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Do Prior Liens Attach to Property After the Fraudulent Conveyance Determination

Ohio Revised Code Section 1336.07 is Ohio's codification of the "Remedies" section of the Uniform Fraudulent Transfer Act ("UFTA").^[1] The first and primary remedy listed in O.R.C. Section 1336.07 (and the UFTA) is "avoidance of the transfer" that is improper under the statute.

Creditors often initiate actions to reach assets transferred away by their debtor only after they have a voluntary lien (UCC or mortgage) or an involuntary lien (judgment). This blog post addresses the effect of those liens on property after the transfer of that property has been successfully attacked under the UFTA. Avoided transfers put property back to the transferor thus permitting certain liens to possibly attach to the property that is now (again) owned by the debtor. That situation gives rise to this question: **Does a lien obtained after the improper transfer attach to the transferred property after the transfer is successfully attacked under the UFTA thus giving that lien a creditor priority over the debtor's other creditors?**

This is not a new question. In *Shepler v. Whalen*, 119 P.3d 1084, 1085–6 (Colo. 2005) the Supreme Court of Colorado, *en banc*, stated:

We determine that the state's race-notice statute does not control the priority among creditors under the facts of this case. Where the judgment debtor had neither a legal nor an equitable interest in the property, recording a judgment does not create a lien on the property because there is no interest on which the lien could attach. Where it is alleged that property titled in the name of another has been fraudulently conveyed by the judgment debtor, the creditor must file an action to uncover the fraud. Such an action, along with a notice of *lis pendens*, does establish the creditor's lien on the fraudulently conveyed property. Accordingly, a junior creditor who successfully exposes a fraudulent transfer by filing suit takes priority over senior creditors holding judgments recorded

prior to the junior creditor uncovering the fraud.

Colorado and Ohio are “race-notice” states, meaning that, once a debtor’s property has been sold, creditors are satisfied out of the proceeds of the sale in the order that their liens attached. As you can see from the above-quotation, that rule may not apply when the property was not “owned” by the debtor prior to the successful UFTA litigation.

The Colorado court cited with approval a decision from the Arkansas Supreme Court more than one hundred years ago, *Doster v. Manistee National Bank*, 55 S.W. 137 (Ark. 1900). In *Doster*, the senior judgment creditor sought reversal of a ruling that the junior judgment creditor was entitled to the proceeds of the sale of land fraudulently transferred by the debtor prior to either creditor obtaining a judgment lien. *Doster* argued that he was entitled to first satisfaction of his judgment because he recorded the first judgment. The Arkansas court rejected *Doster*’s argument, determining that “there is no statutory judgment lien on lands which have been fraudulently conveyed before the rendition of judgment, the debtor no longer owning or being possessed or [seized] of such property, either in law or equity.” *Id.* at 139.

It seems the law in Ohio might be different because there is authority for the position that the transferor of an avoidable transfer retains an “equitable interest in the fraudulently transferred property.” *In re Central Heating and Air Conditioning, Inc.*, 64 B.R. 733 (N.D. Ohio 1986). **So, can that “equitable interest” be liened other than possibly through the filing of a UFTA action and a notice of *lis pendens*[2]?** The answer appears to be “no.” *Bank of Ohio v. Lawrence*, 161 Ohio St. 543 (1954). Accord, the current Ohio statute, section 2329.01(A)[3] and cases interpreting it such as *Basil v. Vincello*, 50 Ohio St.3d 185 (1990) (Syllabus 1: “Equitable interests in real estate cannot be levied upon or sold under execution pursuant to R.C. 2329.01. (*Culp v. Jacobs* [1930], 123 Ohio St. 109, 174 N.E. 242, approved and followed.))

That “no” answer appears to be bolstered by the decision that a judgment lien does not attach to a debtor’s property acquired after the judgment lien was perfected (for real property, by recording of a certificate in the county recorder’s office). See, *Stiles ex dem Miller*

& *McDonald v. Murphy*, 4 Ohio 92 (1829). Accord, 62 O. Jur. 3d *Judgments* Section 186 which states, in part:

A judgment lien, whether acquired by the filing of a certificate of judgment or by seizure, operates as a lien only upon the interest of the judgment debtor in property at the time when the certificate is filed or the levy made. A judgment debtor who has acquired a judgment lien by filing a certificate of judgment must, in order to acquire a lien on the property acquired by the judgment debtor thereafter, either refile his or her certificate of judgment or seize the after-acquired property in execution. A judgment creditor has no lien on after-acquired property that is sold and conveyed to third parties before his or her levy of execution.

In sum, it seems most probable that: in Ohio, the debtor-transferor retains an equitable interest in property the transfer of which can be attacked under the UFTA; but, a lien filed after that transfer does not attach to that equitable interest.^[3] Further, after a successful UFTA action, a lien created before the UFTA determination does not reach the assets again owned by the debtor-transferor because that ownership is after-acquired property.

[1] The UFTA generally succeeded the 1918 Uniform Fraudulent Conveyance Act. A new proposed statute, the Uniform Voidable Transactions Act was promulgated in 2014. Section 7 of the new uniform act titled “Remedies of Creditor” does not make any changes relevant to this blog post.

[2] See Ohio revised Code 2703.26. Proper completion of *lis pendens* (complaint concerning and describing real property is served on the property owner and notice of the litigation is filed with the county recorder) means that while the lawsuit on that property is pending, a third party who acquires an interest in the property takes subject to the final outcome of the suit. *Levin v. George Fraam & Sons, Inc.*, 65 Ohio App.3d 841 (Lorain Cty. App. 1990).

[3] “Lands and tenements, including vested legal interests therein, permanent leasehold estates renewable forever, and goods and chattels, not exempt by law, shall be subject to the payment of debts, and liable to be taken on execution and sold as provided . . .”

[4] For a creditor's hope, however, see *Millstone Development Ltd. v. Berry*, 2002 WL 959566 (Franklin Cty. App. May 9, 2002). Compare, however, *FDIC v. Willoughby*, 19 Ohio App.3d 51 (Cuyahoga Cty. App. 1984) (Syllabus 3: "A judgment creditor acquires a lien on a debtor's equitable assets when a creditor's suit is commenced.")

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