



Lien on Me: Relief From the Shortcoming of Michigan Judgment Lien Statute

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LIEN ON ME: RELIEF FROM THE SHORTCOMING OF MICHIGAN JUDGMENT LIEN STATUTE

By Rick A. Haberman*¹

"Get your judgment and get in line."

Words to that effect have become commonplace in the practices of many creditors attorneys. A lackluster economy combined with the hangover from a period of lax credit standards have created a very challenging environment for attorneys trying to collect a debt.

Even when armed with a judgment, creditor-side attorneys are finding it harder and harder to recover funds owed to their clients. Many attorneys seeking to enforce a judgment have turned to Michigan's Judgment Lien Statute, MCL § 600.2801 *et seq.* ("MJLS"), which allows a judgment creditor to file a lien against real property in which a judgment debtor has an interest. Recently, in an unpublished opinion, Thomas v Dutkavich, 2010 Mich App LEXIS 2049 (Oct. 28, 2010), the Michigan Court of Appeals clarified the scope of relief available under the MJLS, and left open the possibility that the primary shortcoming of the MJLS – the inability to foreclose on the lien it creates -- may have a remedy. This article will begin with an overview of the MJLS and then discuss the decision in Thomas.

The MJLS

Enacted in 2004, the MJLS allows a judgment creditor to file a lien against the judgment debtor's interest in real property, without the burdensome procedures of a

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typical execution and levy. The chief strength of the MJLS is that it creates a recorded encumbrance on real property that must be satisfied when the property is sold, refinanced or otherwise conveyed. MCL § 600.2819.

The MJLS is not without its weaknesses however. A judgment lien cannot be filed against property owned as tenants by the entirety (as is common in the case of residences occupied by man and wife) and, from the standpoint of a creditor, the lien's priority is far from impressive. See MCL § 600.2807 (2). Perhaps the most glaring shortcoming of a judgment lien as a collection tool is the fact that the MJLS explicitly states that a judgment lien cannot be foreclosed upon. MCL § 600.2819. Thus, while the statute says that a judgment creditor who sells, refinances or conveys land subject to a judgment lien "shall pay the amount due" to creditor from the proceeds of the sale, there appears to be no method of enforcing this legislative directive. In other words, the statute leaves open the question of what happens to a judgment lien when property is conveyed, but the judgment debtor makes no effort to satisfy the judgment in whole or in part. This question, the forecloseability of the judgment lien and the extent of the exemption for properties held in the entirety were all recently addressed in Thomas, supra.

Thomas v Dutkavich

Any creditors attorney will tell you that a non foreclosable lien is as useful as an empty slingshot when trying to collect a judgment. This was precisely the experience of the creditors in *Thomas*. In that case, the Appellants, Laverne and Marilyn Dutkavich had obtained a judgment against Steven Pelletier ("Pelletier") in the amount of \$29,183.

Id. at *3. The Dutkaviches then filed a judgment lien against a condominium owned by Pelletier and occupied by he and his wife. *Id.* at *4. A few months, later the Pelletiers conveyed the property via warranty deed to Robert A. Thomas ("Thomas"). Prior to the closing the Pelletier's mortgage was discharged. Based on the closing statement, it appeared the Pelletiers netted over \$51,000. No money was distributed to the Dutkaviches to satisfy their judgment despite their recorded lien. *Id.* at *5.

Having been effectively cut out from the proceeds of the sale, the Dutkaviches obtained an order to seize property from Steven Pelletier. When no suitable property was located, the Dutkaviches attempted to levy against the real estate covered by their judgment lien, which was now in the possession of Thomas. In an effort to protect the newly purchased property, Thomas filed a lawsuit to quiet title. Thomas also asked the court to declare the notice of levy and the judgment lien null and void and to declare his warranty deed superior to the judgment lien filed by the Duktaviches. *Id.* at *6.

In response the Dutkaviches filed a counterclaim based on Thomas' failure to direct payments to the Dutkaviches and thus satisfy their lien. *Id.* at *8. On cross motions for summary disposition, the trial court found that Thomas (the purchaser of the home from the Pelletiers) had no duty under the MJLS to direct monies to the Dutkaviches. The Court further ordered that the Dutkaviches' judgment lien be discharged. *Id.* at *9-10. This result left the Dutkaviches with nothing, Thomas with an unencumbered condominium, and the judgment debtor (Pelletier) with a \$51,000 windfall.

