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**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

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BARBARA A. WEDLINGTON
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

HOME AGAIN RESTORATION, LTD :

Plaintiff : CASE NO. 2015 CVE 00384

vs. : Judge McBride

CYNTHIA GARRETT, ET AL. : DECISION/ENTRY

Defendants :

Kent W. Seifried, counsel for the plaintiff Home Again Restoration, LTD, 2039 Dixie Highway, Ft. Mitchel, Kentucky 41011.

Elizabeth A. Tull, counsel for the defendant Cynthia L. Slagle, formerly known as Cynthia L. Garrett, 215 East Ninth Street, Suite 500, Cincinnati, Ohio 45202.

This cause is before the court for consideration of a motion for summary judgment filed by the plaintiff Home Again Restoration, Ltd. on October 21, 2015. The motion was briefed by the parties, and oral argument was heard on the motion on December 18, 2015. At the conclusion of the oral arguments of counsel, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The parties have stipulated to the following facts. The plaintiff Home Again Restoration, LTD is an Ohio limited liability company.¹ The defendant Cynthia L. Slagle, formerly known as Cynthia L. Garrett, is an individual who resides in Clermont County, Ohio and is the titled owner of property located at 3855 Vineyard Green Drive.² The plaintiff has a certified judgment against the defendant's property from Case No. 2013JUD1451.³

As of October 23, 2015, the amount owing on the plaintiff's judgment lien was \$28,030.79, plus daily interest of \$3.83.⁴ The defendant has defaulted on her payment obligation to the plaintiff.⁵

The Clermont County Auditor valued the defendant's property at \$152,600.⁶ The defendant also had the property appraised, and it was valued at \$150,000.⁷

As of October 21, 2015, the defendant owed approximately \$52,526, plus applicable interest, to the first mortgage holder, PNC Bank, N.A.⁸ The defendant is entitled to receive a homestead exemption under R.C. 2329.66(A)(1)(b) of up to \$132,900.

The plaintiff filed its complaint against the defendant on March 26, 2015, seeking to have its judgment and judgment lien against the defendant foreclosed. On October

¹ Stipulation of Facts, ¶ 1.

² Stipulation of Facts, ¶ 2.

³ Stipulation of Facts, ¶ 3.

⁴ Stipulation of Facts, ¶ 4.

⁵ Stipulation of Facts, ¶ 5.

⁶ Stipulation of Facts, ¶ 6.

⁷ Defs. Ex. 1.

⁸ Stipulation of Facts, ¶ 7.

21, 2015, the plaintiff filed the instant motion for summary judgment against the plaintiff. Both parties briefed this issue, and the court heard oral argument on this matter on December 18, 2015.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

The court must grant summary judgment, as requested by a moving party when:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion.”⁹

The court must view the evidence in a light most favorable to the nonmoving party.¹⁰ Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.¹¹ A fact is material when, under the governing substantive law, the facts “might affect the outcome of the suit.”¹²

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present “a sufficient disagreement to require submission to a jury” or is it “so

⁹ *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). See *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

¹⁰ *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

¹¹ *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

¹² *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

one-sided that the party must prevail as a matter of law”?¹³ This threshold inquiry determines whether there are “any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.”¹⁴

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.¹⁵ This burden requires the movant to “specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond.”¹⁶ If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.¹⁷

However, if the movant satisfies this burden, then the nonmoving party has a “reciprocal burden” to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a “triable issue of fact” remains.¹⁸ The duty of the nonmoving party is more than that of resisting the motion’s allegations.¹⁹ Instead, this burden requires the nonmoving party to “produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial.”²⁰ The nonmoving party must

¹³ Id. at 251-52.

¹⁴ Id. at 250.

¹⁵ *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

¹⁶ *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.

¹⁷ Id. See *HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

¹⁸ *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

¹⁹ *Wells Fargo*, 2013-Ohio-855 at ¶ 25.

²⁰ (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; See *Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).

present documentary evidence of specific facts showing that there is a genuine issue for trial.²¹ It may not rely on the pleadings or unsupported allegations.²²

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action.”²³ The trial court maintains the sound discretion to admit or exclude relevant evidence.²⁴ When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.²⁵

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.²⁶ “Personal knowledge” is defined as “[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay.”²⁷ “Absent evidence to the contrary, an affiant’s statement that his affidavit is based on personal knowledge will

²¹ *Williams*, 2014-Ohio-3778 at ¶ 8. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

²² *Id.*

²³ See *Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 (“Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.”).

