70225-4

No. ~~87455-7~~

SUPREME COURT
OF THE STATE OF WASHINGTON

BANK OF AMERICA, N.A., a national association,

Respondent,

v.

KENNETH TREIGER, a married person as to his separate estate,

Appellant,

J'AMY LYN OWENS, an unmarried person; SHULKIN HUTTON, INC., P.S., a Washington professional service corporation; EDMUND JOHN WOOD; and IN REM AGAINST ANY AND ALL SEPARATE PROPERTY OF J'AMY LYN OWENS AWARDED TO KENNETH TREIGER;

Defendants.

BRIEF OF RESPONDENT

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I. INTRODUCTION

In bringing this matter on appeal for a second time, Appellant Kenneth Treiger ("Treiger") asks the Court to trample on the constitutional rights possessed by creditors following a marital dissolution. He urges the Court to hold, contrary to the federal and state constitutions, not to mention the law of Washington for several decades, that a divorce court has the power to award property free and clear of the equitable claims of existing creditors that are not before it.

Treiger goes on to present a bizarre burden shifting argument: that somehow Respondent Bank of America, N.A. ("Bank of America") had a duty to raise and argue its *in rem* claim in his first appeal involving lien priority, even though that *in rem* claim was never adjudicated by the trial court, having been rendered moot by the trial court's lien priority ruling and preserved in the event of an appeal. Of course, the burden was carried by Treiger, not Bank of America. If Treiger was unhappy with the trial court's preservation of the *in rem* claim, it was his obligation to raise that issue in his first appeal. He failed to do so.

In addition, Treiger again raises the factually incorrect argument that the trial court failed to obey the Mandate of this Court after remand. Judge Canova did not simply "reinstate" his earlier ruling, as Treiger disingenuously claims. Along with reordering earlier disbursements to

comply with this Court's Mandate, Judge Canova then adjudicated the preserved *in rem* claim, which was no longer moot due to that same Mandate. Interestingly, in his brief, Treiger completely fails to mention that this Court has already unanimously denied his Motion to Recall the Mandate which he brought before the Court last July.

Also, for no apparent reason other than to confuse the issues, Treiger repeatedly references the fact that his bankruptcy estate paid a portion of the debt owed Bank of America in the course of discharging the marital community obligation. While true, this fact is completely irrelevant to the issues currently before the Court. While the community obligation was discharged, the separate obligation of Defendant J'Amy Lyn Owens ("Owens") never was. This case is about the equitable claim against Owens' separate property that arose when she executed Guaranties to Bank of America promising to repay the debts that her company incurred.

The trial court correctly granted summary judgment to Bank of America on the preserved *in rem* claim after remand. It properly recognized that the divorce court that dissolved the Owens-Treiger marriage had absolutely no ability to affect the rights of existing separate creditors like Bank of America who possessed equitable claims on the separate property of Owens that was divided in the dissolution action.

Treiger urges the Court to reach an unconstitutional result. A ruling in his favor would necessarily rest on a holding that a divorce court has the power to award property to a spouse free and clear of an existing creditor's equitable claim to it. Such a holding would violate the due process rights of the existing creditor, who is not a party to the dissolution action. For this fundamental reason, the trial court's grant of summary judgment on Bank of America's *in rem* claim should be affirmed.

II. STATEMENT OF THE CASE

In October 1998, while married to Treiger, Owens personally guaranteed two commercial loans from Bank of America's predecessor to her company, The Retail Group, Inc. ("The Retail Group") (II CP 3-5, 38-40, 44-45.) Several years later, The Retail Group defaulted on the loans and was liquidated. (II CP 96.) Owens failed to honor her Guaranties. (CP 5-7, 411.)

In June 2000, Treiger and Owens purchased real property commonly known as 10263 Maplewood Place Southwest in Seattle ("Maplewood"). (II CP 410.) In February 2001, Treiger and Owens petitioned for the dissolution of their marriage. (II CP 410.) In early 2002, during the pendency of the dissolution action, each spouse filed a separate bankruptcy petition. (II CP 410.) A decree of dissolution was entered in

June 2002, but property and debt issues were reserved until the spouses' bankruptcy proceedings had concluded. (II CP 410.)

In April 2004, after a bankruptcy court determined that Maplewood was community property, Owens, as a single woman, purchased Maplewood from the Chapter 7 trustee of Treiger's bankruptcy estate; Maplewood from that point forward was her separate property. (II CP 410-12.) In 2005, Owens' bankruptcy case was dismissed and Treiger's bankruptcy case was closed. (II CP 411.) As a result of the dismissal of her Chapter 11 bankruptcy, the separate debts of Owens were not discharged. (II CP 106, 108.)

