[Cite as *Chapman v. Chapman*, 2015-Ohio-4595.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

WESLEY T. CHAPMAN, ADMINISTRATOR OF THE ESTATE OF CHERYL E. CHAPMAN, DECEASED	:	
Plaintiff-Appellant,	:	Case No. 14CA18
vs.	:	
OWEN D. CHAPMAN, A MINOR et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellees.	:	

APPEARANCES:

William J. Clark, Powell, Ohio, for appellant.

Matthew J. Richardson, Manley Deas Kochalski LLC, Columbus, Ohio, for appellees.

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 10-13-15
ABELE, J.

{¶ 1} This is an appeal from a Pickaway County Common Pleas Court, Probate Division, judgment. The court found that Bank of America N.A. (BOA), defendant below and appellee herein, had a valid first and best lien on property owned by Cheryl E. Chapman, deceased. Wesley T. Chapman, the administrator of her estate, plaintiff below and appellant herein, assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE COURT WAS IN ERROR IN DETERMINING THAT THE LIEN OF DEFENDANT BANK OF AMERICA, N.A. (HEREINAFTER BOA) ON THE SUBJECT REAL PROPERTY,

SUCH LIEN NOT HAVING BEEN RECORDED UNTIL AFTER THE TIME OF THE DEATH OF THE DECEDENT, SHOULD HAVE PRIORITY, AT THE TIME OF THE SALE OF SUCH REAL PROPERTY, OVER THE DEBTS AND CLAIMS AGAINST THE DECEDENT'S ESTATE THAT ATTACH AT THE TIME OF THE DECEDENT'S DEATH AND THAT ARE ACCORDED PRIORITY STATUS BY O.R.C. 2117.25, INCLUDING SPECIFICALLY THE FAMILY ALLOWANCE THAT IS SPECIFIED IN O.R.C. 2106.13."

SECOND ASSIGNMENT OF ERROR:

"THE COURT WAS IN ERROR IN DETERMINING THAT THE PURPORTED ASSIGNMENT OF THE MORTGAGE LIEN OF PEOPLE'S BANK ON THE SUBJECT REAL PROPERTY, TO BOA, AFTER THE TIME THAT THE MORTGAGE LIEN OF PEOPLE'S BANK HAD BEEN TERMINATED BY ORDER OF THE COURT, CONVEYED ANY ENFORCEABLE LIEN INTEREST IN THE SUBJECT PROPERTY TO BOA."

THIRD ASSIGNMENT OF ERROR:

"THE COURT WAS IN ERROR IN DETERMINING THAT THE LANGUAGE IN OHIO'S LAND SALE STATUTE, O.R.C. 2127.38 GIVING PRIORITY TO ". . . MORTGAGES AND JUDGMENTS AGAINST THE DECEDENT ACCORDING TO THEIR RESPECTIVE PRIORITIES OF LIEN, **SO FAR AS THE OPERATED AS A LIEN ON THE REAL PROPERTY OF THE DECEASED AT THE TIME OF THE SALE** . . ." (EMPHASIS ADDED IN THE COURT'S DECISION), CHANGES, IN ANY WAY, THE REQUIREMENTS OF THE OHIO RECORDING STATUTES OR ALLOWS THE ASSIGNEE OF A MORTGAGE LIEN INTEREST TO IMPROVE ITS PRIORITY OF CLAIM BY THE FILING FOR RECORD OF THE NOTICE OF ITS ASSIGNMENT OF MORTGAGE PRIOR TO THE SALE OF THE REAL PROPERTY BUT AFTER THE ATTACHMENT OF INTERVENING CLAIMS OR LIENS UPON THE REALTY."

{¶ 2} On or about October 15, 2010, the decedent obtained a $142,968 loan from Peoples Bank. The loan was secured by a mortgage on real property located at 5289 Horseshoe

Drive in Orient.[1] Shortly thereafter, Peoples Bank sold the note to BOA, but no formal assignment of the mortgage was filed for record at that time.[2] The mortgagor continued to make mortgage payments to BOA, presumably until the time of her death. She died, apparently intestate, on September 26, 2012, leaving no surviving spouse and one minor child, Owen Chapman. The decedent's brother, appellant herein, was appointed as administrator of the estate. After calculating his late sister's assets, and comparing them to her debts, he concluded that her estate would likely be insolvent.

