

The Changing Landscape of Tenants by Entirety Law and How it Affects Your Collection and Bankruptcy Practice

February 8, 2019

Source: New Jersey Law Journal

In *Jimenez v. Jimenez* 454 N.J. Super. 432 (App. Div. 2018), the New Jersey Appellate Division, interpreting on a 30 year old statute, effected a major change in tenancy by the entirety law by holding, 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. It is important to recognize what the Appellate Division decision changed and what it did not change, and how this change impacts collection and bankruptcy law.

Tenancy by the entirety is a form of joint property ownership available only to spouses that is created when they take title to property as husband and wife. *Jimenez v. Jimenez* summarizes the law. Each spouse becomes seized and possessed of the entire estate, and each enjoys the right of survivorship, such that after the death of one spouse, the survivor takes the whole. Although the common law genesis of this concept is predicated on the unity of the spouses, tenancies by the entirety survive as a means of protecting marital assets and as security for one spouse on the death of the other. A judgment creditor seeking to recover from real property held as tenants by the entirety must go through a multistep process.

The Levy, Execution, Partition and Sale of Real Property is a Multistep Process

A. Levy and Execution

New Jersey law provides that a judgment creditor may execute upon a judgment debtor's real property if the debtor's personal property in the county is insufficient to satisfy the judgment. *N.J.S.A.* § 2A:17-1. A judgment creditor's right to levy and sell the judgment debtor's real property is an old and well-established right.

Since at least 1743, a New Jersey judgment creditor has been authorized to cause the debtor's land to be sold at a sheriff's sale to satisfy the underlying debt. 17 George II, *Allinson's Laws*, pp. 129-32; see *Clement v. Kaighn*, 15 N.J. Eq. 47, 49 (Ch. Div. 1862). The process of executing on a judgment involves several steps. After obtaining and docketing a money judgment pursuant to *N.J.S.A.* 2A:16-1, a creditor delivers a writ of execution to the sheriff. See *N.J.S.A.* 2A:17-10. The sheriff is first required to levy on the goods and chattels in the county, *N.J.S.A.* 2A:17-1, and, if insufficient, to levy on the real property held by the debtor. *Ibid.*

New Brunswick Sav. Bank v. Markouski, 123 N.J. 402 (1991).

Before executing on real property, the judgment debtor must make a “good faith” effort to locate personal property within the county. *N.J.S.A. 2A:17-1*; *Borromeo v. DiFlorio*, 409 N.J. Super. 124, 137 (App. Div. 2009). The requirement of a good faith effort to locate personal property is normally satisfied by supplementary proceedings. *Id.* The judgment debtor’s deposition testimony or a certified response to an information subpoena detailing personal property or stating that none exists satisfies this good faith requirement. *Sklar v. Continental Casualty Company (In re Mariano)*, 339 B.R. 344, 349 (Bankr. D.N.J. 2006).

Once a judgment creditor has exhausted personalty, the creditor is entitled to an order directing the sheriff to levy and sell the judgment debtor’s interest in real property, including real property held as tenants by the entirety. The New Jersey Court Rules require that the request to execute upon real property be made by motion. *R. 4:59-1(d)*.

The judgment creditor’s right to levy upon and sell a judgment debtor’s interest in entirety property is well settled in New Jersey, with many cases recognizing that right and no published New Jersey case holding the opposite. *See e.g., King v. Greene*, 30 N.J. 395, 412-13 (1959); *Newman v. Chase*, 70 N.J. 254, 260 (1976); *Freda v. Commercial Trust Co.*, 118 N.J. 36, 45 (1990). “In sum, New Jersey allows the creditors of either spouse to reach his interest in entirety property, subject, however, to the other spouse’s right of survivorship.” *In re Etoll (Straffi, Trustee v. Etoll)*, 425 B.R. 743, 748 (Bankr. D.N.J. 2010) (reviewing the history of tenancy by the entirety law in New Jersey).

The purchaser at the sale of the judgment debtor’s entirety interest 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. *Newman v. Chase*, 70 N.J. at 260. In other words, “the purchaser becom[es] a tenant in common with the remaining spouse for the joint lives of the husband and wife.” *Freda v. Commercial Trust Co.*, 118 N.J. at 45. The purchaser will succeed to an undivided fee simple interest in the real property if the judgment debtor 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 judgment debtor. *Newman v. Chase*, 70 N.J. at 260.

