

ORIGINAL

IN THE SUPREME COURT OF OHIO

ZUKERMAN DAIKER & LEAR CO. L.P.A.)	CASE NO.: 09 0875
)	
Plaintiff-Appellee)	ON APPEAL FROM THE
)	EIGHTH DISTRICT COURT OF APPEALS
)	CASE NO.: CA 91892
)	
vs.)	TRIAL COURT
)	CASE NO. CV 07 619960
)	
BARBARA J. AND ALFRED LUFT, ET AL.)	
)	
Defendants-Appellants)	

ROTATORI, BENDER, GRAGEL, STOPER &
ALEXANDER CO., L.P.A.'S MEMORANDUM IN RESPONSE TO
MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANTS BARBARA J. AND ALFRED LUFT

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I. Introduction

Zukerman, Aker & Lear Co., L.P.A. (Zukerman) initiated the underlying case by filing a complaint for foreclosure and equitable relief against defendants Julie Luft Signer (Signer), Alfred and Barbara Luft (Lufts) and other lienholders. Zukerman's foreclosure was based on a judgment lien on property owned by Signer. As part of the foreclosure action, Zukerman requested that all liens be marshaled and their priority determined according to law. Later, Zukerman amended its complaint to add Rotatori, Bender, Gragel, Stoper & Alexander Co., L.P.A. (Rotatori) and other additional creditors.

Signer asserted no claim in the action. The Lufts (Signer's parents) filed an answer and counterclaim, alleging priority. The Lufts based their claim on a 2002 mortgage granted by Signer in favor of Alfred Luft encumbering her one-half interest in the subject property. By the filing of their answer and counterclaim, the Lufts placed their claim under the scrutiny of the Court. The claims of Zukerman, Rotari, and other judgment lienholders' claims were based claims which were already reduced in prior litigation.

The matter proceeded to trial before a magistrate: testimony was heard, documents were admitted into evidence, and credibility was assessed. After trial, the Magistrate issued a ruling, finding that the Lufts failed to establish that they were owed any money. Additionally, the Magistrate found that the Lufts lacked credibility. Although the Lufts failed to timely file a transcript of the proceedings, they objected to the Magistrate's decision. With no facts before them, the trial court had no option but to

overrule the objections and adopt the Magistrate's decision. The Eighth District Court of Appeals affirmed the trial court's judgment.

II. **This Case is Not a Case of Substantial Constitutional Question or One of Great Public Interest**

This case does not involve a substantial constitutional question, nor does it involve a matter of public or great general interest. This matter merely involves a mortgage holder that failed to establish due on its lien. At its basic level, this case presents a question regarding what burden of proof is required in a marshalling of liens action. The decision of the Eighth District Court of Appeals does not in any way threaten secured creditors or established procedure. Rather, the decision properly states that the burden of proof regarding establishing the balance due on a mortgage is on the party seeking payment.

The Eighth District Court of Appeals properly applied the law in Ohio—that a defendant in a marshalling of liens action must prove the balance due on its lien. In finding that a defendant must establish the balance due on its lien, the Court of Appeals also found that a court may look at a party's credibility when it attempts to establish its balance. The Court of Appeals logically concluded that all creditors must establish the balance due on their liens.

The Lufts' argument that the Eighth District's decision will threaten every secured creditor is merely a scare tactic. To the contrary, the decision does not change the procedural requirements for foreclosures. The decision requires that all creditors, whether businesses or individuals, prove that a balance is due and owing. The Lufts

argue that the mere placing of a lien on property guarantees that the lienholder be paid at sale. They argue that placing such a burden of proof on a creditor would require that a trial be held in every uncontested foreclosure action. However, the law in Ohio requires that any creditor prove its underlying balance and thus be entitled to payment. Creditors accomplish this through properly supported Motions for Default Judgment, Motions for Summary Judgment, or at trial. Regardless of how a decision is reached (through motion or at trial), every court in Ohio requires a creditor to establish its balance, either through affidavit or live testimony. The Lufts seem to suggest that a Court should merely review title work and pay all parties the amount stated on the face of their mortgages or in the pleadings, without regard to whether payments have been received or any interest has accumulated. A lack of judicial review would remove any judicial scrutiny and merely make the foreclosure process a machine churning out judgments based on title work or preliminary judicial reports.

