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No. 72049-0-1

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

THOMAS BARTH and SANDRA A. BARTH
Respondents/Cross-Appellants /Plaintiffs

v.

PATRICK HAFEY and GINA L. HAFEY,
Defendants,

and

AMERICAN PENSION SERVICES, INC.,
Appellant/Cross-Respondent /Defendant.

**REPLY BRIEF OF RESPONDENTS / CROSS-APPELLANTS
THOMAS and SANDRA BARTH**

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I. INTRODUCTION

This cross appeal by the Barths challenges the ruling by the trial court that the owelty or equalizing lien, assigned to American Pension Services, Inc. (“American Pension”) by Tammy Hafey (Patrick Hafey’s ex-wife), attached to Patrick Hafey’s half interest in the real property at issue in this partition action. Plaintiff Sandra Barth and her brother, Defendant Patrick Hafey, each held a one-half interest, as tenants in common, in the property at issue in this matter, located at 3017 120th Place Southeast, Everett, Snohomish County, Washington (the “Subject Property”).

The trial court initially ruled in its Order dated May 20, 2014, that American Pension’s owelty/equalizing lien did not attach to Patrick Hafey’s half interest in the Subject Property. (CP 6-9) Two days later, the trial court judge amended his Order, ruling that the owelty lien attached to the half interest of Patrick Hafey. (CP 1-3) The Amended Order changed the recipient of the \$3,646.75 (relating to Patrick Hafey’s half interest) in sale proceeds from Patrick Hafey to owelty/equalizing lien holder American Pension.

The Barths cross-appeal contention is that the owelty/equalizing lien claimed by American Pension is more limited in scope than a general judgment lien and should not attach to the half interest of Patrick Hafey, as

initially ruled by the trial court.

II. ARGUMENT

A. An Owelty or Equalizing Lien is Limited in Scope and Does Not Attach to Patrick's Hafey's Interest in the Subject Property.

The owelty lien acts as an equalizing lien and attaches only to the specific property awarded to Patrick Hafey as part of his 2009 dissolution proceeding and not to the Subject Property.

American Pension incorrectly contends that its owelty/equalizing lien is “an equitable lien on the present and future interest of Patrick Hafey in his mother’s real estate and the proceeds arising from the sale of the [Subject] Property.” (Reply Brief of American Pension at 7) As authority, American Pension cites to RCW 4.56.190, the general judgment lien statute.¹ American Pension, however, disregards the limited scope and nature of its owelty/equalizing lien obtained as part of the dissolution proceeding.

An owelty/equalizing lien applies to a specific property, not all

¹ RCW 4.56.190, lien of judgment, provides in pertinent part:

The real estate of any judgment debtor, and such as the judgment debtor may acquire, not exempt by law, shall be held and bound to satisfy any judgment of the . . . superior court . . . of this state, and every such judgment shall be a lien thereupon to commence as provided in RCW 4.56.200 As used in this chapter, real estate shall not include the vendor’s interest under a real estate contract for judgments rendered after August 23, 1983. If a judgment debtor owns real estate, subject to execution, jointly or in common with any other person, the judgment shall be a lien on the interest of the defendant only.

present or future properties that Patrick Hafey has an ownership interest in. The Washington Real Property Deskbook describes the limited nature and scope of an owelty/equalizing lien with reference to RCW 4.56.190:

Owelty is confirmed in judgment and becomes an equitable lien on the property. The owelty lien is in the nature of a vendor's lien. Adams v. Rowe, 39 Wn.2d 446, 236 P.2d 355 (1951), and attaches to a particular piece of real property upon its entry to assure payment of a debt related to that property. The owelty lien is more focused and limited in scope than a general judgment lien, which attaches to all real property owned by the debtor in the county in which the judgment lien is entered or filed. RCW 4.56.190-.200; In re Marriage of Wintermute, 70 Wn. App. 741, 855 P.2d 1186 (1993).

4 Washington Real Property Deskbook, §10.3(3)(b) at 10-6 (4th ed. 2010).

The Washington Real Property Deskbook is instructive as it addresses this very issue and provides that the owelty/equalizing lien is more limited in scope than a general judgment lien, thereby not attaching to all real property under this statute.

