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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001724-MR

JOHN H. RUBY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 11-CI-403756

MARCIA SCHERZER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Attorney John H. Ruby has appealed from the October 1, 2012, order of the Jefferson Circuit Court denying his motion to alter, amend, or vacate the court's August 29, 2012, order granting his former client Marcia Scherzer's motion to set aside a summary judgment, remanding a commissioner's sale, and dismissing his action. Because we agree with the circuit court that Ruby

misapplied Kentucky Revised Statutes (KRS) 376.460, the attorney's lien statute, we affirm.

In October 2011, Ruby, a licensed and practicing attorney, filed a foreclosure action against Scherzer, whom Ruby had represented in a dissolution action filed by her husband, Frank Scherzer. In the complaint, Ruby sought to enforce an attorney's lien he filed in the Jefferson County Clerk's office on September 16, 2011, on real property owned by Scherzer that he claimed had been the subject of the litigation for which he had been representing her. Ruby filed the lien to protect his claim for attorney fees, which totaled $13,502.84, plus 18% interest pursuant to their agreement, and he stated that he mailed the lien to Scherzer the date that he filed it. Ruby requested that the property be sold by the Master Commissioner to pay his lien. On November 21, 2011, Scherzer filed a *pro se* response to the complaint, disputing that she owed any additional attorney fees to Ruby and stating that she had already paid him more than $8,000.00 to represent her in the dissolution action and had filed a complaint against him with the Kentucky Bar Association. She listed 5301 Layne Road in Louisville as her address.

Ruby filed a motion for default judgment and order of sale on December 22, 2011, stating that no papers had been served on him by Scherzer. In the attached certificate, Ruby stated that Scherzer had been served on November 14, 2011, and that the amount due was $14,110.47, inclusive of 18% interest, pursuant to the September 16, 2011, agreement. He also attached a copy of the

legal description of Scherzer's property on Bates Lane upon which he had filed the lien. The Master Commissioner filed a report stating that Scherzer had filed an answer, making the entry of a default judgment inappropriate.

In February 2012, Ruby filed a motion for summary judgment, serving Scherzer at the Bates Lane address. In support of his motion, Ruby stated that he held a lien on the Bates Lane property and that Scherzer was the title holder of the property. While she had filed an answer, Ruby claimed that Scherzer had failed to demonstrate the existence of any genuine issues of material fact. Accordingly, Ruby was entitled to a summary judgment. Ruby attached a copy of the lien to the motion, in which he listed Scherzer's property on Layne Road and Bates Lane as being subject to the lien. In March 2012, the Master Commissioner filed a report indicating that Ruby had tendered evidence showing that he was the holder of the note and mortgage and that Scherzer had not responded to the motion for summary judgment.

On March 30, 2012, the circuit court entered a judgment and order of sale, finding that no genuine issues of material fact were in dispute and that Ruby was entitled to a judgment as a matter of law. In granting the motion, the court enforced the attorney's lien, awarded Ruby a judgment of $13,502.84 plus interest, and directed the Master Commissioner to sell the Bates Lane property.

On August 22, 2012, Scherzer moved the circuit court to set aside the judgment and order of sale. She stated that the Master Commissioner's sale was scheduled for September 4, 2012. In support of her motion, Scherzer stated that

she had never received a copy or notice of the motion for summary judgment or the judgment and order of sale because she did not live at the Bates Lane address and Ruby knew that she lived at the Layne Road address. She had inherited the Bates Lane property, but did not receive any mail at that address, and the house had been vacant for more than two years. Scherzer also contested the basis for the suit, arguing that the lien only applied to funds received, not in a dissolution action, and did not attach to real estate. She again stated that she believed she had been overcharged by Ruby for representing her in the dissolution action. Scherzer requested that her motion be treated as a response to Ruby's motion for summary judgment and that the Master Commissioner's sale be taken off of the docket. Scherzer supported her motion with an affidavit.