²⁴ *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.

²⁵ *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

²⁶ Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).

²⁷ *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

suffice to meet the requirements of Civ.R. 56(E).²⁸ Furthermore, if the affiant does not specifically state that he or she has personal knowledge, “personal knowledge may be inferred from the contents of the affidavit.”²⁹

By contrast, if certain statements in the affidavit “suggest that it is unlikely that the affiant had personal knowledge” of the facts, then “something more than a conclusory averment that the affiant has personal knowledge would be required.”³⁰ Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).³¹

Civ.R. 56(E) provides that “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” Thus, documents referenced in the affidavit “must be attached to the affidavit.”³² If the affiant “relies” on documents in the affidavit but fails to attach those documents, “the portions of the affidavit that reference those document[s] must be stricken.”³³

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.³⁴ Summary judgment is inappropriate

²⁸ *Id.*, citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.

²⁹ *Id.*

³⁰ *Id.*, quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.

³¹ *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).

³² *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).

³³ *Id.* at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. See *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).

³⁴ *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.³⁵

Under Civ.R. 56 the trial court is not normally authorized to enter summary judgment in favor of the nonmoving party.³⁶ However, an “entry of summary judgement against the moving party does not prejudice his due process rights where all relevant evidence is before the court, no genuine issue as to any material fact exists, and the non-moving party is entitled to judgment as a matter of law.”³⁷ In such a circumstance, it is appropriate for the trial court to grant summary judgment *sua sponte* to the nonmoving party.³⁸

LEGAL ANALYSIS

Cases involving foreclosure of a mortgage involve two issues: (1) whether the debtor is in default and (2) whether the equities of the situation indicate that foreclosure is appropriate.³⁹ Because an action in foreclosure is an equitable remedy, even when all the elements for foreclosure are met, it “does not require, as a matter of law, the remedy of foreclosure.”⁴⁰

³⁵ *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

³⁶ *State ex. Rel. Cuyahoga County Hosp. v. Ohio Bureau of Workers' Compensation et al.*, 27 Ohio St.3d 25, 28 500 N.E.2d 1370, 27 O.B.R. 442 (1986).

³⁷ *Id.* citing *Houk v. Ross*, 34 Ohio St.2d 77, 296 N.E.2d 266, 63 O.O.2d 119 (1973), paragraph one of the syllabus.

³⁸ *Beasley v. Lanier Tp. Bd. of Trustees*, 12th Dist. Preble No. CA93-10-018, 1994 WL 188590, *1 (Ma 16, 1994).

³⁹ *U.S. Bank, N.A. v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 7. See *Rosselot v. Heimbrock*, 54 Ohio App.3d 103, 561 N.E.2d 555, 105 (12th Dist. 1988).

⁴⁰ *CitiMtge., Inc. v. Byington*, 6th Dist. Lake No. E-12-003, 2013-Ohio-3950, ¶ 15, quoting *Equitable Fed. S. & L. Assn. v. Hopton*, 5th Dist. No. CA-6664 (Oct. 28, 1995).

In the case at bar, the parties have stipulated to the facts, including that the defendant is default with respect to her payment obligation to the plaintiff. Thus, the only issue is whether equity demands foreclosure.⁴¹

The plaintiff argues that there are no equitable issues preventing foreclosure, such as misrepresentation. The plaintiff highlights that even financial ruin to the defendant would not amount to an equitable reason for preventing foreclosure. Indeed, it is not sufficient for the defendant to show that she would merely be left in financial ruin by foreclosure.⁴² The Twelfth District Court of Appeals has observed that “in nearly every foreclosure action the mortgagor in default will bear grievous consequences from a judgment in the mortgagee’s favor.”⁴³

The defendant, however, argues that foreclosure is inappropriate because the defendant can exercise the homestead exemption, and in doing so, there will not be adequate proceeds from a foreclosure sale to pay any portion of the plaintiff’s lien.