In May 2006, the divorce court entered a supplemental decree that ordered the sale of Maplewood and awarded half of the net proceeds of that sale to Treiger. (II CP 411.) Several orders and decrees were entered between March and August of that year during this phase of the dissolution proceeding; these documents ("Documents 1370-76") awarded Treiger varying amounts of fees, sanctions, etc. for Owens' intransigence in the dissolution proceeding. (II CP 411.)

In July 2006, Bank of America sued Owens under the terms of her Guaranties (King County Superior Court Cause No. 06-2-23098-1 SEA). (II CP 3-21.) Four months later, Bank of America amended its Complaint to assert an *in rem* claim against any and all separate property of Owens

awarded to Treiger in their dissolution action, including any interest in Maplewood. (II CP 32-50.) In an interlocutory order, the trial court in the Bank of America action ordered that Owens' interest in Maplewood be attached before judgment, but did not expressly rule on Bank of America's request for a prejudgment writ of attachment on any separate property of Owens awarded to Treiger. (I CP 63-65.) The prejudgment Writ of Attachment on Owens' interest in Maplewood was recorded in December 2006. (II CP 411.)

Maplewood sold in May 2007, and, pursuant to an agreement of all parties, the net proceeds of $1,114,054.83 were placed into a trust account pending a declaratory judgment regarding the priority and extent of claims asserted against Maplewood by Owens, Treiger, Bank of America, and Owens' attorney, Defendant Shulkin Hutton, Inc., P.S. (I CP 147, II CP 411-12.) Under the agreement, Bank of America then brought an action for a declaratory judgment (King County Superior Court Cause No. 07-2-21347-3 SEA). (II CP 196-207, 354.)

On December 14, 2007, judgment for $593,519.24 was entered against Owens in favor of Bank of America in Cause No. 06-2-23098-1 SEA. (II CP 533-36.). No rulings were made with regard to the *in rem* claim, and the trial court ordered that: "It is anticipated that 06-2-23098-1

SEA will be consolidated w/#07-2-21347-3 before Judge Canova." (II CP 536).

The same day, Bank of America and Treiger filed cross-motions for summary judgment in Cause No. 07-2-21347-3 SEA; Bank of America sought priority based on the recording of its Writ of Attachment against Maplewood, while Treiger sought priority based on the entry and recording of the supplemental decree and Documents 1370-76. (I CP 135-62.) While the cross-motions were pending, the two cases referenced above were consolidated. (II CP 537.)

After hearing oral argument on the cross-motions on January 11, 2008, Judge Canova issued his ruling on April 10, 2008. (I CP 284-96.) In the Order Granting Bank of America's Motion for Summary Judgment, he ruled that Bank of America's Judgment against Owens had a lien priority to the Maplewood proceeds over Treiger's award of sale proceeds in the supplemental divorce decree, and also over Documents 1370, 1375, and 1376. (I CP 284-295.)

On May 14, 2008, Judge Canova entered an Order Disbursing Funds and Resolving All Remaining Issues, which certified that the declaratory action had concluded at the trial court level and disbursed the net proceeds according to the priorities specified in the April 10 ruling. (II CP 515-18.) The May 14 Order expressly states:

> Bank of America's *in rem* claim ag
> separate property of J'Amy Lyn Owe
> Kenneth Treiger alleged in Bank of Ame
> Complaint under cause number 06-2-2
> consolidated herein, has not been adj
> rendered moot by entry of the Order Gr
> America's Motion for Summary Judgr
> America's *in rem* claim will be hereafte
> tolled in the event of an appeal of this
> Granting Bank of America's Motion for Summary Judgment.

(II CP 518.) The net proceeds were then divided among the parties pursuant to the May 14 Order. (II CP 224-227.)

Treiger then appealed the characterization of Maplewood as Owens' separate property and the grant of priority to Bank of America's Writ of Attachment over his award in the supplemental decree and Documents 1370, 1375, and 1376. Treiger did not, however, appeal the preservation of the *in rem* claim. (I CP 297-303, II CP 412, 414.) The Court of Appeals issued its opinion on November 16, 2009, holding that: (1) Maplewood was Owens' separate property, (2) Treiger's supplemental decree created a judgment lien on half of the net proceeds that had priority over Bank of America's Writ, (3) Documents 1370 and 1375 were *not* judgments with priority over Bank of America's Writ, and (4) Document 1376 was a judgment with priority over said Writ. (II CP 407-20.)

This Court accepted review of the decision of the Court of Appeals. *Bank of Am., N.A. v. Owens*, 168 Wn.2d 1039, 233 P.3d 888

(2010) (unpublished table decision). On October 27, 2011, it issued its opinion, affirming the Court of Appeals in part and reversing in part. (II CP 340-49.) The Court concluded that the supplemental decree had created an equitable lien (as opposed to a judgment lien), that Document 1370 did not have priority over Bank of America's Writ, and that Document 1375 and Document 1376 did have priority over the Writ. (II CP 347.)