The court held a hearing on Scherzer's motion to set aside the summary judgment. At the hearing, Scherzer stated that she had not received a copy of Ruby's motion for summary judgment or the judgment and order of sale because both had been sent to the incorrect address. She also discussed the application of the attorney's lien statute, KRS 376.460, which she claimed did not apply to a dissolution proceeding, but only to personal injury or collection cases. In addition, Scherzer disputed the attorney fees Ruby claimed. In response, Ruby stated that the two-year dissolution was highly contested and contentious. Through his actions, Ruby claimed that he obtained the rental property for her, noting the hard work he had done for her in order to keep that property, and to obtain child

support and funds to pay for her child's private school tuition. Finally, Ruby argued that Scherzer's motion was filed too late.

After considering the parties' arguments, the court noted it had concerns about the case, recognizing that various attorneys had been making inappropriate use of the attorney's lien statute to collect fees and that this was not the purpose of the statute. The court stated it had ruled the same way in an earlier case involving Ruby and would rule the same way in this case. The court was not aware that a judgment had ever been entered, stating that Ruby had "skipped over" the lawsuit and judgment step, which would have afforded Scherzer due process and established a ruling that Scherzer owed him money, to immediately place a lien on her property and foreclose on it as if he had a judgment. The court stated that attorneys were not permitted to deny others their due process rights by relying on this statute, indicating that Ruby should have sued Scherzer in a civil action to recover the fees, which would have allowed Scherzer to defend herself. Once he had obtained a judgment, Ruby would have been able to collect on it. The court also noted that it was inclined to dismiss the lawsuit, with which Ruby agreed; he indicated that he would be hiring collections attorney Steven Snow, who had given him the idea to file the lien and foreclosure action, to file a civil action against Scherzer to collect his fees.

Following the hearing, and pursuant to what the court and the parties discussed, the circuit court entered an order on August 29, 2012, followed by an amended order on September 5, 2012, granting Scherzer's motion, setting aside its

March 20, 2012, judgment and order of sale, remanding the Master Commissioner's sale, and dismissing Ruby's action. The court held as follows:

> THE COURT FINDS that placing a lien against the Defendant's property under the circumstances was neither in keeping with the letter nor the spirit of KRS 376.460. KRS 376.460 as [sic] not intended to be used as a universal means for lawyers to collect money they believe is owed them in lieu, in circumvention or in the absence of due process of law. As such, and with apologies to the Defendant, entry of summary judgment is this case was a manifest error of law. *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005).

Ruby, at that point represented by attorney Steven Snow, filed a Kentucky Rules of Civil Procedure (CR) 59 motion requesting that the circuit court vacate its order dismissing the action. In support of his motion, Ruby argued that the attorney's lien statute applied in dissolution cases and that a lien under this statute acted as a judgment warranting payment. Ruby also argued that the circuit court in this case did not have jurisdiction to rule on whether the lien was valid or that the fees charged were reasonable. He claimed that he had a valid and existing lien as soon as he filed a pleading on Scherzer's behalf in the dissolution action and that he perfected the lien by placing it on the property he recovered for Scherzer and by filing the notice of the lien in the dissolution action at the county clerk's office and mailing it to her. Ruby stated that because Scherzer never attacked the lien or the reasonableness of his fees in the dissolution action, the court did not have jurisdiction to determine the validity of the lien in the foreclosure action.

In response to the motion, Scherzer argued that KRS 376.460 did not apply to dissolution actions, but only to collection cases or personal injury or similar cases filed for suit or collection. Here, Ruby did not produce, acquire, or obtain anything for her.

The court held another hearing and entered an order on October 1, 2012, denying Ruby's motion to set aside. The court stated:

> THE COURT FINDS that insofar as KRS 376.460 was not intended to be used by lawyers to collect fees from a client in lieu, in circumvention or in the complete absence of due process of law, the Court is neither inclined nor obliged to set aside its Order rectifying the manifest error of law it made in facilitating the misuse of that statute in such a matter in the instant case.

This appeal follows.[1]

On appeal, Ruby contends that the circuit court erred in ruling that KRS 376.460 did not apply to dissolution actions and in dismissing his claim. Scherzer filed a responsive brief disputing Ruby's arguments.

