

**Cavalry Portfolio Servs., LLC v Douilly**

2008 NY Slip Op 31429(U)

May 9, 2008

Supreme Court, Nassau County

Docket Number: 0315-08/

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

CAVALRY PORTFOLIO SERVICES, LLC, as  
assignee of, CAVALRY INVESTMENTS, LLC,  
as assignee of, PNC,

Petitioner,

- against -

SYLVAIN DOUILLY, ANGEMARIE  
MARCELLUS, NORWEST MORTGAGE, INC.  
n/k/a GMAC MORTGAGE CORPORATION and  
SECRETARY OF HOUSING and URBAN  
DEVELOPMENT,

Respondents.

TRIAL / IAS PART 32  
NASSAU COUNTY

Index No. 315/08

Motion Sequence No. 1

The following papers having been read on this motion:

Notice of Petition, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	_____
Replying Affidavits .....	_____
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The petitioner seeks judgment pursuant to CPLR 5206 (e) compelling and directing the sale of real property owned by the respondents Sylvain Douilly and Angemarie Marcellus as described in the petition. The petitioner, by its attorney, states, in the verified petition dated December 24, 2007, on May 5, 2004, the petitioner brought an action against Douilly to recover \$24,371.56. The attorney for the petitioner states on October 27, 2004, a judgment was duly entered in that action in favor of the petitioner for \$24,371.56. The attorney for the petitioner asserts that judgment was duly filed and

docketed in the Office of the Clerk of the County of Nassau on October 27, 2004, and a balance of \$31,793.88, to wit the original judgment plus interest remains unpaid.

The attorney for the petitioner avers all of the petitioner's attempts to collect the amount due on the judgment previously obtained have proven fruitless. The attorney for the petitioner maintains the respondents Sylvain Douilly and Angemarie Marcellus are the current owners of real property described as 64 Dawes Avenue, Roosevelt, New York 11575, to wit Section 55, Block 335, Lot 51-52 in the County of Nassau, exceeding \$50,000.00 in value with an assessed value of approximately \$350,000.00 based upon information and belief, which is homestead exempt from the application to the satisfaction of a money judgment. The attorney for the petitioner points out Norwest Mortgage Inc. N/k/a GMAC Mortgage Corporation currently holds a mortgage on the subject real property which was duly recorded in the Office of the Clerk of the County of Nassau on August 1, 1996, and the Secretary of Housing and Urban Development currently holds a mortgage on it duly recorded in the Office of the Clerk of the County of Nassau on June 21, 2002, and both dates precede the recording of the petitioner's judgment. The attorney for the petitioner concedes should the petitioner's instant application for relief be granted by the Court the interests of the respondents Norwest Mortgage Inc. N/k/a GMAC Mortgage Corporation and the Secretary of Housing and Urban Development in the subject real property would be adversely affected.

The attorney for Ange Marie Marie Marcellus, sued incorrectly here as the

[\* 3 ]

respondent Angemarie Marcellus, states, in an opposing affirmation dated March 5, 2008, Marcellus and Douilly are the current owners of the subject property, however, as the affidavit dated March 5, 2008, by Marcellus makes clear, although Marcellus remains legally married to Douilly, no real marriage exists. The attorney for Ange Marie Marie Marcellus notes Douilly abandoned the family in May 2005, when Douilly awoke one morning, left the marital residence, and never returned without leaving a forwarding address. The attorney for Ange Marie Marie Marcellus points out the family does not know where Douilly resides, and Douilly does not support the family, and currently owes Marcellus over \$17,000.00 in child support arrears for there are two unsatisfied judgments before Douilly left. The attorney for Ange Marie Marie Marcellus points to Marcellus' child support problems with another relationship, and additional details about Douilly's posture as a judgment debtor. The attorney for Ange Marie Marie Marcellus asserts the subject matter of the instant claim is consumer credit where Marcellus was not named in the underlying action, and the debt was personal to Douilly. The attorney for Ange Marie Marie Marcellus never filed a joint consumer credit application with Douilly, the debt was not a marital nor family debt and neither Marcellus nor her son benefitted from it, so the family residence should not be jeopardized in order to pay off Douilly's personal consumer debts. The attorney for Ange Marie Marie Marcellus submits, even if Douilly's debts are legitimate, the action proposed by the petitioner, to wit seizing and selling Marcellus' long-time home, is disproportionate to the alleged harm suffered by the

petitioner. The attorney for Ange Marie Marie Marcellus maintains Marcellus is a single mother, currently earning about \$34,000.00 without support from Douilly, and no other source of income. The attorney for Ange Marie Marie Marcellus contends the result, as proposed by the petitioner, would be particularly egregious since the subject premises is the only home Marcellus has, and the mother and 12 year old son have no place to go. The attorney for Ange Marie Marie Marcellus argues justice and basic fairness dictate the Court fashion a remedy permitting Marcellus to retain this home.

The Court has carefully reviewed and considered all of the papers submitted on this verified petition. CPLR 5206 (e) provides:

A judgment creditor may commence a special proceeding in the county in which the homestead is located against the judgment debtor for the sale, by a sheriff or receiver, of a homestead exceeding fifty thousand dollars in value. The court may direct that the notice of petition be served upon any other person. The court, if it directs such a sale, shall so marshal the proceeds of the sale that the right and interest of each person in the proceeds shall correspond as nearly as may be to his right and interest in the property sold. Money, not exceeding fifty thousand dollars, paid to a judgment debtor, as representing his interest in the proceeds, is exempt for one year after the payment, unless, before the expiration of the year, he acquires an exempt homestead, in which case, the exemption ceases with respect to so much of the money as was not expended for the purchase of that property; and the exemption of the property so acquired extends to every debt against which the property sold was exempt. Where the exemption of property sold as prescribed in this subdivision has been continued after the judgment debtor's death, or where he dies after the sale and before payment to him of his portion of the proceeds of the sale, the court may direct that portion of the proceeds which represents his interest be invested for the benefit of the person or persons entitled to the benefit of the exemption, or be otherwise disposed of as justice requires.

The Appellate Division has held the Court abused its discretion in directing the


immediate sale of a person's home, and stated "[s]equestration and sale of defendant's home is a drastic remedy which should be directed only when it is absolutely necessary and appropriate [citation omitted]" (*Sojka v. Sojka*, 151 A.D.2d 1038, 542 N.Y.S.2d 456 [4<sup>th</sup> Dept.,1989]). This Court concludes the petitioner has not satisfied the burden of making a prima facie evidentiary showing warranting the relief sought. The personal consumer debt action brought by the petitioner to recover \$24,371.56 against Douilly only is not shown to be related to the estranged spouse Marcellus who, it appears, was forsaken by Douilly, who owes child support and other possible funds to Marcellus.

Accordingly, the petition is dismissed.

So ordered.

Dated: **May 9, 2008**

ENTER:

  
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 J. S. ANTONIO L. BRANDVEIN

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

**ENTERED**  
 MAY 14 2008  
 NASSAU COUNTY  
 COUNTY CLERK'S OFFICE