61671-4

61671-4

84044-0

No. 61671-4

COURT OF APPEALS, DIVISION I
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;

Appellant,

SHULKIN, HUTTON, INC., P.S. a Washington professional service corporation; and EDMUND JOHN WOOD,

Defendants.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE GREG CANOVA

BRIEF OF APPELLANT KENNETH TREIGER

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2008 OCT 23 AM 10: 29

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

Attorneys for Appellant Kenneth Treiger

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENT OF ERRORS 2

III. STATEMENT OF ISSUES 4

IV. STATEMENT OF FACTS 5

A. Husband's Bankruptcy Action Discharged Community Debts But Left Wife's Separate Debts Unaffected. 5

1. Husband Filed For Bankruptcy While He And Wife Were Separated. 5

2. Respondent Bank Filed A Claim In Husband's Bankruptcy For A Debt Personally Guaranteed By Wife During The Marriage. Husband's Bankruptcy Estate Partially Paid The Debt And Any Community Obligation Was Discharged 7

B. The Dissolution Court Divided The Marital Estate, Awarding Husband One-Half Of The Net Proceeds From The Sale Of Real Property And Ordering Wife To Be Responsible For Any Personal Debts. 8

C. Respondent Bank Filed Suit Against Wife For The Balance Owed Under Her Personal Guarantee After The Community's Bankruptcy Discharge 10

1. While The Bank's Action Was Pending Husband Filed And Recorded Several Judgments Awarding Certain Sums Of Money To Him From Wife. 10

2. The Bank Obtained A Prejudgment Writ Of Attachment Only Against Wife's Interest In The Proceeds From The Sale Of Real Property. 12

D. After The Real Property Was Sold, Each Party Sought Priority For Their Liens Against The Proceeds..... 13

E. The Trial Court Granted Priority To The Bank Over Husband's Interest In One-Half Of The Net Proceeds Awarded To Him By The Dissolution Court. 15

V. ARGUMENT..... 18

A. The Trial Court Erred In Allowing The Bank To Satisfy Wife's Separate Debt From Husband's Interest In Former Community Property After Any Community Obligation Was Discharged By Husband's Bankruptcy Proceeding..... 18

1. The Trust Agreement Did Not Govern The Character Of The Maplewood Property. 19

2. The Maplewood Property Was Community Property And Husband Held An Ownership Interest In The Property As A Tenant In Common..... 21

3. The Bankruptcy Discharge Prohibited The Bank From Pursuing Husband's Interest In Former Community Assets To Satisfy Wife's Separate Debt. 22

B. Even If The Maplewood Property Was Wife's Separate Estate, Husband Had A Perfected Lien Against The Property Proceeds, Which Should Have Been Granted Priority Over The Bank's Prejudgment Writ Of Attachment. 26

1. The Supplemental Decree Was A Judgment, Which Awarded Husband An Interest In The Maplewood Property. 26

2. The Supplemental Decree Had Priority Over Any Lien Of The Bank Because It Was Filed And Recorded Before The Bank's Prejudgment Writ Of Attachment..... 27

C. Husband's Filed And Recorded Orders Should Have Been Granted Priority Over The Bank's Later-Filed Prejudgment Writ Of Attachment. 30

1. The Orders Against Owens Became Liens Against Her Interest In Real Property Once They Were Recorded In The County Where The Property Was Situated. 31

2. Because The Recorded Orders Gave Constructive Notice To The Bank Of Sums Owed By Owens, They Substantially Complied With The Statute Even Though They Lacked The Required "Judgment Summary." 33

3. By Court Rule, The Orders Were Entered and Effective When Filed..... 35

VI. CONCLUSION 37

TABLE OF AUTHORITIES

CASES

Black v. Evergreen Land Developers, Inc., 75 Wn.2d 241, 450 P.2d 470 (1969) 19

Hamlin v. Merlino, 44 Wn.2d 851, 272 P.2d 125 (1954) 20

Hartley v. Liberty Park Associates, 54 Wn. App. 434, 774 P.2d 40, *rev. denied*, 113 Wn.2d 1013 (1989) 26, 27

In re Deal, 85 Wn. App. 580, 933 P.2d 1084 (1997) 32

Kim v. Lee, 102 Wn. App. 586, 9 P.3d 245 (2000), *overruled on other grounds by* 145 Wn.2d 79, 31 P.3d 665 (2001) 34

Kshensky v. Pioneer National Title Insurance Co., 22 Wn. App. 817, 592 P.2d 667, *rev. denied*, 92 Wn.2d 1025 (1979) 28-30

Marriage of Skarbek, 100 Wn. App. 444, 997 P.2d 447 (2000) 20

Minder v. Gurley, 37 Wn.2d 123, 222 P.2d 185 (1950) 23

Molvik v. Molvik, 31 Wn. App. 133, 639 P.2d 238 (1982) 21, 24

Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005) 24

State v. Smith, 84 Wn.2d 498, 527 P.2d 674 (1974) 36

Yeats v. Yeats' Estate, 90 Wn.2d 201, 580 P.2d 617 (1978) 21, 24

STATUTES

RCW 2.04.190 36

RCW. ch. 4.64 33

RCW 4.64.020 33

RCW 4.64.030 ..... 26, 31, 33-36

RCW 6.13.090 ..... 2, 27, 31, 32

RCW 26.09.010 26

RCW 26.09.140 36

RCW 26.16.200 ..... 2, 18, 23

RCW 61.24.080 ..... 2, 27

11 U.S.C.A. § 727(b) 23

CONSTITUTIONAL ARTICLES

Wash. Const. art. IV, § 24 36

RULES AND REGULATIONS

CR 58 35

OTHER AUTHORITIES

1 Washington Practice: Methods of Practice § 12.5
(4th ed. 1997) 33

I. INTRODUCTION

Respondent Bank is a separate creditor of the wife. Any obligation of the husband or the community to the Bank was discharged in the husband's bankruptcy. Subsequent to the bankruptcy discharge, the dissolution court ordered certain real property sold and awarded the husband one-half of the net proceeds. The dissolution court also ordered the wife to satisfy any of her separate debts from her share of the proceeds. The decree of dissolution was filed and recorded in the King County, where the real property at issue was located. Thereafter, the Bank obtained a prejudgment writ of attachment against only the wife's interest in the real property and its proceeds.