The homestead exemption that the defendant refers to has been part of Ohio law for more than 160 years.⁴⁴ The homestead exemption is codified in R.C. 2329.66(A)(1)(b), which provides, in pertinent part:

“Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows: * * * In the case of all other judgments and orders, the person’s interest, not to exceed one hundred twenty-five thousand dollars, in one parcel or item of real or personal property that the person or a dependent of the person uses as a residence.”

⁴¹ (Citation omitted.) See *Rosselot*, 54 Ohio App.3d at 106 (“Accordingly, once a court has determined that a default on an obligation secured by a mortgage has occurred, it must then consider the equities of the situation in order to decide whether foreclosure is appropriate.”).

⁴² *Bryant*, 2013-Ohio-3993 at ¶ 11.

⁴³ *Bryant*, 2013-Ohio-3993 at ¶ 11, citing *Citi Mortgage, Inc. v. Schippel*, 6th Dist. Erie No. E-11-041, 2012-Ohio-3511.

⁴⁴ *In re McVicker*, – B.R. –, 2016 WL 660102, *10 (Bankr.N.D. Ohio 2016).

Although the homestead exemption most often applies in bankruptcy proceedings, it is also “generally applicable in executions against real property in state court.”⁴⁵ The exemption must be “timely asserted and proved by the person claiming the exemption.”⁴⁶ Courts have “emphasized” that the homestead exemption “should be liberally construed in favor of a debtor claiming homestead rights.”⁴⁷

Prior to 2008, Ohio had one of the lowest homestead exemptions in the country, which was \$5,000.⁴⁸ The Ohio legislature raised it in 2008 to \$20,200, and then beginning March 27, 2013, the homestead exemption increased to \$125,000.⁴⁹ The exemption amount has been adjusted for inflation by the Ohio Judicial Conference to \$132,900 until April 1, 2016.⁵⁰ A “logical reading” of the homestead exemption suggests that the amount of the exemption is to be determined when the defendant’s interest in the exemption arises, not the date that the plaintiff obtained the judgment lien.⁵¹

Under R.C. 2329.66(D)(2) the debtor’s “interest” in the property is determined “as of the date of an appraisal, if necessary under Section 2329.68 of the Revised Code, or the issuance of a writ of execution.” Moreover, an interest does not include “the amount of any lien otherwise valid pursuant to section 2329.661 of the Revised Code.”⁵²

⁴⁵ *First National Bank of Pennsylvania v. Jones*, 6 N.E.3d 1231, 2014-Ohio-746, ¶ 13 (11th Dist.), quoting *Johnson v. Cromaz*, 11th Dist. Geauga No. 98-G-2151, 1999 WL 1313552, *3 (Dec. 23, 1999).

⁴⁶ *Johnson*, 1999 WL 1313552 at *3, citing *Cactus Capital Co. v. Mekong Market, Inc.*, 1st Dist. Franklin Nos. 96APE08 and 96APE09-1250 (Apr. 5, 1997).

⁴⁷ *Jones*, 2014-Ohio-746 at ¶ 14, quoting *Adkins v. Massie*, 4th Dist. Lawrence No. 99CA18, 2001 WL 803031, *2.

⁴⁸ *In re McVicker*, 2016 WL 660102 at *10.

⁴⁹ *Id.*

⁵⁰ Ohio Judicial Conference memorandum 3/15/2013.

⁵¹ *Jones*, 2014-Ohio-746 at ¶ 19.

⁵² 2329.66(D)(2).

In turn, R.C. 2329.661(A) excludes the homestead exemption from extending to “a judgment rendered on a mortgage executed, or security interest given on real or personal property by a debtor * * *,” nor will the exemption “[a]ffect or invalidate any mortgage on any real property or any lien created by such mortgage.” Thus, the homestead exemption is not applicable to a “mortgage or other security interest attached to the residential premises.”⁵³ As such, the debtor’s interest in the homestead exemption is subordinate to the mortgage.⁵⁴ Accordingly, a mortgage claim has priority over the debtor’s homestead exemption claim, which has priority over all judicial liens.⁵⁵

