels also argue that the trial court erred in denying their motions for sanctions. We reverse and remand.

In a bench trial, this Court reviews a trial court’s findings of fact for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). When reviewing an equitable determination reached by a trial court, this Court reviews the trial court’s conclusion de novo, but the trial court’s underlying findings of fact are reviewed for clear error. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998). In general, “[f]indings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). The trial court’s decision to award mediation sanctions is a question of law that we review de novo. A trial court’s decision regarding the amount of a mediation sanction award is reviewed for an abuse of discretion. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000).

To approach this case chronologically, we first address the merits of the cross-appeal with respect to the claim that the execution against property, notice of levy, and sheriff’s sale were plagued with irregularities and statutory violations, rendering the lien and sale invalid. Prime Title’s claims were dismissed in their entirety after the trial court ruled that Prime Title lacked standing. The Kleinheksels’ arguments on this particular issue were rejected for lack of standing, with the trial court finding that the arguments were personal to Rider. These “standing” rulings are not challenged on appeal; therefore, we question the necessity to address or reach the substantive arguments relative to the execution against property, notice of levy, and

sheriff's sale. Nonetheless, having closely examined the arguments, and assuming that the Kleinheksels had standing, their arguments fail.

Regarding the execution against property and the apparent failure of the court officer to file a return, the officer's inaction does not invalidate the lien, *In re Fees of Court Officer*, 222 Mich App 234, 247-248; 564 NW2d 509 (1997), and the levy was recorded within 90 days of the court officer's receipt of the execution, MCL 600.6002(2); 2 Michigan Civil Procedure, § 20.70, p 20-32. With respect to the argument under MCL 600.6004 and the necessity to levy first against personal property, the court officer testified that unsuccessful attempts were made to find personal property, and plaintiffs failed to present evidence establishing that nonexempt personal property was available at the time of the execution. In regard to the arguments concerning the shortcomings in the procedures and notices as to the sheriff's or execution sale, the sale was not invalidated where plaintiffs presented no evidence that Delta was a bad-faith purchaser with notice of the court officer's omissions. MCL 600.6054(3). Additionally, and regardless, the lien itself remained untainted. Plaintiffs' argument pursuant to MCL 565.25(2) that the lien was unperfected where Rider was never given actual notice fails because subsection (3)(b) of the statute makes an exception to the notice requirement for the "filing of an instrument of encumbrance authorized by state or federal statute." MCL 600.6018 specifically authorizes the execution, levy, and sale of realty held by a judgment debtor.<sup>1</sup> With respect to plaintiffs' argument concerning post-sale requirements under MCL 600.6055, we fail to see how any violation bears on the validity of the execution, lien, and sale under the circumstances of this case, especially where the litigation was in full throes at the time. In sum, plaintiffs' arguments on cross-appeal fail because they did not challenge the trial court's ruling on standing and because there is a lack of merit relative to plaintiffs' substantive arguments even if considered.

Turning to Delta's appellate arguments that entail bifurcation, the "stripping down" of liens, and other matters arising out of the Bankruptcy Code, we first find that it is evident that the trial court relied on and sought to enforce the Bankruptcy Code in rendering its ruling.<sup>2</sup> We hold that, while the trial court had the authority and jurisdiction to construe the bankruptcy

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<sup>1</sup> We note that the Legislature recently amended the Revised Judicature Act, adding Chapter 28, MCL 600.2801 *et seq.*, which specifically governs judgment liens encumbering real property. 2004 PA 136. The enactment became effective September 1, 2004, and is thus not applicable to the case at bar, which is unfortunate because it likely would have prevented the situation that arose here. MCL 600.2805(3) provides that, except as provided in subsection (4), the notice of judgment lien certified by the court "shall be served by certified mail on the judgment debtor at the judgment debtor's last known address. Proof of service shall be filed with the court that issued the judgment." Subsection (4) provides that where a judgment lien is for \$25,000 or more the notice of judgment lien "shall be personally served on the judgment debtor and proof of service filed with the court that issued the judgment." MCL 600.2805(4). Moreover, MCL 600.2807(3) touches on bifurcation principles.