The Court's sole direction to Judge Canova upon remand was contained in the final sentence of the majority opinion: "We remand this case to the superior court for further proceedings consistent with this opinion." (II CP 347.)

In March 2012, the parties returned to Judge Canova's courtroom. Bank of America moved for summary judgment on its preserved *in rem* claim, which was no longer moot due to the reversal of the April 2008 ruling on lien priority. (I CP 303, II CP 208-64.) Treiger, in turn, filed a Motion to Enter Judgment on Mandate and for Taxable Costs. (II CP 265-321.) Oral argument was heard on April 6, 2012. (RP 1, 3.)

On May 15, 2012, Judge Canova granted Bank of America's Motion and denied Treiger's. (II CP 455-60.) The Order for Summary Judgment *In Rem* ("Order *In Rem*") awards judgment to Bank of America *in rem* in the amount of $308,990.37. (II CP 457.) This amount is the

portion of net proceeds disbursed to Bank of America in May 2008 with priority over Treiger's claims, based on Bank of America's status as an existing separate creditor of Owens at the time of the May 2006 award of her separate property to Treiger. (II CP 457.) The Order *In Rem* also expressly reallocates the May 2008 disbursements "in accordance with the Supreme Court's ruling in this case . . . ." (II CP 457.)

Treiger appealed the Order *In Rem* on June 4, 2012. (II CP 451-54.) He also moved this Court to recall its Mandate, alleging that Judge Canova had "refused to follow this Court's mandate, entering a judgment for the Bank identical in effect to the one reversed by this Court . . . ." (Mot. to Recall Mandate and for Fees 1-2.) Treiger's motion to recall the Mandate was subsequently unanimously denied by the Court. (Order, July 12, 2012, Case No. 84044-0.)

This appeal is currently before this Court instead of the Court of Appeals because Treiger filed his notice of appeal to this Court. (II CP 451-54.) (Statement of Grounds for Direct Review 1, 14.) At this time, the Court has not yet decided whether there are grounds to justify direct review.

III. ARGUMENT

On review of an order granting summary judgment, the appellate court considers only the evidence and issues called to the attention of the

trial court. RAP 9.12. Summary judgment is properly granted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). "The standard of review for a summary judgment order is de novo, applying the same inquiry as the trial court, and viewing the facts and reasonable inferences in the light most favorable to the nonmoving party." *Ramey v. Knorr*, 130 Wn. App. 672, 685, 124 P.3d 314 (2005) (citing *Lam v. Global Med. Sys., Inc., P.S.*, 127 Wn. App. 657, 661, 111 P.3d 1258 (2005)).

A. <u>The Treiger Property Award Was Subject to Bank of America's Existing Equitable Claim</u>.

It is well settled that a property award in a dissolution action is subject to the existing equitable claims of creditors. There is a constitutional basis for this rule. The parties to a dissolution action are the spouses. Creditors of the spouses are not before the court, and the divorce court thus lacks jurisdiction over them. Without jurisdiction, the divorce court cannot enter a decree restricting a creditor's ability to pursue its claims without violating the creditor's due process rights. A divorce decree that purports to award property free and clear of the existing equitable claims of creditors cannot withstand constitutional attack.

1. Washington Cases Have Consistently Recognized that a Property Award in a Dissolution Action Is Subject to Existing Equitable Claims of Creditors.

Washington law has long recognized that a divorce court lacks the power to strip a creditor's existing equitable claim from an award of property between spouses. *Watters v. Doud*, 95 Wn.2d 835, 631 P.2d 369 (1981); *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979); *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 70 Wn.2d 893, 425 P.2d 623 (1967); *Dizard & Getty v. Damson*, 63 Wn.2d 526, 387 P.2d 964 (1964); *Arneson v. Arneson*, 38 Wn.2d 99, 227 P.2d 1016 (1951); *Farrow v. Ostrom*, 16 Wn.2d 547, 133 P.2d 974 (1943); *Capital Nat'l Bank of Olympia v. Johns*, 170 Wash. 250, 16 P.2d 452 (1932); *McLean v. Burginger*, 100 Wash. 570, 171 P. 518 (1918).