As the supplemental decree was both filed and recorded before the Bank's prejudgment writ of attachment, the husband's interest as set forth in the decree had priority over the Bank's writ of attachment. In granting the Bank's writ of attachment priority over the husband's interest in the sale proceeds, the trial court violated the bankruptcy discharge by allowing the Bank to take from community assets and the husband's separate interest in those assets to satisfy its debt even though the community and husband's liability to the Bank had already been discharged. The trial court's

decision also was contrary to RCW 26.16.200, which provides that a spouse is not liable for the other spouse's separate debts, and contrary to the rule that competing creditor's rights to proceeds are determined by the order in which the creditor's liens attached to real property. *See* RCW 6.13.090; RCW 61.24.080(3). This court should reverse and remand for entry of judgment against the Bank consistent with a disbursement of proceeds reflecting the true priority of the parties' interests in the proceeds.

II. ASSIGNMENT OF ERRORS

1. The trial court erred in finding that "the parties to this action agreed that Owens, as her separate estate, was the owner of the Maplewood property." (Finding of Fact (FF) 7, CP 288)

2. The trial court erred in concluding that three orders entered in the dissolution action awarding fees, sanctions, and other sums to Treiger were not "judgments" solely because they failed to contain a "judgment summary" within the order. (*See* FF 16, RP 292-93)

3. The trial court erred in finding that "[a]t no point in the Supplemental Decree or the addendum attached thereto did the court in the Marital Dissolution Action award Treiger an ownership

interest in or a lien on the Maplewood Property, itself." (FF 14, CP 291)

4. The trial court erred in concluding "this matter is controlled by the terms of the Trust Agreement executed by the parties prior to filing this Declaratory Judgment Action." (Conclusion of Law (CL) 2, CP 293)

5. The trial court erred in concluding "for purposes of this proceeding, the parties to the Trust Agreement agreed that the Maplewood Property is the separate estate of Owens." (CL 3, CP 293)

6. The trial court erred in concluding "apart from the money judgments against Owens specified in the judgment summary contained [in] the Supplemental Dissolution Decree, said decree did not grant Treiger a lien or other interest in the Maplewood Property." (CL 6, CP 294)

7. The trial court erred in concluding "Treiger was awarded one-half the proceeds from the sale of the Maplewood Property, which is one-half of the monies received by Owens as the seller of the Maplewood Property after payment of all encumbrances including deeds of trust and recorded liens which

attached to the Maplewood Property prior to the sale on May 20, 2007." (CL 7, CP 294)

8. The trial court erred in entering its Order Granting Bank of America's Motion for Summary Judgment. (CP 285-96)

9. The trial court erred in entering its Order Disbursing Funds and Resolving All Remaining Issues. (CP 300-03)

III. STATEMENT OF ISSUES

1. Both the bankruptcy court and the dissolution court held that the Maplewood real property was the community property of husband and wife. Did the trial court err in finding that the proceeds from the sale of the real property were the wife's separate property?

2. The husband's bankruptcy estate paid nearly $100,000 to the Bank, and thereafter the community and husband's liability to the Bank was discharged. Did the trial court err in allowing the Bank to collect the wife's separate debt, which was not discharged, from the husband's interest in proceeds from the sale of community real property?

3. In the decree of dissolution, the dissolution court awarded the husband one-half of the net proceeds from the sale of certain community real property. The decree defined "net

proceeds" as the balance after costs of sale, including real estate commission, taxes, and mortgage, were paid. The decree was filed and recorded more than two months before the Bank obtained a prejudgment writ of attachment against "*only*" the wife's interest in the proceeds. Did the trial court err by granting the Bank priority over the decree, thus allowing the Bank to take from the proceeds before the husband?

4. The husband filed and recorded superior court orders ordering the wife to pay him certain sums before the Bank obtained its prejudgment writ of attachment. The Bank does not deny that it had actual notice of these orders. Did the trial court err by granting the Bank priority over these judgments?

IV. STATEMENT OF FACTS

A. Husband's Bankruptcy Action Discharged Community Debts But Left Wife's Separate Debts Unaffected.

1. Husband Filed For Bankruptcy While He And Wife Were Separated.

Appellant Kenneth Treiger ("Treiger"/husband) and appellant J'Amy Lynn Owens[1] ("Owens"/wife) were married on July 4, 1997

[1] Owens and Treiger filed notices of appeal from the orders at issue here on the same day. This court determined that both parties would be considered appellants. Treiger has moved to have his appeal considered separately.

and separated in 2000. (CP 84) On February 22, 2001, Treiger filed a petition to dissolve their marriage. (CP 84) On January 30, 2002, while the dissolution was pending, Treiger filed for Chapter 13 bankruptcy, which was later converted to a Chapter 7 bankruptcy. (CP 136) Owens filed her own Chapter 11 bankruptcy action on February 19, 2002. (CP 179) Owens' filing was subsequently dismissed. (*See* CP 84) When the parties' marriage was dissolved on June 19, 2002, the dissolution court expressly reserved property and debt issues until the parties' bankruptcy proceedings were concluded. (CP 84)

Before their marriage was dissolved, the parties purchased real property at 10263 Maplewood Place SW in Seattle (the "Maplewood property") as "husband and wife." (CP 179, 269) On May 30, 2003, after the parties' marriage was dissolved, the bankruptcy court concluded that the Maplewood property was community property, and thus property of Treiger's bankruptcy estate.[2] (CP 180-81) The determination of the bankruptcy court was made after a full hearing at which Owens was represented by

[2] Treiger filed for bankruptcy after Owens stated that she was going to file for bankruptcy. Treiger was advised to file for bankruptcy first so that his bankruptcy action could manage the community estate. (CP 89, 136)

counsel. (*See* CP 178-82) Owens filed an appeal of this determination that was subsequently dismissed when Owens entered into an agreement with the trustee in Treiger's bankruptcy to purchase the Maplewood property out of Treiger's bankruptcy estate in exchange for $215,000, which would be used to partially satisfy community debts. (*See* CP 137, 186-89)

2. Respondent Bank Filed A Claim In Husband's Bankruptcy For A Debt Personally Guaranteed By Wife During The Marriage. Husband's Bankruptcy Estate Partially Paid The Debt And Any Community Obligation Was Discharged.

