

Judgment creditors in the house: creditor rights in solely and jointly owned residences

A judgment can be satisfied by different types of property, including the judgment debtor's home, but a special proceeding is required. If it's owned together with a spouse, the judgment creditor will only take the property if the non-debtor spouse predeceases the judgment debtor. But if there's rental property (like additional units upstairs), then the judgment creditor can collect rents while waiting to take ownership.

Investment properties

First, before we get to the debtor's residence, let's talk about investment properties, which are (relatively) much easier. Under CPLR 5236, judgment enforcement attorneys deliver a property execution to the sheriff, who serves it on the judgment debtor. The sheriff schedules an auction and the judgment creditor pays to advertise the auction. (In New York City, the sheriff's fee is currently \$350 and the advertising costs approximately \$3,000.) No further court proceedings are required. Once the gavel bangs, the money goes to the judgment creditor.

The debtor's residence

As for the debtor's home, under New York's "homestead exemption," the first \$150,000 of value of a property in the NYC area, and \$75,000 to \$125,000 upstate, is protected from creditors, including judgment creditors. (CPLR 5206.) Of course, a weekend house upstate is not the residence and is not subject to the homestead exemption. See *In re Galcia's Est.*, 59 Misc. 2d 511, 514 (Sur. Ct., N.Y. Cty. 1969). We are talking about primary residences.

While this baseline is relatively low, the exemption also comes with the requirement for the judgment creditor to commence a new special proceeding in order to execute on the home. (CPLR 5206(e).) In other words, the judgment creditor and their lawyers will need to launch a new court case to take the property (unlike an investment property, where we can directly execute without court involvement). See, e.g., *Fisch v. Aiken*, 252 A.D.2d 556 (2d Dep't 1998); *Smolka Co. Inc. v. Brown*, 18 Misc. 3d 1108(A) (Sup. Ct., Kings Cty. 2007).

Property owned with a spouse

In New York, real property (i.e., houses, apartments, etc.) can be owned by two spouses "in the entireties." This is a fancy lawyer's phrase conveying the legal magic that both spouses entirely own the property. When one spouse dies, the surviving spouse continues to own the entire property.

The creditor can execute on the judgment debtor's interest in the home. However, the creditor doesn't actually get the ownership interest until and unless the non-debtor spouse pre-deceases the debtor. See *Sklar v. Gestetner*, 190 A.D.3d 750, 752 (2d Dep't 2021) ("the purchaser would have acquired only a tenancy in common subject to [the non-debtor's] survivorship rights"). So, if the debtor dies first, the entire property goes to the non-debtor spouse, and the creditor gets nothing. Certainly, a morbid death watch.... See *V.R.W., Inc. v. Klein*, 68 N.Y.2d 560, 565 (1986).

There's another important lesson to note in the Sklar case. The house was jointly owned by Alan and his wife Malka and the parties had stipulated that the value of the house was \$830,000. But the court found that the judgment creditor had not presented "evidence establishing the value of Alan's interest in the marital home". It's hard to understand why the value wasn't simply 50% of \$830,000, but the appellate court affirmed. Practitioners, take note that the mere stipulation was not enough.

Multi-unit properties

What if the debtor owns a multi-unit property? There seems to be some debate among the courts, but the general rule is that the homestead exemption applies to the entire property. See *In re Rupp*, 415 B.R. 72 (Bankr. W.D.N.Y. 2008); *In re Vizentinis*, 175 B.R. 824 (Bankr. E.D.N.Y. 1994).

As a result, we have to commence a special proceeding to reach the multi-unit property. In practice, however, the homestead exemption should not be a bar, given that the exempted amounts are so low, and a multi-unit property is likely to be worth a whole lot more.

Capturing tenants' rents

If there's a multi-unit property that's jointly owned, the creditor doesn't have to wait for the non-debtor spouse to die to enjoy the rental income. Instead, after executing on the property interest, the creditor shares in the rents (and expenses). See *BNY Fin. Corp. v. Moran*, 154 Misc. 2d 435, 437 (Sup. Ct., N.Y. Cty. 1992); *In re Waxman*, 128 B.R. 49, 51 (Bankr. E.D.N.Y. 1991); *In re Weiss*, 4 B.R. 327, 330 (Bankr. S.D.N.Y. 1980).

Can the judgment creditor obtain an order directing tenants to pay their rents directly to the judgment creditor, without a successful property execution first? Some fifty years ago, New York's highest court said no. *Glassman v. Hyder*, 23 N.Y.2d 354 (1968). But modern practice suggests yes. See, e.g., *First Am. Title Ins. Co. v. Cohen*, 163 A.D.3d 814 (1st Dep't 2018). This topic will be covered in a future blog post.

Conclusion

Planes, trains, automobiles, sure, but homes and other real property too can be a source of recovery for a judgment creditor, although the road to get there is often trickier.

(For more information on judgment enforcement and asset recovery, contact Enforcement@PollockCohen.com.)