

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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THE GREENPOINT SAVINGS BANK,

Plaintiff,

- against -

STEFANOS PAPOUTSAKIS, VARDITSA
PAPOUTSAKIS, et al.,

Defendants.

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Index No. 24907/02

REPORT OF REFEREE

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In this mortgage foreclosure action, following the sale pursuant to the final judgment, there remained a surplus of \$22,372.76. Pursuant to § 1361 of the Real Property Actions and Proceedings Law, the undersigned was appointed by Supreme Court, Queens County, as referee to ascertain and report any and all claims to the surplus money. The report of my findings is herewith respectfully submitted.

The property sold was a one-family house formerly owned by the defendants-mortgagors, Stefanos Papoutsakis (husband) and Varditsa Papoutsakis (wife) as tenants by the entirety. They claim the entire surplus as owners of the equity of redemption. The other claimant to the surplus is the State of New York, which had docketed a tax warrant and judgment in the Office of the Clerk of

Queens County in the amount of \$83,235 with interest continuing, against the husband.

The claim of the defendants mortgagors to the entire surplus rests on the ground in that title to the property had vested in them as tenants in the entirety and the surplus of the proceeds of a foreclosure sale continue to be held in such a tenancy since those proceeds are constructively real property subject to the right of survivorship in such a tenancy of both husband and wife and cannot be divided.

The State, on the other hand, contends that the surplus is personal property of both husband and wife and while it concedes that the wife is owner of half the proceeds not subject to the State's judgment, the other half of the surplus belongs to the husband and is subject to its judgment and claims priority to his half as judgment creditor.

As authority for their position, defendant mortgagors cite a 1961 Appellate Division, Second Department decision, *First Federal Savings & Loan Ass'n v. Lewis*, 14 A.D.2d 150, 228 N.Y. Supp. 2d 857, which holds that where the realty held by husband and wife as tenants by the entirety is sold in a foreclosure auction, the surplus is "constructively real property held in entirety by both spouses." Thus, defendants argue, as such, the whole surplus belongs to both and is inseverable and a judgment creditor can have no claim against a husband's equity in the surplus. Defendants-mortgagors further contend when real property is held by the "entirety", the ownership is in both as if they are one person, (*Matter of Violi*, 65 N.Y.2d 550), and it must follow that the judgment creditor, the State, can have no claim on the surplus since it is owned by both and is indivisible.

The State, on the other hand, contends that while the property might have been held by husband and wife as tenants by the entirety before the entry of the judgment of foreclosure, the judgment wipes out the tenancy and whatever surplus remains becomes personal property held by both after sale and as such the husband's share is divisible from the wife's and is thus subject to its

judgment. The Appellate Division, Third Department in 1977, in *National Bank of Norwich v. Rickard*, (57 A.D.2d 156, 393 N.Y.S.2d 801), recognizing that there are “many decisions giving inconsistent treatment to this issue” held that the surplus monies remaining following a sale of real property formerly held as a tenancy by the entirety becomes personal property of husband and wife as tenants in common, citing *Mojeski v. Siegmann*, (57 Misc.2d 690, 386 N.Y.S.2d 609, Sup. Ct. Suffolk 1976). The Mojeski decision written by Hon. John F. Scileppi, Certificated Justice of the Supreme Court, Suffolk County, retired Judge of the Court of Appeals, traced the history of the inconsistencies of interpretation in the Courts, and resolved the question in favor of the view that such surplus money is personalty. In his opinion, Judge Scileppi cited the reasoning in the 1963 Court of Appeals decision in *Hawthorne v. Hawthorne*, 13 N.Y.2d 82 (which held that there can be no holding by the entirety in personalty)¹, and determined that the decision on the issue in *First Federal Savings & Loan v. Lewis* (supra), and those cases holding to the contrary, was based on dicta and as such were not binding. The Mojeski decision was affirmed by the Appellate Division, Second Department, (57 A.D.2d 549, 386 N.Y.S.2d 1021), and is authority in this department.

In common usage, the word “tenancy” as used in “tenancy by the entirety”, “tenancy in common”, “joint tenancy”, “landlord and tenant”, “month to month tenant”, all relate to an interest in real property, rather than an interest in personal property or former interest in real property such as the situation as taken by the mortgagors-defendants. Confirmation of my views in this case are the words of the Court in *National Bank of Norwich* (supra), “As a starting point, we are confronted with the generally accepted principle that estates by the entirety are recognized only in real property. (*Matter of McKelway*, 221 N.Y. 15, 116 N.E. 348).”

¹ Of interest is that Justice Scileppi in his opinion recognized the authority of the Court of Appeals in *Hawthorne v. Hawthorne* (supra) for his determination. As associate judge of the Court of Appeals, Judge Scileppi dissented from the majority’s determination in that appeal.

Thus, I must hold that the half share of the husband, being personal property, is subject to execution by the State's judgment against his share.

The matter doesn't end there, however. The husband also claims the benefits of the "Homestead Exemption" pursuant to CPLR § 5206 in that the first \$10,000 of the surplus remaining after the judgment sale of his home is exempt from creditors such as the State. However, the law is quite clear that the Homestead Exemption is only applicable to proceedings involving the enforcement of money judgments and *not* to other proceedings and is not applicable to a mortgage foreclosure action. (*Citibank, N.A. v. Cambel*, 119 A.D.2d 720, 501 N.Y.S.2d 133 (2nd Dept. 1986)). Directly in point is *First Fed. Sav. & Loan Assn. v. Brown*, 78 A.D. 119, 434 N.Y.S.2d 306 (4th Dept. 1980), where the Court held that the Homestead Exemption under CPLR 5206 exempts only real property from application to the satisfaction of money judgments and that inasmuch as the surplus monies resulting from a foreclosure sale becomes personal property, CPLR 5206 has no application to such funds. Therefore, none of Stefanos Papoutsakis' one-half share can be claimed as exempt from execution.

Accordingly, the surplus monies are to be distributed after the award of the referee fee; one-half of the same is payable to VARDITSA PAPOUTSAKIS; the other half payable to the STATE OF NEW YORK, which is to give credit for the same on account of its judgment against STEFANOS PAPOUTSAKIS.

Dated: Rego Park, New York
August 2, 2004

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