The Ohio Supreme Court has not issued a controlling case that interprets the term “interest” in R.C. 2329.66(A)(1)(b).⁵⁶ However, bankruptcy courts applying Ohio law have consistently found that a debtor is not precluded from using the homestead exemption if the debtor lacks equity in the real estate.⁵⁷ Additionally, “equity in the amount of the exemption is not a prerequisite either to a debtor’s obtaining an exemption or avoiding any liens impairing the exemption.”⁵⁸

As mentioned, the exemption is determined as of the date of an R.C. 2329.68 appraisal or at the issuance of the writ of execution. An “execution” is statutorily defined

⁵³ *Johnson*, 1999 WL 1313552 at *3. See *Matter of Anderson*, 57 B.R. at 958 (“Under Ohio law, therefore, a ‘debtor’s interest’ in property includes any liens not excluded by § 2329.661 * * *”).

⁵⁴ *Finrock v. Little*, 2d Dist. Clark No. 1854, 1983 WL 2586, *1 (Dec. 14, 1983).

⁵⁵ *Markle v. Wayne Savings & Loan Co.*, 5th Dist. Ashland No. 98-COA-01274, 1999 WL 547443,*3 (June 29, 1999). A mortgage is a consensual lien, and a judicial lien, by contrast, is “obtained involuntarily by judgment, levy, sequestration, or other legal or equitable process.” *Id.* See *State Sav. & Loan v. Parker*, 11th Dist. Lake No. 11-162, 1986 WL 13289, *5 (Nov. 21, 1986) (holding that the correct prioritization for proceeds from a foreclosure sale is that the “mortgage claim * * * would stand ahead of the exemption claim, while the exemption claim would take priority over all judgment liens whenever filed).

⁵⁶ *In re Pugh*, N.D. Ohio No. 15-301102, 2015 WL 5145030, *3 (Aug. 31, 2015).

⁵⁷ *Matter of Anderson*, 57 B.R. 953, 958 (S.D. Ohio 1986).

⁵⁸ *Id.*, citing *Morelock v. All-Phase Electric Supply Co. (In re Morelock)*, 35 B.R. 518, 519 (Bankr.N.D. Ohio 1983). See *In re Brown*, 81 B.R. 432, 434 (Bankr.N.D. Ohio 1985) (finding that a debtor is not required to have actual equity before the homestead exemption applies).

as "a process of a court, issued by its clerk, the court itself, or the county board of revision with jurisdiction * * * and directed to the sheriff or the county."⁵⁹ It has also been described as "a direction to the sheriff 'commanding him to seize or take possession of property and to sell it in the manner provided by law for the satisfaction of judgments."⁶⁰

When a certificate of judgment is filed with the clerk of courts, such as has occurred with respect to the plaintiff's judgment, it is "well-established in Ohio that, pursuant to 2329.02, 'a lien is immediately created upon the lands of the judgment debtor."⁶¹ As a valid lien, the plaintiff's lien "may be enforced in several ways, including a foreclosure action on the debtor's real property."⁶²

As discussed, the plaintiff has filed an action in foreclosure, and its position is that there are no equitable impediments to granting foreclosure, including the homestead exemption. First, the plaintiff argues that the homestead exemption is immaterial at this stage of the litigation, citing to *New Falls Corporation v. Pierson*, 12th Dist. Clermont No. CA2013-03-023, 2014-Ohio-567. The Twelfth District Court of Appeals affirmed a trial court's award of summary judgment for the lienholder, granting foreclosure.⁶³ One of the grounds on which the debtors appealed, was that the

⁵⁹ R.C. 2327.01. See Civ.R. 69, stating that "[p]rocess to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise."

⁶⁰ *Jones*, 2014-Ohio-746 at ¶ 18 quoting *Lash v. Mann*, 1441 Ohio St. 577, 49 N.E.2d 689 (1942), paragraph two of the syllabus.

⁶¹ *New Falls Corp. v. Pierson*, 12th Dist. Clermont No. CA2013-03-023, 2014-Ohio-567, ¶ 10, citing *State ex rel. Collier v. Farley*, 4th Dist. Lawrence No. 05CA31, 2006-Ohio-4901, ¶ 19.

⁶² *New Falls Corp.*, 2014-Ohio-567 at ¶ 10, citing *Denune v. Carter-Jones Lumber Co.*, 144 Ohio App.3d 266, 268-69 (2d 2001).