Farrow perhaps best enunciates this principle. In that case, a married man named Cameron Ostrom seriously injured Emma Farrow in his car. 16 Wn.2d at 548-49. At the time of the accident, he and Mrs. Ostrom owned an interest in a real estate contract. *Id.* Shortly after the accident, Mrs. Ostrom filed for divorce. *Id.* at 549. Mrs. Farrow brought a tort action against Mr. Ostrom and the marital community; but before a verdict or judgment was entered in the Farrow case, the divorce court awarded Mrs. Ostrom the community interest in the real estate contract. *Id.*

After a judgment was entered in Mrs. Farrow's favor in the tort action and a casualty company had satisfied a portion of it, Mrs. Farrow sought the remainder from the property awarded in divorce to Mrs. Ostrom in a new action. *Id.* Specifically, Mrs. Farrow attempted to collect from the real estate contract interest awarded Mrs. Ostrom by the divorce court. *Id.* Mrs. Farrow's action failed at the trial court level, as the judge deemed it an improper collateral attack on the divorce decree. *Id.* at 552.

This Court disagreed, however, honing in on the critical issue:

> [T]he property was awarded to Mrs. Ostrom "free and clear from any claim on the part of the husband," but what we are concerned with in this case is whether or not it was thereby awarded to her free and clear of any claim on the part of Mrs. Farrow.
>
> An interlocutory decree of divorce is not an action to quiet title, and even when such a decree awards a husband's interest in community property to his wife "as her sole and separate property," it purports to do no more than transfer such interest as he has. . . . [A]ll that it purported to do was to make the property involved the sole and separate property of Mrs. Ostrom *in so far as Cameron W. Ostrom was concerned.* In entering the interlocutory decree, the court did not attempt to extinguish the plaintiff's equitable claim against the property. In fact, it was not even advised of its existence. Had the claim been called to the attention of the court, it could have made no adverse ruling concerning it, since the claimant was not a party to the action.

Id. at 552-53 (second emphasis added).

The Ostroms urged that the case be treated as a priority contest between two tort claimants, in which Mrs. Ostrom's claim was reduced to judgment by the divorce decree 18 days before Mrs. Farrow's claim was reduced to judgment in her action. Responding to this argument, this Court stated:

> We are not impressed by this contention. To treat a divorce action as a tort action is to depart from reality. Furthermore, if we should so treat it, it would be somewhat incongruous to establish priority between the two claims. They are against different things. Mrs. Ostrom's claim relates to her husband's community interest in the property only, while Mrs. Farrow's relates not only to that, but also to the community interest of Mrs. Ostrom herself.

Id. at 553. This Court held that Mrs. Farrow, as the holder of an equitable claim against the real estate contract interest awarded to Mrs. Ostrom, was entitled to the proceeds from Mrs. Ostrom's sale of that interest, less a credit for certain amounts that Mrs. Ostrom had paid under the contract from her separate funds following the divorce. *Id.* at 555-56.

The rule of law enunciated in *Farrow* controls here. Just as the award of the real estate contract interest to Mrs. Ostrom was subject to the equitable claim of Mrs. Farrow, the award of Owens' separate Maplewood property to Treiger was subject to the equitable claims of her existing separate creditor, Bank of America. *Farrow* makes clear that the holder of an equitable claim has a superior interest in such property over a former

spouse awarded the property, even if the existing creditor's claim is unliquidated and unsecured at the time of the award of the property by the divorce court.

This Court's decision in *Watters v. Doud*, 95 Wn.2d 835, 631 P.2d 369 (1981) is also particularly instructive here. In that case, the creditor sought to levy upon the full appreciated value of former community real property that was currently held as separate property by the non-liable ex-spouse. *Id.* at 838. This Court, deciding a matter of first impression, held that creditors holding equitable claims on property awarded in a dissolution are limited to the existing equity in the liable property at the time of the divorce and cannot reach any post-divorce appreciation. *Id.* at 839-40. As in *Farrow* and this case, the existing creditor in *Watters* had not reduced his equitable claim to judgment at the time the liable property was awarded to the non-liable spouse. *Id.* at 836-37.

The *Watters* court also noted the legal similarities, from a creditor's perspective, between a debtor's divorce and his or her death:

> Our ruling will not frustrate any legitimate expectations. It will, to a degree, affect creditors in the same way as when death terminates the marriage. When death terminates the marriage, creditors must file their claims within a limited period of time and those claims are satisfied only to the extent of the value of the property at that time. They are not entitled to execute upon the appreciated value of the distributed assets years after the death.

> There is no significant reason to treat creditors differently because the marriage is terminated by divorce rather than death. Dissolution is like death in that both end the marriage and convert all assets into separate property. In each, there is need for certainty to ascertain and to fix the burdens attending the disbursed property. While we do not go so far as to require a final accounting upon divorce, as in death, we do believe, in light of the equities and the community property principles, that creditors should be limited to the net equity as of divorce. We therefore conclude that community debts may be satisfied from the community's net equity, as measured at the time of divorce, in any property held by either spouse.

