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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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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; and
EDMUND JOHN WOOD,
Defendants.

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

REPLY BRIEF OF APPELLANT KENNETH TREIGER

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

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I. REPLY ARGUMENT

A. Any Community Obligation To The Bank Was Discharged By Husband's Bankruptcy Proceeding. The Bank Was Thereafter Barred From Satisfying Wife's Separate Debt From Either Husband's Separate Property Or His Interest In Former Community Property.

As the Bank concedes, neither Treiger nor the community had any liability to the Bank, as any obligation was discharged when the Bank was paid from Treiger's bankruptcy action. (See Resp. Br. 24-25) Only Owens, as her separate obligation, had any liability to the Bank. Therefore, the Bank was barred from satisfying Owens' separate debt from either Treiger's separate property or community property under RCW 26.16.200, and 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 had been community property of Treiger and Owens, in which the dissolution court awarded Treiger a separate interest. (See CP 15, 16, 23, 84) 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, and improperly, allowed the Bank to pay itself from community assets twice, even though the community's liability was discharged in Treiger's bankruptcy. 11 U.S.C.A. § 727(b) (a

discharge in bankruptcy “discharges the debtor from all debts that arose before the date of the order”).

1. The Maplewood Property Was Community Property At The Time Of The Parties’ Divorce.

Owens’ purchase of the Maplewood property from Treiger’s bankruptcy estate in order to pay community obligations (including to the Bank) did not convert property that was otherwise community property into Owens’ separate property. It is undisputed that the origin of the Maplewood property, purchased during Treiger and Owens’ marriage, was community property. (See Resp. Br. 21) The Bank alleges that the Maplewood property became the separate property of Owens when she acquired it from Treiger’s bankruptcy estate after their marriage was dissolved but before the parties’ marital property was distributed. (Resp. Br. 15) But the trial court did not find that the Maplewood property was Owens’ separate property on that basis. Instead, it relied solely, and incorrectly, on a recital in the parties’ Trust Agreement. (Conclusion of Law (CL) 3, CP 293) See Arg. § A.2, *infra*.

The trial court in any event could not rely on Owens’ purchase of the Maplewood property out of Treiger’s bankruptcy estate to find that it was converted from community property to

separate property. The Bank's argument ignores the fact that until the dissolution court distributed the parties' marital estate, the parties continued to own the property jointly. See *Molvik v. Molvik*, 31 Wn. App. 133, 135, 639 P.2d 238 (1982); see also *Yeats v. Yeats' Estate*, 90 Wn.2d 201, 203-04, 580 P.2d 617 (1978).

In fact, the dissolution court rejected this same argument when Owens made it. The dissolution court had already determined that Owens' purchase out of Treiger's bankruptcy estate had no effect on the character of the property, as "the bankruptcy Trustee had no authority to make distributions in dissolution of marriage":

[Owens] asserted repeatedly throughout this proceeding that this court lacks subject matter jurisdiction and that because the Maplewood home, a community property asset, was purchased by the wife from the bankruptcy estate of the husband all claims of the husband to the property in this dissolution proceeding have thereby been extinguished

(Dissolution Court Finding of Fact (FF) 2.21 (1), CP 88-89)

The apparent transformation of the Maplewood home from community property to separate property of the wife as a result of the Trustee's quit claim deed to her is irrelevant to the task before this court. The bankruptcy Trustee had no authority to make distribution in dissolution of marriage

(Dissolution Court FF 2.21(3), CP 89)

The dissolution court also found that the Maplewood property remained community property, as “the court accepts as res judicata the bankruptcy court’s determination on the character of this asset.” (Dissolution Court FF 2.8(1), CP 84) The bankruptcy court had previously found that the Maplewood property was community property. (CP 178-81) Further, the dissolution court acknowledged that Owens partly used community funds to purchase the Maplewood property out of Treiger’s bankruptcy estate. (Dissolution Court FF 2.8(13), CP 85) Therefore, even if Owens’ purchase of the Maplewood property out of Treiger’s bankruptcy estate changed its character, as the Bank claims, it was at least partially community property as it was purchased in part with community funds. ***Marriage of Chumbley/Beckham***, 150 Wn.2d 1, 7-8, 74 P.3d 129 (2003) (the character of an asset will be characterized according to the character of the funds used to purchase the asset).

2. The Trust Agreement Did Not Control The Character Of The Maplewood Property.

The parties did not intend to make any substantive determination of ownership or character of the Maplewood property by entering into the Trust Agreement. Instead, the Trust

Agreement was entered into solely because “Chicago Title [had] advised that it will not insure the Pending Sale unless there is an agreement between the parties to allow the Pending Sale to close.” (CP 50) 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 and insure title of the purchasers.” (CP 50) The Bank’s claim that the Trust Agreement was intended to control the character of the Maplewood property makes no sense, because a determination of ownership of the Maplewood property was the very dispute that required deposit of the proceeds into escrow pending resolution of the dispute.

