



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

BRUCE D. WHITE, CHIEF JUDGE

RANDY I. BELLOWS
ROBERT J. SMITH
JAN L. BRODIE
BRETT A. KASSABIAN
MICHAEL F. DEVINE
JOHN M. TRAN
GRACE BURKE CARROLL
DANIEL E. ORTIZ
PENNEY S. AZCARATE
STEPHEN C. SHANNON
THOMAS P. MANN
RICHARD E. GARDINER
DAVID BERNHARD
DAVID A. OBLON

JUDGES

COUNTY OF FAIRFAX

CITY OF FAIRFAX

THOMAS A. FORTKORT
JACK B. STEVENS
J. HOWE BROWN
F. BRUCE BACH
M. LANGHORNE KEITH
ARTHUR B. VIEREGG
KATHLEEN H. MACKAY
ROBERT W. WOOLDRIDGE, JR.
MICHAEL P. McWEENY
GAYLORD L. FINCH, JR.
STANLEY P. KLEIN
LESLIE M. ALDEN
MARCUS D. WILLIAMS
JONATHAN C. THACHER
CHARLES J. MAXFIELD
DENNIS J. SMITH
LORRAINE NORDLUND
DAVID S. SCHELL
RETIRED JUDGES

February 7, 2019

LETTER OPINION

Mr. Larry E. Johnson
Office of Larry E. Johnson, Attorney at Law
5415-A Backlick Road
Springfield, VA 22151

Counsel for Petitioner, Chris Heald

Ms. Michelle Benitez Jessee
Mr. William L. Mitchell, II
Eccleston and Wolf, P.C.
10400 Eaton Place, Suite 107
Fairfax, VA 22030

Counsel for Respondent, Special Commissioner of Sale

Re: *Sepideh Nassabeh v. Khashayar Montazami*
Case No. CL-2014-4585

Dear Counsel:

This matter comes before the Court on the Petition of Mr. Chris Heald ("Petitioner" or "Heald") against the Special Commissioner of Sale ("Commissioner") appointed in the underlying divorce cause to conduct a judicial sale of certain realty (the "Marital Home") belonging to Mr. Khashayar Montazami ("Montazami" or "Debtor"). Petitioner alleges

OPINION LETTER

funds due him by virtue of a lien in his favor as Montazami's judgment creditor were misdirected to Montazami, his debtor, as a direct result of the Commissioner causing the Court to enter an erroneous order that divested him of enforcement of his judgment lien respecting the Marital Home. Heald petitions the Court to hold the Commissioner personally liable for his loss pursuant Virginia Code § 8.01-105. In assessing the merits of Heald's claim, the Court examines: 1) the confines of the Court's power to order a partition sale; 2) the nature of the judgment liens and associated creditors' rights; 3) whether notice to judgment creditors prior to the judicial sale was required; 4) whether the Commissioner owed a fiduciary duty to the judgment creditors; and 5) whether the Commissioner is personally liable for directing the proceeds to the Debtor without a formal accounting in light of the obligation as agent of the Court to "faithfully discharge" the duties of Special Commissioner of Sale, thereby failing to comply with the terms of the Appointment Order¹ of this Court.

For the reasons more fully detailed herein, the Court finds the Commissioner failed to comply fully with the fiduciary duties imposed by the nature of the agency with this Court and the Court's Appointment Order delineating the manner of approval of the sale, which included accounting for the encumbrances—namely, identifying all liens on the Marital Home, their respective priorities, and the amounts thereof, upon the sale. The Commissioner failed to quantify the judgment lien of Petitioner for the Court at the hearing for entry of the final Confirmation Order², and the Commissioner further volunteered

¹ Refers to the order dated May 6, 2016, wherein the Court appointed the Commissioner to sell the subject property.

² Refers to the order dated August 26, 2016 confirming the judicial sale on.

“everyone was in agreement as to the distribution” as contemplated in the order, despite not providing Petitioner with notice of the judicial sale proceedings. In consequence of the aforesaid, the Court finds the Commissioner failed to faithfully discharge the duties of a commissioner of sale³ by failing to file a *proper* accounting as ordered and by making representations which could only cause the Court to infer Petitioner was in agreement with the court-ordered distribution, effectively causing the dishonor of Petitioner's lien and directing payment instead to his Debtor without complete consideration of Petitioner's interest. Virginia Code § 8.01-105 contemplates imposing liability against a commissioner of sale under circumstances such as these, pursuant to the Court's civil contempt power. Thus, the Court holds the Commissioner personally liable pursuant to the provisions of that Code section. Wherefore, the Court rules the Commissioner shall interplead to the Court the sum of \$79,452.28 within sixty (60) days of the entry of the final order incorporating this Letter Opinion. The Commissioner shall provide notice to all then-existing lien creditors of Montazami or of the Marital Home who may have had valid legal claim to the proceeds when initially deposited with the Clerk of the Court in 2016. Upon discharge of these tasks, the Commissioner may apply to be released from the interpleader action and the judgment of civil contempt shall be deemed purged.

BACKGROUND

On November 12, 2003, Montazami purchased the Marital Home with his then-wife Sepideh Montazami (“Wife”), as “Husband and Wife.” The couple divorced by order

³ The Court notes the Commissioner otherwise enjoys an unblemished reputation with the undersigned judge so the Court has no reason to believe the mistakes made in the handling of this transaction are other than an isolated circumstance.

of this Court on May 31, 2015 (the "Divorce Order"). The Divorce Order required Montazami to refinance the Marital Home to remove Wife from two deeds of trust securing loans acquired by the couple to purchase the property. Concurrently or shortly thereafter, Wife was to transfer her interest to Montazami by quit claim deed.

As a fallback, the Divorce Order decreed a special commissioner of sale would be appointed if Montazami did not refinance the Marital Home by October 15, 2015. The Divorce Order contemplated, "[i]n the event of a sale of the Marital Home, [Montazami] shall be the sole and separate owner of the net proceeds of the sale, after payment of all commissioner's fees, sales commissions, payment of the first and second deed of trust notes and other liens and encumbrances, and settlement charges and costs of sale."