Among the community debts were amounts owed to the respondent in this appeal, Bank of America ("Bank"). (CP 137, 148) During the parties' marriage, Owens executed a Promissory Note and Borrowing Agreement in favor of the Bank for a business partially owned by Owens. (CP 148) The Bank filed proofs of claim for these debts in Treiger's bankruptcy action, describing them as "community obligations." (CP 137) The Bank has never asserted that Treiger was separately liable for the debt.

Treiger's bankruptcy estate paid over $95,000 to the Bank towards the $455,308.78 debt alleged owed. (CP 137, 200) Thereafter, the Treiger bankruptcy was closed and the community

debt and any separate debts of Trieger, including the obligation to the Bank, discharged. (CP 137, 173-74)

B. The Dissolution Court Divided The Marital Estate, Awarding Husband One-Half Of The Net Proceeds From The Sale Of Real Property And Ordering Wife To Be Responsible For Any Personal Debts.

After the bankruptcy action was concluded, Treiger and Owens returned to state court to resolve their marital property issues. (*See* CP 84) In the dissolution action, Owens alleged that the Maplewood property was now her separate property as a result of her purchase of the property out of Treiger's bankruptcy estate. (*See* CP 88-89) The dissolution court concluded that the bankruptcy action did not affect the dissolution court's ability to resolve the parties' rights to the Maplewood property (CP 88-89), and that the bankruptcy court's determination that the Maplewood property was community property was *res judicata*:

> This property was community property at separation, although the wife now holds Maplewood in her name by virtue of the quitclaim deed from the bankruptcy trustee. The court accepts as res judicata the bankruptcy court's determination on the character of this asset.

(CP 84)

While accepting the bankruptcy court's determination of the community character of the Maplewood property, the trial court

acknowledged that Owens had used both separate property and community property to purchase the Maplewood property out of Treiger's bankruptcy estate. (CP 85, 89) The dissolution court also recognized that Owens made contributions to the Maplewood property by way of mortgage payments and improvements with her separate property, but declined to impose an equitable lien on the property in her favor. (CP 85-86)

Without awarding the Maplewood property to either party, the dissolution court ordered that the Maplewood property be sold. (CP 89) The dissolution court awarded Treiger one-half of the net proceeds from the sale of the Maplewood property. (CP 16, 22) The decree expressly defined "net proceeds" as the proceeds from the sale less the costs of sale and the outstanding mortgage. (CP 21)

From the remaining net proceeds, Owens was ordered to pay certain amounts to Treiger for back child support, attorney fees, and one-half of the IRS refund. (CP 22) The decree also provided that any "lawsuits against the wife or liens or encumbrances against the property for wife's debts" would be paid from the wife's share of the proceeds:

> If the parties are unable to clear title due to lawsuits against wife or liens or encumbrances against the property for wife's debts, wife's share of the property (after the payment to husband of the amounts due to him) shall be placed in escrow to be held available to plaintiff or creditor, provided that the funds shall not be set aside unless plaintiff or creditor execute documents clearing lis pendens, mechanics liens or any other cloud.

(CP 22)

The supplemental decree of dissolution dividing the marital estate was entered on May 9, 2006. (CP 15-23, 83) Owens' appeal of the supplemental decree of dissolution was subsequently dismissed. Cause No. 58256-9-I.

C. Respondent Bank Filed Suit Against Wife For The Balance Owed Under Her Personal Guarantee After The Community's Bankruptcy Discharge.

1. While The Bank's Action Was Pending Husband Filed And Recorded Several Judgments Awarding Certain Sums Of Money To Him From Wife.

On July 18, 2006, the Bank filed an action against Owens seeking payment from her separately of the outstanding amounts still owed under the Promissory Note and Borrowing Agreement. (CP 138) On November 17, 2006, Bank of America amended its complaint to add, "in rem against any and all separate property of J'Amy Lyn Owens awarded to Kenneth Treiger." (CP 138)

Prior to the Bank amending its complaint, Treiger recorded several orders entered in the dissolution action awarding certain sums of money in favor of Treiger against Owens in King County, including the supplemental decree of dissolution that awarded Treiger one-half of the net proceeds from the sale of the Maplewood property:

Order	**Date entered**	**Date recorded**	**Amount**
Order on Pre-trial motion (CP 6-9)	Mar. 21, 2006	Oct. 27, 2006	$ 3,200
Order on Attorney Fees (CP 10-13)	Mar. 29, 2006	Oct. 27, 2006	$ 1,429
Supp. Decree of Dissolution (CP 14-24)	May 9, 2006	Oct. 27, 2006	$27,501.42
Order for Attorney Fees (CP 25-28)	Jun. 9, 2006	Oct. 27, 2006	$16,018
Order on Contempt (CP 29-36)	Jun. 12, 2006	Oct. 27, 2006	$ 8,278
Order for Attorney Fees (CP 37-40)	Jul. 18, 2008	Oct. 27, 2006	$ 750
Order re: Closing (CP 40-46)	Aug. 28, 2006	Oct. 27, 2006	$99,012

The supplemental decree filed May 9, 2006, also contained a "real property judgment summary" listing the Maplewood property. (CP 15) The Bank does not dispute that it had both actual and constructive notice of these orders, including the

supplemental decree of dissolution, all of which were recorded prior to the Bank's prejudgment writ of attachment recorded December 20, 2006.

