

[Cite as *Robertson v. A.E.M.M. Properties, Inc.*, 2004-Ohio-632.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83136

SYLVESTER ROBERTSON, ET AL.,

Plaintiffs-appellees

vs.

A.E.M.M. PROPERTIES, INC., ET
AL.,

Defendants-appellants

JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT
OF DECISION:

FEBRUARY 12, 2004

CHARACTER OF PROCEEDING:

Civil appeal from Common Pleas
Court, Case No. CV-453206

JUDGMENT:

AFFIRMED.

DATE OF JOURNALIZATION:

APPEARANCES:

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Appearances continued on next
page.

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KARPINSKI, J.

{¶1} A jury awarded plaintiff-appellee Sylvester Robertson ("Robertson") \$75,000 against defendant-appellant A.E.M.M. ("AEMM") properties. Robertson filed a certificate of judgment lien under R.C. 2329.02 with the clerk of courts the next day. A year and a half later, Robertson filed a foreclosure action under R.C. 2323.07

against AEMM properties.¹ Robertson filed a motion for summary judgment, which stated that AEMM's answer admitted all necessary material facts and that Robertson was entitled to judgment as a matter of law. Opposing the motion, AEMM claimed that unless he first attempted to execute on its personal property, Robertson was precluded from executing on its real property. The court granted summary judgment to Robertson in a judgment entry which stated:

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS TAKEN AS BOTH A MOTION FOR SUMMARY JUDGMENT AND A MOTION FOR JUDGMENT ON THE PLEADINGS. SINCE DEFENDANT A.E.M.M. DOES NOT DISPUTE THE EXISTENCE OF PLAINTIFF'S LIEN OR THE AMOUNT DUE THEREON, JUDGMENT IS RENDERED ON THE PLEADINGS AS TO THESE ISSUES. FURTHER, PLAINTIFF MAY ELECT TO PURSUE FORECLOSURE PURSUANT TO R.C. 2323.01 ET SEQ. WITHOUT FIRST EXECUTING UPON DEFENDANT'S PERSONAL PROPERTY (SEE FEINSTEIN V. RODGERS, (1981), 2 OHIO APP.3D 96, 98). ACCORDINGLY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THIS ISSUE IS GRANTED. ****

{¶2} Final foreclosure judgment was rendered a few weeks later.

AEMM² properties appealed, stating one assignment of error:

¹A year after Robertson filed his foreclosure action, Republic Bank, with leave of court, entered the action and filed an answer and crossclaim. A year and a half after Republic entered the action, the magistrate granted Republic a first and best lien on the subject property. Republic is not a party to this appeal and its lien has no effect on the question at bar.

²This appeal is filed only by and in the name of AEMM. Although its appellate brief states that it is "Defendant-Appellant A.E.M.M. Properties, Inc.'s Merit Brief," appellant's reply brief lists "Elie Abboud" as the defendant-appellant in its caption and states in the body of the brief that it is filed by "Appellant Abboud Properties, Inc." The briefs were filed by the same attorney, and a review of the common pleas docket shows the statutory agent for A.E.M.M. as Ruth S. Abboud. Appellee's brief also erroneously lists on its outside cover "Elie Abboud, et al." first in the caption, but has the correct caption on the brief itself. We also note appellant failed to attach a certified copy of service to its merit brief. At oral argument, however, appellees acknowledged receiving this brief.

{¶3} THE TRIAL COURT ERRED IN FINDING THAT APPELLEES DID NOT HAVE TO EXECUTE ON APPELLANT AEMM'S PERSONAL PROPERTY BEFORE ATTEMPTING TO EXECUTE ON REAL PROPERTY.

{¶4} There are no disputed facts; AEMM presents only a question of law. It alleges that because Robertson's judgment against it was obtained under R.C. 2329.02, it must be executed under the same chapter, that is, 2329. Thus AEMM cites to R.C. 2329.11, which states:

{¶5} The officer to whom a writ of execution is delivered shall proceed immediately to levy it upon the goods and chattels of the debtor. If no goods and chattels can be found, the officer shall indorse on the execution the words "no goods," and forthwith levy it upon the lands and tenements of the debtor which are liable to satisfy the judgment.