Montazami failed to refinance, wherefore, by order dated May 6, 2016, the Court appointed the Commissioner to sell the Marital Home (the "Appointment Order"). The Appointment Order prescribed for all proceeds of the judicial sale to be paid directly to the Clerk of Court for Fairfax County, "thereafter to be distributed by the clerk in accordance with further Order of this Court." The Commissioner was instructed to "prepare an accounting of all outstanding encumbrances existing upon the house to be presented to the Court upon the sale."

On June 7, 2016, having secured an offer to purchase the Marital Home for \$516,000.00 (\$17,000.00 above the listing price), the Commissioner filed a Motion for Approval of Contract. The motion invited the Court to approve the contract and requested the Court "direct the settlement agent to pay" outstanding taxes, a commissioner's fee, commissioner's costs, standard and customary settlement costs, brokers' fees, and, importantly, "[a]ny properly recorded liens or judgments against the Property, including

any first or second trusts, prior to payment of the remaining proceeds into the Clerk's office." The Motion for Approval also requested,

If there are any liens and encumbrances associated with [the Marital Home] not paid at settlement for any reasons that they be transferred to the proceeds of sale. (See Virginia Code Sections 8.01-98, 8.01-110, *Washburn v. Angle Hardware Co., Inc.*, 144 Va. 508 (1926), and *Hurt v. Jones*, 75 Va. 341 (1881)).

The Court approved the contract for sale by order dated June 17, 2016 (the "Approval Order"). The Approval Order entrusted to the settlement agent the obligation to satisfy the two deeds of trust to which the Marital Home was subject. By that order, all unpaid liens and encumbrances associated with the Marital Home were transferred to the proceeds of sale, which were to be paid over to the Clerk's Office. The Approval Order, prepared by the Commissioner, denoted "I ask for this," above the Commissioner's signature.

The judicial sale closed on August 4, 2016. Subsequently, the Commissioner filed a Motion for Confirmation of Sale, noting the deposit of \$79,452.28 of the proceeds of sale with the Clerk's Office. The Court entered an order confirming the judicial sale on August 26, 2016 (the "Confirmation Order"). The Confirmation Order too was prepared by the Commissioner, again denoting "I ask for this," above the Commissioner's signature. The Confirmation Order commanded the Clerk's Office pay Montazami the entirety of the proceeds of sale and discharged the Commissioner. The order further decreed,

That all liens encumbering the property prior to the settlement including, but not limited to those held by Richard D. Paugh, Chris Heald and FIA Card Services against [Montazami] alone have been transferred to the proceeds of sale which have been deposited with the Clerk and no longer attach or encumber the property located at 7004 Maple Tree Lane, Springfield, Virginia 22152.

OPINION LETTER

The Confirmation Order did not further address payment of these liens.

Of import, prior to the divorce and judicial sale, on January 6, 2010, the Circuit Court for Montgomery County, Maryland, entered judgment against Montazami in favor of Chris Heald in the amount of \$186,662.56. Heald docketed this judgment with this Court on February 1, 2010, as judgment number 470968. Likewise, FIA Card Services, N.A. obtained a judgment against Montazami in this Court in the amount of \$38,611.61 on August 11, 2011, docketed in the judgment records in the Clerk's Office of this Court shortly thereafter. According to their relative priority, the \$79,452.28 of the proceeds from the judicial sale were thus apparently sufficient to satisfy only part of Petitioner's lien but none of the lien belonging to FIA Card Services. See Va. Code §§ 8.01-458, 459. The entirety of the remaining proceeds from the sale were paid to the Clerk of the Court pursuant to the Approval Order, and in turn paid out to Montazami pursuant to the Confirmation Order. The case is now before the Court on a rule to show cause issued against the Commissioner and petitioned for by Heald (the "Rule").

ANALYSIS

I. Confines of the Court's Power to Order a Partition Sale

Montazami and his Wife held the Marital Home as tenants by the entirety until May 20, 2015, when this Court entered the Divorce Order. See Va. Code § 55-20. At that time, the estate converted into a tenancy in common and the property was thereafter subject to partition. See Va. Code § 20-111 (extinguishing tenancy by the entirety upon divorce); Va. Code § 8.01-81 (permitting partition of realty held by tenants in common); *Rogers v. Rogers*, 257 Va. 323, 326 (1999) (holding realty held by tenants by the entirety is exempt

from claims of creditors of only one spouse). Prior to the Divorce Order, Heald had no claim to the Marital Home. However, once the estate transitioned to become a tenancy in common, Montazami held his tenancy subject to the judgment liens against him, including that of Petitioner. See Va. Code § 8.01-458 (providing for liens on docketed judgments); Va. Code § 8.01-465.2 (providing for domesticating foreign judgments).

“Any court having general equity jurisdiction shall have jurisdiction in cases of partition; and in the exercise of such jurisdiction may take cognizance of all questions of law affecting the legal title that may arise in any proceedings.” Va. Code § 8.01-81.

Generally,

[w]hen there are liens on the interest of any party in the subject so sold, the court may, on the petition of any person holding a lien, ascertain the liens, and apply the dividend of such party in the proceeds of sale to the discharge thereof, so far as the same may be necessary.

Va. Code § 8.01-84. “The proceeds of any sale made [by partition] shall . . . be deemed personal estate from the time of the confirmation of such sale by the court.” Va. Code § 8.01-89.

Thus, in exercising the requirements of the divorce decree, when Montazami failed to refinance the Marital Home by October 15, 2015, it was incumbent upon the Court to conduct a judicial sale of the property. “There is no subject about which the courts are more careful than that of judicial sales.” *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 640 (1916). “It is the effort of the courts at all times to see that the land is brought to the hammer under the most advantageous circumstances, so as to realize the best price that can be obtained therefor, and to protect the interests of all parties. . . .” *Id.* (citing *Thomas*

v. Farmers' Nat'l Bank, 86 Va. 291 (1889)). "It [i]s the duty of the court, as far as possible, to remove all impediments to a fair sale, and one to the best advantage." *Id.* at 640-641.