“[R]ecitals supply only background for the paragraphs which set forth the bargain that the parties struck on the date of execution of the contracts.” *Rains v. Walby*, 13 Wn. App. 712, 716, 537 P.2d 833 (1975), *rev. denied*, 86 Wn.2d 1009 (1976). “As a general rule, ‘recitals in a contract, such as ‘whereas’ clauses, are merely explanations of the circumstances surrounding the execution of the contract, and are not binding obligations unless referred to in the operative provisions of the contract.” *DeMorais v. Wisniowski*, 81 Conn. App. 595, 841 A.2d 226, 236, *cert. denied*, 268 Conn. 923 (2004) (*quoting* 17 C.J.S., Contracts § 317 (1999)).

Here, the recital in the Trust Agreement that "Owens, as her separate estate, is the owner of the Property" (CP 50) is simply "background," acknowledging that Owens was technically the seller of the property since only her name was on title. It was not intended to be binding on the parties as an "operative provision" of the Trust Agreement. The fact that this statement was merely explanatory background is evident from the remaining paragraph, which describes the circumstances surrounding the execution of the Trust Agreement:

Owens, as her separate estate, is the owner of the Property. Currently, there is a pending sale of the Property from Owens to Ashton J. Palmer and Kristina S. Royce for a sale price of \$1,750,000.00 (the "Pending Sale"). Owens, Treiger, Shulkin, and Bank of America have asserted conflicting claims against the Property and/or its sale proceeds which appear as exceptions to the preliminary title commitment issued by Chicago Title under its Order Number 123426 (the "Preliminary Commitment") with respect to the Property. As a result, Chicago Title has advised that it will not insure the Pending Sale unless there is an agreement between the parties to allow the Pending Sale to close.

(CP 50)

Clearly, this was not an "operative provision" of the contract that is binding on the parties. The trial court erred in relying on that recital to determine that the Maplewood property was Owens'

separate property, especially in light of the bankruptcy court and dissolution court's prior characterization of the property as community property. "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) (discussed at App. Br. 19-20).

As the Trust Agreement did not govern the character of the Maplewood property, the trial court erred in relying on the recitals in the Trust Agreement to determine the character of the property. The Maplewood property was the community property of Treiger and Owens and any community obligation was discharged in the Treiger bankruptcy. Therefore, the Bank was barred from satisfying Owens' separate debt from Treiger's interest in the property under RCW 26.16.200.

B. Husband Had A Perfected Lien Against The Maplewood Property, Which Should Have Been Granted Priority Over The Bank's Prejudgment Writ Of Attachment.

"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). Therefore, the supplemental decree was a judgment that awarded Treiger an interest in the Maplewood property.

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.” See *also* RCW 4.56.190 (the real estate of any judgment debtor shall be held and bound to satisfy any judgment of the superior court). 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).

1. The Supplemental Decree Gave Husband An Interest In Both The Maplewood Property And Its Proceeds.

The Bank is wrong when it claims that the supplemental decree did not award Treiger an interest in the Maplewood property. (Resp. Br. 25) By not specifically awarding the Maplewood property to either party and addressing only the net proceeds from its future sale, Treiger and Owens were left as tenants in common in the Maplewood property until it was sold and the proceeds distributed. *Molvik v. Molvik*, 31 Wn. App. 133, 135, 639 P.2d 238 (1982).

This case is unlike *Kshensky v. Pioneer National Title Insurance Co.*, 22 Wn. App. 817, 820-21, 592 P.2d 667, *rev. denied*, 92 Wn.2d 1025 (1979), where this court held that a lien on proceeds from the sale of real property does not also provide a lien on the property itself. In that case, the wife was specifically awarded ownership of the home and the husband was awarded some portion of the proceeds *if* the wife sold the home at some unspecified distant time in the future for over a specified amount.

Here, the dissolution court did not specifically award the Maplewood property to either party but ordered it sold. The parties were left as tenants in common until the property was sold and the proceeds divided.