{¶ 3} On December 28, 2012 appellant commenced the instant action, pursuant to R.C. 2127.10, declaring the estate insolvent and asking for permission to sell the real estate. As defendants to the action, he named, inter alia: (1) himself and Stella Chapman, as guardians of the estate of Owen D. Chapman, a minor; (2) the Pickaway County Treasurer; (3) BOA; and (4) the Peoples Bank. Only the Pickaway County Treasurer filed a timely answer and asserted its priority for real estate taxes.

{¶ 4} In February 2013, appellant filed Civ.R. 55 motions for default judgment against the two lenders. Peoples Bank did not enter an appearance in this action (most likely because it almost immediately assigned the loan to BOA). BOA filed a motion that same month and

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[1] We take our factual recitation from the parties' May 8, 2014 stipulation of facts and the trial court's findings included in its July 6, 2014 decision and judgment entry. There is no clear indication whether the loan proceeds were used to actually purchase the subject real estate.

[2] A formal assignment of the mortgage from Peoples Bank to BOA was executed on March 19, 2013 and filed on March 27, 2013. Obviously, both actions occurred several months after the decedent's death.

sought leave to file an answer and cross-claim.[3] On February 14, 2013, the trial court granted BOA thirty days to file its answer and cross-claim. On March 14, 2013, BOA filed an answer and, several weeks later an amended answer, together with a "cross-claim" that asserted the priority of its mortgage as a first and the best lien in the premises.[4] Appellant subsequently filed an "Answer to Cross Claim" and asserted, in part, that BOA waived any of its claim to the property and failed to perfect its interest in the property at the time of the decedent's death.

{¶ 5} What followed thereafter was a flurry of motions and memoranda contra that addressed such issues as whether BOA was entitled to summary judgment (the trial court ruled that it was not) and whether BOA should have been granted ex parte permission to file its motion and "cross-claim" out of rule (the trial court ruled that it should not, and rescheduled the issue for hearing).

{¶ 6} The matter came on for determination based upon the parties' stipulations. On July 16, 2014, the trial court rendered its decision and concluded that BOA's mortgage was a valid first and best lien on the premises after other fees. The court thereafter directed appellant to prepare "an Order of Sale."

{¶ 7} A notice of appeal was timely filed from that decision. However, the record does not indicate that the "Order of Sale" was filed. However, on August 7, 2014, appellant filed "Report of Private Sale" and reported to the Probate Court that the property had been sold to

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[3] On March 5, 2013, the trial court granted default judgment to appellant against Peoples Bank.

[4] BOA's claim on the note and mortgage is against the estate. Thus, the action should have been labeled a "counterclaim" rather than a "cross-claim."

Stella Chapman for $95,000.[5] An August 7, 2014 confirmation entry of sale approved the sale and ordered the disbursement from the proceeds to cover all standard fees, costs and expenses of the transfer of the real estate. The court ordered the remaining proceeds be held in escrow pending further order. The matter is now properly before us for review.

I

{¶ 8} We first consider, out of order, appellant's second assignment of error wherein he asserts that BOA's legal interest in the lien against the property was extinguished. Appellant argues that because the estate took a default judgment against Peoples Bank before a formal transfer of the mortgage was executed and recorded, BOA has no interest against the property. Like the trial court, we reject this argument.[6]

{¶ 9} The parties stipulated that: (1) the decedent executed the mortgage to Peoples Bank; (2) "shortly thereafter" Peoples Bank sold to BOA the note that the mortgaged secured; and (3) an employee of the assignor signed an undated allonge that made the note payable, without recourse, to BOA. The parties further stipulated that a formal, written assignment of the mortgage that secured the note was not executed or recorded until after a default judgment was

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[5] It is not clear whether this is the same Stella Chapman as the co-"Guardian of the Estate" and the named defendant in the R.C. 2127.10 complaint.