In dismissing Ruby's action, the circuit court essentially granted Scherzer a summary judgment. Our standard of review from a summary judgment is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for summary judgment is 'whether the trial court correctly found that there were no genuine issues as to any material fact and that

[1] We note that Ruby only appealed from the October 1, 2012, order denying his motion to set aside, but not from the order of dismissal. We shall nevertheless consider the merits of his appeal.

the moving party was entitled to judgment as a matter of law.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. International Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors and Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999). Because there are no disputed issues of material fact, we shall confine our review to whether the circuit court's decision that KRS 376.460 does not apply to Ruby's claim is proper, which is a legal issue. Accordingly, our review is *de novo*.

The sole question before this Court relates to the interpretation of KRS 376.460 and whether this statute applies in this action. Statutory interpretation is considered an issue of law, which we review *de novo*. *Monumental Life Ins. Co. v. Dept. of Revenue*, 294 S.W.3d 10, 16 (Ky. App. 2008), citing *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). "The primary purpose of judicial construction is to carry out the intent of the legislature. In construing a statute, the courts must consider the intended purpose of the statute - and the mischief intended to be remedied. A court may not interpret a statute at variance with its stated language." *Monumental Life Ins. Co.*, 294 S.W.3d at 19

(internal quotations omitted) citing *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky. App. 2001). "The courts should reject a construction that is unreasonable and absurd, in preference for one that is reasonable, rational, sensible and intelligent[.]" *Monumental Life Ins. Co.*, 294 S.W.3d at 19 (internal quotations omitted), citing *Commonwealth v. Kerr*, 136 S.W.3d 783, 785 (Ky. App. 2004); *Commonwealth v. Kash*, 967 S.W.2d 37, 43–44 (Ky. App. 1997).

KRS 376.460, known as the attorney's lien statute, provides as follows:

> Each attorney shall have a lien upon all claims, except those of the state, put into his hands for suit or collection or upon which suit has been instituted, for the amount of any fee agreed upon by the parties or, in the absence of such agreement, for a reasonable fee. If the action is prosecuted to a recovery of money or property, the attorney shall have a lien upon the judgment recovered, legal costs excepted, for his fee. If the records show the name of the attorney, the defendant shall be deemed to have notice of the lien. If the parties in good faith and before judgment compromise or settle their controversy without the payment of money or other thing of value, the attorney for the plaintiff shall have no claim against the defendant for any part of his fee.

Ruby, without citing to any supporting caselaw, contends that because he obtained a "recovery" for Scherzer in the dissolution case – restoration of her nonmarital, inherited real estate – he is entitled to use KRS 376.460 to immediately assert a lien on that property to recover his attorney fees. Scherzer disagrees that Ruby obtained a recovery for her as contemplated by the statute, and she argues that the purpose of the attorney's lien statute was to give notice to the payor of

funds to the plaintiff. We agree with the circuit court and Scherzer that KRS 376.460 is not applicable in dissolution cases.

In *Rice v. Kelly*, 226 Ky. 347, 10 S.W.2d 1112 (1928), the former Court of Appeals addressed a case involving a suit in equity filed by the attorney of a corporation against both the corporation and its bankruptcy trustee to recover his attorney fees. The Court considered the prior version of the attorney's lien statute, explaining:

> [A]n attorney has a general or retaining lien upon all documents, money, or other property of his client coming into his hands professionally until any balance due him for professional services has been paid. 6 C. J. § 368, p. 770; *Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601; *McPherson v. Cox*, 96 U. S. 404, 24 L. Ed. 746; *In re Hollins*, 197 N. Y. 361, 90 N. E. 997. But this right cannot be exercised unless possession of the money, papers, or property is retained by the attorney. 6 C. J. § 363, p. 766.
>
> The lien given by section 107, Ky. Stats., is limited to claims placed in the attorney's hands for suit or collection, or upon which suit has been instituted, and it has no application to cases of the character here involved. *Wilson v. House*, 10 Bush, 406.

Rice, 10 S.W.2d at 1115. In *Rice*, the attorney was seeking a judgment to recover his attorney fees pursuant to the former version of the attorney's lien statute; he was not seeking to enforce a lien without having first obtained a judgment, as Ruby did in the present case.

In *Exchange Bank of Kentucky v. Wells*, 860 S.W.2d 785 (Ky. App. 1993), this Court considered the current version of the attorney's lien statute, this

time in connection with attorney fees sought for an action for wrongful termination of a lease and failure to properly manage a leasehold. The decision addressed the relation back and priority of the actual lien.

