

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

FIFTH THIRD BANK,	:	OPINION
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2014-P-0040
WILLIAM E. RICHARDS aka	:	
WILLIAM E. RICHARD, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2013 CV 00409.

Judgment: Affirmed in part, reversed in part, and remanded.

Brittany L. Griggs, Harry W. Cappel, and Harry J. Finke, IV, Graydon Head & Ritchey LLP, 1900 Fifth Third Center, 511 Walnut Street, Cincinnati, OH 45202 (For Plaintiff-Appellee).

Jack Morrison, Jr., Jack W. Morrison, and Richard P. Schroeter, Jr., Amer Cunningham Co., L.P.A., 1100 Key Building, 159 South Main Street, Akron, OH 44308 (For Defendants-Appellants).

DIANE V. GRENDELL, J.

{¶1} Defendants-appellants, William and Janice Richard,¹ appeal from the judgment of the Portage County Court of Common Pleas, granting summary judgment in favor of plaintiff-appellee, Fifth Third Bank, on its claim and the counterclaims, and

1. The appellants' surname is referred to as both "Richard" and "Richards" throughout the pleadings in this case, including the appellate briefs. It appears from William's signed affidavit that their last name is Richard.

ordering that Fifth Third be granted possession of the Richards' mobile home. The issues to be decided in this case are whether a lien can be avoided through bankruptcy proceedings when no motion to avoid the lien is pursued, whether evidence must be presented in support of a summary judgment motion, and whether a party is entitled to recover attorney fees when the court rules in the opposing party's favor. For the following reasons, we affirm in part, reverse in part, and remand the decision of the lower court.

{¶2} On April 18, 2013, Fifth Third Bank filed a Complaint for Replevin. In this Complaint, it alleged that it was the holder of a note executed by William Richard in 2004, on which William was in default. It stated that the note "facilitated the purchase of a Mobile Home," titled in the Richards' names, and that Fifth Third holds the first lien upon the mobile home, the value of which was \$49,000. It asked to "replevin said vehicle." Attached to the Complaint were a copy of the note and the title.

{¶3} The Richards filed a Request for Hearing on April 26, 2013.

{¶4} On May 24, 2013, the Richards filed an Answer, in which they asserted that William was not in default. They argued that the note is "no longer an enforceable obligation by virtue of the bankruptcy" of the Richards and that the lien had been discharged. They raised a Counterclaim for Declaratory Judgment on this ground and a Counterclaim for Attorney Fees. They also raised Counterclaims for Unjust Enrichment, for payments obtained by Fifth Third subsequent to the discharge of bankruptcy that were collected "in violation of the Discharge Order," and Fraud for obtaining these payments and refusing to return them.

{¶5} Fifth Third filed a Motion for Summary Judgment on November 22, 2013. It argued that the lien was not avoided in the bankruptcy action and was still enforceable, noting that it did not seek a monetary judgment against William Richard due to the bankruptcy action. Fifth Third also sought judgment on the Counterclaims, emphasizing that there was no unjust enrichment because the Richards continued to voluntarily pay their debt post-discharge to keep possession of the mobile home.

{¶6} On March 31, 2014, an Affidavit of William Richard was filed, in which he explained that he took out a \$50,000 loan with Fifth Third Bank, that his debt to Fifth Third was discharged through Chapter 7 bankruptcy proceedings that concluded on January 23, 2007, and that Fifth Third had collected a total of \$24,690.21 since the date of the filing of the Richards' bankruptcy petition on August 29, 2006.

{¶7} On the same date, the Richards filed their Response and Motion for Summary Judgment. They argued that, following the discharge of the debt on the mobile home, which Fifth Third did not oppose, Fifth Third continued to collect payments, debiting them from the Richards' bank account, in violation of the bankruptcy stay. Regarding the claim for replevin, they argued that it cannot be granted since the lien was avoided in the bankruptcy proceedings. They also requested to withdraw their Fraud counterclaim.

{¶8} On June 30, 2014, the court issued a Judgment granting Fifth Third Bank's Motion for Summary Judgment on the claim and counterclaims and denying the Richards' Motion. It found that the lien against the mobile home was valid and there was a default that entitled Fifth Third to replevin of the mobile home. The court granted

an in rem judgment against the Richards in the amount of \$61,007.83 and ordered that Fifth Third was entitled to possession of the mobile home.

{¶9} On July 15, 2014, the Richards filed an Emergency Motion for Stay of Execution Pending Appeal, which was denied by the trial court. The Richards filed a Motion to Reconsider on July 21, 2014. On August 5, 2014, following a hearing, a Magistrate's Decision was issued, ordering that the stay may be granted on condition that the Richards posted supersedeas bond in the amount of \$25,000.