Legal authority supports the characterization that an owelty/equalizing lien is analogous to a vendor's lien, in that it attaches to a particular piece of property to assure payment of a debt related to that property. In re Marriage of Wintermute, 70 Wn. App. 741, 745, 855 P.2d 1186 (1993); *see also* Adams v. Rowe, 39 Wn.2d 446, 449, 236 P.2d 355 (1951); Hartley v. Liberty Park, 54 Wn. App. 434, 774 P.2d 40; In re Marriage of Foley, 84 Wn. App. 839, 845, 930 P.2d 929 (1997) (noting “a

judgment in owelty is an equitable lien on the property specified in the nature of a vendor's lien"). In addition, American Jurisprudence, summarized an owelty lien in a similar manner: "[a]n owelty lien is like a vendor's lien in that it attaches to a particular piece of real property to assure payment of a debt related to that property." 59A Am. Jur. 2d Partition § 179 (2013) (citing Sayers v. Pyland, 139 Tex. 57, 161 S.W.2d 769, 140 A.L.R. 1164 (1942); In re Marriage of Wintermute, 70 Wn. App. 741, 855 P.2d 1186 (Div. 2 1993)).

American Pension attempts to distinguish In re Marriage of Wintermute by asserting that the narrowness of the scope of an owelty lien is not justified by the holding and is dicta. (Reply Brief of American Pension at 7-8) Although the court in In re Marriage of Wintermute addressed the issue of the ten-year statutory period for an owelty judgment, the court conducted a detailed analysis of the nature and limited scope of an owelty/equalizing lien in reaching its holding. In re Marriage of Wintermute, 70 Wn. App. at 744-747 (stating "[b]y attaching to a particular piece of real property to secure an equalizing award of money, an owelty lien is significantly more focused and limited in scope than a general judgment lien. It is a compensating device tailored by the court or the parties to address a specific situation.")

Here, the owelty lien acts as an equalizing lien and attaches only to

the specific property that was awarded to Patrick Hafey in his 2009 dissolution proceeding, not to the Subject Property.

1. American Pension’s Inaccurate Quote of the Court’s Ruling in Hartley, in Support of its Argument that the Owelty Lien Attached to the Subject Property, is Misleading.

American Pension incorrectly asserts that its owelty/equalizing lien attached to two properties in which Patrick Hafey held an ownership interest. American Pension erroneously relies on Hartley v. Liberty Park, 54 Wn. App. 434, 774 P.2d 40 (1989), for the proposition that an owelty lien becomes a lien on “all” partitioned property as established in RCW 4.56.190. Moreover, American Pension inaccurately characterizes what it refers to as the rule in this state announced by the court in Hartley. (Reply Brief of American Pension at 8-9)

In its brief, American Pension inaccurately quotes from the Hartley case. American Pension states that “the Hartley Court quoted the rule in this state” as follows:

““An award of owelty will become a lien on all partitioned property as established in RCW 4.56.190.” (Emphasis Added.)”
(Reply Brief of American Pension at 8-9, quoting Hartley)

The correct quotation, however, follows:

“An award of owelty will become a lien on the partitioned property as established in RCW 4.56.190.”

Hartley, 54 Wn. App. at 438 (Emphasis added). American Pension inputs the word “all” for the word used by the court, “the”, as evident in the

preceding quotations. This error is not only misleading, it is key to American Pension's broad contention that an owelty/equalizing lien attaches to "all" property under RCW 4.56.190, not "the" partitioned property.

This error impacts an analysis in evaluating the limited scope and nature of an owelty/equalizing lien in that it attaches to a specific property, not all property present and future. In this case, the distinction between "all" and "the" partitioned property is important since there are two properties against which American Pension asserted its divorce owelty/equalizing lien interest.

The first property is the Subject Property at issue in this lawsuit, located at 3017 120th Pl. SE, Everett, Washington. In 2002, Plaintiff Sandra Barth and her brother, Patrick Hafey, inherited the Subject Property as tenants in common from their mother's estate.

The second property, located at 12020 52nd Ave. SE, Everett, Washington, is the real property obtained by Patrick Hafey in his 2009 divorce (the "Dissolution Property"). The Dissolution Property is not at issue in this partition action. When Patrick Hafey and his ex-wife, Tammy Hafey, dissolved their marriage in 2009, the Decree of Dissolution (1) awarded Patrick Hafey their former family home located at 12020 52nd Ave. SE in Everett, Washington, the Dissolution Property, as his sole and

separate property; and in exchange, (2) awarded Tammy Hafey an owelty /equalizing lien of \$150,000 secured by a promissory note and deed of trust (due and payable to the wife two years from the date of dissolution, or upon sale or refinance of the Dissolution Property). (CP 45-53) In June of 2013, American Pension recovered \$44,263.37 as part of its owelty/equalizing lien that attached to the Dissolution Property.

