

STATE OF VERMONT

SUPERIOR COURT  
Windsor Unit

CIVIL DIVISION  
Docket No. 446-7-10 Wrcv

Mayer & Mayer  
Plaintiff

v.

Lawrence Drown, Jacob Dorman,  
Marion Ballou, Vermont Human Rights Commission,  
Rose Austin, and the Town of Northfield  
Defendants

Decision on Post-Judgment Motions

A judgment has been entered in this case granting the Town of Northfield the right to foreclose upon real property owned by defendant Larry Drown. The judgment additionally grants Rose Austin and the Vermont Human Rights Commission the rights to receive surplus proceeds from the foreclosure sale.

All three of the foreclosure creditors had judgment liens on the property. Ms. Austin obtained her judgment against Mr. Drown in December 2008, the Human Rights Commission obtained its judgment against Mr. Drown in February 2010, and the Town of Northfield obtained its judgment against Mr. Drown in April 2010. Yet each judgment was recorded in the land records at exactly the same time: the town clerk stamped each judgment as having been recorded at 7:45 a.m. on July 21, 2010. The *Town of Northfield* judgment was recorded on pages 404-407 of the land records, the *Austin* judgment was recorded on page 408, and the *Vermont Human Rights Commission* judgment was recorded on pages 409-411.

In this foreclosure proceeding, the Town of Northfield moved for summary judgment on the ground that it was entitled to the first-priority position because its judgment was recorded first in the land records, on pages 404 through 407, whereas the remaining creditors had judgments recorded on pages 408 through 411. Ms. Austin opposed summary judgment, *but not on the ground that the town was entitled to the first-priority position because its judgment was recorded first*. She instead opposed summary judgment on the ground that the town's judgment order was not valid because it was not adequately certified by the clerk of the environmental division. It does not appear that the Human Rights Commission filed any opposition at all to the summary-judgment motion.

In a written decision issued August 24th, 2011, Judge Hayes ruled that the environmental division had issued an adequate certification of the judgment, and that the judgment was final. Judge Hayes also noted that the issue involving the timing of the recording of the judgments raised "obvious questions," but that none of the parties had disputed the town's assertion that

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“the order of recordation controls the question of priority.” Judge Hayes therefore granted summary judgment to the town, and a judgment order was eventually entered in which the town was given the first priority to the proceeds from the foreclosure sale.

Ms. Austin and the Human Rights Commission now both seek an amendment of the judgment order to provide that each of the three judgment creditors should share equally in the proceeds from the foreclosure sale because the three judgments were “received” by the town clerk at the same time. After reviewing the record, the court concludes that the question remains an interesting one, but that it has not been preserved for review. See *Drumheller v. Drumheller*, 2009 VT 23, ¶ 36, 185 Vt. 417; 11 Wright, Miller, Kane & Marcus, Federal Practice and Procedure: Civil 2d § 2810.1 (explaining that a court has broad power to reexamine the correctness of a judgment under Rule 59 but that it is not the time or place to “raise arguments or present evidence that could have been raised prior to the entry of judgment”).

The town moved for summary judgment on the issue of whether the order of recordation should control the order of priority. Ms. Austin chose not to oppose summary judgment on this ground, instead preferring to argue that the town was not entitled to priority because it had not obtained an adequate certification from the clerk of the environmental division. Judge Hayes thereafter ruled on the arguments that Ms. Austin had made and noted that she had not filed any objections on the issue of whether the order of recordation should control the order of priority. Having chosen not to oppose the issue when it was squarely before the court, Ms. Austin is not entitled to the amendment of the judgment on that basis. See *Campbell v. Stafford*, 2011 VT 11, ¶ 17, 189 Vt. 567 (mem.) (motions for reconsideration do not provide parties with an opportunity to make arguments that could and should have been raised before summary judgment was granted to the moving party). Moreover, the court notes that, contrary to the statement made by Ms. Austin in her motion for amendment of judgment, there is no evidence in the record as to when the judgments were “received” by the town clerk, or under what circumstances; the evidence instead showed only when the judgments were recorded. Having failed to “raise arguments or present evidence that could have been raised prior to the entry of judgment,” Ms. Austin is not entitled to reconsideration of the judgment on these grounds. 11 Federal Practice and Procedure, *supra*, at § 2810.1; *Campbell*, 2011 VT 11, ¶ 17. Similarly, the Human Rights Commission did not oppose summary judgment at all. For the same reasons as above, therefore, the Human Rights Commission has waived any arguments it may have as to the order of priority in this case. *Id.*

Ms. Austin and the Human Rights Commission have also moved for permission to appeal the issue of whether the order of recordation should control the order of priority. Motions for permission to appeal from foreclosure judgments are entrusted to the discretion of the civil division with very little guidance as to how that discretion should be exercised. It can be inferred, however, that the role of the court should be to screen out appeals that are taken for an improper purpose or that would present arguments that have not been preserved. *Nationwide Mut. Fire Ins. Co. v. Gamelin*, 173 Vt. 45, 49 (2001); *Citibank, N.A. v. Groshens*, 171 Vt. 639, 639 (2000) (mem.); *Vermont Nat'l Bank v. Clark*, 156 Vt. 143, 145 (1991). Here, for the foregoing reasons, Ms. Austin and the Human Rights Commission did not preserve their arguments related to the merits of the issue of whether the order of recordation should control the order of priority, and so their motion for permission to appeal the merits of this issue is denied.