A circuit court has broad discretion when ordering a judicial sale. "In decreeing a sale under any provisions of law, the court may provide for the sale of property in any part of the Commonwealth, and may direct the sale to be for cash, or on such credit and terms as it may deem best." Va. Code § 8.01-96. The relevant Code sections governing judicial sales require the Court ascertain delinquent taxes prior to confirming a sale, but are silent about inquiring into other encumbrances on the property. *See generally* Va. Code §§ 8.01-96, 113.

In exercising the power of judicial sale, a circuit court may appoint a special commissioner to conduct the sale on behalf of the court. Va. Code § 8.01-96. "In judicial sales the court in some sense is regarded as the vendor, making sale by a commissioner as its agent, and the contract is treated as a contract substantially between the purchaser on one side and the court as vendor on the other." *Long v. Weller Ex'r*, 70 Va. 347, 355 (1877). "A special commissioner . . . is a quasi judicial officer . . . [and] is a mere agent of the court in selling property, collecting and paying out the purchase money under the decrees of the court." *French v. Pobst*, 203 Va. 704, 709 (1962) (citing *Mountain Lake Co. v. Blair*, 109 Va. 147, 159 (1909); *Watts v. Newberry*, 107 Va. 233, 243 (1907)). Thus, "[t]he court and not the commissioner is the real seller at a judicial sale and the commissioner is merely the ministerial agent of the court and the medium through which the purchaser makes an offer to the court." *Id.* (citing 11 MICH. JURIS., JUD. SALES & RENTINGS, § 38, p. 335).

“The trial court is given broad discretion in determining whether to confirm a judicial sale.” *Jones v. Jones*, 249 Va. 565, 572 (1995) (citing *Schweitzer v. Stroh*, 182 Va. 842, 849 (1944)). “Confirmation is the judicial sanction of the court; and by confirmation the court makes it a sale of its own; and the purchaser is entitled to the full benefit of his contract, which is no longer executory but executed, and which will be enforced against him and for him.” *Langyher v. Patterson*, 77 Va. 470, 473 (1883). That said, the Court’s judicial sale power is not unbridled. In confirming a judicial sale, “[t]he court should exercise a sound legal discretion, with a view to fairness, prudence, and just regard to the rights of all concerned.” *Benet v. Ford*, 113 Va. 442, 447 (1912).

Under the power of the trial court, the cardinal duty of a commissioner of sale is to secure a contract for the sale of the property, collect the proceeds, and disburse the proceeds in adherence with a court order. “Unless the court otherwise directs, the commissioner of sale is the only person authorized to collect the proceeds of a judicial sale and he is the only person to whom the purchaser is permitted to make payment.” *Johnson v. Kelley*, 171 Va. 239, 243 (1938). “After the money has been collected the commissioner of sale disburses it in accordance with the order of the court.” *Id.*

A court’s order confirming the judicial sale is a final order. “The court, in confirming a sale, may ratify various irregularities in the proceeding of the commissioner of sale, even changing of the terms of sale, and supply or cure all defects in the execution of its decree, except those founded in defect of jurisdiction, or in fraud.” *Langyher*, 77 Va. at 473 (citations omitted). That is, “after a judicial sale has been absolutely confirmed by the court which ordered it, it will not be set aside except for fraud, mistake, surprise, or other cause for which equity would give like relief.” *Berlin v. Melhorn*, 75 Va. 639, 641 (1881).

Therefore, the order confirming a judicial sale in the instant case could only be set aside if shown to be void. Here, the Court was well within its authority to order a judicial sale of the Marital Home and appoint the Commissioner to administer the sale as an agent of the Court.

II. Nature of the Judgment Liens and Associated Creditors' Rights

Judgment liens held by Heald and FIA Card Services, encumbered the Marital Home at the time of the judicial sale. Their reach and impact must be considered in the context of the Rule issued against the Commissioner.

Every judgment for money rendered in this Commonwealth by any state . . . court . . . shall be a lien on all the real estate of or to which the defendant in the judgment is or becomes possessed or entitled, from the time such judgment is recorded on the judgment lien docket of the clerk's office of the county . . . where such land is situated

Va. Code § 8.01-458. Concerning foreign judgment liens in particular,

A copy of any foreign judgment authenticated . . . may be filed in the office of the clerk of any circuit court of any . . . county of this Commonwealth. . . . The clerk shall treat the foreign judgment in the same manner as a judgment of the circuit court. . . . A judgment so filed has the same effect . . . as a judgment of a circuit court of any . . . county of this Commonwealth and may be enforced or satisfied in like manner.

Va. Code § 8.01-465.2.

"The lien of a judgment reaches far." *Miller v. Kemp*, 157 Va. 178, 190 (1931). A judgment lien "reaches every interest of the judgment debtor in land which the record of the title shows that he had, either before or after the judgment was docketed." *Id.* "[A]s originally created, the judgment lien was a right to subject a part of the land owned or subsequently acquired by the judgment debtor to the satisfaction of the debt." *Jones v. Hall*, 177 Va. 658, 663–64 (1941).

However, a judgment lien “is not a proprietary right in the lands of the judgment debtor, but merely a right to levy on any such lands for the purpose of satisfying the judgment to the exclusion or destruction of any right which may have accrued to others since the attachment of the lien.” *Id.* (citing *TIFFANY ON REAL PROPERTY*, Vol. II, pp. 1304-05). Put differently, a judgment lien does not give the judgment creditor a property right in the debtor’s property. “A judgment lien on land constitutes no property or right in the land itself.” *Massingill v. Downs*, 48 U.S. 760, 767 (1849). Rather, “[a] judgment creditor acquires an equitable lien . . . in the debtor’s property.” *Haleys v. Williams*, 28 Va. 140, 145 (1829). A judgment lien constitutes “a right given the judgment lien creditor to have his claim satisfied by the seizure of the land of his judgment debtor.” *Jones*, 177 Va. at 664. “A judgment creditor has no *jus in re*^[4], but a mere power to make his general lien effectual, by following up the steps of the law.” *Conard v. Atl. Ins. Co.*, 26 U.S. 386, 443 (1828).