American Pension incorrectly asserts that its assigned divorce owelty/equalizing lien attached to both the Dissolution Property and the Subject Property. However, since American Pension's assigned divorce owelty/equalizing lien is more limited in scope than a general judgment lien and like a vendor's lien, it attached to a particular piece of property. Accordingly, American Pension's owelty/equalizing lien is limited to the Dissolution Property. As to the Subject Property, American Pension's owelty/equalizing lien does not reach Patrick Hafey's half interest (it was not subject to the owelty lien in the dissolution decree). The language in the Decree of Dissolution specifies that it is an owelty/ equalizing lien against the Dissolution Property, and that the lien is secured by a note and deed of trust on that particular property. (CP 45-53) Patrick Hafey, not American Pension, should be entitled to receive sale proceeds of \$3,646.75.

The Barths rely on their opening brief for the remainder of their

argument regarding the trial court's error in finding the owelty/equalizing lien attached to the Subject Property.

B. American Pension's Assertions that the Barths' Cross-Appeal Issue is Raised for the First Time on Appeal and that there was a Judicial Admission are Baseless Claims and Not Supported by Any Part of the Record on Appeal.

First, American Pension's assertion that the trial court's award of \$3,646 to owelty lien holder American Pension Services is challenged for the first time on appeal is without merit and not supported by the record. (Reply Brief of American Pension at 6). Rather, the record clearly demonstrates otherwise. (CP 1-9, 119-141) The Barths raised this issue as part of their Motion for Disbursement of Sale Proceeds in Partition Action. (CP 119-141) And, the trial court ruled on this very issue in its Order and subsequent Amended Order granting said motion, which are at issue on appeal. (CP 1-3, 6-9)

Throughout the trial court proceedings, the Barths maintained a clear and consistent position. The Barths asserted that the divorce owelty/equalizing lien, assigned to American Pension by Patrick Hafey's ex-wife, Tammy Hafey, was more limited in scope and did not attach to the half interest of Patrick Hafey in the Subject Property. Furthermore, the Barths contended that, even if the trial court ruled that American Pension's lien attached to Patrick Hafey's half interest in the Subject Property, said

lien should be found subordinate and lower in priority to the claims and offsets on that interest asserted by the Barths. American Pension's assertion that the trial court's award to lien holder American Pension is challenged for the first time on appeal is without merit.

Second, American Pension's assertion that "this question is barred by the judicial admission of Barth's attorney that \$3,646 was the proper award for the court to allow" to American Pension is without any foundation in fact or law. (Reply Brief of American Pension at 6)

A judicial admission is "not really evidence at all. The term is simply a short-hand way of saying that because of something a party has said or done, certain facts will be deemed admitted and binding, and the party will not be permitted to dispute them." 5B Karl B. Tegland, Wash. Prac.: Evidence Law & Practice § 801.54 (2007); Hogenson v. Service Armament Co., 77 Wn.2d 209, 214, 461 P.2d 311 (1969) (stating that "[t]his court has long held that '(a)n admission, by an attorney, to be binding upon his client, must be distinct and formal, and made for the express purpose of dispensing with the formal proof of some fact at the trial.'").

Neither the Barths nor anyone in a representative capacity stated that the \$3,646 awarded to American Pension was proper at any point during the trial court proceedings. (CP 1-3, 6-9, 119-141) Moreover, no

portion of the record provides any factual or legal support for American Pension's claim of judicial admission by Barths' counsel. Accordingly, American Pension's claim should be disregarded.

III. CONCLUSION

This Court should affirm the trial court's Amended Order dated May 22, 2014 disbursing the Subject Property sale proceeds in this partition action, with one exception: This Court should reverse the trial court's ruling in the Amended Order that Defendant American Pension's owelty/equalizing lien attached to the half interest of Defendant Patrick Hafey in the partitioned property at issue in this lawsuit. Even if the Court were to find that the owelty/equalizing lien attaches to Patrick Hafey's interest in the Subject Property, the Court should affirm the trial court's ruling that such lien is subordinate and lower in priority to the claims and offsets asserted by the Barths.

RESPECTFULLY SUBMITTED this 24th day of November, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2014, I caused the foregoing *Reply Brief of Respondent/Cross-Appellants / Plaintiffs Thomas and Sandra Barth* to be filed with the Clerk of the above-entitled Court and served upon counsel of record in the manner as indicated below:

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Dated this 24th day of November 2014.


Matthew Snell, WSBA #40460