> Kentucky's rule that an attorney's lien relates back to the time of the commencement of services, and that an attorney's lien takes precedence is also the law in other jurisdictions. The enforceability of the attorney's lien is founded upon the theory that the judgment is the product of the services and skill of the attorney. An attorney's lien on the fund that he or she created should be granted priority over set-off judgments. Further, we are persuaded by counsel's argument that the trial court's right to set off one judgment against another is equitable in nature, and thus, the trial court has the power to determine the amount and manner of set-off.

Wells, 860 S.W.2d at 787 (internal citations omitted). This case does not address whether the lien was appropriate, but how one that has been properly obtained is treated in conjunction with the rest of the judgment obtained.

We have also reviewed the unpublished opinion in *Meehan v. Ruby*, 2011 WL 1515415 (Ky. App. 2011)(2009-CA-002402-MR), a case in which Ruby, the appellant in this case, was an appellee. *Meehan* arose as a result of an earlier domestic action between Ruby and his wife; Meehan represented Ruby's wife in that case. Meehan filed an attorney's lien on their real property after Ruby had been ordered to pay his wife's reasonable legal fees. The Court affirmed the lower court's order finding that the lien was invalid, explaining:

> While the attorney's lien statute does not require that money has to be paid on a judgment before an attorney can file a lien as stated in *Arny v. Johnson*, 443 S.W.2d 543, 545 (Ky. 1969), the right to file a lien can only arise

> when the suit handled by the attorney results in the creation or obtaining of attachable assets. *Rice v. Kelly*, 226 Ky. 347, 10 S.W.2d 1112, 1115 (1928).
>
> After reviewing the record, we conclude that Meehan was not entitled to file an attorney's lien against the Rubys' real estate pursuant to KRS 376.460. While we acknowledge Meehan's argument that *Rice* involved an interpretation of an earlier version of our attorney's lien statute, the language of the prior statute and of the present statute are very similar. Additionally, the current statute expressly provides the manner in which a lien may be filed and, while the statute provides a right to a lien in a suit involving the recovery of money or property, it does not authorize a lien in cases without the recovery of attachable assets.
>
> Furthermore, the right to file an attorney's lien is founded upon the theory that the attorney's services and skills produced the property that the client now possesses. *Exchange Bank of Kentucky v. Wells*, 860 S.W.2d 785, 787 (Ky. App. 1993). Therefore, consistent with our courts' interpretation of the attorney's lien statute for over a century, we conclude that KRS 376.460 does not permit a lien against property or assets that did not arise directly as a result of the underlying suit. *Wilson v. House*, 10 Bush 406, 73 Ky. 406 (1874). Therefore, because Meehan's legal services did not result in the recovery of any property or money on Josefina's behalf, she was not entitled to file an attorney's lien.

Meehan, 2011 WL 1515415 at *2-3.[2]

Based upon our review of the statutory language and the cited caselaw, we must hold that Ruby improperly used KRS 376.460 to recover his fees in the dissolution action because there was nothing obtained in that action to which

[2] We cite to this unpublished opinion pursuant to CR 76.28(c): "[U]npublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court."

a lien could properly attach. Like the situation in *Meehan*, Scherzer did not "obtain" any property, such as a money judgment in a personal injury action. Rather, Scherzer's marriage was dissolved, and she was merely assigned her nonmarital property and awarded her share of the marital property. Being awarded a money judgment or property in a civil action and the assignment and division of property in a dissolution action represent two very different circumstances, as Scherzer points out in her brief. And we agree with her statement of the statute's purpose, which is to provide notice to the payor of funds in order to protect the plaintiff's attorney.

This is not to say that Ruby is not entitled to attempt to recover his attorney fees from Scherzer. The circuit court was exactly right in informing Ruby that he should have filed a separate action against Scherzer to obtain a judgment, which could then be enforced, presumably pursuant to KRS 426.720. If he had done so, Ruby and Scherzer could have litigated Ruby's entitlement to the fees he had charged, and Scherzer would have been afforded her due process rights to assert any available defenses, as she attempted to do in the foreclosure action.

For the foregoing reasons, the orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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