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Ms. Austin and the Human Rights Commission have also moved for permission to appeal on the issue of whether the clerk of the environmental division adequately certified the *Town of Northfield* judgment. Ms. Austin raised this legitimate issue at the summary-judgment stage and obtained a thoughtful and considered ruling from Judge Hayes on an interesting question of law; she has more than established her right to appeal this issue under the standard articulated above; her motion for permission to appeal this issue is granted.

The Human Rights Commission, however, did not file any opposition to the town's summary-judgment motion. As such, the Human Rights Commission failed to preserve any arguments it may have as to the adequacy of the clerk's certification. For this reason, the Human Rights Commission's motion for permission to appeal this issue is denied.

Finally, Mr. Drown filed a letter with the court on June 22nd, 2012 stating that he had been found "incompetent to represent myself" in a state criminal proceeding, and that the attorneys for the Town of Northfield were "aware" of both the finding of incompetency and the fact that he "cannot defend myself, make or answer phone calls." Mr. Drown then filed a notice of appeal on August 13th, 2012, in which he represented that he has a legal guardian who was appointed by the "Montpelier Probate Court," and that the attorney for the town has been aware of that fact.

Mr. Drown's letter and notice of appeal must be taken as a suggestion that he lacks the capacity to understand the nature of the proceedings, and the suggestion appears to be supported by the materials suggesting that he was found incompetent to stand trial in a state criminal proceeding. It would be improper to enter a judgment against him, and sell his property at a foreclosure sale, without making at least some effort to ensure that his legal rights are protected. See *Pettengill v. Gilman*, 126 Vt. 387, 388 (1967) (explaining that a judgment against an incompetent defendant must be set aside if the court and attorneys knew of the incompetency and yet failed to appoint a guardian to protect the defendant's interests). Here, Mr. Drown has represented that he has a court-appointed guardian: Robert Carpenter of Randolph, Vermont, with a phone number of 431-3472, extension 120.

Attorney Atwood shall ascertain whether Mr. Carpenter is the court-appointed guardian for Mr. Drown and, if so, shall serve Mr. Carpenter under Civil Procedure Rule 4 with a copy of the complaint, the judgment order, and a copy of this decision, and file a return of service with the court. Mr. Carpenter shall then have thirty days from the time of service to file a notice of appearance in this action and to file any motions, if he sees fit. If Mr. Carpenter is not the court-appointed guardian for Mr. Drown, the court will schedule a hearing on whether a guardian should be appointed and, if so, who should be appointed. Any costs and fees incurred by Attorney Atwood in this process shall not be included in the foreclosure judgment. See *Morissette v. Morissette*, 143 Vt. 52, 57 (1983) (explaining that attorneys have an obligation to raise the issue of an opposing party's incompetency when it is known to them).

Finally, the court has made some rulings in this decision with respect to the preservation of certain arguments based upon its own review of the file. If either party believes that the court has missed a spot in the record where the party preserved its argument with sufficient clarity to

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permit the court to rule upon it at the time it was made, the party may bring that to the court's attention within the next ten days.

### ORDER

(1) Defendant Larry Drown's Motion for Permission to Appeal (MPR #20), filed August 13, 2012, is treated as a notice of incompetency. Attorney Atwood shall endeavor to determine the identity of defendant's guardian and to serve the guardian with copies of the complaint, the foreclosure judgment, and a copy of this order. Attorney Atwood shall then file either a return of service or a certification that defendant does not have a court-appointed guardian.

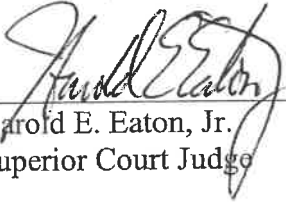
(2) Defendant Rose Austin's Motion for Permission to Appeal (MPR #21), filed August 17, 2012, is *granted* as to the issue of the adequacy of the clerk's certification of the *Town of Northfield* judgment and *denied* as to the issue of whether the order of recordation controls the order of priority.

(3) Defendant Rose Austin's Motion to Amend the Judgment (MPR #22), filed August 17, 2012, is *denied*.

(4) Defendant Vermont Human Rights Commission's Motion for Permission to Appeal the Foreclosure Judgment (MPR #23), filed August 30, 2012, is *denied*.

(5) Defendant Vermont Human Rights Commission's Motion to Amend Foreclosure Judgment and Decree (MPR #24), filed August 30, 2012, is *denied*.

Dated at Woodstock, Vermont this 19 day of October, 2012.

  
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Harold E. Eaton, Jr.  
Superior Court Judge

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