A judgment lien is an equitable lien, and “[u]ntil the land is actually seized, the possession of the owner is not disturbed. The debtor has full power to use, to sell or to otherwise dispose of it.” *Jones*, 177 Va. at 666 (citing *Rodgers v. Bonner*, 45 N.Y. 379 (1871)). “The creditor, by virtue of the judgment lien, is not entitled, as a matter of right, to the proceeds of sale, if the land . . . is sold.” *Id.* Indeed, “[i]f the debtor should sell the estate, he [the judgment creditor] has no right to follow the proceeds of the sale . . . or to claim the purchase money in the hands of the latter.” *Conard*, 26 U.S. at 443.

The only remedy of the judgment creditor is against the thing itself, by making that a specific title which was before a general lien. He can only claim the proceeds of

⁴ A “*jus in re*” is “a right in property valid against anyone in the world; a complete and perfect right to a thing.” *Jus in Re*, BLACK’S LAW DICTIONARY (2014).

the sale of the land, when it has been sold on his own execution, and ought to be applied to its satisfaction.

Id. Thus, Heald possessed a valid judgment lien against the Marital Home. His right to assert a claim on the proceeds of sale derived from the Approval Order and was implicitly recognized in the Confirmation Order.

III. Petitioner Was Not Entitled to Notice of the Judicial Sale

Heald argues he and FIA Card Services, as judgment creditors of Montazami, were entitled to notice of the judicial sale of the Marital Home prior to the sale. Heald's argument assumes the Court or its agent (i.e., the Commissioner) must first identify all liens and encumbrances against the property prior to any sale. Consequently, the Court must first determine whether liens and encumbrances needed to be ascertained prior to, rather than at the time of, confirmation of the sale of the Marital Home. The Court may then address the notice requirement, if any, owed to the judgment lienholders.

It has been settled by repeated decisions that it is error to decree a sale of land before taking an account of liens thereon, and their respective priorities, unless it appears by the pleadings or evidence that all the liens are set forth in the bill and proceedings, and may be ascertained and determined by decree without an order of reference.

Alexander v. Howe, 85 Va. 198, 200-01 (1888) (citation omitted). In accordance with the foregoing, “[t]he rule is well settled that it is error to decree a sale of land for the payment of the liens thereon until there has first been an account of such liens and their relative priorities, if any. . . .” *Kirby v. Booker*, 122 Va. 290, 295 (1918). A judicial sale is “premature and erroneous” where made “without first ascertaining, settling and determining what encumbrances are chargeable on the property, the amounts thereof respectively, and the order in which they are so chargeable. . . .” *Schultz v. Hansborough*, 74 Va. 567, 577

(1880). Therefore, “it [i]s premature and error to decree the sale of the real estate . . . until the court ha[s] ascertained and adjusted the amount of liens thereon and their priorities.” *Moran v. Brent*, 66 Va. 104, 104 (1874). Furthermore, often “[i]t [i]s a vain ceremony for [a circuit] court to undertake to determine the question of incumbrances⁵, in the absence of the parties in interest.” *Kirk v. Oakey*, 110 Va. 67, 69 (1909). However, “[i]n some cases . . . it has been held, where there has been no conflict or dispute as to the existence of liens resting upon property, or question of amounts and priorities to be determined, that no good reason required an account to be taken.” *Tackett v. Bolling*, 172 Va. 326, 332 (1939) (citing *Shickel v. Berryville Land & Improvement Co.*, 99 Va. 88 (1901)). The general rule is not that it is error for a court to decree a sale of real property until all creditors or lienholders are provided notice of the proceedings. Nor does the “settled” rule require a formal accounting report in each instance where a judicial sale is ordered. Instead, the rule merely requires an *account* of the liens, their existence, holders, *amounts*, and *order of priority*.

The record in this cause does not reveal a proper accounting of the lienholders with liens encumbering the Marital Home—either via a formal commissioner’s report or from the face of the pleadings and record. *See, e.g., Kirby*, 122 Va. at 296-297; *see also Alexander*, 85 Va. at 201. While the Confirmation Order clearly divulges the Commissioner reported the *existence* of Heald’s and FIA Card Services’ judgment liens to the Court prior to the confirmation of the judicial sale of the Marital Home, the Confirmation Order does not reflect the amounts or priorities of such liens. Nor is the

⁵ The term “incumbrance” of old is synonymous with its modern iteration of “encumbrance.” *Encumbrance*, BLACK’S LAW DICTIONARY (2014)

amount or priorities of the judgment liens substantiated in any other part of the Court's record. It was thus error for the Commissioner to tender the Confirmation Order for entry by the Court without fulfilling the obligation, imposed by the Appointment Order, to provide a proper accounting.

The ensuing question for the Court to address is whether known judgment lien creditors must be notified before the Court enters a confirmation of sale and distributes the proceeds. The Court's analysis must turn to consideration of what authority the Court had, if any, to disburse the proceeds of the judicial sale to Montazami without notice to the judgment creditors. For several reasons, Heald's assertion he necessarily should have been made a party to the judicial sale proceedings is erroneous, and in any event, is without recourse at this stage of the litigation.

First, the diversion of the judgment creditors' interests to the proceeds of the judicial sale was by the permissible exercise of the Court's equitable authority, albeit by means of an order entered at the behest of the Commissioner. "Jurisdiction to enforce the lien of a judgment shall be in equity." Va. Code § 8.01-462. "In exercising its equitable powers, a trial court cannot permit what this Court and the General Assembly have said is unlawful." *Frank Shop, Inc. v. Crown Cent. Petrol. Corp.*, 264 Va. 1, 6 (2002).