<sup>2</sup> The trial court stated in its written opinion and order, "While this court would much have preferred such issues to be determined by the Bankruptcy Court, the court is convinced that Delta's interest in the real estate once owned by Rider is limited based upon unchallenged valuation of same set forth in Rider's Schedule A filed with the Bankruptcy Court."

discharge and determine the impact of the discharge on the lien on the basis of actual bankruptcy proceedings, it lacked jurisdiction to act, where the bankruptcy court had not acted, when it effectively applied and enforced provisions of the Bankruptcy Code by essentially concluding that, had the judicial lien against Rider been addressed in the bankruptcy proceedings, bifurcation would have occurred pursuant to 11 USC 506, and by then proceeding to enter judgment on that basis. 28 USC 1334; 28 USC 157; *In re McGhan*, 288 F3d 1172, 1179-1181 (CA 9, 2002).

Rider's bankruptcy discharge, as it relates to matters actually addressed in the bankruptcy proceedings and as issued by the bankruptcy court, relieved him of any *in personam* liability in regard to Delta's underlying judgment, but it did not affect or impair the judicial lien against the property because a secured creditor may proceed against property via *in rem* actions after Chapter 7 proceedings. 11 USC 524(a)(1); *Dewsnup v Timm*, 502 US 410, 417; 112 S Ct 773; 116 L Ed 2d 903 (1992)(liens typically pass through bankruptcy unaffected); *Johnson v Home State Bank*, 501 US 78, 81-83; 111 S Ct 2150; 115 L Ed 2d 66 (1991)(bankruptcy discharge extinguishes only one mode of enforcing a claim, namely, an action against the debtor *in personam*); *In re Wrenn*, 40 F3d 1162, 1164 (CA 11, 1994)(discharge does not affect liability *in rem*); *In re Sanders*, 39 F3d 258, 260 (CA 10, 1994)(secured debts, including judgment liens, generally survive bankruptcy).

Plaintiffs argue that 11 USC 727, the general "discharge" provision, eliminated not only personal liability but also any right to enforce the lien. 11 USC 727(b) provides, in part, that a discharge, except as otherwise provided under § 523 (exceptions to discharge), "discharges the debtor from all debts that arose before the date of the order for relief . . . ." However, the United States Supreme Court in *Johnson, supra* at 82-83, ruled that the combined effect of a discharge under § 727 and the language of § 524(a) is to bar actions against a debtor *in personam* for liability on a discharged debt secured by a lien on property, but an action against the debtor to collect from the property *in rem* is unaffected.

Contrary to plaintiffs' repeated complaints about Delta's failure to become involved in the bankruptcy proceedings by not filing a claim, "[a] secured creditor does not have to participate in a debtor's bankruptcy proceedings. If it does not want to participate, the creditor does not have to file a claim. The creditor's security interest will survive the discharge, but enforcement actions will be stayed until the discharge date." Norton, *Bankruptcy Law and Practice* (2<sup>nd</sup> ed), 43:5, p 43-30 (voluminous citations omitted); see also *Chandler Bank of Lyons v Ray*, 804 F2d 577, 579 (CA 10, 1986)(*in rem* actions not affected by discharge injunction, even if creditor did not participate in bankruptcy case); *In re Franklin*, 210 BR 560, 565 (ND Ill, 1997)(not necessary for secured creditor to file a proof of claim to preserve its lien).<sup>3</sup> Accordingly, Delta was not required to file a proof of claim.

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<sup>3</sup> Federal Rule of Bankruptcy Procedure (FRBP) 3002(a) indicates that "[a]n *unsecured* creditor . . . must file a proof of claim or interest for the claim or interest to be allowed . . . ." (Emphasis added).

Furthermore, plaintiffs' argument that Delta was required to object to Rider's exemption relative to the equity in the condo fails. With respect to exemptions, FRBP 4003(a) provides that a debtor shall list the property claimed as exempt under § 522 of the Code on a schedule of assets, as was done here. A party in interest may file an objection to the list of property claimed as exempt. FRBP 4003(b). However, as suggested by § 522(c)(2), a secured creditor need not object to a debtor's claimed exemption in order to preserve its lien. *Franklin, supra* at 565; *In re Montgomery*, 80 BR 385, 391 (WD Tex, 1987). A bankruptcy discharge does not prevent enforcement of valid liens regardless of whether property is deemed exempt or nonexempt. *Chandler, supra* at 579.

While the general rule is that exempt property will not be liable for unsecured claims during or after the case, the rule is reversed with respect to secured claims. Thus, exempt property remains liable for all liens not avoidable under the avoiding powers contained in the Bankruptcy Code. Similarly, a bankruptcy discharge will not prevent the enforcement of valid liens as against exempt property. [4 Collier Bankruptcy Practice Guide, § 74.02[5], p 74-7.]