Sale of the Maplewood property was initially intended to close in August 2006. (CP 40-46) In contemplation of the sale, the dissolution court ordered a distribution of the proceeds consistent with the supplemental decree of dissolution. (CP 43) Specifically, Treiger was awarded one-half of the proceeds after deducting costs and the balance of the mortgage. (CP 43) From Owens' share of the proceeds, Owens was ordered to pay certain sums to Treiger plus "any judgment or payments to third parties other than Kenneth Treiger necessary to clear title to property." (CP 43)

As a result of certain actions taken by Owens, the August sale never closed. (*See* CP 276)

2. The Bank Obtained A Prejudgment Writ Of Attachment Only Against Wife's Interest In The Proceeds From The Sale Of Real Property.

In its action against Owens, the Bank sought a prejudgment writ of attachment against the Maplewood property. (CP 63) The superior court granted the Bank's request only in part. In an order entitled "Order Directing Issuance of Prejudgment Writ Of Attachment On Real Property Against Interest In Property Held By

J'Amy Lyn Owens Only," the court granted the Bank's request for a prejudgment writ of attachment in the amount of $351,413.55 against "the defendant J'Amy Owens' interest (including any and all rights to proceeds) in that certain real property commonly known as 10623 Maplewood Place SW, Seattle." (CP 64, 68-70) The court considered but declined the Bank's request to attach Treiger's interest in the Maplewood property and its proceeds. (*See* CP 63-64)

This prejudgment writ of attachment was recorded on December 20, 2006. (CP 66-73) Thereafter, Treiger recorded several other judgments against Owens awarded by the dissolution court, totaling $56,408.62. (*See* CP 295)

D. After The Real Property Was Sold, Each Party Sought Priority For Their Liens Against The Proceeds.

The Maplewood property was sold in May 2007. (CP 135) In light of the various parties claiming interest in the property and the proceeds from its sale, Chicago Title refused to insure title to the property absent agreement of the competing parties. (CP 135) At Chicago Title's insistence, the parties entered into an "Agreement Regarding Closing Of Sale And Holding Of Net Proceeds In Trust" ("Trust Agreement"). (CP 50-56) The parties in

the Trust Agreement agreed "to execute whatever documents [are] deemed necessary by Chicago Title in order for Chicago Title to close the Pending Sale." (CP 50) The parties agreed that after closing costs and the mortgage were paid, the remaining proceeds would be paid to a trustee pending a determination of how it would be distributed. (CP 51) The parties agreed that after closing, any party could commence an action in King County asking the court for a declaration "regarding the priority and extent of the claims asserted by Owens, Treiger, Shulkin [Owens' attorney], and Bank of America." (CP 51) Finally, the parties also agreed that their interests "shall attach to the Net Sale Proceeds [ ] as though the Net Proceeds were the Property in the same manner, date and priority as they attached to the Property at the time of the closing of the Pending Sale." (CP 51)

By the time the sale closed, Treiger had over $212,000 in judgments against Owens recorded in King County, in addition to the supplemental decree that awarded him one-half of the net proceeds. (*See* CP 139, 294-95) The Bank had a later-filed prejudgment writ of attachment in the amount of $351,422.55 against only "J'Amy Lyn Owens' interest (including any and all rights to proceeds)" in the Maplewood property. (CP 68-70)

On or about May 20, 2007, $1,114,054.83 was wired to the trustee pursuant to the Trust Agreement. (CP 147) On December 14, 2007, seven months after the sale of the Maplewood property closed, the court entered a judgment in favor of Bank against Owens in the amount of $593,519.24, representing the principal owed, accrued interest, and attorney fees of $57,228.09. (CP 58-61) The court in this order did not resolve the "in rem" proceeding against any separate property of Owens awarded to Treiger. (*See* CP 58-61, 303) The same day the Bank judgment was entered, both Treiger and the Bank filed motions asking the court to determine the priority of their respective judgments and liens over the other party. (CP 135, 144)

E. The Trial Court Granted Priority To The Bank Over Husband's Interest In One-Half Of The Net Proceeds Awarded To Him By The Dissolution Court.

The trial court found that the Maplewood property was Owens' "separate estate" (Conclusion of Law (CL) 2, CP 293) based on a recital in the Trust Agreement that "Owens, as her separate estate, is the owner of the Property." (CP 50) This recital contradicted the dissolution and bankruptcy courts' findings that the Maplewood property was community property. (CP 84, 180)

The trial court found that "[a]part from the money judgments against Owens specified in the judgment summary contained [in] the Supplemental Dissolution Decree, said decree did not grant Treiger a lien or other interest in the Maplewood Property." (CL 6, CP 294) The trial court refused to pay Treiger his one-half of the "net proceeds" as ordered by the dissolution court before several other disbursements. The trial court ordered the proceeds to be disbursed in the following order:

1. Unpaid fees and costs to the trustee [per the parties' agreement] (CP 301);

2. $40,000 to Owens for a homestead exemption (CP 301);

3. $72,288.57 to Treiger for four of Treiger's seven money judgments against Owens that were recorded before the Bank perfected its prejudgment writ of attachment. (CP 301) The trial court declined to give priority to three other money judgments, totaling $102,962, because it found that "[n]one of [those] documents . . . contained a judgment summary or in any way purported to be a judgment. None of the documents referenced in this paragraph were entered by the Court clerk in the execution document." (FF 16, CP 292-93)

4. $590,670.77 to the Bank for the judgment against Owens (CP 302);