⁶³ *New Falls Corp.*, 2014-Ohio-567 at ¶ 24.

homestead exemption (which they mistakenly conflated with a dower interest) prevented summary judgment.⁶⁴

The court rejected this argument and opined that “as noted by other Ohio appellate courts, ‘the statute contemplates the [homestead exemption] issue being raised after judgment has been rendered.’⁶⁵ The court elaborated that the application of the homestead exemption is “determined as of the date of the execution, garnishment, attachment, or sale of the subject property.”⁶⁶ As such, the court found that the homestead exemption would not take effect until the property was sold, and thus the homestead exemption did not alter the summary judgment analysis.⁶⁷ Additional districts have concurred that the homestead exemption becomes effective once there is “an involuntary execution that subjects the property to judicial sale.”⁶⁸

Citing to cases from the nineteenth century, which precede the codified homestead exemption, the defendant argues that the exemption can be raised at any point before the sale. In light of the more recent case law that directly deals with the statute at issue, the court finds that the homestead exemption is properly raised and

⁶⁴ *Id.*

⁶⁵ *New Falls Corp.*, 2014-Ohio-567 at ¶ 22, citing *Gale v. Ficke*, 8th Dist. Cuyahoga No. 80716, 2002-Ohio-4030, ¶ 7.

⁶⁶ *New Falls Corp.*, 2014-Ohio-567 at ¶ 24, quoting *Adkins*, 2001 WL 803031 at * 3.

⁶⁷ *New Falls Corp.*, 2014-Ohio-567 at ¶ 24.

⁶⁸ *Jones*, 2014-Ohio-746 at ¶ 20, citing *Adkins*, 2001 WL 803031 at * 3 and *Gledhill v. Walker*, 143 Ohio St.381, 385-86, 55 N.E.2d 647 (1944) (“[t]he proper time for the assertion of the debtor’s claim, under the statutes to have such homestead exempted from sale, is when the sheriff or other officer is about to execute the writ of execution or order of sale.”). See *Gale v. Ficke*, 148 Ohio App.3d, 2002-Ohio-4030, 775 N.E.2d 548, ¶ 7, (11th Dist.) (noting that the homestead exemption need not be raised via the defendant’s answer and the statute “contemplates the issue being raised *after* judgment has been rendered.”); *Security Nat. Bank and Trust Co. v. Jones*, 2d Dist. Clark No. C.A.2000-CA-59, 2001 WL 754776, *5 (July 6, 2001) (clarifying that the homestead exemption “does not prevent judgment and foreclosure on the mortgage attached to the residential premises.”); (Citation omitted.) *Johnson*, 1999 WL 1313552 at *3 (“With respect to the homestead exemption, the time for asserting the right recognized by R.C. 2329.66(A)(1)(b) is prior to the foreclosure sale.”)

applied once the trial court issues a writ of execution, which has not occurred yet in this case.

However, the fact that the homestead exemption should ordinarily be raised between the writ's issuance and the involuntary sale still does not completely resolve the defendant's equity argument. The defendant argues that granting a foreclosure decree is inequitable because when the homestead exemption is applied, which both parties agree is applicable, there will be inadequate sale proceeds to pay the plaintiff's lien.

Although the defendant is not required to raise the homestead exemption now, if the court fails to consider its future effect on the foreclosure proceeds, an inequitable sale may result that will not benefit the plaintiff while rendering the defendant homeless. *New Falls Corporation* and the other cases cited above support the proposition that the exemption should be raised once a sale is ordered, and the exemption generally does not impact summary judgment. However, none of those cases address a situation similar to the problem in the present case, in which applying the homestead exemption will leave the lienholder without any proceeds.