{¶10} The Richards filed an Emergency Motion for a Stay in this court on August 6, 2014. In a Judgment Entry on that date, this court granted "a brief temporary stay" until August 20, 2014, since the trial court had not addressed the Magistrate's Decision.

{¶11} On August 8, 2014, the Richards filed an Objection to the Magistrate's Decision. A hearing was set on this matter for December 15, 2014. On August 21, 2014, this court issued a Judgment Entry, granting the stay pending appeal, effective upon the Richards posting a supersedeas bond in the amount of \$25,000.

{¶12} The parties filed a Joint Motion to cancel the hearing on December 15, 2014, asserting that the issue was moot. The hearing was cancelled and removed from the docket by the trial court.

{¶13} The Richards timely appeal and raise the following assignments of error:

{¶14} "[1.] The trial court erred in entering the writ of replevin/order of possession.

{¶15} "[2.] The trial court erred in holding that Fifth-Third holds a valid lien against the Richards' mobile home.

{¶16} “[3.] The trial court erred in entering judgment in favor of Fifth-Third on the Richards['] counterclaim for declaratory judgment.

{¶17} “[4.] The trial court erred in entering judgment in favor of Fifth-Third on the Richards' counterclaim for unjust enrichment.

{¶18} “[5.] The trial court erred in entering judgment in favor of Fifth-Third on the Richards' counterclaim for Attorney Fees.”

{¶19} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows “that there is no genuine issue as to any material fact” to be litigated, (2) “the moving party is entitled to judgment as a matter of law,” and (3) “it appears from the evidence * * * that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party's favor.” A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). “A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision.” (Citation omitted.) *Peer v. Sayers*, 11th Dist. Trumbull No. 2011-T-0014, 2011-Ohio-5439, ¶ 27.

{¶20} In the Richards' first assignment of error, they argue that the order of possession of the mobile home is void because replevin was not properly sought by Fifth Third pre-judgment and the court had no authority to issue a writ of replevin post-judgment.

{¶21} Fifth Third argues that the replevin statutes do not mandate that a plaintiff seek a pre-judgment order of possession.

{¶22} As an initial matter, we note that Fifth Third raises the issue of mootness as to this as well as the second and third assignments of error. Fifth Third asserts that these assignments of error are moot since the property has been sold in satisfaction of the judgment. Fifth Third's argument is supported by citations to case law that an appeal is moot when real property has been sold and proceeds distributed, typically in foreclosure cases. See *MHN Sub I, LLC v. Donnelly*, 11th Dist. Lake No. 2014-L-031, 2014-Ohio-4128, ¶ 14-19; *Dietl v. Sipka*, 185 Ohio App.3d 218, 2009-Ohio-6225, 923 N.E.2d 692, ¶ 21 (11th Dist.).

{¶23} As the Richards emphasize, however, this court has also held that an appeal can be considered on the merits and is not moot when a foreclosed property has been sold, the appellant filed for a stay, "but was unsuccessful due to his or her failure to post a supersedeas bond," holding that restitution would be an appropriate remedy. *Ameriquest Mtge. Co. v. Wilson*, 11th Dist. Ashtabula No. 2006-A-0032, 2007-Ohio-2576, ¶ 19.

{¶24} Regardless, we note that this case does not involve foreclosure proceedings. Even presuming that the sale of the mobile home in this matter would render this appeal moot under the foregoing law, there is no evidence in the record to support Fifth Third's contention that the mobile home has been sold to a third party to satisfy the in rem judgment, but only that the sheriff caused Fifth Third to be in possession of the property. Fifth Third presents no argument that the possession itself satisfied the judgment for the purposes of rendering the appeal moot. Based on the law

relied upon by Fifth Third, the record does not contain evidence that would allow this court to determine the outcome of the appeal solely on this ground.

{¶25} As to the first assignment of error, Fifth Third emphasizes that this argument was waived, since it was not raised by the Richards below.

{¶26} “It is well founded that a party who fails to raise an issue at the trial court level waives the issue on appeal.” *Trumbull Career & Technical Ctr. Bd. of Edn. v. Trumbull Career & Technical Ctr. Edn. Assn.*, 11th Dist. Trumbull No. 2012-T-0034, 2012-Ohio-5838, ¶ 9; *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1993) (“It is a universal principle of appellate procedure that ‘[a] party who fails to raise an argument in the court below waives his or her right to raise it [on appeal].’”) (citation omitted).

{¶27} A review of the pleadings, including the summary judgment motions, reveal that the Richards failed to raise this argument before the trial court. Although they disputed the ability of Fifth Third to be granted possession of the mobile home based on the grounds that the lien had been discharged in bankruptcy, this was the sole basis for their contention. While they recognize in their appellate brief that Fifth Third sought final judgment on the issue of the writ of possession, they failed to argue in the trial court that final judgment could not be granted on the grounds that it had not been properly sought as a pre-judgment remedy.