5. $64,639.25 to Treiger for four judgments that Treiger recorded after the Bank perfected its prejudgment writ of attachment (CP 302);

6. Finally, the trial court ordered "all remaining sums shall be disbursed to Kenneth Treiger as partial payment to him of his one-half share of the 'net proceeds.'" (CP 302)

In total, the Bank received nearly $700,000 from both Treiger and Owens towards a loan of less than $500,000 that Owens alone had personally guaranteed. (*See* CP 148, 200, 302) Because the trial court granted priority to the Bank ahead of Treiger's interest in one-half of the net proceeds as defined by the dissolution court, Treiger received only $516,149.84 instead of $749,566.46 from the proceeds of sale. (*See* CP 250)

Treiger appeals. (CP 283, 297)

V. ARGUMENT

A. The Trial Court Erred In Allowing The Bank To Satisfy Wife's Separate Debt From Husband's Interest In Former Community Property After Any Community Obligation Was Discharged By Husband's Bankruptcy Proceeding.

The trial court erred in allowing the Bank to satisfy Owens' separate debt from the full net proceeds received from the sale of the Maplewood property. The Maplewood property was community property and the dissolution court awarded Treiger a separate interest in both the property and its proceeds. The Bank could not satisfy Owens' separate debt from either Treiger's separate property or community property under RCW 26.16.200.

Further, neither Treiger nor the community had any liability to the Bank, as any obligation was discharged *and the Bank was paid* from Treiger's bankruptcy action. Treiger was entitled to payment for his one-half share of the net proceeds before any other payments were made to the Bank or any other creditor of Owen. By allowing the Bank to collect Owens' separate debt from the entire net proceeds before distributing Treiger's share under the supplemental decree, the trial court effectively allowed the Bank to pay itself from community assets twice even though the community's liability was discharged in Treiger's bankruptcy.

1. The Trust Agreement Did Not Govern The Character Of The Maplewood Property.

The trial court's decision to allow the Bank to take from the whole of the net proceeds to satisfy Owens' separate debt stemmed from its erroneous conclusion that the Maplewood property was Owens' separate property for purposes of distributing the proceeds. (CL 3, CP 293) The trial court's determination was based solely on a recital in the Trust Agreement (CP 50), despite the contrary determination by the bankruptcy court and the dissolution court in earlier proceedings. (*See* CP 84, 180)

"A party to a contract is not bound by a false recital of fact, and parol evidence is admissible to show the true state of affairs." ***Black v. Evergreen Land Developers, Inc.***, 75 Wn.2d 241, 250, 450 P.2d 470 (1969) (citations omitted). In ***Black***, there was evidence to support an oral agreement between a landowner and developer that defendant developer would not impair the plaintiff owner's view. 75 Wn.2d at 249-50. A subsequent agreement executed between the parties stated there were "no verbal or other agreements which modify or affect this agreement." ***Black***, 75 Wn.2d at 250. The Supreme Court found that in "view of the overwhelming evidence of this case [of an oral agreement], it is

obvious that the above statement of the earnest money agreement is false and therefore we will not adhere to it." ***Black,*** 75 Wn.2d at 250. Likewise in this case, there is "overwhelming evidence" that the Maplewood property was community property and not, as the Closing Agreement recited, Owens' separate property. The community character of the Maplewood property had already been determined by the bankruptcy court (CP 180) and the dissolution court. (CP 84)

While the Maplewood property was held in Owens' name at the time of the divorce and when the property was sold, it has long been the law of this state that title does not control character of property. *See* ***Hamlin v. Merlino***, 44 Wn.2d 851, 862, 272 P.2d 125 (1954); ***Marriage of Skarbek,*** 100 Wn. App. 444, 448-49, 997 P.2d 447 (2000). Further, it is clear from the Trust Agreement itself that the parties did not intend to make any substantive determination of ownership of the Maplewood property. Instead, the Trust Agreement was entered into solely because "Chicago Title [had] advised that it will not ensure the Pending Sale unless there is an agreement between the parties to allow the Pending Sale to close." (CP 50) The Trust Agreement itself provided that it would not affect how the proceeds would be distributed. Instead, to

allow the sale to close, the parties all had to agree to "execute whatever documents deemed necessary by Chicago Title in order for Chicago Title to close the Pending Sale to close and for Chicago Title to insure title to the purchasers." (CP 50)

It was not necessary nor did the Trust Agreement intend to have the parties make a determination of ownership of the Maplewood property – the very dispute that required deposit of the proceeds into escrow pending resolution of the dispute. In light of the falsity of its characterization of the property as Owens' separate property, the trial court erred in adhering to this provision of the Trust Agreement.

2. The Maplewood Property Was Community Property And Husband Held An Ownership Interest In The Property As A Tenant In Common.

Because the dissolution court did not specifically dispose of the Maplewood property itself in the decree, the parties were left as tenants in common of the Maplewood property until it was sold and the proceeds divided, at which point it became the parties' separate property. *See* ***Molvik v. Molvik***, 31 Wn. App. 133, 135, 639 P.2d 238 (1982) ("it is well settled that community property not disposed of in a decree of dissolution is owned thereafter by the former spouses as tenants in common"); *see also* ***Yeats v. Yeats' Estate***,

90 Wn.2d 201, 203-04, 580 P.2d 617 (1978) (awarding the first wife one-half of the life insurance proceeds under a life insurance policy not divided in the decree of dissolution when the husband subsequently died). The fact that the dissolution court intended to award an ownership interest in the Maplewood property to Treiger is evidenced by the fact that it ordered Owens to provide Treiger a full set of keys to the residence upon entry of the decree and ordered that "both parties shall sign all documents necessary for the listing of the house." (CP 20).

