

<b>Matter of Stern v Hirsch</b>
2009 NY Slip Op 32552(U)
October 22, 2009
Supreme Court, Nassau County
Docket Number: 12473/09
Judge: Karen V. Murphy
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 20 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

\_\_\_\_\_x

**In the Matter of the Arbitration of Certain  
Differences between,**

**Index No. 12473/09**

**HEATHER STERN,**

**Motion Submitted: 9/25/09  
Motion Sequence: 001, 002**

**Plaintiff/Petitioner,**

**-against-**

**RANDOLPH HIRSCH, JP MORGAN CHASE  
BANK, N.A., AMY HIRSCH, ANTHONY  
LoPRESTI, JOHN BIORDI, JOHN DOE 1-10,**

**Defendants/Respondents.**

\_\_\_\_\_x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....XX
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....X
- Defendant's/Respondent's.....

Motion by the attorneys for the petitioner for an order directing the Sheriff of Nassau County to publically notice and sell the real property located at 10 Barberry Court, Massapequa, New York to satisfy the judgment entered on April 24, 2003 in the amount of \$140,048.23 with interest due thereon by Heather Stern against Randolph Hirsch is denied. Cross-motion by the attorneys for respondent Randolph Hirsch for an order pursuant to CPLR § 1012(a)(2)(3), or in the alternative, pursuant to CPLR § 1013 granting Cheryl Hirsch leave to intervene, and CPLR § 5240 restraining Stern from selling or executing upon the

Marital Residence, until it becomes vacant, is sold or until Cheryl Hirsch predeceases Randolph Hirsch is granted.

On April 24, 2003 petitioner Heather Stern (Stern) entered a judgment against respondent Randolph Hirsch (Hirsch) in the sum of \$140,048.23. Hirsch and Stern were co-owners in a soft drink delivery business. At the time of the entry of judgment and up to the present time Hirsch has been the owner of residential real property located at 10 Barberry Court, Massapequa, N.Y. (the property) with his wife Cheryl Hirsch as tenants by the entirety.

Stein's judgment attaches solely to Randolph Hirsch's undivided one-half interest in the marital premises and remains subject to Cheryl Hirsch's rights of survivorship and exclusive occupancy. CPLR § 5206(a) provides that a homestead is protected by a \$50,000 exception in "value above liens and encumbrances." The exemption protects the first \$50,000 of equity in a homestead against collection by judgment creditors. The judgment creditor wants this Court to direct the Sheriff of Nassau County to sell the marital residence, distribute the \$50,000 homestead exemption to Hirsch and turn over to petitioner, Stern, so much of the excess as is available to satisfy the balance due on the judgment.

Any judicial sale, especially involving the judgment debtor's residence, is a tragic event. Debtors are often divested of their only asset to satisfy a previous obligation. In many instances, the family home is sold for substantially less than the debtor's equity in it. Even the threat of a sale of a residence places enormous pressure on the debtor. This is particularly unfortunate where there are less drastic means by which the creditor may enforce here judgment such as an income execution (CPLR § 5231). See *Guardian Loan Company v. Early*, 47 N.Y.2d 515, 518, 392 N.E.2d 1240, 419 N.Y.S.2d 56 [1979]). CPLR § 5240 is used to protect judgment debtors from the often harsh results of lawful enforcement procedures. The statute provides: "The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure. Section 3104 is applicable to procedures under this article." CPLR § 5240 grants the courts broad discretionary power to control and regulate the enforcement of a money judgment under article 52 to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." See *Sanders v. Manufacturers Hanover Trust Company*, 229 A.D.2d 544, 644 N.Y.S.2d 1017 [2d Dept., 1996]).

The Court in *In re Waxman*, 128 B.R. 49, 51 (Bankr. E.D.N.Y. 1991) stated that under CPLR § 5240:

“Pursuant to New York Real Property Law as it exists today, a party’s interest in a tenancy by the entirety has a dubious and uncertain value. While the interest of a tenancy by the entirety is subject to a judgment lien and may be sold upon levy of execution under New York Law, practicalities of such action are dubious, as a creditor cannot force partition and any purchaser of the Debtor’s interest becomes a tenant in common with the other tenant by the entirety, subject to the latter’s right of survivorship; additionally, the purchaser steps into the shoes of the tenant whose interest was purchased and is limited to a right to share rents and profits as well as use and occupancy until the tenancy by the entirety is terminated by death, divorce, or in some other way.”