The Bank alleges that the long-standing rule that “property not disposed of in a decree of dissolution is owned thereafter by the former spouses as tenants in common,” *Molvik v. Molvik*, 31 Wn. App. 133, 135, 639 P.2d 238 (1982), does not apply in this case based on their allegation that the Maplewood property was not community property. (Resp. Br. 24) But regardless whether the Maplewood property was community property or the separate property of Owens, it was marital property to be distributed under RCW 26.09.080 in the divorce proceeding. (See CP 89 (Dissolution Court FF 2.21(2)): “The bankruptcy proceedings have terminated, and now this court has jurisdiction to make a fair and equitable distribution *of all of the parties’ property*”) (emphasis added)) The dissolution court’s failure to specifically award either party an interest in the Maplewood property itself, referring only to its proceeds, made the parties owners of the property as tenants in common until sold.

The dissolution court's intent that the Maplewood property be held by both Treiger and Owens jointly until sold is evident from the court's findings relating to the Maplewood property, in particular its findings rejecting Owens' claim that the Maplewood property could not be distributed to Treiger because she purchased the property out of his bankruptcy estate:

- [Owens] asserted repeatedly throughout this proceeding that this court lacks subject matter jurisdiction and that because the Maplewood home, a community property asset, was purchased by the wife from the bankruptcy estate of the husband all claims of the husband to the property in this dissolution proceeding have thereby been extinguished. (Dissolution Court Finding of Fact (FF) 2.21 (1), CP 88-89)
- The bankruptcy proceedings have terminated and now this court has jurisdiction to make a fair and equitable distribution of all of the parties' property. (Dissolution Court FF 2.21(2), CP 89)
- The apparent transformation of the Maplewood home from community property to separate property of the wife as a result of the Trustee's quit claim deed to her is irrelevant to the task before this court. The bankruptcy Trustee had no authority to make distribution in dissolution of marriage. (Dissolution Court FF 2.21(3), CP 89)
- The Trustee testified in this proceeding, and confirmed that he did not purport to distribute the parties' property between them under the dissolution statute. (Dissolution Court FF 2.21(4), CP 89)

- Taking into consideration the nature and extent of the parties' property, the fact that the Maplewood property is both separate and community property, that the wife has a substantial greater earning capacity than [sic] the husband... the Maplewood property should be sold, the mortgage balance be satisfied, and the remaining proceeds be distributed one-half to each party, subject to the offsets set out above. (Dissolution Court FF 2.21(10), CP 89)

Further, the dissolution court ordered that Treiger immediately receive "a full set of keys to the residence immediately upon entry of [the] supplemental decree" and that "both parties shall sign all documents necessary for the listing of the house." (CP 20)

Because the supplemental decree of dissolution provided Treiger with an interest in the Maplewood property, the "real property judgment summary" set forth on the front page of the supplemental decree (CP 15) gave notice that the decree awarded an interest in real property to one or both of the parties. RCW 4.64.030(2)(b). As this judgment 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 of the Maplewood property before it allowed the Bank to be paid.

2. This Court's Decision In *Kshensky* Does Not Control Because The Bank Had Notice Of Husband's Lien.

The trial court erred in concluding 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) The trial court apparently relied on *Kshensky*, a case with facts far different from the present case. In *Kshensky*, an unrecorded decree of dissolution provided that in the event the wife sold the residence awarded to her for a price in excess of \$14,250, the husband would be entitled to one-half of the proceeds. 22 Wn. App. at 820. This court held that "the husband's lien was by its terms limited to *proceeds* of any such sale, if the home was ever sold." *Kshensky*, 22 Wn. App. at 820 (emphasis in original). This court held that the "proceeds of sale' in this context means moneys actually received by the seller." *Kshensky*, 22 Wn. App. at 820.

But here, Treiger's lien "by its terms" was specifically defined as one-half of the "net proceeds," which were in turn defined as the proceeds from sale less "costs of sale (Real Estate Commission, Excise Tax, etc.) [and] mortgage owing to Select Portfolio Servicing

(approximately \$469,982).” (CP 21) The supplemental decree also contemplated that there might be encumbrances other than costs of sale and the mortgage (such as Owens’ obligation to the Bank) and provided that “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 proceeds (*after the payment to husband of the amounts due to him*) shall be placed in escrow to be held available to plaintiff or creditor...” (CP 22, emphasis added) The trial court in this case then ordered precisely the opposite, concluding that Treiger had an interest in the proceeds only “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)

The concern in *Kshensky*, not present here, was whether a lien given to the husband on the proceeds from the sale of a home awarded to the wife was enforceable against a subsequent purchaser who had no actual knowledge of the lien. This court held 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. In this case, however, the Bank undisputedly had both actual and constructive notice of Treiger’s lien against the Maplewood property and its proceeds because of the real property judgment summary on the front of the supplemental decree and by reason of its recordation. Accordingly, Treiger’s lien against the proceeds of one-half of the net proceeds after closing costs and the mortgage was binding on the Bank. *Kshensky*, 22 Wn. App. at 820-21.