As might be expected, the Dutkaviches appealed, arguing that payment of the underlying debt was a prerequisite to discharge of the lien and that Thomas had failed in his duty to satisfy the lien despite having constructive notice that the property was encumbered. They argued that MCL §600.6018 (which is not part of the MJLS) allowed them to foreclose on the lien despite the MJLS' prohibition on foreclosure. The Dutkaviches also claimed that equity demanded that they be paid the amount of the outstanding judgment. Id. at *11 Thomas responded that he had no duty under the MJLS despite his constructive notice of the lien because the statute was only enforceable against the judgment debtor and not a purchaser like himself. Thomas also asserted that the judgment lien never attached to the property because Mrs. Pelletier's dower interest in the property created a tenancy by the entirety and was therefore within the protection of MCL § 600.2807 (1). He further argued that MCL § 600.2018 was not applicable because the Dutkaviches' levy was recorded after he bought the property. Id. at *11-12.

Thus, four issues were brought before the Court of Appeals: 1) whether a dower interest in property is sufficient to create a tenancy by the entirety and thus bar attachment of a judgment lien; 2) whether a buyer of property subject to a judgment lien has any duty to direct satisfaction of the lien from proceeds of the sale; 3) whether a judgment lien simply disappears when a judgment debtor alienates the property without making any attempt to extinguish the indebtedness; and 4) whether MCL § 600.2018 allows foreclosure on a judgment lien despite the explicit prohibition in the MJLS.

On the first issue, the Court of Appeals noted that because the land was originally conveyed only to Steve Pelletier, and never re-deeded to both Pelletiers, no tenancy by the entirety was ever created. The fact that Mrs. Pelletier participated in the property's later sale did not create a tenancy by the entirety after the fact. Furthermore, the Court noted that the Legislature referred only to "tenants by the entirety" and made no mention of dower rights. Thus, the Court reasoned that protection of the dower interest sought by Thomas would be "improperly reading language into a statute that simply does not exist." *Id.* at *18.²

On the second issue, the Court once again looked to the plain language of the statute and held that under the MJLS, "the obligation or duty to pay the judgment creditor ... rests solely with the judgment debtor." *Id.* at *21. Accordingly, as a purchaser of the encumbered property Pelletier could not be held liable under the statute, and was under no duty to direct payment of the Dutkaviches' judgment.

On the last issue, the Court recognized that the statute did not explicitly speak to "the failure of a judgment debtor to make the required payment, although capable of doing so, ... let alone the resulting status of the judgment lien upon the failure." *Id.* To fill this void in statutory language the Court turned to other parts of the MJLS for guidance. Specifically, the Court looked to sections 2807(3), 2811, and 2813(3) all of which allow for the partial discharge of a judgment lien if the required payment is

² In *dicta*, the Court went on to state that Mrs. Pelletier's interest was never really in jeopardy because 1) a judgment lien cannot be foreclosed upon and 2) Mrs. Pelletier had adequate opportunity to protect her dower interest and had, in fact, voluntarily relinquished it by signing the conveyance to Thomas. *Id.* at *18.

insufficient to pay the underlying debt. According to the Court, the language of these sections contemplates:

continued attachment of a judgment lien on property despite new ownership where the lien was not fully discharged. *The necessary corollary is that, where no payment whatsoever was made to the judgment creditor from available real estate sales proceeds... the judgment lien remains attached to the property...."*

Id. at 24 (emphasis added).

Thus, Pelletier (the judgment debtor) kept his proceeds. Thomas (the purchaser) was left with a property encumbered by a judgment lien which he had no duty to satisfy. *Id.* at *25 The Dutkaviches (the judgment creditors) were left with an unsatisfied judgment and a non forecloseable lien on a condominium. Hardly a satisfactory result from a creditor's perspective.

Fortunately for the Dutkaviches, the Court's analysis did not end here. The Dutkaviches had not only pressed their case under the MJLS, but had also argued that insofar as Pelletier had tried to convey his property "in fraud of" the judgment creditors, MCL § 600.6018 allowed them to levy upon their judgment lien. That statute states:

All the real estate of any judgment debtor, including but not limited to, interests acquired by parties to contracts for the sale of land, whether in possession, reversion or remainder, *lands conveyed in fraud of creditors*, equities and rights of redemption, leasehold interests, ... and all undivided interests whatever are subject to execution, levy and sale except as otherwise provided by law.