Once again, Delta's failure to act in not objecting to Rider's exemption did not defeat the survivability of the lien.

Regarding the potential application and enforcement of 11 USC 506(a) and (d), 11 USC 522(f), and other provisions of the Bankruptcy Code, which concern lien avoidance and avoidance, these matters were not addressed in the bankruptcy proceedings and were solely within the purview and jurisdiction of the bankruptcy court, not a Michigan circuit court. While we fully understand and appreciate the willingness of the trial court to make a reluctant attempt to enforce the Bankruptcy Code where it appears that Rider had no notice of the judgment lien, these issues need to be addressed by a bankruptcy court, whether in original or reopened proceedings. As noted in *McGhan, supra* at 1181:

Nor do we suggest that a listed creditor such as Rutz is without means to attack a discharge order on grounds of inadequate notice or to repel attempts to enforce the order against him if notice was insufficient. *Rather, we hold that only the bankruptcy court could grant such relief.* Rutz had several options, such as addressing the validity of the discharge order before proceeding in state court by petitioning the court to reopen the McGhan proceedings or by petitioning the bankruptcy court for leave to file an untimely complaint of nondischargeability. If Rutz was unaware of the existence of the bankruptcy order until after he filed his state action, he could have sought to stay the lawsuit and petitioned the bankruptcy court for relief before proceeding in state court. [Emphasis added.]

Moreover, it would appear that bifurcation analysis under 11 USC 506 does not generally permit a court to strip down a consensual or nonconsensual lien as was done here. *Dewsnup, supra* at 417; *In re Talbert*, 344 F3d 555, 556 (CA 6, 2003); *In re Fitzmaurice*, 248 BR 356, 362 (WD Mo, 2000); 4 Collier on Bankruptcy (15<sup>th</sup> ed), § 506.06[1][b], p 506-150. We also question whether the court's action was consistent with the Revised Judicature Act (RJA), MCL 600.101 *et seq.* See MCL 600.6051(2); MCL 600.6062(1); *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 56; 503 NW2d 639 (1993).

Delta is entitled to the full amount of its judgment lien as reflected in the sheriff's sale, minus the Michigan homestead exemption, and subject to the Kleinheksels' exercise of their redemption rights as provided by and consistent with MCL 600.6062, except that redemption may be made within a reasonable time period following the issuance of this opinion because of the existing circumstances, and the Kleinheksels are entitled to a setoff for the prior redemption payment. Additionally, as requested in the cross-appeal on the possibility that this Court would accept Delta's position, the liability of defendant Rider to the Kleinheksels pursuant to the claim predicated on breach of the warranty deed is hereby increased to the amount required to be paid by the Kleinheksels to Delta in order to redeem the property.

Finally, with respect to sanctions, the Kleinheksels argue that the trial court erred in declining to award any sanctions in their favor and against Delta and Rider on the basis of the case evaluation and MCL 565.151. With regard to Rider and MCL 565.151, assuming that the statute provides for an award of attorney fees under the holding in *McCausey v Oliver*, 253 Mich App 703; 660 NW2d 337 (2002), the concession by counsel that the Kleinheksels were not incurring the costs to defend title supports the court's ruling. As to mediation or case evaluation sanctions, the Kleinheksels, in light of our ruling above, are not entitled to sanctions against Delta under MCR 2.403(O), even if we assume that the Kleinheksels stood in Prime Title's shoes for purposes of the case evaluation. With respect to case evaluation sanctions and Rider, or the possibility of a future request for such sanctions by Delta, the Kleinheksels were simply not referenced or listed in the case evaluation award, and thus no sanctions arose in favor of any party relative to the Kleinheksels. As noted by the trial court, there is no basis to render the determination required by MCR 2.403(O)(1) in regard to whether the verdict was more or less favorable than the case evaluation; it is silent as to the Kleinheksels. Where there are multiple parties, "the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties[.]" MCR 2.403(O)(4)(a). Again, this analysis cannot be undertaken because the evaluation does not speak of the Kleinheksels. The Kleinheksels argue that the trial court's ruling is inconsistent with how the court dealt with the Kleinheksels after Wolven's acceptance of the case evaluation. While this might be true, it does not provide a ground to issue a ruling in contravention of MCR 2.403(O) and is basically irrelevant.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy  
/s/ Helene N. White  
/s/ Michael R. Smolenski