The Lufts' lien was correctly scrutinized by the Court. The Lufts are the parents of a residential property owner. At trial they were unable to offer any credible testimony regarding consideration for the mortgage, whether they received any payments from Signer, and whether they applied any payments received to the original balance. At the Court of Appeals, the Lufts argued that the court should take into consideration that they are an elderly couple that do not keep records as a business would. Court of Appeals Opinion page 11. The Court of Appeals correctly found that not requiring a family member to prove that they lent money for consideration or prove whether they received payment would create havoc and chaos for all creditors. The

Court of Appeals correctly reasoned that “if this court were to adopt the Lufts’ reasoning, however, then family members could loan money to each other to avoid paying other debts or to avoid foreclosure of property. It is our view that if family members loan money to each other with the expectation that the loan will be repaid, then it should be incumbent upon the holder of the note to keep such accounting records.” Court of Appeals Opinion page 11. The Court continued that secured creditors, like banks, already must bear this burden. “If a bank filed a foreclosure against a debtor claiming that the debtor never made payments on his or her mortgage, but did not show proof of want of payments due, courts would not foreclose on the debtor’s property. In fact, the same burden that the trial court placed on the Lufts in this case also applied to the other creditor defendants.” Court of Appeals Opinion Page 12.

Moreover, due process is not at issue. The Lufts, by filing an answer and cross-claim, were on notice that their claims would be subject to judicial scrutiny. The Lufts mistakenly argue that the other creditor defendants were required to plead the affirmative defense of payment. Other creditors are not required to raise the affirmative defense of payment. The affirmative defense of payment would need to be raised by the person required to pay, the Lufts daughter—Signer. Unlike the other defendants, who filed cross-claims against Signer, the Lufts did not cross-claim Signer for payment, so there was no opportunity to raise the affirmative defense of payment.

The decision of the Eighth District Court of Appeals does not conflict with Ohio Civ. R. 8(c). Ohio Civil Rule 8(C) speaks to certain pleading requirements that include pleading payment as an affirmative defense. The Appellate Court’s decision does not

state that the Lufts' lien was paid. The decision merely indicates that certain payments were unaccounted for by the Lufts, which was further evidence indicating that the Lufts were unable to prove the balance on their lien.

This case does not raise a substantial constitutional question or one of public or great general interest. This is a procedurally flawed case, where the facts were not properly before the trial court or the Court of Appeals, thus forcing a limited review, under which the Court of Appeals upheld the decision of the trial court, as there was no evidence of an abuse of discretion.

Under Civ. R. 53, a party may object to a magistrate's decision within fourteen days of the filing of the decision, and the Lufts timely objected to the magistrate's decision. Any objection to a factual finding must be supported by a transcript of all the evidence or an affidavit if a transcript is not available. However, the Lufts did not provide a transcript for the trial court's review. Furthermore, as the Eighth District Court of Appeals found, there "is no indication that the Lufts requested a transcript be prepared for the trial court, nor is there any indication that the Lufts submitted an affidavit regarding the evidence upon which they based their objections or that they sought leave to supplement their objections with a transcript or affidavit at a later date." See Eighth District Court of Appeals Opinion page 5.

It is well-settled law that: "When a party objecting to a referee's report has failed to provide the trial court with the evidence and documents by which the court could make a finding independent of the report, appellate review of the court's findings is limited to whether the trial court abused its discretion in adopting the referee's report,

and the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record.” State ex rel. Duncan v. Chippewa Twp. Trustees (1995), 73 Ohio St.3d 728, 1995 Ohio 272, 654 N.E.2d 1254. While the Lufts claim that their appeal is not based on factual findings, neither the trial court, nor the appellate court, had a transcript or facts to review. With an incomplete, partial record, this case is not the type of case that creates a substantial constitutional question, nor is it a case of great or general public interest. Any ruling resulting from this case could not be a standard for any other cases in Ohio, as there were no facts before any of the reviewing courts.

III. Response to Argument in Support of Propositions of Law

Proposition of Law No. I: A party who asks a court to recognize its lien bears the burden of proof.

In the underlying case, the Lufts asserted a claim that their mortgage be recognized as valid, and that their lien be marshaled. At trial, each creditor bore the burden of proof that their lien was enforceable, whether it had been paid, and what amount was currently due and owing.

The law in Ohio is clear: all parties seeking to foreclose or be paid through a foreclosure sale must establish their balance due. “If one seeking payment on a mortgage cannot prove the existence of the underlying debt, a mortgage securing that debt ceases to be enforceable as an encumbrance on the property secured.” Magistrate’s Decision, citing Moore v. Burnet (1842), 11 Ohio 334, 341.