Id. at 840-41 (internal citations omitted) (emphasis added).

In a probate proceeding, an heir cannot expect to receive an award from the decedent's estate if the valid claims of creditors (whether secured or unsecured) have not been paid first. Yet that is exactly what Treiger is seeking here. Upon the death of his marriage, Treiger, like an heir in a probate, is only entitled to an award of separate property from Owens subject to the existing equitable claims of her separate creditors.

Treiger cites *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979) for the proposition that Bank of America had no right to the portion of Owens' separate property awarded to him by the divorce court. As will be explained below, *Griggs* is completely inapposite to the facts of this case. Moreover, the fact pattern in *Griggs* is quite unusual,

and the *Griggs* court cautioned that its "holding is limited necessarily to such narrow facts." *Id.* at 586.

In *Griggs*, an action was commenced against the Branches during their marriage. *Id.* at 578. After their divorce, a default judgment was entered against each of the Branches (but not their community), jointly and severally, after they failed to appear for trial. *Id.* at 579. Mrs. Branch then obtained an order vacating the default judgment entered against her, on the ground of excusable neglect. *Id.* at 580. Her reinstated case went to trial, and she prevailed on the merits. *Id.* The plaintiffs appealed, and while the appeal was pending, they attempted to enforce their default judgment against Mr. Branch, which had not been vacated. *Id.* They sought to execute on former community property awarded to Mrs. Branch in her divorce decree, but Mrs. Branch obtained an order restraining the execution. *Id.* at 580-81.

This Court affirmed the trial court's entry of the restraining order. *Id.* at 586. Because the plaintiffs had not obtained the judgment against Mr. Branch during the marriage, and because Mrs. Branch had prevailed on the merits on the claim against her, the Court held that the plaintiffs were unable to reach the former community assets awarded to Mrs. Branch by the divorce court.

The result in *Griggs* was reached because the asset owner before the divorce court award (the marital community) did not match the only obligor under the debt (Mr. Branch separately). In other words, under that particular set of facts, the community property awarded to Mrs. Branch was not liable for the separate debt of Mr. Branch.

The circumstance in *Griggs* is not present in the case at bar. Here, the asset owner before the divorce court award (Owens separately) matches the obligor under the debt (Owens separately). Thus, the separate property of Owens awarded to Treiger was liable for the existing equitable claims of Owens' separate creditors, including Bank of America.

In his brief, Treiger asserts that the pertinent case law discusses existing community, not existing separate liabilities. This is a distinction without a difference. There is no logical reason why, in equity, a separate asset subject to a separate debt should be treated differently than a community asset subject to a community debt. In each case, any existing equitable claims by a creditor against an asset travel with the asset upon it being awarded to a spouse in a dissolution decree. The statute governing such awards between spouses makes no distinction between community and separate property; either can be awarded to either spouse if the equities of the case demand it. RCWA 26.09.080.

Treiger's fundamental argument, that Bank of America needed to secure its equitable claim against Owens' separate property before the property award to him occurred, is simply wrong. The well-established case law discussed above demonstrates the contrary. In both *Watters* and *Farrow*, the creditors had not reduced their equitable claims to judgment at the time the liable property was awarded to the non-liable spouse. *Watters,* 95 Wn.2d at 836-37; *Farrow,* 16 Wn.2d at 553.

Further, as is discussed in the following section, the result urged by Treiger is not constitutionally tenable.

2. A Divorce Court Cannot Constitutionally Award Property to a Spouse Free and Clear of an Existing Creditor's Equitable Claim.

A basic tenet of divorce law is that only the spouses are parties to the proceeding; their creditors are not. A court presiding over a dissolution proceeding has no jurisdiction over the creditors of the spouses and thus has no ability to modify the rights of those creditors. This is a fundamental due process protection afforded creditors, as this Court has recognized:

> The spouses are made parties to a divorce action by due process and the state is made one by statute. The children are not parties, but, as a subject of the action, they have been made the chief concern of both the legislature and the courts. Other persons can not [sic] be made parties to the action by any statutory form of notice, nor can they intervene therein. It would appear elementary then, that there is no due process of law in a divorce action as to the rights of creditors of the spouses. The judgment can neither

> conclusively determine their rights, nor be made available on their behalf as a basis for any of the provisional remedies.

Arneson, 38 Wn.2d at 101 (emphasis added).

In *Arneson*, the divorce court decreed that certain real property be sold and that the proceeds be applied to taxes, existing liens, with the remainder prorated to creditors in the amounts of their respective claims. *Id.* at 100. This decree left nothing to be distributed to the spouses. *Id.* This Court reversed, holding that the divorce court had overreached. *Id.* at 101-03. The Court emphasized an important principle: The spouses' "several interests in the property [before the court for distribution] are, of course, determined, *as between themselves*, by the decree." *Id.* at 101.