The court finds the instant situation more similar to that involved in *Scalise v. Cushman*, 9th Dist. Summit No. 27216, 2014-Ohio-4781. In *Scalise* a foreclosure action had been brought against the debtors, and one of their judgment lienholders asserted a cross-claim and also requested foreclosure for its unpaid judgment lien.⁶⁹ The debtors filed for summary judgment against the lienholder, arguing that the amount of the homestead exemption exceeded the value of the property, and therefore the

⁶⁹ *Scalise v. Cushman*, 9th Dist. Summit No. 27216, 2014-Ohio-4781, ¶¶ 2-3.

lienholder could not foreclose on their property.⁷⁰ The lienholder countered that the homestead exemption did not exceed the value of the property, and therefore it could foreclose.⁷¹

Finding the homestead exemption would apply in the amount of \$132,900, the trial court granted summary judgment in favor of the debtors and denied foreclosure because the lienholder would be unable to collect on the debt after the foreclosure sale.⁷² The problem was that the value of the exemption exceeded the value of the property, making it impossible for the lienholders to have their lien satisfied from the sale.⁷³

Upon review, the appellate court acknowledged that the appropriate time to raise the exemption is at the date of either the appraisal or issuance of a writ of execution, neither of which had occurred.⁷⁴ Even so, the appellate court affirmed the trial court's award of summary judgment. The homestead exemption applied, exempting up to \$132,900, and thus the lienholder would be unable to collect on the debt because the exemption exceeded the property's value.⁷⁵

In reviewing the trial court's decision, the appellate court considered the homestead exemption's purpose, which was "to protect from creditors' legal process those debtors with minimal assets."⁷⁶ Moreover, because the homestead exemption was "intended to protect the family, courts have consistently applied a liberal

⁷⁰ *Id.* at ¶ 4.

⁷¹ *Id.* at ¶ 4.

⁷² *Scalise*, 2014-Ohio-4781 at ¶ 5.

⁷³ *Id.*

⁷⁴ *Id.* at ¶¶ 10, 13, citing R.C. 2329.66(D)(2).

⁷⁵ *Id.* at ¶ 18.

⁷⁶ *Id.* at ¶ 12, quoting *Daugherty v. Central Trust Co. of Northeastern Ohio, N.A.*, Ohio St.3d 441, 447 (1986).

construction in favor of the debtor.”⁷⁷ The appellate court reasoned that the lienholder’s judgment lien was not impaired by applying the homestead exemption because the judgment lien would still be valid; it merely prevented the lienholder from foreclosing on the debtors’ personal residence to force payment.⁷⁸

Like the debtors in *Scalise*, the defendant in the present case is at the same juncture in the foreclosure proceedings, summary judgment, and no writ of execution has been granted. Both parties agree that the homestead exemption will apply to the defendant’s interest, up to the agreed value of \$132,900. In examining the effect that the exemption will have on the plaintiff’s lien satisfaction, the court finds that, as in *Scalise*, foreclosing on the defendant’s property will not satisfy any part of the plaintiff’s judgment lien.

The plaintiff counters that the application of the homestead exemption will still allow it to receive sizable proceeds towards the defendant’s debt. The plaintiff calculates the distribution of the proceeds as follows:

“Under the correct application of the homestead exemption, the (assumed) \$150,000.00 value of the Defendant Garrett’s property interest is properly allocated: \$52,526.41 to her secured creditor, PNC; \$80,277.39 (\$132,900 minus \$52,526.41) to Defendant Garrett herself; and, the remaining \$17,100.00 (\$150,000.00 minus \$132,900) to Home Again Restoration.”

The plaintiff’s order of distributions and resulting calculations are incorrect. As discussed, R.C. 2329.661(A) excludes the homestead exemption from extending to a mortgage or other secured interest, such as the one PNC has. A mortgage claim has

⁷⁷ *Scalise*, 2014-Ohio-4781 at ¶ 12, quoting *Cowen v. Wassman*, 64 Ohio App. 84, 88 (7th Dist. 1939).

⁷⁸ *Scalise*, 2014-Ohio-4781 at ¶¶ 17-18.

priority over the debtor's homestead exemption claim, which has priority over all judicial liens.⁷⁹

The defendant's property has been appraised at \$152,600 and \$150,000. For ease of calculation purposes, the court will use the value of \$150,000.⁸⁰ In a foreclosure, PNC's mortgage has highest priority and is paid from the proceeds before applying the defendant's homestead exemption interest. Subtracting PNC's mortgage of \$52,526 from the projected \$150,000 in foreclosure sale proceeds, the remaining proceeds are \$97,474. Under the homestead exemption, the defendant has the next best interest, which exempts up to \$132,900. The defendant's homestead exemption would therefore subsume all the remaining proceeds of \$97,474.