As the Lufts were attempting to prove that they were owed money, the Lufts were required to establish a balance due and owing and that the debt had not been satisfied. The Lufts attempt to argue that the mere production of a promissory note established the existence of the debt and created a presumption that the face value of the note is due. To support their argument, the Lufts cite Cuyahoga County Local Rule 24(C) requiring the filing of a Preliminary Judicial Report. In referencing the requirement to file a Preliminary Judicial Report, the Lufts seem to argue that being notated on the report establishes the right to be paid proceeds from a foreclosure sale, unless another party challenges that payment.

Additionally, the Lufts argue that they did not have the burden of proof in establishing the amount due and owing, rather the other defendants should bear the burden of proof establishing that the underlying debt was a sham, fraud or was paid. See Lufts Argument page 6. While the affirmative defense of payment could have been raised by Signer, this did not negate the Lufts burden of establishing the balance of the underlying debt. As noted by the Court of Appeals, there is a vast difference between a holder of a note and mortgage demanding payment from the maker versus “attempting to show that [Lufts’ daughter] never paid him to preclude a forced sale of the property.”

The Appellate Court correctly affirmed the decision, affirming the magistrate’s reasoning regarding the burden of proof.

[T]he present case further illustrates the sensibility of placing the burden of proof regarding the balance due on the party seeking payment. If the burden of proof is on the other lien claimants, shoddy or incomplete bookkeeping could preclude other lien claimants from contesting the amount

due on the lien simply because no evidence exists upon which to base a challenge. Accordingly, the magistrate finds that a party asserting a lien in response to a marshalling of liens claim has the burden of proving the balance due on his lien at trial. Alfred Luft has failed to meet that burden.

As the Appellate Court pointed out, the adoption of the Lufts' reasoning¹ would allow family members to loan each other money to avoid paying other debts or to avoid foreclosure of property. It is incumbent upon a family member that engages in intra-family lending with the expectation of payment to keep accounting records to support the balance due. This same standard applies to all creditors. Any party that asks a Court to recognize its lien bears the burden of proof regarding the validity and amount of its lien.

Proposition of Law No. II: A party, who requests that the court marshal its lien, or request distribution of proceeds, must establish the balance due and owing. A party is not denied due process when that party fails to establish a balance due and owing, through evidence at trial.

The Lufts were not deprived of a valuable interest in property without due process. The Lufts failed to meet their burden of proof regarding a balance due. "[D]ue process requires that notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Orrenmaa v. CTI Audio, Inc.* (2008), 2008 Ohio 4299 citing *In re Foreclosure of Liens for Delinquent Taxes* (1980), 62 Ohio St.2d 333, 405 N.E.2d 1030, paragraph one of the syllabus. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice

¹ The Lufts' proposition essentially is that the promissory note itself is the primary evidence of the debt and once the note is produced, the presumption is that the face value of the note is due.

reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Akron-Canton Regional Airport Authority v. Swinehart, 62 Ohio St. 2d 403, 406. The Lufts were given an opportunity to establish entitlement to payment. They did not do so. Due Process requires nothing more.

A party asserting a lien in response to a marshaling of liens claim has the burden of proving the balance due on his lien at trial. The Lufts were well aware that they would have to establish the existence of the note and mortgage at trial. The Lufts filed an Answer and a Cross-Claim, thus placing their lien under judicial scrutiny. Rotatori put all parties on notice when it filed its Answer and Cross-Claim asserting that its lien was the best lien. Rotatori's Answer, Cross-Claim, and Trial Brief challenged the Luft's lien.

As all liens were scrutinized, and all creditors were required to establish their balance, all parties received full due process. All parties had the ability to provide testimony and evidence to establish their claims. Only after a full trial, and after noting the Lufts' lack of credibility, did the Magistrate find that the Lufts failed to establish their balance. Merely disagreeing with a Court's ruling does not constitute lack of due process.

IV. Conclusion

As there were no facts before the trial court, the trial court had no choice but to affirm the Magistrate's Decision. Likewise, the Court of Appeals, absent a showing of abuse of discretion, could not overturn the decision. The failure to set forth facts by

transcript of affidavit precluded the trial and appellate courts from finding different than the Magistrate. Such a procedurally flawed case, with no facts before this Court, cannot be the standard bearer for future foreclosure litigation. Despite the lack of facts, the legal conclusions in the underlying litigation did not change any of the requirements under Ohio Civil Rules or law. Rather the decisions affirmed the basic requirement of any litigation, that a party prove its claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Response of Rotatori, Bender, Gragel, Stoper & Alexander Co., L.P.A. was mailed this 12th day of June 2009, by regular U.S.

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