In other words, a dissolution decree is binding on the spouses, whose rights it determines, but it has no such effect on parties not before the court, such as creditors. *In re Marriage of McKean*, 110 Wn. App. 191, 195, 38 P.3d 1053 (2002) (citing *Arneson*, 38 Wn.2d at 101; *In re Marriage of Soriano*, 44 Wn. App. 420, 422, 722 P.2d 132 (1986)). Before a court can extinguish a person's property interest in an action, due process requires that the person be joined as a party in the action. *See Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372, 374, 680 P.2d 453 (1984) (citing *Valentine v. Portland Timber & Land Holding Co.*, 15 Wn. App. 124, 128, 547 P.2d 912 (1976); G. Osborne, *Mortgages* § 321 (2d ed. 1970)).

The court that dissolved the marriage of Owens and Treiger did not have jurisdiction over Bank of America. The supplemental decree entered in that matter has no bearing on the rights of Bank of America in Owens' separate property. Judge Canova did not err when he ruled that the supplemental decree did not convey the separate property of Owens to Treiger free and clear of Bank of America's existing equitable claim. A ruling in favor of Treiger on the *in rem* claim would have made a mockery of Bank of America's constitutional right to due process of law.

B. Bank of America Had No Duty to Raise an Alternate Ground to Affirm in Treiger's First Appeal.

Treiger's argument that Bank of America should have raised its *in rem* claim in his first appeal is meritless. It was Treiger who appealed the trial court's lien priority decision; Bank of America was the respondent. In his briefing, Treiger did not appeal the preservation and tolling of the *in rem* claim, as was his obligation if he was displeased with it. As such, it became a final, non-appealable order, and the law of the case. As the initial prevailing party, Bank of America did not cross-appeal to the Court of Appeals and had no obligation under the Rules of Appellate Procedure to urge the Court of Appeals or this Court to review the preservation ruling.

The scope of review is determined by the appellant. RAP 2.4(a). A respondent may ask the appellate court to review acts which may prejudice it if repeated upon remand, but there is no obligation to do so. *Id.* Under that rule, then, the scope of review in the first appeal was limited to the issues raised by Appellant Treiger.

Treiger never assigned error to Judge Canova's preservation of Bank of America's *in rem* claim. His argument that Bank of America somehow had a duty to raise or argue that claim on appeal flies in the face of the plain language of RAP 2.4(a).

Nor did RAP 2.5(a) require Bank of America to present the *in rem* claim as an alternate ground for affirming the trial court's lien priority ruling. This rule is expressly permissive: "A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a) (emphasis added).

The cases cited by Treiger merely discuss that an appellate court may affirm a trial court's decision on whatever grounds are supported by the record; however, nowhere in the cases cited by Treiger is there any type of obligation imposed on a respondent to raise an alternative basis for affirming the lower court's decision. That is because RAP 2.5(a) is expressly permissive.

For example, in *Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994), an appellate court's power to affirm a trial court's decision on any basis supported by the record was discussed; no obligation of a party to point out such a basis was mentioned. And in *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975), the Court likewise held that a correct judgment can be sustained by an appellate court on any theory supported by the record. Again, the Court was discussing the power of an appellate court, not any obligation or duty of a party to the appeal.

Two cases cited by Treiger are of dubious relevance indeed. *See LK Operating, LLC v. Collection Group, LLC*, 168 Wn. App. 862, 279 P.3d 448 (2012), *amended by* 287 P.3d 628 (Wash. Ct. App. 2012); *Katare v. Katare* (*In re Marriage of Katare*), 125 Wn. App. 813, 105 P.3d 44 (2004). Treiger cites these cases, in which cross-appeals occurred, for the proposition that cross-appeals were required. Of course, these courts said no such thing. *LK Operating* and *Katare* do not relate to the matter before this Court; moreover, these cases provide absolutely no support for Treiger's assertion that a respondent has an obligation to cross-appeal an order under which it is the prevailing party.

Treiger also argues that the resurrection of the *in rem* claim after the appellate reversal of the lien priority ruling contravenes the general

policy of discouraging piecemeal appeals. This argument fails, as Treiger has only himself to blame for the fact that this case is now before the Court for the second time. First, no one forced him to file a second appeal; he chose to do so. Second, if he was truly concerned with the possibility of multiple appeals, it was within his power as the appellant in the first appeal to more broadly define its scope.

Finally, one portion of Treiger's argument deserves special scrutiny. In his brief, Treiger incorrectly states that Bank of America "had actually lost on the [*in rem*] claim it attempted to resurrect on remand." (Appellant's Br. 19.) This statement misstates both the law and the facts.