[6] Although authority exists for the proposition that probate court decisions should be reviewed under the abuse of discretion standard, here the trial court addressed legal issues. Generally, appellate courts review questions of law de novo. See generally *Grimes v. Grimes*, 173 Ohio App.3d 537, 2007-Ohio-5653, 879 N.E.2d 247, at ¶¶15-16; *2-J Supply, Inc. v. Garrett & Parker, L.L.C.*, 4th Dist. Highland No. 13CA29, 2015- Ohio-2757, at ¶9; *Kerr v. Logan Elm School Dist.*, 4th Dist. Pickaway No. 14CA6, 2014-Ohio-5838, at ¶6. In other words, appellate courts give no deference to the trial court and, instead, apply our own, independent review.

taken against Peoples Bank. Obviously, the better practice would have been for BOA to have obtained and recorded a formal assignment of the mortgage at the same time the note was assigned. The question we face, however, is whether its failure to do so extinguished the mortgage and BOA's priority lien in the premises. We hold that it did not.

{¶ 10} First, even if we assume for purposes of argument that appellant is correct as to the substantive law and the default judgment against Peoples Bank terminated BOA's interest, the fact remains that the default judgment was interlocutory and subject to change at any time before entry of a final judgment. See *King v. King*, 4th Dist. Jackson No. 13CA8, 2014-Ohio-5837, 2014-Ohio-5837, at ¶17; *Denuit v. Ohio State Bd. of Pharmacy*, 4th Dist. Jackson Nos. 11CA11 & 11CA12, 2013-Ohio-2484, 994 N.E.2d 15, at ¶19; *Rice v. Lewis*, 4th Dist. No. 11CA3451, 2012-Ohio-2588, at ¶15.[7] The trial court's July 16, 2014 decision could be construed in that manner. Although we do not believe that the default judgment terminated the BOA mortgage (as we will discuss infra), even if it arguably did so, the trial court could have vacated the default judgment at any time and the court's ultimate finding in favor of BOA could arguably be construed as doing just that.

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[7] Although it does not appear to have been raised in his brief, appellant argued in the trial court that the default judgment could only be vacated through a Civ.R. 60(B) motion for relief from judgment, that BOA did not file. By its very terms, however, Civ.R. 60(B) is only available for relief from a final judgment. As we have held in the past, in a case that involves multiple parties, a Civ.R. 55 default judgment is only a final, appealable order if it includes a Civ.R. 54(B) finding that there is "no just reason for delay." See *Settlers Bank v. Burton*, 4th Dist. Washington Nos. 11CA10, 11CA12 & 11CA14, 2012-Ohio-2418, at ¶¶13-16. This case involves multiple parties and the March 5, 2013 default judgment against Peoples Bank does not include a finding that there is "no just reason for delay." Hence, the judgment is interlocutory and

{¶ 11} Second, we are not persuaded that appellant is correct regarding the substantive law. Mortgages are protected property interests. *Central Trust Co., N.A. v. Jensen*, 67 Ohio St.3d 140, 144, 616 N.E.2d 873 (1993); also see *Central Trust Co., N.A. v. Spencer*, 41 Ohio App.3d 237, 239, 535 N.E.2d 347 (1st Dist. 1987). In the final analysis, "[t]he purpose of a mortgage is to secure the payment of a debt." *Riegel v. Belt*, 119 Ohio St. 369, 164 N.E. 347, at the third syllabus paragraph (1928); also see *Community Action Committee of Pike County, Inc. v. Maynard*, 4th Dist. Pike No. 02CA695, 2003-Ohio- 4312, at ¶10. It is the debt that is the property interest, and not the instrument itself that secures payment of that debt.

