

Creditors' Rights Bulletin: New Appellate Division Decision Prohibits the Partition and Sale of Marital Property to Satisfy Judgments

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In a case decided on May 8, 2018, the New Jersey Appellate Division held, *for the first time*, that New Jersey law prohibits the forced partition and sale of real property owned as “tenants by the entirety” to satisfy a judgment creditor of one spouse. A tenancy by the entirety is a form of joint property ownership available only to spouses that is created when property is held by a husband and wife with each becoming seized and possessed of the entire estate. Each spouse enjoys the right of survivorship, such that after the death of one spouse, the survivor takes the whole.

The Appellate Division found that a 1988 statute supersedes and nullifies earlier case law that had allowed the forced partition and sale of such real property in certain equitable circumstances. Significantly, the Court, recognizing that the plain language of the statute does not prohibit this remedy, found support for their interpretation in the “legislative intent.” (The case has been approved for publication.) While this case is a significant change in the law, there are still remedies available to creditors pursuing collection against debtors who own tenants by the entireties property which can be just as significant as partition and sale.

New Jersey law has long provided that a judgment creditor may execute upon a debtor’s real property if the debtor’s personal property is insufficient to satisfy a judgment. This is an old and well-established right, available since at least 1743. The levy, execution, partition and sale is a multi-step process.

Once a court determines that a debtor’s personal property is insufficient to satisfy a judgment, the creditor is entitled to an order directing the sheriff to levy and execute upon the debtor’s interest in real property, *including real property* held as tenants by the entireties. The purchaser at the execution sale of the debtor’s interest in entireties property acquires the right of survivorship of the debtor spouse as well as the interest of the debtor spouse in the life estate for the joint lives of husband and wife. In other words, the purchaser becomes a tenant in common with the non-debtor spouse for the joint lives of the husband and wife. The purchaser will succeed to an undivided fee simple interest in the real property if the debtor spouse survives the non-debtor spouse, and conversely the non-debtor spouse will succeed to the entire fee simple interest if he or she survives the debtor spouse.

After levy and execution, a separate question is under what circumstances the property may be partitioned and sold, with the proceeds divided between the purchaser at the execution sale and the non-debtor spouse. Prior case law authorized courts to compel the partition and sale where equitable considerations justified such a remedy. Such equitable factors could include, for example, the interests of the debtor's family members in not being dispossessed from their home, and the competing policy concern of not automatically allowing delinquent debtors the

opportunity to sequester substantial assets from just liabilities. The Appellate Division's decision interprets a 1988 statute to prohibit this remedy of partition and sale.

Even without partition and sale, the levy and execution upon a judgment debtor's interest in real property held as tenants by the entireties is a valuable remedy for several reasons. First, New Jersey law gives priority to judgment creditors that pursue collection and levy on real and personal property. Therefore, you can get paid before previously filed liens if you are proactive with your collection efforts. Second, bankruptcy trustees have "strong-arm powers" that allow them to avoid the pre-petition liens of judgment creditors that have not levied, leaving the judgment creditors unsecured. Accordingly, to be protected in the event of a bankruptcy filing, the creditor must levy. Finally, the levy and execution may foster settlement.

Should you have any questions about the issues discussed above, or any other creditors' rights issues, please contact John August at jaugust@saiber.com or 973.622.3699.