The bankruptcy court and dissolution court orders determining that the Maplewood property was community property prove the falsity of the recital in the Trust Agreement that the Maplewood property was Owens' separate estate. (CP 84, 180) The trial court erred in concluding that the Maplewood property was Owens' separate property for purposes of distributing the proceeds based solely on this recital in the Trust Agreement. (CP 293)

3. The Bankruptcy Discharge Prohibited The Bank From Pursuing Husband's Interest In Former Community Assets To Satisfy Wife's Separate Debt.

The Maplewood property was community property and the supplemental decree of dissolution left Treiger and Owens tenants

in common in the property at the time of its sale. The Bank could not satisfy Owens' separate debt from either Treiger's separate property or community property under RCW 26.16.200, which provides that "neither person in a marriage [ ] is liable for the debts or liabilities of the other incurred before marriage [ ], nor for the separate debts of each other."

The bankruptcy discharge prohibited the Bank from pursuing Treiger's interest in former community assets to satisfy Owens' separate debt. A discharge in bankruptcy "discharges the debtor from all debts that arose before the date of the order." 11 U.S.C.A. § 727(b). The fact that any community liability to the Bank was discharged at the close of Treiger's bankruptcy was undisputed. (*See e.g.* CP 173-74 (Bank response): "While it is undisputed that the marital community's liability to Bank of America was discharged in Mr. Treiger's bankruptcy, the separate debt of Ms. Owens has never been discharged.") The Bank has never alleged that Treiger was separately liable for Owens' guarantees to the Bank, and in any event any individual liability that Treiger may have had was also discharged at the close of his bankruptcy action. ***Minder v. Gurley***, 37 Wn.2d 123, 136, 222 P.2d 185 (1950) (discharge in bankruptcy reciting that community property of husband and wife

was discharged, in absence of any provision in order indicating a contrary intent, also discharged husband's separate liability for debts which he incurred in behalf of himself and marital community).

The trial court's decision allowing the Bank to pursue Treiger's interest was based on its erroneous finding that the supplemental decree of dissolution did not award Treiger "an ownership interest in or a lien on the Maplewood property itself." (FF 14, CP 291) But Treiger had an ownership interest in the Maplewood property as a tenant in common. *See* ***Molvik***, 31 Wn. App. at 135; ***Yeats***, 90 Wn.2d at 203-04. The fact that the Bank could only pursue Owens' interest in the Maplewood property also is evident from the prejudgment order granting writ of attachment, which limited the Bank's attachment to only "Owens' interest" in the Maplewood property and proceeds and not also Treiger's interest as requested by the Bank. (CP 63-65)

Further, the Bank's December 2007 judgment, on which the Bank sought to collect, was only against Owens. (*See* CP 58-61) The Bank was thus collaterally estopped from asserting a claim against Treiger's interest in the Maplewood property in the declaratory action. ***Roberson v. Perez***, 156 Wn.2d 33, 41, ¶ 20,

fn. 6 123 P.3d 844 (2005) ("Collateral estoppel, or issue preclusion, prevents a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one").

The Bank was barred from satisfying Owens' separate obligation from Treiger's interest in the Maplewood property, which both the bankruptcy court and dissolution court held was community property. (CP 84, 180) The trial court erred in allowing the Bank to effectively take Treiger's interest in the Maplewood proceeds to satisfy Owens' separate debt. In doing so, the trial court circumvented the bankruptcy court's discharge of the Bank of America debt as to Treiger and the community. The trial court ruling ran afoul of the bankruptcy discharge, which prevented the Bank from pursuing its claims from either the community property or Treiger's separate property. As a result of the trial court's ruling, the Bank was paid twice by Treiger, a result prohibited under the bankruptcy laws.

B. Even If The Maplewood Property Was Wife's Separate Estate, Husband Had A Perfected Lien Against The Property Proceeds, Which Should Have Been Granted Priority Over The Bank's Prejudgment Writ Of Attachment.

Even if the Maplewood property were Owens' separate property, the supplemental decree of dissolution created a lien against the Maplewood property and its proceeds that should have been satisfied before the Bank's later-filed prejudgment writ of attachment.

1. The Supplemental Decree Was A Judgment, Which Awarded Husband An Interest In The Maplewood Property.

"A judgment granted by the superior court creates a lien against the judgment debtor's non-exempt real property." ***Hartley v. Liberty Park Associates***, 54 Wn. App. 434, 437, 774 P.2d 40, *rev. denied*, 113 Wn.2d 1013 (1989). A decree of dissolution is a judgment. RCW 26.09.010(5). The supplemental decree of dissolution contained a "real property judgment summary" (CP 15) that gave notice that the decree awarded an interest in real property to one or both of the parties. RCW 4.64.030(2)(b) ("if the judgment provides for the award of any right, title, or interest in real property, the first page must also include an abbreviated legal description of the property in which the right, title, or interest was

awarded by the judgment, including lot, block, plat, or section, township, and range, and reference to the judgment page number where the full legal description is included, if applicable; or the assessor's property tax parcel").

2. The Supplemental Decree Had Priority Over Any Lien Of The Bank Because It Was Filed And Recorded Before The Bank's Prejudgment Writ Of Attachment.

RCW 6.13.090 provides that "a judgment against the owner of a homestead shall become a lien on the value of the homestead property in excess of the homestead exemption from the time the judgment creditor records the judgment with the recording officer of the county where the property is located." RCW 61.24.080(3) provides that "interests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to such surplus in the order of priority that it had attached to the property." Because Treiger's lien was filed and recorded prior to the Bank's prejudgment writ of attachment, the trial court should have first paid Treiger his interest in the proceeds before it allowed the Bank to be paid. *See* ***Hartley,*** 54 Wn. App. at 438-39 (a judgment lien in a decree of dissolution attached to real property on the day it was filed in the superior court giving constructive notice to any

subsequent mortgagee and making any later deeds of trust subordinate).

