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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA11-459

Opinion Delivered February 8, 2012

BENEFIT BANK APPELLANT V. MARILYN ROGERS APPELLEE	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, GREENWOOD DISTRICT [NO. CV-10-460-G] HONORABLE STEPHEN TABOR, JUDGE REVERSED and REMANDED

WAYMOND M. BROWN, Judge

On January 14, 2011, the Sebastian County Circuit Court entered an order finding that appellee Marilyn Rogers held a valid lien that had priority over appellant Benefit Bank's lien.[1] Benefit Bank brings this appeal arguing that Marilyn's lien was not a valid lien because the divorce court lacked the authority to impose a lien on real property to secure future alimony payments. It also argues that the lis pendens that Marilyn filed did not create or perfect a lien. We reverse and remand.

William C. Morgan, using the corporate name of WCM Investments, LLC, purchased a home and twenty-seven acres on Cook Terrace in Sebastian County, Arkansas, while he and

[1]The order also granted Benefit Bank a judgment against separate defendants William C. Morgan and WCM Investments, LLC. That portion of the order is not at issue in this appeal.

Marilyn were still married. In the divorce decree entered on November 30, 2007, the court granted Marilyn a lien on the property "as collateral security for the continued payment of spousal support." The order directed Marilyn to file a lis pendens or "other such document" to record the evidence of the lien. Marilyn filed a notice of lis pendens on November 13, 2007.[2] On May 19, 2008, William, acting for WCM Investments, took out a loan in the amount of $323,000 with Benefit Bank and used the Cook Terrace property as collateral. WCM defaulted on its payment obligation to Benefit Bank, and the bank filed a complaint for foreclosure on July 16, 2010, against both WCM and William. Benefit Bank filed an amended complaint on August 6, 2010, which included Marilyn in its foreclosure action. Benefit Bank contended that any interest Marilyn had in the property was secondary to its interest. After a hearing, the court found that Marilyn held a valid lien that had priority over Benefit Bank's lien. This appeal followed.

When a case is tried by a circuit court sitting without a jury, our inquiry on appeal is not whether there is substantial evidence to support the factual findings of the court, but whether the findings are clearly erroneous, or clearly against the preponderance of the evidence.[3] A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, when considering all of the evidence, is left with a definite and firm conviction that a mistake has been committed.[4] In conducting its review of a circuit court's

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[2]The lis pendens was filed after the divorce hearing but before the decree was filed.

[3]*Pine Meadow Autoflex, LLC v. Taylor*, 104 Ark. App. 262, 290 S.W.3d 626 (2009).

[4]*Robinson v. Villines*, 2009 Ark. 632, 362 S.W.3d 870.

findings of fact, we consider the evidence and all reasonable inferences therefrom in the light most favorable to the appellee.[5] Appellate courts give due regard to the opportunity and superior position of the circuit court to determine the credibility of the witnesses.[6] However, a circuit court's conclusion on a question of law is reviewed de novo and is given no deference on appeal.[7]

Benefit Bank contends that the divorce court did not have the authority to impose a lien on William's property in favor of Marilyn as security for future alimony payments. In response, Marilyn asserts that the "no-security-for-alimony rule" only applies if it is applied involuntarily. The trial court, relying on *Whitmore v. Brown*,[8] rejected Benefit Bank's argument. It concluded that Marilyn had an enforceable lien on the property at issue because

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[5]*Murphy v. City of West Memphis*, 352 Ark. 315, 100 S.W.3d 221 (2003).

[6]*See Combs v. Stewart*, 374 Ark. 409, 288 S.W.3d 574 (2008).

[7]*Id.*

[8]147 Ark. 147, 227 S.W. 34 (1921). The *Whitmore* court cited dicta from *Casteel v. Casteel*, 38 Ark. 477 (1882). The pertinent language in *Casteel* was as follows:

> We need not modify the decree, as it is not urged upon us to do so. Otherwise it would be proper to remand the cause for its correction. The alimony should not have been made a lien upon the lands of complainant. This is equivalent to charging them with an annuity, which the owner might do voluntarily, but the court should not *in invitum*, as it embarrasses alienation. If objection had been made, or were now insisted upon, the court might have secured the payment of the alimony by sequestration, or by exacting sureties. (*See* Gantt's Dig. sec. 2205.) The appellant has, however, chosen to stand on other ground.

Dicta has been defined by this court as "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to the determination of the case at hand," and it lacks "the force of an adjudication." *Hutchens v. Bella Vista Vill. Prop. Owners' Ass'n, Inc.*, 82 Ark. App. 28, 110 S.W.3d 325, 331 (2003).

the lien contained within the decree was not imposed against an unwilling party. In Arkansas, the law is clear that a decree or order for future payments of alimony does not constitute a lien upon real estate; that only sums ordered to be paid at once and for which execution may then issue constitute a lien upon lands as to other judgments.[9] The reason for the rule denying liens for future alimony is that it would likely embarrass alienation.[10] This rule prohibiting the placement of liens in divorce decrees to secure alimony payments, outlined as early as 1881 in *Kurtz*, has not been overturned; therefore it is controlling in our decision. As such, the divorce court lacked the authority to place a lien on William's property to secure future alimony payments. Because Marilyn's lien was not valid, we reverse and remand this case back to the circuit court for an order consistent with this opinion. Since we are reversing on this ground, we do not find it necessary to reach Benefit Bank's second point on appeal.

Reversed and remanded.

GRUBER and MARTIN, JJ., agree.

Wright, Lindsey & Jennings LLP, by: *Regina A. Young* and *Gary D. Marts, Jr.*, for appellant.

Meadors Law Firm, PLLC, by: *Brian Meadors* and *Mandy Thomas*, for appellee.

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[9] *See Massengale v. Massengale*, 186 Ark. 917, 56 S.W.2d 763 (1933) (citing *Kurtz v. Kurtz*, 38 Ark. 119 (1881); *Casteel v. Casteel*, *supra*; *Whitmore v. Brown*, *supra*; *Warren v. Moore*, 162 Ark. 564, 258 S.W. 361 (1924)).

[10] *Id.*