Id. (emphasis by the Court).

The trial court had never considered this argument, a decision the Court of Appeals found to be in error. Thus the Court ordered remand for "a more detailed examination of the statutory scheme and proof of a fraudulent transfer." *Id.* at *29-30.

Application of MCLA § 600.6018

There is no case law indicating how MCL § 600.6018 fits within the MJLS.³ Can a creditor simply execute upon his judgment lien without abiding by the procedures applicable to an ordinary execution and levy? Do the other protections applicable to execution and levy under § 6018 – such as the requirement to seize personalty first and the homestead exemption – apply to a judgment lien? Also on remand, Thomas may well raise the argument that allowing to Dutkaviches to levy against his condominium constitutes an end run around the MJLS's explicit prohibition on foreclosure.

Michigan case law does not offer a ready answer. The only case arguably offering an guidance on this issue is Kleinshinski v Delta Properties, 2005 Mich App LEXIS 1721 (2005). That case seems to suggest that a creditor can execute on the real property of a debtor, regardless of the anti-foreclosure provision of the MJLS. However, that case arose after enactment of the MJLS and key passages regarding the MJLS reside in dicta. Thus, the case is of minimal utility. Commentary to the MJLS seems to suggest a legislative intent to supplement, not replace the traditional remedy of levy and execution found in MCL § 600.6018 by providing a simple and streamlined way to place

³ Neither the Dutkaviches or the Michigan Creditors Bar Association, who filed an amicus brief in support of the Dutkaviches, explored this topic.

a lien on property without the necessity of execution and levy. °See generally, Buckles, Michael It Makes Good Sense for Michigan, 83 MI Bar J. 39 (2004)(discussing pending legislation creating the MJLS).

Similarly, a Court will also have to determine whether to allow a levy against the property after its conveyance to Thomas. Such an act would seem to undermine the scheme set up by the MJLS that places the entire burden on the judgment debtor, not the purchaser of the encumbered property; however it would seem consistent with the plain language of MCL. § 600.6018 which foresees the possibility of levy after property has been transferred.

In addition to these statutory questions, on remand the trial court will also have to determine the proofs necessary to show a conveyance "in fraud of" a creditor. In this regard, the closest statutory analog would seem to be Michigan's Fraudulent Conveyance Act. MCL § 566.34 (1)(a) provides that transfer by a debtor is fraudulent if the debtor made the transfer "with actual intent to hinder, delay or defraud any creditor." While the statute then provides numerous factors for consideration, none of them seem readily applicable to the judgment debtor who simply alienates his encumbered property without servicing the lien. See MCL 566.34 (2)(a-k). Perhaps the most probative evidence of fraud may be the existence of the judgment lien itself combined with both parties' failure to act upon it. The Duktavichs have a strong argument that the MJLS places an affirmative duty upon the seller of an encumbered property to disclose the sale to the lien holder. By failing to do so, a fraud was perpetrated on the Duktavichs. Whether this evidence is sufficient evidence of fraud under MCL §600. 6018, is a determination that will have to be made on remand.

Conclusion

While the ultimate outcome of Duktavich is not known, (and it would seem to be candidate for settlement) the case points out the shortcoming of the MJLS. Should a lienholder under the MJLS have to pursue the course of litigation pursued by the Dutkavichs? Should the MJLS include a provision mandating that a seller of encumbered property notify the lienholder of the sale? Can this requirement be interpreted as part of the existing statute? Should the statute require a buyer of encumbered property to direct proceeds of the sale to the lienholder? (After all, the buyer may well be buying at a discount due to the lien.) While these are questions for the legislature or a future court, Thomas makes a few things clear:

- the MJLS places no duty on a buyer of encumbered property and the buyer cannot be held liable .
- a dower interest does not prevent attachment of a lien under the MJLS.
- absent discharge, a judgment lien remains attached to the property despite sale or transfer.
- a seller who alienates encumbered property may be exposed to liability for fraud should he or she simply ignore the judgment lien pursuant to MCLA §600.6018.

The MJLS remains an imperfect remedy. Under the Thomas decision, the creditors would be left with a completely unenforceable lien absent an action under §6018. While this gap is perhaps best addressed by the legislature, for the moment, creditors side practitioners are best counseled to combine their judgment lien with an action under the 6018.