The trial court misplaced its apparent reliance on ***Kshensky v. Pioneer National Title Insurance Co.***, 22 Wn. App. 817, 592 P.2d 667, *rev. denied*, 92 Wn.2d 1025 (1979) to conclude that the only interest created by the supplemental decree was Treiger's interest in the proceeds "after payment of all encumbrances including deeds of trust and recorded liens which attached to the Maplewood Property prior to the sale on May 20, 2007." (CL 7, CP 294) In ***Kshensky***, a decree of dissolution awarded the family residence to the wife. The decree also provided that in the event the wife sold the residence for a price in excess of $14,250, the husband would be entitled to a lien on the proceeds of such sale in a sum equal to one-half of the total sales prices in excess of $14,250. ***Kshensky***, 22 Wn. App. at 818. The decree was never recorded. Twelve years after the divorce, the wife sold the home for $61,000 cash and left the country. Because the wife could not be located, the husband sued the purchaser, who had no actual knowledge of the lien, for the proceeds owed to the husband. ***Kshensky***, 22 Wn. App. at 818-19.

The trial court dismissed the action against the purchaser, and this court affirmed. This court held that the decree "unambiguously" awarded the wife the residence and that the lien language in the decree did not create a lien on the property. ***Kshensky***, 22 Wn. App. at 820. This court held that the lien was "by its terms limited to the proceeds" and the "proceeds of sale in this context means moneys actually received by the seller," and that "a lien is binding on all persons who acquire property with notice of the lien or who have constructive notice of the lien by reason of its recordation but unless otherwise provided by statute, it is not binding on bona fide purchasers for value and without notice." ***Kshensky***, 22 Wn. App. at 820-21.

This case is entirely different than ***Kshensky*** in several significant respects. First, in this case the residence itself was not specifically awarded to either party. Second, the supplemental decree was recorded in the county where the property was situated. Third, the Bank in this case had both actual notice of the lien and constructive notice of the lien by reason of its recordation. Finally, the proceeds "by its terms" were defined as the proceeds less "costs of sale (real estate commission, excise tax, etc.) [and]

mortgage owing to Select Portfolio Servicing (approximately $469,982)." (CP 21)

Trieger's lien against the proceeds of one-half of the net proceeds after closing costs and the mortgage was binding on the Bank, which had actual and constructive notice of the lien. ***Kshensky***, 22 Wn. App. at 820-21. As Treiger's lien was recorded before the Bank's prejudgment attachment against the Maplewood property, the trial court should have given it priority over the Bank. Further, the Bank's prejudgment writ of attachment only affected Owens' interest in the Maplewood proceeds. (CP 63-65) The Bank's prejudgment writ had no priority over Treiger's interest in the proceeds as defined in the supplemental decree. The trial court erred in granting the Bank priority over Treiger's interest in and lien against the Maplewood property, which was embodied in a validly executed and recorded judgment.

C. Husband's Filed And Recorded Orders Should Have Been Granted Priority Over The Bank's Later-Filed Prejudgment Writ Of Attachment.

The dissolution court's orders requiring Owens to pay sums certain to Treiger were valid judgments that were both filed with the clerk's office and recorded with the auditor months in advance of the Bank obtaining their prejudgment writ of attachment. The trial

court erred in refusing to grant priority to Treiger's judgments, totaling over $100,000, solely because they lacked the first-page summary described in RCW 4.64.030(2) when they were recorded with the auditor's office. The husband's filed and recorded orders were "judgments" that should have been granted priority over the Bank's later-filed prejudgment writ of attachment.

1. The Orders Against Owens Became Liens Against Her Interest In Real Property Once They Were Recorded In The County Where The Property Was Situated.

"A judgment against the owner of a homestead shall become a lien on the value of the homestead property in excess of the homestead exemption from the time the judgment creditor records the judgment with the recording officer of the county where the property is located." RCW 6.13.090. As was the supplemental decree of dissolution, these orders were not just filed but were recorded in the county where the Maplewood property was located, and thus became "a lien on the value of the homestead property in excess of the homestead exemption" at the time of recording. RCW 6.13.090. Because these judgments had priority over the Bank's later filed and recorded prejudgment attachment, the trial court

erred in granting priority to the Bank. *See* ***In re Deal***, 85 Wn. App. 580, 933 P.2d 1084 (1997).

In ***Deal,*** two creditors were competing over surplus proceeds of a trustee's sale of the debtor's property. The respondent had recorded her judgment with the King County auditor in accord with RCW 6.13.090 but did not file a certified abstract of her judgment until six months later. In the intervening six months, the appellant recorded a deed of trust securing a debt owed by the debtors. This court rejected appellant's claim that it had priority over the respondent's judgment because the abstract of judgment was not filed with the clerk until after appellant's deed of trust was recorded. ***Deal***, 85 Wn. App. at 584. This court held that the respondent's lien on the homestead property was perfected at the time it was recorded with the county auditor, and not when the abstract of judgment was filed with the clerk. ***Deal***, 85 Wn. App. at 584. Therefore, the respondent's lien had priority over the appellant's later recorded deed of trust. ***Deal***, 85 Wn. App. at 586.

In this case, the orders awarding sums certain to Treiger were valid judgments that were recorded before the Bank filed and recorded its prejudgment writ of attachment. Treiger's lien was perfected at the time they were recorded. Therefore, Treiger's lien

had priority over the Bank's later recorded prejudgment writ of attachment.

2. Because The Recorded Orders Gave Constructive Notice To The Bank Of Sums Owed By Owens, They Substantially Complied With The Statute Even Though They Lacked The Required "Judgment Summary."

RCW 4.64.030 provides that a summary of the judgment appear on "the first page of each judgment" providing the names of the judgment creditor and debtor, the names of their attorneys, the interest owed to date, and total taxable attorney fees and costs. RCW 4.64.030(2). The statute also provides that "the clerk may not enter a judgment, and a judgment does not take effect, until the judgment has a summary in compliance with this section." RCW 4.64.030 (3).