{¶6} AEMM claims that the statute required that Robertson first try to execute judgment on its "goods and chattels" before it could foreclose on its real property. Additionally, AEMM states, Robertson could not pursue foreclosure against it under R.C. 2323.07 because the judgment lien was filed under another chapter, R.C. 2329, specifically 2329.02. In support of its claims, AEMM cites to two old cases, *Wheeling L.E. & P. Coal Co. v. First Natl. Bank of Smithfield* (1896), 55 Ohio St. 233, and *Willis v. Beeler* (1937), 90 F.2d 538.

{¶7} Neither of these cases is on point with the issue presented, because neither addresses the difference between the statutes. Rather, they merely address executing judgment under R.C.

2329. Because they do not discuss executing judgment under R.C. 2323.07 or the difference between the two statutes, these cases are not helpful in our analysis.

{¶8} More recent case law, including law from this district, provides that a judgment creditor may execute upon the real property of the debtor, regardless under which statute the creditor obtained his judgment. The Tenth Appellate District explained as follows:

R.C. 2329.02 is intended to create a specific lien³ upon the lands and tenements of the judgment debtor which lie within the county at the time there is filed in the office of the clerk of the court of common pleas of such county a certificate of judgment. The lien applies specifically to all such property identified as belonging to the judgment debtor at the time of the filing of the certificate *and may be enforced as a specific lien pursuant to R.C. 2323.07 by a foreclosure action.*

{¶9} A judgment creditor may elect to enforce a judgment against a judgment debtor by either of the alternative methods provided by R.C. Chapter 2323 or R.C. Chapter 2329.

{¶10} *Feinstein v. Rogers* (1981), 2 Ohio App.3d 96, syllabus, emphasis added. This court favorably cited to *Feinstein* in *BancOhio v. Miele* (Mar. 28, 1985), Cuyahoga App. No. 48917, 1985 Ohio App. LEXIS 7532, at *4:

³"A lien may be specific in that the holder thereof has a right against a particular property for the satisfaction of his claim, or it may be general if the amount, description, and location of the debtor's property necessary to satisfy the lien has not been ascertained, and if no particular property has been possessed, set aside, or conveyed to guarantee satisfaction of the lien. *** A general lien or claim in favor of the public or private person against another which has been reduced to judgment or its statutory equivalent may become specific by its enforcement through seizure on execution, warrant, or other process." Ohio Jurisprudence 3d (1986), 66 Liens, §29.

{¶11} In *Feinstein v. Rogers* (1981), 2 Ohio App.3d 96, 97, 440 N.E.2d 1207, 1209, the court held that a lien established pursuant to R.C. 2329.02 is a specific lien within the meaning of R.C. 2329.07 [sic]⁴, and therefore a plaintiff who obtains such a lien may enforce it by a foreclosure action. The court in *Feinstein* found that summary judgment was properly granted in favor [sic] the plaintiff in a suit to foreclose a lien established pursuant to R.C. 2329.02 where the plaintiff showed, by affidavits or other documents, that he obtained a judgment, filed a certificate of the judgment in the county where the defendants' real property was located, and had the certificate recorded.

{¶12} See, also, *Denune v. Carter-Jones Lumber Co.* (2001), 144 Ohio App.3d 266 ("In general, liens may be enforced in several ways, *inter alia*, a [sic] R.C. 2323.07 foreclosure action or a writ of execution pursuant to R.C. Chapter 2329."); *Cent. Trust Co. v. Young* (Dec. 2, 1993), Franklin App. No. 93AP-785.

{¶13} AEMM provides no law to support its assertion that a party obtaining a judgment under R.C. 2329.02 cannot levy execution upon property under R.C. 2323.07. On the contrary, the case law states that it can.

{¶14} The judgment is affirmed.

Judgment affirmed.

SEAN C. GALLAGHER and ANTHONY O. CALABRESE, JR., JJ., concur.

⁴R.C. 2329.07 discusses dormant judgments. The correct statute is 2323.07, which discusses foreclosure liens.

It is ordered that appellees recover of appellants their 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 Common Pleas Court to carry this judgment into execution.

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

DIANE KARPINSKI
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