After these first two distributions, there are no proceeds remaining to satisfy any portion of the plaintiff's judgment lien, which, as of October 23, 2015, was \$28,030.79 plus \$3.83 daily interest. Even if the house sells for more than its projected value, the defendant still has another \$35,426 left in her homestead exemption that she could retain. Thus, the house would need to sell by more than \$35,000 higher than its appraised value before the plaintiff could receive proceeds in satisfaction of its judgment lien. For the plaintiff to receive anywhere near the entire value of its lien, the house would need to sell for more than \$63,000 more than its appraised value.

⁷⁹ *Markle*, 1999 WL 547443 at *3. See *Parker*, 1986 WL 13289 at *5 (holding that the correct prioritization for proceeds from a foreclosure sale is that the "mortgage claim * * * would stand ahead of the exemption claim, while the exemption claim would take priority over all judgment liens whenever filed); *Matter of Anderson*, 57 B.R. at 958 ("Under Ohio law, therefore, a 'debtor's interest' in property includes any liens not excluded by § 2329.661 * * *."); *Finfrock*, 1983 WL 2586 at *1 (a debtor's interest in the homestead exemption is subordinate to PNC's mortgage

⁸⁰ The difference between the two values is small enough that it will not impact the ultimate outcome.

In calculating the distribution of proceeds, the plaintiff drew PNC's mortgage from the defendant's homestead exemption, which is in error. As mentioned, the mortgage is a separate interest from the defendant's homestead interest and is paid from the proceeds before the homestead exemption applies.

Once the mortgage and homestead exemption are paid, it is nigh impossible for the plaintiff to collect any money from a foreclosure sale. The defendant would be rendered homeless, and the plaintiff would not be any closer to having its judgment lien satisfied. Like the Ninth District Court of Appeals in *Scalise v. Cushman*, this court cannot conclude that a judgment in foreclosure is an equitable remedy for the defendant's default because the plaintiff will not be in any better position following the sale.

Even the plaintiff has acknowledged that foreclosure may be inequitable when it "squeezes out no equity for the judgment lien holder."⁸¹ Moreover, the court has been unable to identify any case which orders distributions to be made in the same fashion that the plaintiff suggests, i.e. ordering the mortgage to be deducted from the debtor's homestead exemption interest.⁸²

The court agrees with the defendant that it would be futile to award the plaintiff summary judgment now only to shortly thereafter reverse that ruling once the defendant raises the homestead exemption at the time of appraisal or when the writ of execution is

⁸¹ Pls. Mot. for Summ. J., pg. 4.

⁸² Also, until 2008 the homestead exemption was only \$5,000. If a mortgage in a foreclosure action was to be paid from the debtor's homestead exemption interest, as the plaintiff argues, in most cases the debtor would not have been able to receive any of his or her homestead exemption interest. The remaining mortgage balance would have needed to be under \$5,000 for the debtor to receive any portion of the homestead exemption interest. Given the purpose of the homestead exemption, it seems unlikely that the legislature would have intended such a result.

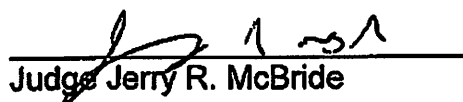
issued.⁸³ This would be particularly futile given that both parties agree the homestead exemption applies and that its amount is \$132,900. For these reasons, the court will not order that the defendant's property be foreclosed.

CONCLUSION

For the foregoing reasons, the plaintiff's motion for summary judgment is not well-taken and is denied. Because "all relevant evidence is before the court, no genuine issue as to any material fact exists, and the non-moving party is entitled to judgment as a matter of law," the court hereby grants summary judgment in favor of the defendant.⁸⁴

IT IS SO ORDERED.

DATED: 4-4-16


Judge Jerry R. McBride

⁸³ See *Manhattan Life Ins. Co. v. Smith*, 44 Ohio St. 156, 5 N.E. 417, 15 W.L.B. 225, 58 Am.Rep. 806 (1886) ("The law never requires a vain thing to be done.").

⁸⁴ *State ex. Rel. Cuyahoga County Hosp.*, 27 Ohio St.3d 25 at 28 citing *Houk*, 34 Ohio St.2d at paragraph one of the syllabus.