{¶28} The first assignment of error is without merit.

{¶29} In their second assignment of error, the Richards argue that the trial court erred in holding that Fifth Third held a valid lien against their mobile home, since it was discharged during the bankruptcy proceedings, where Fifth Third took no action to

protect its interest. Similarly, in their third assignment of error, the Richards argue that the trial court should have issued a declaratory judgment in their favor on this issue.

{¶30} Fifth Third argues that liens generally pass through bankruptcies unaffected and that the proper procedures to avoid the lien were not followed.

{¶31} “Ordinarily, liens and other secured interests survive bankruptcy.” *Farrey v. Sanderfoot*, 500 U.S. 291, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991); see *Dewsnup v. Timm*, 502 U.S. 410, 418, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992), citing *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991) (a bankruptcy discharge generally extinguishes “an action against the debtor *in personam* -- while leaving intact another -- namely, an action against the debtor *in rem*”). Certain circumstances will allow a debtor to avoid a lien on his property.

{¶32} The Richards argue that the exception under Section 522(f)(1), Title 11 of the U.S. Code, applies here and allowed them to seek avoidance of the lien in their bankruptcy proceedings. Pursuant to this section, “the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled” if the lien is “a judicial lien” or a “security interest in any * * * household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor,” health aids, or tools of the debtor’s trade. The Richards do not elaborate upon the applicability of this section in this case. The item on which the lien was placed, the mobile home, does not fall into any of the aforementioned categories. Further, no argument is presented to support a conclusion that there was a judicial lien on the mobile home. A judicial lien is one

“obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.” 11 U.S.C. 101(36). Nothing in the record shows that a judgment was entered to place the lien on the mobile home. Rather, the pleadings and the filings with the Complaint indicate that, in 2004, a Security Agreement was executed between the parties and the lien was placed on the title soon thereafter. A lien created by consent/a security interest is “not avoidable under section 522(f).” *Naqvi v. Fisher*, 192 B.R. 591, 596 (Bankr.N.H. 1995).

{¶33} It is hard to imagine that the bankruptcy court granted an exemption that did not apply. It is noteworthy that the bankruptcy judgment/order of discharge does not specify that the lien was to be avoided. The document attached to that order specifically notes that creditors may have a right to enforce a valid lien after the bankruptcy. In the absence of any clarification in the judgment, we again emphasize that liens generally pass through bankruptcies unaffected. The Richards have not shown that the lien was actually avoided.

{¶34} Even if Section 522(f) was applicable, “avoidance of the lien * * * is not automatic” and “[t]he provisions of Section 522(f) are not self operating.” *Columbus Dispatch Credit Union v. Jones*, 4th Dist. Lawrence No. 94CA28, 1995 Ohio App. LEXIS 3716, 8 (Aug. 21, 1995). “The debtor must affirmatively seek the Bankruptcy Court’s review, in either a motion, application or some form of adversarial proceeding, in order to avoid a lien.” *Id.*, citing *In re DeSimone*, 13 B.R. 981, 983 (S.D.Pa.1981); Fed.R. Bankr.P. 4003(d) (actions to avoid a lien on a 522(f) exemption “shall be by motion in accordance with Rule 9014”). Here, a general notation was made on the “Statement of Intention” within the Richards’ bankruptcy petition that they intended to avoid the lien.

They took no further action to do so. In fact, the Richards admit in their briefs that their attempt at lien avoidance was “procedurally deficient.”

{¶35} The Richards argue that the lien was still avoided, pursuant to *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010), since Fifth Third did not appear or contest their attempt to avoid the lien. They argue that, under *Espinosa*, a party who fails to object to an error in discharging certain debt waives that issue and cannot raise it later to avoid the application of the discharge.

{¶36} *Espinosa* is distinguishable for several reasons. First, in *Espinosa*, the debt in question required the application of an entirely different provision, as it was a student loan, and the type of proceeding was also different, as it was a Chapter 13 bankruptcy. In addition, there was no argument that the request to avoid the debt was not properly before the bankruptcy court and the parties, such that they would be aware of the issue and be able to dispute it. *Id.* at 265-268. In this case, Fifth Third had no reason to appear or object, as the procedures required to even initiate avoidance of a lien were not followed, such that Fifth Third would be aware the lien would be subject to discharge, nor would an appeal be appropriate since it was not clear that the lien was discharged at all.