The Nassau County Supreme Court has used CPLR § 5240 to limit executions on tenancies by the entirety until the house is sold, the wife predeceases her husband, or at such other time as the judgment creditor may be able to show a sufficient change of circumstances warranting relief. See *Seyfarth v. Bi-County Electric Corp.*, 73 Misc.2d 363, 341 N.Y.S.2d 53 (Sup. Ct. Nassau Co., 1973); *Hammond v. Econo-Car of the North Shore, Inc.*, 71 Misc.2d 546, 336 N.Y.S.2d 493 (Sup. Ct., Nassau Co., 1972); and *Gilchrist v. Commercial Credit Corp.*, 66 Misc.2d 791, 322 N.Y.S.2d 200 (Sup. Ct., Nassau Co. 1971); *Matter of Sand*, 213 N.Y.L.J. 58, pg. 29, col. 4, Sup. Ct. Nassau Co. 3/28/05; compare *Matter of Kantor v. Mesibov*, 14 Misc.3d 1228(A), 836 N.Y.S.2d 493, 2007 WL415981.

In the within action the wife had limited resources. The marital residence has been occupied by the wife for over 30 years. Two children live in the house. Respondent, Randolph Stern, is 56 years old and suffers from mitral valve prolapse, Barrett’s syndrome and the onset of diabetes. Randolph Hirsch has a life expectancy of 22.5 years. Cheryl Hirsch has a life expectancy of 30.8 years (Life Table for Males: United States 1997 and Table 3, Life Table for Females: United States 1997). The actual analysis demonstrates that Randolph Hirsch’s life expectancy is shorter than Cheryl Hirsch’s life expectancy. Stern does not refute that the value of Randolph Hirsch’s interest in the marital residence is reduced.

Randolph Hirsch and Cheryl Hirsch share the marital residence with their two (2) children, Sarah (18 years of age) and Matthew (13 years of age). Both children suffer from Tourette’s syndrome, Attention Deficit Disorder and Obsessive Compulsive Disorder. The medical condition provides another reason that a stable home environment is necessary. Under the terms of the mortgage on the marital residence a sheriff’s sale of Randolph’s interest in the marital residence would provide the lien holder with the right to demand immediate payment in full of the mortgage and to foreclose in the event Cheryl Hirsch failed to pay in full even though part of Chase’s lien may be subordinate to the petitioner’s

judgment. In the reargument motion in *Kantor v. Mesibov, supra*, relied upon by the petitioner, the judgment debtor attempted to argue that a mortgage on the premises contained a provision that gave the mortgagee the right to declare the entire unpaid balance due and payable if any part of the property is sold or transferred without the bank's prior written consent. However, the trial court refused to consider this "new evidence" in the motion to reargue. In *Kantor, supra*, the petitioner did not provide the Court with a copy of either the mortgage note or the mortgage. In the within action the respondents have timely provided copies of the loan documents that demonstrate that a sale of Randolph's interest might very well result in the mortgagee demanding full payment, resulting in his wife's interest in the property being foreclosed. The judgment has been a lien on the property since April, 2003. The petitioner has done nothing since then to collect the judgment by means of an income execution or wage garnishment. In *Seyfarth, supra*, the Court stated:

"The fundamental point is that the judgment creditor is not harmed, but, in fact, is fully protected by relying on its lien, and deferring the execution on the real property which serves it no legitimate practical purpose. There is no practical possibility of a commercial creditor, or sheriff sale speculator, getting immediate co-possession of a home with a woman and her child. And, in the long run, if the husband should outlive the wife and his survivorship interest comes into fruition by the operation of law, the creditor may then enforce its lien against the entire property." 73 Misc.2d at 365-366, 341 N.Y.S.2d at 535.

"While the 5240 remedy must be used sparingly, its purpose is to protect persons from unnecessarily harsh use of legal procedures. Perhaps nowhere is this more pertinent than in the area of unredeemable Sheriff's sales of residential property." 73 Misc.2d at 365-366, 341 N.Y.S.2d at 535 (citations omitted).

The sale of the premises would serve "no legitimate practical purpose" and would undermine the basic tranquility of spousal ownership.