A court of equity will never deprive a party of a fair legal advantage for the benefit of one who has no superior equity. It will inquire, as a court of law cannot do, into all the equities of the parties, and will properly adjust them, but will not take from one to give to another, where right and justice do not require it.

Nolting v. National Bank of Virginia, 99 Va. 54, 60 (1901). The mere transfer of the creditors' interest to the sale proceeds did not deprive the lien holders of a legal advantage but rather brought nearer the day for satisfaction of their judgment liens. Heald

also does not complain that the price obtained was unfair or below market value, and that the value of his lien was sacrificed.

Second, notwithstanding Heald's assertion he should have been made a party to the judicial sale proceedings, "the necessary party doctrine does not implicate subject matter jurisdiction. . . ." *Michael E. Siska Revocable Tr. v. Milestone Dev., LLC*, 282 Va. 169, 181 (2011). The entry of the Confirmation Order "ratif[ied any] irregularities in the proceeding of the commissioner of the sale," and "cure[d] all defects in the execution of its decree, except those founded in defect of jurisdiction, or in fraud." *Langyher*, 77 Va. at 473. Heald does not specifically allege the Commissioner's failure to disclose and ascertain the judgment lienholders constituted fraud. Thus, upon becoming final, the Confirmation Order cannot be set aside unless shown to be void.⁶ Consequently, even if notice to the judgment lienholders had been required, this does not deprive the Court of its jurisdiction to conduct a judicial sale. More simply put, the failure to join the judgment creditors does not render the judicial sale of the Marital Home void.

Third, even had Heald been notified, he and FIA Card Services had no standing to prevent the sale. At most, they could have bid on the Marital Home. It may be a prudent practice for commissioners of sale to notify judgment lien creditors where practicable of a sale affecting their interests. Such course of conduct may draw such creditors to bid on

⁶ Whether or not the failure to join the judgment creditors renders the judgment void or voidable is an important distinction. As a general rule, "[u]nder settled legal principles, a judgment is void *ab initio* only if it 'has been procured by extrinsic or collateral fraud, or entered by a court that did not have jurisdiction over the subject matter or the parties.'" *Parrish v. Jessee*, 250 Va. 514, 521 (1995) (quoting *Rook v. Rook*, 233 Va. 92, 95 (1987)). A void judgment "may be attacked in any proceeding by any person whose rights are affected." See *Pure Presbyterian Church v. Grace of God Presbyterian Church*, 296 Va. 42, 50 (2018) (quoting *Harris v. Deal*, 189 Va. 675, 686–87 (1949)). By contrast, a voidable judgment is only subject to direct attack by any interested party at any time before the judgment becomes final. See *generally* Va. Sup. Ct. R. 1:1.

the sale and provide greater assurance the property is not sacrificed below its fair market value, obviating the circumstance where the Court would require a rebidding at the time of application for confirmation of the sale.⁷ However, such pre-sale practice is not required by law as already delineated.

Heald nevertheless condemns the diversion of his judgment lien to the proceeds of the judicial sale. The flaw in Petitioner's position is his assumption that he and FIA Card Services had an interest in anything other than that of Montazami in the proceeds of the judicial sale. Where there is a valid partition, a judgment lien can "only attach to the interest or estate of the judgment debtor." *Miller*, 157 Va. at 195-96. Heald's and FIA Card Services' interests as judgment creditors were not in the Marital Home (i.e., the realty) itself, but were in Montazami's interest in the proceeds of the judicial sale after satisfaction of the superior creditors.

Being judgment lien creditors, this Court's power to enforce the interests of Heald and FIA Card Services sounded in equity, and the transfer of their lien claim to the proceeds of sale merely attached their interest to the liquidated proceeds of the sale of the Marital Home. Heald's lien was not discharged by the Court's previous orders, except as it encumbered the Marital Home, and remains a viable lien against Montazami until fully satisfied. This does not end the Court's inquiry, however. This Court found the Commissioner failed to properly account for all liens. As such, the Court must now resolve whether such conduct violated a legal duty and, if so, the Commissioner's liability for such breach.

⁷ In this case a sacrificial value was not in issue as the Marital Home sold well above its listed price.

IV. The Commissioner Had No Fiduciary Duty to The Judgment Creditors

Of next consideration is whether the Commissioner owed a duty to the judgment creditors as a fiduciary. Virginia jurisprudence recognizes a cause of action for breach of fiduciary duty, and “an act which is otherwise legal may, nevertheless, breach one’s fiduciary duty.” *Flippo v. CSC Assocs. III*, 262 Va. 48, 57 (2001). The elements of a claim for breach of fiduciary duty are the same as any other claim sounding in tort: (1) duty, (2) breach, and (3) damages. See generally *Cartensen v. Chrisland Corp.*, 247 Va. 433, 444 (1994); see also *Sun Hotel v. Summitbridge Credit Invs. III, LLC*, 86 Va. Cir. 189, 195 (Fairfax 2013) (citing *Carstensen*, 247 Va. at 444). “A fiduciary relationship exists in all cases when special confidence has been reposed in one who in equity and good conscience is bound to act in good faith and with due regard for the interests of the one reposing the confidence.” *Augusta Mut. Ins. Co. v. Mason*, 274 Va. 199, 207 (2007) (quoting *H-B Ltd. v. Wimmer*, 220 Va. 176, 179 (1979)) (citing *Ferguson v. Gooch*, 94 Va. 1, 6 (1896)). The Court in turn examines the applicability of such a cause of action to the facts at bar, because if the Commissioner owed a common law duty to the judgment creditors, that same duty might also apply in the statutory context of the Rule proceeding before this Court.