{¶37} Importantly, in cases involving the same exception for lien avoidance as in this case, it has been noted that “the lien creditor’s failure to object to the debtor’s claim of exemption does not prevent the creditor from raising the issue when the debtor seeks to avoid the creditor’s lien.” *In re Morgan*, 149 B.R. 147, 151-152 (Bankr.App. 9th Cir.1992) (describing case law from bankruptcy courts in support of two opposing positions as to this issue). This analysis is on point with the facts and circumstances of

this case, unlike *Espinosa*. Again, it must be emphasized that this is not merely the case where the court may have reached the wrong conclusion as to whether the debtor was exempt, since the issue was not even before the bankruptcy court to issue a ruling. As noted by appellee in its brief, it is reasonable to conclude, based on the record that, due to the Richards' failure to file a motion to avoid the lien, "the validity of the lien was never presented to the bankruptcy court for adjudication" and "passed through the bankruptcy unaffected."

{¶38} The second and third assignments of error are without merit.

{¶39} In their fourth assignment of error, the Richards argue that granting summary judgment in favor of Fifth Third on the counterclaim for Unjust Enrichment was in error since Fifth Third improperly collected payments during the bankruptcy proceedings while a stay was in place. They assert that there is at least a genuine issue of material fact as to whether the payments were voluntarily made.

{¶40} Fifth Third argues that the payments made by the Richards were voluntary and, therefore, there is no basis for a claim that they were improperly collected.

{¶41} In the present matter, it is important to consider the applicable summary judgment law. The Ohio Supreme Court in *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996), explained:

[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the

nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.

(Emphasis sic.) *Id.* at 293.

{¶42} The Court also emphasized summary judgment cannot be granted when the movant has failed to provide “evidentiary materials demonstrating that there are no material facts in dispute and the movant is entitled to judgment as a matter of law,” since the moving party “bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record* [Civ.R. 56(C) evidence] *which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.*” (Emphasis sic.) *Id.* at 296.

{¶43} Here, Fifth Third, in both its Motion for Summary Judgment and subsequent response, cited to no attached materials in support of its request on the Unjust Enrichment counterclaim. Its Motion included a sole paragraph, explaining that voluntary payments are permitted on discharged debts and that the Richards had not disputed that their payments were voluntary. Fifth Third submitted no evidentiary materials related either to its claim that the payments were voluntary or its contention that the Richards failed to provide any evidence that the payments were obtained

involuntarily. The only documents attached to the Motion for Summary Judgment were the original Security Agreement, the title, documentation of the installment loan history, and an affidavit authenticating these documents, none of which were cited in relation to the Unjust Enrichment claim or appear to have any bearing on the claim.

{¶44} We note that, although the Richards did not present a great deal of evidence to support their unjust enrichment claim, they did argue in an affidavit that Fifth Third “collected” payment since the bankruptcy proceedings and, in their summary judgment pleadings, argued that automatic payments continued to be debited from their bank account in violation of the bankruptcy proceedings, attaching bank records. Regardless of whether this was adequate evidence to prevail on an Unjust Enrichment claim, the law is clear as to the requirements in pursuing summary judgment. Since Fifth Third failed to meet these requirements, given the absence of any reference to evidentiary materials to show that the Richards’ claim must fail or that the payments were actually voluntary, the trial court erred in granting summary judgment in its favor on this claim. *Kurtz Bros., Inc. v. Ace Demo, Inc.*, 11th Dist. Portage No. 2014-P-0027, 2014-Ohio-5184, ¶ 50 (“Appellees did not attach to their summary-judgment motion any affidavits or any other Civ.R. 56(C) evidentiary materials that demonstrated Kurtz lacked evidence to support its claim against Lally, as required by *Dresher* * * *. For this reason alone, the trial court was required to deny Lally’s motion for summary judgment.”)

{¶45} The fourth assignment of error is with merit.

{¶46} In their fifth assignment of error, the Richards argue that the trial court erred in granting summary judgment in favor of Fifth Third on the Richards’ claim for

attorney fees since such fees “are traditionally awarded for willful violations of the bankruptcy discharge injunction.”

{¶47} The Richards essentially concede that issues of material fact on the attorney fees claim arise only if the trial court’s rulings are reversed. Thus, the court’s grant of summary judgment on this issue as to the claim for replevin/possession and the counterclaim for Declaratory Judgment was proper.

{¶48} While attorney fees may be proper following further proceedings on the Unjust Enrichment counterclaim, this will depend upon various factors, especially whether that claim has merit. On that basis, to the extent that the attorney fees counterclaim was denied on the Unjust Enrichment claim, this holding is reversed.

{¶49} The fifth assignment of error is with merit in part, to the extent discussed above.

{¶50} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas, granting summary judgment in favor of Fifth Third on its Complaint and the counterclaims is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Costs to be taxed against the parties equally.

CYNTHIA WESTCOTT RICE, J.,
THOMAS R. WRIGHT, J.,
concur.