{¶ 12} There is no dispute in the case sub judice that the decedent incurred a debt to Peoples Bank, or that BOA purchased such debt. What appellant argues is that the security for the payment of this debt was not assigned or recorded at precisely the right time. Again, we find no merit in this argument. It is well-settled that the purpose of the recording statute is to put other lienholders on notice and to prioritize liens. *Bank of New York Mellon Trust Co, N.A. v. Loudermilk*, 5th Dist. Fairfield No. 2012–CA–30, 2013-Ohio-2296, at ¶29; *Weaver v. Bank of New York Mellon*, 10th Dist. Franklin No. 11AP–1065, 2012-Ohio-4373, at ¶21; *Fifth Third Mtge. Co. v. Brown*, 8th Dist. Cuyahoga No. 97450, 2012-Ohio-2205, 970 N.E.2d 1183, at ¶14. If appellant represented another lienholder who relied to its detriment, on the absence of a recorded mortgage assignment, this would be a different situation. However, in the case sub judice appellant represents the minor child of the deceased owner of this property. It is not that we do not have sympathy for a child who lost his parent, and that the parent's estate will be

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not subject to a Civ.R. 60(B) motion for relief from judgment.

unable to provide for him, but we cannot escape the fact that he did not rely (to his detriment) on the failure to record the mortgage assignment.

{¶ 13} Thus, we will not extinguish a valuable property interest in the mortgagee simply because the correct forms were not properly executed or filed. Appellant cites no authority to support the proposition that a mortgage can be extinguished simply because the former owner of the debt does not file a timely response when it no longer had any interest to defend in the debt or mortgage.

{¶ 14} For these reasons, we find no merit in appellant's second assignment of error and it is hereby overruled.

II

{¶ 15} We now consider appellant's first and third assignments of error.[8] Our analysis begins with R.C. 2106.13(A), which provides that the decedent's son is entitled to a $40,000 allowance of support from his mother's estate. Whether he receives that support, however, is dependant on whether BOA has a valid lien against the real estate. There is no question that the

[8]Before we consider the merits of appellant's first and third assignments of error, we note that the argument portion of his brief states that the two assignments of error are related and will ''be briefed together.'' Appellate courts may review assigned errors together, but litigants do not have that option. *State v. Wyatt*, 4th Dist. Scioto No. 93CA2168, 1994 WL 484083 (Aug. 30, 1994). App.R. 16(A)(7) requires a separate argument be made as to each assignment of error. Failure to comply with that requirement is grounds to disregard them pursuant to App.R. 12(A)(2) and, thus, affirm the trial court's judgment. *McKim v. Finely*, 4th Dist. Washington No. 13CA5, 2014-Ohio-4012, at ¶9; *Wells Fargo Bank, N.A. v. Dumm*, 4th Dist. Athens No. 13CA5, 2014-Ohio-3124, at ¶13. However, we believe that the interests of justice compel us to address these assignments of error.

estate is insolvent.[9] In his complaint, appellant stated that the decedent had $12,840 in personal property. The real estate was sold for $95,000. This totals $107,000 in gross assets. Appellant states that the costs of administering the estate will be in excess of $10,000. BOA, in its "cross-claim," stated it is due in excess of $138,000 on the mortgage.

{¶ 16} The pivotal question is who gets paid first from the available assets. R.C. 2117.25 sets out an estate's priority of payment of debts as follows:

> "(A) Every executor or administrator shall proceed with diligence to pay the debts of the decedent and shall apply the assets in the following order:
>
> (1) Costs and expenses of administration;
>
> (2) An amount, not exceeding four thousand dollars, for funeral expenses . . .and an amount, not exceeding three thousand dollars, for burial and cemetery expenses . . .
>
> (3) The allowance for support made to the surviving spouse, minor children, or both under section 2106.13 of the Revised Code[.]"

The payment of a minor child's support allowance occurs after administration and funeral expenses, but before the payment of other debts. If BOA is an unsecured creditor, the decedent's son will take the support allowance and the bank (as well as any other creditors) will compete for any remaining assets. That changes, however, if the mortgage lien held by BOA is valid. R.C. 2127.38 states, in pertinent part, as follows:

> "The sale price of real property sold following an action by an executor, administrator, or guardian shall be applied and distributed as follows:
>
> (A) To discharge the costs and expenses of the sale . . .

[9] Appellant does not contest the validity of the debt to BOA, but only the validity of the mortgage that secured that debt.

> (B) To the payment of taxes, interest, penalties, and assessments then due against the real property, and to the payment of mortgages and judgments against the ward or deceased person, according to their respective priorities of lien, so far as they operated as a lien on the real property of the deceased at the time of the sale, or on the estate of the ward at the time of the sale, that shall be apportioned and determined by the court, or on reference to a master, or otherwise;" (Emphasis added.)