The final substantive ruling on the merits of Bank of America's *in rem* claim was not made by the trial court until Judge Canova entered the Order for Summary Judgment *In Rem* on May 15, 2012. (II CP 455-60). Contrary to Treiger's assertion, the prior interlocutory Order on December 14, 2006, which related to the Motion for Prejudgment Writ of Attachment, was not a final ruling on the merits of the *in rem* claim. Rather, it was merely an interlocutory ruling on that Motion. (I CP 63-65).

By definition, any ruling on a prejudgment attachment motion is interlocutory and cannot be a final ruling on the merits. This is because the matter is before the court prejudgment (i.e., before final substantive rulings on the causes of actions asserted are made). Moreover, it is well

established that trial courts have the power to amend and change prior interlocutory orders. As the Court of Appeals has noted:

> In the early case of *Balfour-Guthrie Inv. Co. v. Geiger*, our Supreme Court recognized the distinction between an interlocutory order and a final order or judgment for purposes of finality. There, the trial court had initially appointed a receiver to take possession of property during a foreclosure proceeding. The court later vacated its order. On appeal, the Supreme Court concluded that the trial judge was free to correct its "improvident" appointment of the receiver at any time before entry of the final decree of foreclosure. According to the court, "The order [appointing the receiver] was interlocutory, and, until the case terminated in a final judgment, the court retained jurisdiction, which carried with it the right to vacate any previous order improvidently made."
>
> The principle of this case has been unmodified by subsequent case authority. It is also consistent with the Black's Law Dictionary definition of the word interlocutory:
>
> > Provisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy. An interlocutory order or decree is one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.

Alwood v. Aukeen Dist. Court, 94 Wn. App 396, 399-400, 973 P.2d 12 (1999) (citing *Balfour-Guthrie Inv. Co. v. Geiger*, 20 Wash.

579, 579-80, 56 P. 370 (1899); *Black's Law Dictionary* 815 (6th ed. 1990)) (emphasis added).

Treiger's willingness to misstate the factual and procedural history of this case further undermines his contention that Bank of America, as the initial prevailing party, was somehow obligated to either raise an alternate ground for affirmance in his first appeal or to cross-appeal. This argument simply has no merit.

C. The Trial Court Obeyed the Mandate Following Remand.

The trial court strictly followed this Court's Mandate when it used its discretion to dispose of the remaining *in rem* claim upon remand. "[T]he language 'we remand for further proceedings' signals [the appellate] court's expectation that the trial court will exercise its discretion to decide any issue necessary to resolve the case." *In re Marriage of Rockwell*, 157 Wn. App. 449, 453, 238 P.3d 1184 (2010) (citing *State v. Schwab*, 134 Wn. App. 635, 645, 141 P.3d 658 (2006)). This type of remand is distinguished from the type in which the appellate court directs the trial court to do a specific act, such as enter a judgment in a certain amount or enter a specific order. *Harp v. Am. Sur. Co. of N.Y.*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957).

Treiger's argument regarding compliance with the Mandate is premised on the erroneous assertion that the Court issued a "specific

direction" remand, as described in *Harp*. (Appellant's Br. 13.) On the contrary, the Court issued an "exercise of discretion" remand, as described in *Rockwell*. It remanded for further proceedings. It did not direct the trial court to enter a judgment in favor of Treiger. Had the Court wished the trial court to simply enter judgment for him, it could have issued this specific direction. Instead, correctly recognizing that the *in rem* claim below was no longer moot due to the reversal of the lien priority ruling, the Court omitted any such specific direction to the trial court, instead implicitly directing Judge Canova to exercise his discretion in resolving that preserved claim.

After reversal and remand, a ruling against the successful appellant on an issue closely related to the overturned ruling does not constitute noncompliance with the mandate. For example, in *Monroe v. Winn*, 19 Wn.2d 462, 464-65, 142 P.2d 1022 (1943), a closely analogous trust case, this Court reversed the trial court in the first appeal, ruling that none of the parties could recover attorney fees on appeal from another party. After remand, the trial court nevertheless proceeded to award such fees from the trust estate. *Id.* at 463-64. On a second appeal, the Court affirmed this exercise of discretion by the trial court upon remand, explaining that the question of whether fees should be awarded from the trust estate "was not before [it in the first appeal] and was a question that would have to be

heard and determined by the trial court when the case again came before it." *Id.* at 465.

Here, as in *Monroe*, the question of whether Bank of America could recover under its *in rem* claim was never before this Court; it was thus appropriately resolved by the trial court after remand, even though the ruling went against Treiger.