As the Commissioner correctly points out,

It is well settled that the court and not the commissioner is the real seller at a judicial sale. The commissioner is merely the ministerial agent of the court and the medium through which the purchaser makes an offer of purchase to the court. A bid by a purchaser to the commissioner is a bid to the court. Until his offer of purchase has been accepted and confirmed the sale is incomplete.

Fine Acres, Inc. v. Whitehurst, 206 Va. 66, 69 (1965) (citing *French v. Pippis*, 171 Va. 133, 139 (1938); *French*, 203 Va. at 709; 11 MICH. JURIS., JUD. SALES & RENTINGS, § 38, p. 335, 336).

“[A] ‘duty’ is defined as ‘[a] legal obligation that is owed or due to another and that needs to be satisfied’ or ‘that which one is bound to do, and for which somebody else has a corresponding right.’” *Rastek Constr. & Dev. Corp. v. Gen. Land Commercial Real Estate Co.*, 294 Va. 416 (2017) (citation omitted). Generally, claims for breach of fiduciary duty sound in contract. See *Crosby v. ALG Trustee, LLC*, No. 180062, 2018 WL 6696588, 3 (Va. Dec. 20, 2018) (quoting *O’Connell v. Bean*, 263 Va. 176, 181 (2002)). Plainly, the Commissioner had no contractual duty to the judgment creditors.

Nevertheless, a claim for breach of fiduciary duty could also rest upon a duty gratuitously assumed by the Commissioner. “[I]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.” *Kellerman v. McDonough*, 278 Va. 478, 489 (2009) (quoting *Nolde Bros. v. Wray*, 221 Va. 25, 28 (1980) (quoting *Glanzer v. Shepard*, 233 N.Y. 236 (1922))). “As a general proposition, a duty that does not otherwise exist may be impliedly assumed from the defendant’s conduct.” *Terry v. Irish Fleet, Inc.*, 296 Va. 129, 138 (2018) (citing 2 Dan B. Dobbs *et al.*, THE LAW OF TORTS § 410, at 671 (2011)). This requires an undertaking to render services for another, or more specifically, an undertaking to render services for the injured party. *Kellerman*, 278 Va. at 489 (quoting *Didato v. Strehler*, 262 Va. 617, 629 (quoting RESTATEMENT (SECOND) OF TORTS § 323)). The facts of this case are wanting as to any indication the Commissioner gratuitously assumed a duty on behalf of the judgment creditors.

In the Commissioner's role effecting the sale of the Marital Home there is no reposition of trust consigned from Heald and vested in the Commissioner. Nor did the Commissioner act to undertake or assume a duty for Heald. There is thus no direct fiduciary duty owed by the Commissioner to Petitioner. Thus, the Commissioner owed no fiduciary duty directly to the judgment lien creditors. The Commissioner's duty owed in this instance was to the Court.⁸

V. The Commissioner's Personal Liability

Based on the Commissioner's failure to ascertain the amount of the judgment liens and their relative priority—that is, to provide a proper accounting—Heald's petition for the Rule prayed for the Court to require the Commissioner show cause why judgment should not be entered against the Commissioner in the amount of \$79,452.28.

When complaint is made that the Commissioner has failed to faithfully discharge fiduciary duties owed the Court, a Rule may be issued to determine whether personal liability of the Commissioner attaches to the consequences of such failure.

Any court of this Commonwealth, may, at the instance of any party in interest, award a rule against any special commissioner or receiver appointed by or acting under the authority of such court . . . to show cause why judgment shall not be entered against them for any amount which the court may ascertain to be due from such commissioner, receiver, or purchaser.

Va. Code § 8.01-105. The remedy however has significant limitations, so that it applies narrowly to the duties of the Commissioner. Not every minor failure of or defect in a

⁸ Presumably, this is why Heald did not file a complaint for breach of fiduciary duty against the Commissioner in a personal capacity. Even so, the occasion for filing a breach of fiduciary duty claim against the Commissioner has passed, as the statute of limitations windows for such a right of action is two years. Va. Code § 8.01-248.

commissioner's performance is reachable by this statutory remedy. To provide the relief sought by Heald, the Court must look to a test of whether its civil contempt power is applicable. See *French*, 203 Va. at 710 (directing the procedure to hold special commissioners personally liable is by civil contempt rule under Virginia Code § 8-644, a predecessor to Virginia Code § 8.01-105).

The potential liability of the Commissioner is thus confined to a civil contempt analysis. "[T]he 'judicial contempt power is a potent weapon.'" *DHRI, Inc. v. Hanback*, 288 Va. 249, 255 (2014) (quoting *Petrosinelli v. PETA*, 273 Va. 700, 706–07 (2007) (quoting *Int'l Longshoreman's Ass'n v. Phila. Marine Trade Ass'n*, 389 U.S. 46, 76 (1967))). "A court's authority to punish contemptuous conduct is exercised to preserve the power of the court and to vindicate the court's dignity." *Gilman v. Commonwealth*, 275 Va. 222, 227 (2008) (citations omitted). "[O]nly '[t]he least possible power adequate to the end proposed' should be used in contempt cases." *United States v. Wilson*, 421 U.S. 309, 319 (1975) (quoting *Anderson v. Dunn*, 19 U.S. 204, 231 (1821)). "A contempt fine is considered civil and remedial if it either coerces a defendant into compliance with a court order or compensates the complainant for losses sustained." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829 (1994) (citing *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947)). Additionally,

Under well-established Virginia jurisprudence, *contempt only lies "for disobedience of what is decreed, not for what may be decreed."* [B]efore a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties thereby imposed upon him and the command must be expressed rather than implied. "[F]or a proceeding in contempt to lie," there "must be an express command or prohibition' which has been violated."

DHRI, 288 Va. at 255 (quoting *Petrosinelli*, 273 Va. at 706–07 (first quoting *Taliaferro v. Horde*, 22 Va. 242, 247 (1822)); then quoting *Winn v. Winn*, 218 Va. 8, 10 (1977); then quoting *French*, 203 Va. at 710)) (emphasis added).