The Appellate Division’s decision in *Jimenez* did not change the law allowing levy and execution on real property held as tenants by the entirety. The Court recognized that a tenant by the entirety can alienate his or her right of survivorship, and a judgment creditor of either spouse may levy and execute upon such right. *Jimenez v. Jimenez* 454 N.J. Super. at 436 (citations omitted). Rather, the *Jimenez* Court addresses and prohibits the second step: partition and sale.

B. Partition and Sale

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 to the Appellate Division’s decision in *Jimenez*, case law authorized courts to compel the partition and sale where equitable considerations justified such a remedy. *Newman v. Chase*, 70 N.J. at 264. 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 affects a change in this law by interpreting *N.J.S.A. 46:3-17.4* to prohibit the remedy of partition and sale. The statute provides:

Neither spouse may sever, alienate, or otherwise affect their interest in the tenancy by entirety during the marriage or upon separation without the written consent of both spouses.

The Appellate Division found that this statute supersedes and nullifies earlier case law that had allowed the forced partition and sale of such entireties property in certain equitable circumstances. The Appellate Division, recognizing that the plain language of the statute does not prohibit a judgment creditor from seeking partition and sale, interpreted *N.J.S.A. 46:3-17.4* to prohibit this remedy to a judgment creditor and found support for their interpretation in a legislative intent to maximize each spouse's protection from a non-consensual diminution of his or her interests. 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.

Even without partition and sale, the levy and execution upon a judgment debtor's interest in real property held as tenants by the entireties, which is not prohibited by *Jimenez*, is a valuable remedy in your collection practice. New Jersey law gives priority to judgment creditors that pursue collection and levy on real and personal property. Moreover, 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. To be protected in the event of a bankruptcy filing, the creditor must levy.

The Appellate Division's Effect on Bankruptcy Proceedings

While the *Jimenez* decision affects collection law, its effect on bankruptcy law is minimal. Filing a petition for relief under the Bankruptcy Code does not sever a tenancy by the entirety. *In re Brannon*, 476 F.3d 170, 176 (3d Cir. 2007). A debtor's undivided interest in tenancy by the entirety property becomes property of the bankruptcy estate. *Id.*, at 174. The question then becomes whether a debtor may exempt entireties property and, if not, whether a trustee may compel a forced sale under Bankruptcy Code § 363(h).

Bankruptcy Code § 522(b)(3)(B) exempts from property of the estate "any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety ... to the extent that such interest as a tenant by the entirety ... is exempt from process under applicable nonbankruptcy law." Pre-*Jimenez*, entireties property in New Jersey was not exempt under this section. *In re Tarquinio*, 2017 WL 5707538 at *6 (Bankr. D.N.J. November 27, 2017). Following *Jimenez*, property held as a tenant by the entirety is exempt from partition and sale, but not from process, that is not from levy and execution. Accordingly, entireties property in New Jersey is still not exempt under § 522(b)(3)(B).

Since a debtor's interest in entireties property is not exempt and remains property of the estate, a trustee may compel a forced partition and sale of such property under Bankruptcy Code § 363(h),

notwithstanding *N.J.S.A.* 46:3-17.4. Section 363(h) provides, in relevant part, “the trustee may sell both the estate’s interest ... and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a ... tenant by the entirety, only if (1) partition in kind of such property among the estate and such co-owners is impracticable; (2) sale of the estate’s undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners; [and] (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners ...” The considerations relevant to a 363(h) sale are similar to the equitable factors set forth in *Newman v. Chase*. Section 363(h) preempts state laws that would erect a barrier to the trustee’s sale. *See e.g., In re Youmans*, 117 B.R. 113, 118-19 (Bankr. D.N.J. 1990); *In re Murray*, 900 F.3d 53, 61-62 (2d Cir. 2018); *In re Shaw*, 2010 WL 128383, at *17 (Bankr. N.D. W. Va. January 11, 2010) (collecting citations). Accordingly, §363(h) sales may still go forward following *Jimenez v. Jimenez*.