In the event this Court fails to grant petitioner's request for a sale of Hirsch's interest in the property, she asks for a hearing on the following issues:

Whether Chase had knowledge of or should have had knowledge of the petitioner's judgment lien; the value of Hirsch's interest in the property; Hirsch's physical condition and life expectancy; whether the family will be rendered homeless; and any estrangement between husband and wife. A hearing is not necessary. Petitioner's judgment lien is subordinate to at least a portion of Chase's mortgage by virtue of the doctrine of equitable subrogation. The

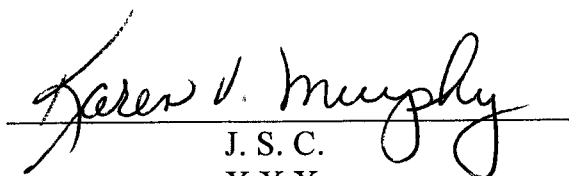
proceeds from the Chase mortgage were used to satisfy two pre-existing mortgage liens on the premises, at least one of which pre-dates and is superior to petitioner's judgment lien. Reference is made to: Citicorp Mortgage, Inc. mortgage in the principal amount of \$169,000 dated April 22, 1996 and recorded May 8, 1996; and Commerce Bank, N.A. mortgage in the principal amount of \$100,000 dated April 18, 2004 and recorded on April 21, 2004. Out of the proceeds of the Chase mortgage, \$146,280 was paid to CitiMortgage, Inc. f/k/a Citicorp Mortgage, Inc., and \$33,696 was paid to Commerce Bank, N.A. at closing, satisfying and paying off both of said mortgages. The doctrine of equitable subrogation is well established. It has been applied in situations, like the one at hand, where the funds of a mortgagee (in this case Chase) are used to satisfy the lien of an existing, known encumbrance (in this case Citicorp Mortgage, Inc.'s mortgage), when another lien (in this case petitioner's judgment) on the premises exists that is senior to the mortgagee's, but junior to the one satisfied with mortgagee's funds. See *Elwood v. Hoffman*, 61 A.D.3d 1073, 876 N.Y.S.2d 538 (3d Dept., 2009); *King v. Pelkofski*, 20 N.Y.2d 326, 229 N.E.2d 435, 282 N.Y.S.2d 75 [1967]). Chase also maintains an equitable mortgage interest in the property that is superior to Petitioner's judgment lien, at least to the extent of the \$146,280 that was paid to CitiMortgage, Inc. f/k/a Citicorp Mortgage, Inc., whose mortgage interest in the Premises pre-dated and was superior to the petitioner's judgment lien. Hirsch's physical condition and life expectancy have been set forth in the submissions to the Court and are not in dispute. Although the family might not be rendered "homeless" by a sheriff's sale, this is not the benchmark to determine whether the innocent spouse and two children should be evicted from the house they lived in for almost 20 years. Moreover, in *Kantor v. Mesibov*, *supra* relied upon by the petitioner, the judgment debtor and his wife had sufficient assets and income to pay real property taxes on the property in excess of \$38,000 per year and mortgage payments in excess of \$150,000.00 per year. The property was a large single family home located on 6.7 acres of property. The fair market value of the Mesibov property exceeded \$3 million. The Hirsch house was appraised at \$390,000 as of August 7, 2009. According to their 2007 U.S. income tax return the Hirsches' taxable income was \$47,196, the adjusted gross income \$90,143. There is not one iota of evidence before this Court of any estrangement between the husband and wife. The issues that petitioner assert require a hearing are either baseless as a matter of law, putative, or a canard to take attention away from the petitioner's failure to demonstrate the need for a sheriff's sale of the marital residence. See *Seyfarth v. Bi-County Electric Corp.*, *supra*; *Hammond v. Econo-Car of the North Shore, Inc.*, 71 Misc.2d 546, 336 N.Y.S.2d 493 (Sup. Ct., Nassau Co., 1972); and *Gilchrist v. Commercial Credit Corp.*, 66 Misc.2d 791, 322 N.Y.S.2d 200 (Sup. Ct., Nassau Co. 1971); *Matter of Sand*, 213 N.Y.L.J. 58, pg. 29, col. 4, Sup. Ct. Nassau Co. 3/28/05.

Pursuant to CPLR § 5240 the petitioner is restrained from selling or executing on the real property located at 10 Barberry Court, Massapequa, New York until it becomes vacant, is sold or until Cheryl Hirsch predeceases Randolph Hirsch.

This decision is the order of the Court and terminates all proceedings under Index No. 12473/09.

The foregoing constitutes the Order of this Court.

Dated: October 22, 2009  
Mineola, N.Y.



J. S. C.  
XXX

**ENTERED**

OCT 27 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**