The inquiry of the Court concerning whether the Commissioner’s conduct meets the test for contempt focuses on the question of whether the Commissioner had the duty to account for the liens encumbering the Marital Home, and in breach of such duty, is personally liable for causing the disbursement of proceeds to Montazami in derogation of the rights of lien creditors. Specifically, resolution of the Rule requires a determination whether the Commissioner’s failure to provide the Court with a proper accounting breached a duty owed to the Court and, if so, to what extent. As Virginia Code § 8.01-96 recognizes, the Commissioner had a duty, owed to the appointing Court, to “faithful[ly] discharge” the duties undertaken in accepting the Court’s appointment. Here, the Appointment Order charged the Commissioner with the responsibility to “prepare an accounting of all encumbrances existing upon the house to be presented to the Court upon the sale.”

Central to whether the Commissioner breached duties owed to the Court is what is meant by the term “encumbrances” in the Appointment Order. In Virginia, “[a] lien is defined to be ‘a hold or claim which one person has upon the property of another as security for some debt or charge.’” *Buckner v. Metz*, 77 Va. 107, 115 (1883) (quoting *Lien*, BUR. LAW DICTIONARY). An “encumbrance” is “a claim or liability that is attached to property or some other right and that may lessen its value, *such as a lien or mortgage.*” *Encumbrance*, BLACK’S LAW DICTIONARY (2014) (emphasis added). “‘Encumbrance’ is broader than ‘lien,’” James Buchwalter, *et al.*, 92 C.J.S. VENDOR AND PURCHASER § 418

(Dec. 2018), and includes *any* sort of claim attached against a property. The term “encumbrances” in Virginia jurisprudence, in harmony with the definition aforesaid, comprehends judgment liens against property. See *Haisfield v. Lape*, 264 Va. 632, 638 (2002) (equating encumbrances with tax and judgment liens).

Thus, although the Appointment Order only directed the Commissioner to “prepare an accounting of all outstanding encumbrances existing upon the house to be presented to the Court upon the sale,” the Commissioner was obligated thereby to account for all liens. Accordingly, the Commissioner had a duty to determine what liens were chargeable to the Marital Home, and to ascertain the amount and priorities of those liens. See *Shultz v. Hansbrough*, 74 Va. 567, 577 (1880); see also *Moran*, 66 Va. at 104. Heald’s judgment lien represented a monetary claim encumbering Montazami’s property pursuant to Virginia Code § 8.01-458, to secure payment of an obligation, which was readily quantifiable. His lien, although from a foreign judgment, was properly docketed in the Clerk’s office of this Court and was to be honored as any judgment issuing from this Commonwealth.

The Appointment Order, in directing the Commissioner to prepare an accounting of all encumbrances upon the sale, was merely complying with long established practice determining how such sale was to be managed.

[A] sale without first removing a cloud from the title and adjusting and settling rights in dispute, and without previously *ascertaining and determining the liens and encumbrances, the amounts, and priorities*, tends to a sacrifice of the property--as to creditors, by discouraging them from bidding, when they probably would have bid, for the protection of their own interests, if the rights of all parties had been previously ascertained and fixed with reasonable certainty.

Shultz, 74 Va. at 577 (emphasis added).

Moreover, the statutory scheme for enforcement of judgment liens, Virginia Code §§ 8.01-458 through -465, envisions the Court determine the rights of competing claimants to proceeds of a judicial sale, particularly those of potential claimants who do not have notice their claims may be divested. Virginia Code § 8.01-458 provides for an immediately effective lien against a judgment debtor's property upon proper recordation of a judgment and Virginia Code § 8.01-459⁹ delineates the relative priority as among a judgment debtor's respective judgment creditors, if there be more than one. The conclusion follows that while the Court had no immediate legal obligation to pay out the proceeds to the judgment creditors, the Court conversely could not wittingly ignore the judgment liens in favor of the Debtor.

Based on the foregoing, the Court concludes the Commissioner breached duties to the Court in two respects. First, the Commissioner failed to detail to the Court the *amount and priority* of Heald's lien, as mandated by the Appointment Order which required an "*accounting of all encumbrances existing upon the house . . . upon the sale.*" Had the Commissioner complied with such directive, the detailed amounts would have made clear to the judge contemplating the Confirmation Order that the proceeds were due Petitioner, not his debtor, Montazami. While "in some cases" there is "no good reason requir[ing] an account to be taken," *Tackett*, 172 Va. at 332, as previously noted, it must "appear . . . by the pleadings or evidence that all liens are set forth in the bill and proceedings, and may be ascertained and determined by decree without an [accounting],"

⁹ That Code section reads: "Judgments against the same person shall, *as among themselves*, attach to his real estate, and be payable thereout in the order of the priority of the lien of such judgments, respectively." Va. Code § 8.01-459 (emphasis added).

Alexander, 85 Va. at 201. In other words, the record must be such that “there [is] no conflict or dispute as to the existence of liens resting upon property, or question of amounts and priorities.” *Tackett*, 172 Va. at 332 (emphasis added). Here, the Court’s record is lacking as to the amounts and relative priority of the judgment liens held by Heald and FIA Credit Services. Resorting solely to the record in existence at the time of the entry of the Confirmation Order, that Court could not discern the sales proceeds failed to fully satisfy the judgment liens before paying the remainder to the Debtor.

Second, the Commissioner breached the fiduciary duty to the Court to “faithfully discharge” the office of special commissioner of sale. The Commissioner compounded noncompliance with the Court’s directive by incorrectly advising the Court “everyone was in agreement” with the Confirmation Order, thereby assuaging the Court to pay the Debtor without a proper accounting. In his petition for the Rule, Heald referred the Court’s attention to a certified transcript dated August 26, 2016, documenting the Commissioner’s oral exchange with the Court prior to the entry of the Confirmation Order. In this colloquy, the Commissioner relayed,

Your honor, this is a case where I sold the property. I have deposited the proceeds with the Clerk’s Office. And everyone was in agreement as to the distribution.