Thus, after payment of the expenses related to the sale and taxes, lienholders are next in priority for payment from the sale proceeds. Courts have held that lienholders must be paid prior to any distribution of proceeds pursuant to R.C. 2117.25. See *In re Estate of Cogan*, 123 Ohio App.3d 186, 189, 703 N.E.2d 858 (8th Dist.1997); *In re Estate of Durr*, 11th Dist. Portage No. 92-P-0029, 1992 WL 267419 (Sep. 30, 1992). Indeed, estates should not be permitted to use probate statutes to defeat the interests of secured creditors. *In re Fleisch*, 1st Dist. Hamilton No. C-950282, 1996 WL 539797 (Sep. 25, 1996).

{¶ 17} In the case at bar, the gist of appellant's argument in his first and third assignments of error is that the failure to file the mortgage assignment in a timely manner obliterated the lien altogether and reduced BOA to the status of an unsecured creditor. Thus, appellant reasons, BOA should take after payment of the support allowance to the minor child. We disagree.

{¶ 18} We believe that the flaw in appellant's argument is that he treats the assignment itself as the instrument that created the lien, rather than the mortgage. Recording a mortgage assignment simply puts the world on notice as to the ownership and enforcibility of the lien created by the original mortgage. It does not create the lien itself.

{¶ 19} Appellant cites R.C. 5301.23, the statutory provision that requires all mortgages to be recorded. We agree and, in the parties' stipulations, the first states that the "mortgage was

duly filed for record." Appellant then cites R.C. 5301.231(A) which states that "[a]ll amendments or supplements of mortgages, or modifications or extensions of mortgages" shall be recorded and "shall take effect at the time they are delivered to the recorder . . ." (Emphasis added.) It appears appellant's argument in these two assignments of error is based on the "shall take effect" language of the statute. We, however, are unsure why he thinks this supports his position.

{¶ 20} First, the parties final stipulation is that the mortgage assignment was filed for record on March 27, 2013, and, thus, would have "taken effect" on that day. This is well before the trial court's decision. Second, a failure to comply with this statute only affects the lienholder priority, and has no effect on the underlying obligation. *Secy. of Veterans Affairs v. Leonhardt*, 3rd Dist. Crawford No. 3–14–04, 2015-Ohio-931, 29 N.E.3d 1, at ¶61. A failure to comply with this statute does not result in the invalidation of the original mortgage. *Community Action Committee of Pike County, Inc. v. Maynard*, 4th Dist. Pike No. 02CA695, 2003-Ohio-4312, at ¶8. Again, the gist of appellant's argument is that the failure to timely record an assignment of mortgage simply negates the mortgage lien altogether. Appellant, however, cites no authority to support such an extraordinary result and we have found none in our own research.

{¶ 21} In his brief, appellant purports[10] to cite to several cases that stand for the proposition that (1) the failure to record an assignment of mortgage rendered the assignment invalid to subsequent bona fide purchasers, and (2) a mortgage assignee, who does not record the instrument pursuant to R.C. 5301.231(A), risks not being notified and made a party to an action

[10] We use the term "purports" because appellant fails to give us a pinpoint citation to the page of the official reporter where

concerning the property. We have no dispute with these principles, but do not believe that they have any bearing here. Neither appellant, nor the minor child, is a bona fide purchaser for value, and BOA was not notified of the instant action.

{¶ 22} Although we reiterate that we agree that the better practice would have been to record the mortgage assignment as soon as possible after the transfer of the promissory note (for BOA's own benefit as against future lienholders), its failure to do so does not simply eliminate the lien that it acquired from Peoples Bank.

{¶ 23} For these reasons, we hold that appellant's first and third assignments of error are without merit and are hereby overruled.

{¶ 24} Having considered all of the errors appellant assigned and argued, and having found merit in none, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

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any of his propositions appears.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court, Probate Division, to carry this judgment into execution.

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

Hoover, P.J.: Concurs in Judgment & Opinion
McFarland, A.J.: Concurs in Judgment Only

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.