Out of state authority exists that is directly on point, as well. In *Southern Tool & Supply, Inc. v. Beerman Precision Inc.*, 818 So. 2d 256, 257 (La. Ct. App. 2002), a state antitrust action was brought against the defendants. They filed exceptions alleging both lack of subject matter jurisdiction and "no cause of action." *Id.* at 257-58. The trial court dismissed the antitrust claims on the first ground, which mooted the second "no cause of action" exception. *Id.* at 263. The dismissal was reversed on appeal, which revived the "no cause of action" exception. *Id.* Because the trial court had not ruled on this second exception, the case was remanded "to the trial court for its consideration [of] the exception of no cause of action." *Id.*

Similarly, in *Reyher v. State Farm Mutual Automobile Insurance Co.*, 171 P.3d 1263, 1267 (Colo. Ct. App. 2007), the trial court granted summary judgment to the defendant and struck the plaintiff's class action allegations. *Id.* The striking of the class action claim was based on the

court's belief that the grant of summary judgment rendered it moot. *Id.* On appeal, the ruling on summary judgment was reversed. *Id.* Accordingly, upon remand for further proceedings, the appellate court concluded that the class certification issue had to be revisited by the trial court. *Id.*

Both *Southern Tool* and *Reyher* demonstrate that there is nothing improper about a trial court resolving a formerly moot claim revived after an appellate reversal, and that Treiger's contention that Judge Canova ignored the Mandate is completely unfounded. Rather than confirming the earlier reversed ruling, as Treiger claims (Appellant's Br. 13), the Order *In Rem* expressly reallocates earlier disbursements to comply with this Court's ruling (II CP 457).

Moreover, other cases upon which Treiger relies are easily distinguishable. In *State ex rel. Smith v. Superior Court for Cowlitz County*, 71 Wash. 354, 357, 128 P. 648 (1912), this Court issued a "specific direction" remand, not an "exercise of discretion" remand. The trial court in that case was specifically directed "to enter an order directing the money to be paid to the heirs of L. P. Smith, deceased." *Id.* at 356.

Similarly, in *McCausland v McCausland*, 129 Wn. App. 390, 399-400, 118 P.3d 944 (2005), *rev'd on other grounds*, 159 Wn.2d 607, 152 P.3d 1013 (2007), the trial court was directed to "reconsider" three discrete issues after certain terms in a spousal agreement were determined

to be unenforceable by Division II. The trial court was intended to wield some discretionary power in doing so, but was bound to "formulate its decision within the limitations of our specific instructions on remand." *Id.* at 400 (quoting *Harp*, 50 Wn.2d at 369).

Smith and *McCausland* are inapposite because they involve "specific direction" remands. Here, Judge Canova was given no such specific direction. He was simply told to conduct further proceedings consistent with the Court's opinion. He did so, by adjudicating the revived *in rem* claim and reallocating the disbursements per the Court's ruling on lien priority.

Finally, Treiger's reliance on *National Bank of Washington v. Equity Investors*, 83 Wn.2d 435, 518 P.2d 1072 (1974) is also misplaced. In that case, the basis of the Court's decision regarding priority between the three lienholders was the existence of a subordination agreement between MacDonald and the Bank. *Id.* at 440-43. "There [was] no way that MacDonald, by this subordination agreement, [could] be placed in a more favorable position than the Bank in the sharing of the proceeds of the foreclosure sale." *Id.* at 440. The Bank had lost the battle for first position in the first appeal, and MacDonald was thus unable, after remand, to claim that position due to the subordination agreement. *Id.* at 440-43. The priorities of MacDonald and the Bank were inextricably linked under this

agreement. MacDonald could not obtain a higher priority than Columbia because the Bank, to whom it was subordinated, could not. *Id.*

National Bank does not support Treiger's argument that Judge Canova disobeyed the Mandate. Judge Canova did not fail to obey the Mandate after remand by reordering the lien priorities as Treiger asserts. Rather, Judge Canova simply made a new substantive decision on a preserved cause of action that was no longer moot after the conclusion of the first appeal. Moreover, this case is distinguishable from *National Bank* on its facts. Here, there is no subordination agreement. Bank of America's equitable *in rem* claim against the separate property of Owens is not dependent upon the priority of another lienholder, as was the case in *National Bank*. Rather, it is based on the fact that its equitable claim to the net proceeds from the sale of Maplewood arose before half of those proceeds were awarded to Treiger in his dissolution action.

IV. CONCLUSION

For the reasons given above, Bank of America respectfully requests that the Court affirm the trial court's grant of summary judgment on its *in rem* claim.

Dated this 14th day of January, 2013.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the state of Washington that the following is true and correct:

On January 14, 2013, I arranged for filing and service of the foregoing BRIEF OF RESPONDENT to the Court and counsel for the parties to this action, as follows:

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Executed this 14th day of January, 2013, at Seattle, Washington.

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