The Bank complains that the supplemental decree could not alter its rights as a third party creditor. (Resp. Br. 29-30) But the supplemental decree did not alter the Bank’s rights, because the only rights it held were against Owens’ separate property. The Bank had no rights against Treiger/Owens community property or any separate property interest awarded therein to Treiger. This is evident by the Bank’s prejudgment writ of attachment, which 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 and proceeds, which was embodied in a validly executed and recorded judgment.

C. The Trial Court Erred In Granting The Bank's Prejudgment Writ Of Attachment Priority Over Husband's Earlier-Filed And Recorded Orders.

Treiger recorded several orders entered in the dissolution action awarding certain sums of money in favor of Treiger against Owens in King County, where the Maplewood property was located. The Bank does not dispute that it had both actual and constructive notice of these orders, all of which were recorded prior to the Bank's prejudgment writ of attachment was recorded. But despite the Bank's knowledge of these prior-recorded orders, it "cut in line" by relying on a specious technicality, claiming that because these orders contained no "judgment summaries" under RCW 4.64.030(2)(a) they are not enforceable obligations. Regardless of the lack of judgment summary, there is no dispute that Treiger's recordation of these orders gave notice to the Bank of sums owed by Owens, immediately enforceable upon their entry. The trial court erred in granting priority to the Bank's later-filed pre-judgment writ of attachment.

1. Regardless Of The Lack Of Judgment Summary, The Trial Court's Filed And Recorded Orders Gave The Bank Notice Of The Sums Owed By Wife.

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)(a), when they were actually recorded with the auditor's office, and not just filed with the superior court. Treiger's filed and recorded orders were enforceable judgments that should have been granted priority over the Bank's later-filed prejudgment writ of attachment. This is especially true when there is no question that the Bank had notice of these orders before it filed its prejudgment writ of attachment.

The intent of the provisions of RCW 4.64.030 requiring a judgment summary, which directs the clerk to enter the judgment in the execution docket, 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, while the orders awarding Treiger judgments against Owens did not contain summaries, they complied with the substantive purpose of RCW 4.64.030 because they were recorded in the county where the real property was located, providing notice to the Bank of the existence of Treiger's judgments.

This court held that “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” in *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). In *Kim*, the respondent had obtained a default judgment against appellant. The respondent had recorded the judgment in the county where appellants owned property, but the judgment did not contain a summary as described in RCW 4.64.030(2) because the summary was on the second, not the first, page of the judgment. A lender seeking priority over the judgment for its lien asserted that the judgment was not effective due to this procedural imperfection, claiming to have not found an abstract within the clerk’s office even though respondent had provided the lender with the judgment recording number. See *Kim*, 145 Wn.2d at 84. However, “ordinary efforts to search the record readily disclosed the judgment.” *Kim*, 102 Wn. App. at 591.

This court held that regardless of the fact that the judgment did not specifically comply with RCW 4.64.030, requiring the summary to be on the first page, the judgment was nevertheless

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. This court noted that the “apparent purpose of the first page summary is to facilitate lien and title searches. There is no evidence that Yakima Title failed to locate the judgment because the summary continued to the second page.” *Kim*, 102 Wn. App. at 592. Likewise in this case, the filed and recorded orders 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. The Bank does not, nor can it, claim that they were unaware of these judgments, as they were recorded in the county where the property at issue was located.

2. Under The Court Rules, The Orders Were Effective When Filed.

Under the court rules, orders are enforceable as judgments regardless whether a “summary” as required under RCW 4.64.030(3) is included. Civil Rule 58 provides that these judgments “shall be deemed entered for all procedural purposes from the time of delivery to the clerk for filing” after signed by a judge. CR 58 (a), (b). It is beyond question that an order awarding

money to a party would be immediately effective and enforceable against the other party regardless of the absence of a judgment summary. The order should also be effective against third parties who have knowledge of the outstanding order. Because these recorded orders actually complied with the purpose of the judgment statute by giving notice to the Bank, these orders 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.

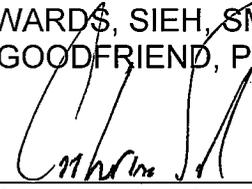
II. CONCLUSION

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

Dated this 21st day of January, 2009.

EDWARDS, SIEH, SMITH
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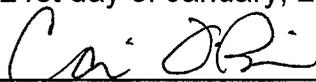
DECLARATION OF SERVICE

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

That on January 21, 2009, I arranged for service of the Reply Brief of Appellant Kenneth Treiger, to the court and counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 21st day of January, 2009.



 Carrie O'Brien