The intent of the provisions of RCW ch. 4.64 is to give notice to any persons subsequently acquiring title to or a lien upon real property of a party against whom a judgment is entered. *See* RCW 4.64.020; 1 Washington Practice: Methods of Practice § 12.5 (4th ed. 1997) ("Entry of a judgment imparts constructive notice to a purchaser even if it is not recorded in real property records"). Here, the judgments entered by Treiger did not contain judgment summaries but nonetheless actually complied with the substantive

purpose of RCW 4.64.030 because they were recorded, providing notice to the Bank of the existence of Treiger's judgments. ***Kim v. Lee***, 102 Wn. App. 586, 591, 9 P.3d 245 (2000), *overruled on other grounds by* 145 Wn.2d 79, 31 P.3d 665 (2001).

"Strict compliance with legislatively mandated procedures [of RCW 4.64.030] is not always required. Washington courts have long upheld actions taken in substantial compliance with statutory requirements, albeit with procedural imperfections." ***Kim***, 102 Wn. App. at 591. In ***Kim***, the judgment did not contain a summary as described in RCW 4.64.030(2) because the summary was on the second page of the judgment. A lender, who was seeking priority of its lien over the judgment, asserted that the judgment was not effective due to this procedural imperfection. This court disagreed and held that the judgment was effective because it "was in actual compliance with the substantive purpose of RCW 4.64.030 despite the minor procedural imperfection." ***Kim***, 102 Wn. App. at 592.

Here, the orders that were filed and recorded were valid judgments as they "actually complied with the substantive purpose" of RCW 4.64.030 by providing notice to the Bank of the existence of Treiger's judgments. These judgments should have been given priority over the Bank's later filed prejudgment writ of attachment.

The trial court erred in refusing to grant priority to Treiger's orders that were filed and recorded prior to the Bank's prejudgment writ of attachment.

3. By Court Rule, The Orders Were Entered and Effective When Filed.

It is the Legislature that has imposed the summary requirement, and not the courts. A judgment is not defined by whether or not a "judgment summary" is imprinted on the first page of an order as described in RCW 4.64.030(3). Court Rule 54 defines a judgment as "the final determination of the rights of the parties in the action and includes any decree and order from which any appeal lies." Judgments are "entered immediately after they are signed by the judge" and "shall be deemed entered for all procedural purposes from the time of deliver to the clerk for filing." CR 58 (a), (b).

These court rules allow the courts to enforce its judgments regardless of whether a "summary" is included. To the extent that RCW 4.64.030(3) purports to prohibit the clerk from entering a judgment "until the judgment has a summary in compliance with this section," it is inconsistent with the rules. One provision prohibits the clerk from doing what the other commands – the

statute says a judgment is not take effect until a judgment summary is attached, whereas the court rule provides that the judgment is effective immediately for all procedural purposes.

When such a conflict occurs, the nature of the right at issue determines which one controls. ***State v. Smith,*** 84 Wn.2d 498, 501, 527 P.2d 674 (1974). If the right is substantive, then the statute prevails; if it is procedural, then the court rule prevails. ***Smith,*** 84 Wn.2d at 501-02. Here, the rule pertains solely to the procedure of the court, an area reserved for court control by our state constitution. Wash. Const. art. IV, § 24; ***Smith***, 84 Wn.2d at 502-03; RCW 2.04.190. The rule directs that judgment shall enter immediately, charges the clerk to do so, and makes the judgment effective immediately.

For example, RCW 26.09.140 provides that the court may from "time to time after considering the financial resources of both parties may order a party to pay ... reasonable attorney's fees or other professional fees." The statute does not require a judgment summary and the court under its procedural rules can enforce the fee award regardless of the fact that it may not be an "effective" judgment under RCW 4.64.030 (3).

The judgments of the court are fundamental to its functioning. The ability to decide controversies and render judgment is the core purpose for which the courts exist. No function is more reserved to the court by the constitution than the effect of the court's pronouncements. If the legislature can prohibit the court's judgments from being effective if a summary in the form it dictates is not included, it can completely control when the court's acts become effective. The constitution prohibits this. By court rule, the orders were entered and effective when filed.

VI. CONCLUSION

This court should reverse and remand for entry of judgment against the Bank consistent with a disbursement reflecting the true priority of the pretrial interest in the proceeds.

Dated this 2nd day of October, 2008.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By:_____
Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

Attorneys for Appellant Kenneth Trieger

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:

That on October 2, 2008, I arranged for service of the foregoing Brief of Appellant Kenneth Treiger, to the court and counsel for the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger ✓ U.S. Mail ___ Overnight Mail
Jerome Shulkin Shulkin Hutton Inc., P.S. 7525 SE 24th Street, Suite 330 Mercer Island, WA 98024	___ Facsimile ___ Messenger ✓ U.S. Mail ___ Overnight Mail
Mr. Jerry R. Kimball Attorney at Law Law Office of Jerry R. Kimball 1200 Fifth Avenue, Suite 2020 Seattle, WA 98101	___ Facsimile ___ Messenger ✓ U.S. Mail ___ Overnight Mail
Edmond John Wood Wood & Jones PS 303 N 67th St Seattle, WA 98103-5209	___ Facsimile ___ Messenger ✓ U.S. Mail ___ Overnight Mail
Cynthia B. Whitaker Attorney at Law 1200 Fifth Avenue, Suite 2020 Seattle, WA 98101-3100	___ Facsimile ___ Messenger ✓ U.S. Mail ___ Overnight Mai
Thomas S. Linde Law Offices of Laurin S. Schweet 80th Avenue Professional Building 2955 - 80th Ave. SE, Suite 102 Mercer Island, WA 98040	___ Facsimile ___ Messenger ✓ U.S. Mail ___ Overnight Mail

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 OCT -3 AM 10:29

DATED at Seattle, Washington this 2nd day of October, 2008.

Carrie O'Brien