So I went ahead. And once the, I assume, appeal period has passed, the Clerk will issue a check to Mr. Montazami. . . .

Thereupon, the Court inquired of the Commissioner, “This is the order which you wish me to sign?” The Commissioner replied, “It is indeed, Your Honor.”

The Commissioner owed a fiduciary duty to this Court to faithfully discharge the duties of the agency. Incorporated into every relationship “between a fiduciary and his

principal is an obligation, imposed by law upon the fiduciary, to disclose anything known to him which might affect the principal's decision whether or how to act." *Augusta Mut. Ins. Co. v. Mason*, 274 Va. 199, 207 (2007) (quoting *Owen v. Shelton*, 221 Va. 1051, 1054 (1981)). "One to whom a representation has been made is entitled to rely on it [with respect to] the maker, and need make no further inquiry." *Cerriglio v. Pettit*, 113 Va. 533, 544 (1912) (quoting *Lowe v. Trundle*, 78 Va. 65 (1883)). The Commissioner's misstatement to the judge that "everyone was in agreement," whether knowingly or merely negligently made, imparted that the order was appropriate to sign and consented to by all the parties named therein. The judgment creditors were listed by name in the Confirmation Order, compounding the inferred impression they were in agreement.

The Confirmation Order was submitted without the required accounting called for in the Appointment Order. This Court reasonably infers the presiding judge thereby presumed in error that Petitioner, who was named in the body of the Confirmation Order, was also in agreement to its entry and that his lien had either been satisfied or that further collateral was available for that purpose.

This state of affairs—the failure to properly account for the judgment liens and to faithfully discharge the office of a commissioner of sale—is precisely the type of circumstance contemplated by Virginia Code § 8.01-105, permitting imposition of personal liability upon the Commissioner. The Commissioner's noncompliance with the Court's mandate in the Appointment Order, as well as the incorrect statement of facts aforesaid, caused the Commissioner to shirk the duty, albeit without any apparent ill motive, to account for the amount and relative priority of all encumbrances and not wittingly induce the Court to distribute prematurely proceeds of the sale without the

identified lienholders first being given notice and an opportunity to be heard. The only way to right this consequent legal wrong is for the Commissioner to pay into the Clerk of the Court's registry the amount of misdirected funds by means of interpleader, so that the Court may make the appropriate judgment as to which creditor(s) are legally entitled to the funds.¹⁰

CONCLUSION

The Court has considered the Petition of Mr. Chris Heald against the Special Commissioner of Sale, appointed in the underlying divorce cause to conduct a court-ordered sale of the Marital Home belonging to Mr. Khashayar Montazami. Petitioner alleges funds due him by virtue of a lien in his favor as Montazami's judgment creditor were misdirected to Montazami, his debtor, as a direct result of the Commissioner causing the Court to enter an erroneous order that divested him of enforcement of his judgment lien respecting the Marital Home. Heald petitioned the Court to hold the Commissioner personally liable for his loss pursuant Virginia Code § 8.01-105. In assessing the merits of Heald's claim, the Court examined: 1) the confines of the Court's power to order a partition sale; 2) the nature of the judgment liens and associated creditors' rights; 3) whether notice to judgment creditors prior to the judicial sale was required; 4) whether the Commissioner owed a fiduciary duty to the judgment creditors; and 5) whether the Commissioner is personally liable for directing the proceeds to the Debtor without a formal

¹⁰ The Court having lost jurisdiction to amend the final Confirmation Order after twenty-one days, absent fraud as already noted, and because the Debtor bears no legal fault for his windfall, Montazami is not reachable by this Court for the clawing back of that to which it appears he would not have been entitled absent the mistaken actions of the Commissioner herein detailed.

accounting in light of the obligation as agent of the Court to “faithfully discharge” the duties of Special Commissioner of Sale, thereby failing to comply with the terms of the Appointment Order of this Court.

For the reasons more fully detailed herein, the Court finds the Commissioner failed to comply fully with the fiduciary duties imposed by the nature of the agency with this Court and the Court’s Appointment Order delineating the manner of approval of the sale, which included accounting for the encumbrances—namely, identifying all liens on the Marital Home, their respective priorities, and the amounts thereof, upon the sale. The Commissioner failed to quantify the judgment lien of Petitioner for the Court at the hearing for entry of the final Confirmation Order, and the Commissioner further volunteered “everyone was in agreement as to the distribution” as contemplated in the order, despite not providing Petitioner with notice of the judicial sale proceedings. In consequence of the aforesaid, the Court finds the Commissioner failed to faithfully discharge the duties of a commissioner of sale by failing to file a *proper* accounting as ordered and by making representations which could only cause the Court to infer Petitioner was in agreement with the court-ordered distribution, effectively causing the dishonor of Petitioner’s lien and directing payment instead to his Debtor without complete consideration of Petitioner’s interest. Virginia Code § 8.01-105 contemplates imposing liability against a commissioner of sale under circumstances such as these, pursuant to the Court’s civil contempt power. Thus, the Court holds the Commissioner personally liable pursuant to the provisions of that Code section. Wherefore, the Court rules the Commissioner shall interplead to the Court the sum of \$79,452.28 within sixty (60) days of the entry of the final order incorporating this Letter Opinion. The Commissioner shall provide notice to all then-

OPINION LETTER

existing lien creditors of Montazami or of the Marital Home who may have had valid legal claim to the proceeds when initially deposited with the Clerk of the Court in 2016. Upon discharge of these tasks, the Commissioner may apply to be released from the interpleader action and the judgment of civil contempt shall be deemed purged.

The Court shall enter an order incorporating its ruling herein, and until such time,
THIS CAUSE CONTINUES.

Sincerely,

A solid black rectangular redaction box covering the signature of David Bernhard.

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER