

Matias v Hymes

2014 NY Slip Op 32876(U)

June 25, 2014

Sup Ct, Westchester County

Docket Number: 51299/2011

Judge: James W. Hubert

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR §5513[a]), you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
JEFFREY MATIAS and ROBERT J. FALLER JR.,

Plaintiffs,

Index No. 51299/2011

DECISION AND ORDER

-against-

KEVIN HYMES also known as KEVIN HYMOWITZ,
ARMONK HOLDINGS, INC. et al.,

Defendants.

-----X
Hubert, A.J.S.C.

Before the Court is the motion by Lisa D'Alessio to intervene in the above captioned matter and obtain an order pursuant to CPLR §§ 5206 and 5240 staying the sale of the property known as 3 Evergreen Row, Armonk, New York (the premises). The plaintiff/judgment creditors, Matias and Faller, oppose by Opposing Affirmation. The intervenor D'Alessio replies by Memorandum of Law.

The plaintiffs are judgment creditors against the judgment debtor Kevin Hymes, a/k/a Kevin Hymowitz ((Himes). Ms. D'Alessio (the Intervenor) is the spouse of the defendant Kevin Hymes. The plaintiffs' status as judgment creditors arises from a judgment of the Supreme Court (Colabella, J) entered against Hymes in the amount of \$345,835.69, on or about April 18, 2012. D'Alessio is not a judgment debtor.

There is a lengthy history to this case, which the court will not endeavor to reconstruct in detail. The money judgment was the result of a law suit brought by the plaintiffs against Hymes

arising from a larceny, and mortgage fraud, committed by the defendant Hymes against the plaintiffs.¹ During the pendency of the criminal case, the plaintiffs obtained the judgment in question. Hymes subsequently pleaded guilty to the larceny, and was incarcerated. The judgment is presently unsatisfied.

Accordingly, the plaintiffs sought to sell the defendant's house in an effort to satisfy their judgment. In due course, Matias and Faller obtained an order of the Supreme Court permitting the plaintiffs to levy execution on the premises in question. A sheriff's sale was noticed for October 17, 2013,² however the Intervenor filed the instant application and the sale was stayed pending resolution.

D'Alessio seeks to intervene under the so-called "Homestead Exemption" codified in CPLR § 5206 (a). D'Alessio, as spouse of the defendant Hymes, claims the house is her homestead, and as such may not be sold to satisfy plaintiffs' money judgment.

In order for Ms. D'Alessio to prevail under CPLR § 5206 (a), it must be shown that the premises is indeed her homestead, i.e., that she "... own[s] and occupie[s] [the premises] as a principle residence . . . *Id.* The plaintiffs counter that she does not meet either requirement.

Annexed to the plaintiffs' Opposing Affirmation are copies of two deeds. The first is a deed dated December 1, 2005 (recorded 2/24/06), from Margaret L. Rao (seller) purporting to convey the subject premises to Kevin C. Hymowitz (the defendant) and Lisa D'Alessio (the Intervenor) as "Husband and Wife." Opposition Affirmation at Exhibit 1. The second is a deed

¹ According to D'Alessio, Hymes is incarcerated on federal mortgage conspiracy charges. Presumably this overlaps with his state conviction.

² As averred by D'Alessio. Neither the order permitting levy or copy of the notice of sheriff's sale are annexed to the papers filed in the instant application.

dated March 5, 2008 (recorded May 21, 2008) from Kevin C. Hymowitz n/k/a Kevin C. Hymes (the defendant) and Lisa B. D'Alessio n/k/a Lisa B. Hymes (the Intervenor) purporting to convey the subject premise to Kevin C. Hymes (the defendant). Opposition Affirmation at Exhibit 5.

Thus, on the face of these two exhibits, at all times relevant to the instant application, Ms.

D'Alessio was not, and is not, an owner of the subject premises. While much effort is expended to raise a factual question as to whether the premises might well be her principle residence, under the plain language of CPLR § 5206 (a), D'Alessio cannot qualify under the homestead exemption because she cannot (and does not) show, ownership of the premises.

Nowhere in the Intervenor's moving papers is this issue of ownership addressed.

Throughout her pleadings, Ms. D'Alessio alleges fraudulent conveyances, without her knowledge, by her defendant husband as to the various mortgages encumbering the premises.

She disclaims financial obligation under the promissory notes that accompany the mortgages for the same reason. However, she does not claim fraud in the execution of the two deeds.

Interestingly the signatures on the March 5, 2008 deed are accompanied by a Notary attestation witnessing the execution of the deed by Hymes and D'Alessio in the presence of the Notary.

Case law suggests that Ms. D'Alessio, as a non-judgment debtor spouse, quite possibly could assert the home owner exemption if she were able to demonstrate that the home was her principle residence and the deed was in the form of tenancy by the entirety. See, *Hammond v. Econo-Car of N. Shore*, 71 Misc.2d 546, 336 N.Y.S.2d 493 (S.Ct. Nassau Cnty. 1972); *Putnam County Nat'l Bk. v. Pryschlak*, 226 A.D.2d 358, 640 N.Y.S.2d 253 (2d Dept., April 1, 1996).

However, the parties have failed to address the issue of whether D'Alessio's non-ownership of the premises defeats her claim.

There are numerous cases addressing the issue of whether an owner has, or has not, “occupied [the premises] as a principle residence,” for purposes of relief under the homestead exemption (*see, e.g., Matter of Galcia*, 59 Misc.2d 511, 299 N.Y.S.2d 723 (N.Y.Sur. 1969)). However, the Court can find no State cases suggesting that the exemption may be claimed by a non-owner spouse. The Court must therefore rely on the plain wording of the statute and accord it full weight.

Courts are clear that the homestead exemption is purely a statutory right to be strictly applied.

The right of a debtor to hold his property . . . free from the claims of creditors is not a common-law right, but rather a statutory one. It is a privilege - a grace or favor dependent on the will of the State and granted on grounds of public policy for a humane and generous purpose . . . Exemption, therefore, is not a vested right . . . *Wyoming County Bank & Trust Co. V. Kiley*, 75 A.D.2d 477, 479, 430 N.Y.S.2d 900 (4th Dep’t 1980).

This view finds support in cases reported under the holdings of the Federal Bankruptcy Courts. *See In re de Kleinman*, 172 B.R. 764 (SDNY 1994)(court assumes for the sake of argument that the Debtor occupies Condo as her principal residence; she does not, however, satisfy the “ownership” test. In common legal parlance, “ownership” means having “good legal title); *In re Martinez*, 392 B.R. 530 (EDNY 2008)(In order to be entitled to a homestead exemption, N.Y. C.P.L.R. § 5206 requires evidence of two things: an ownership interest in real property and residency by the Debtor in that property. N.Y. Real Prop. Law § 290(3) requires ownership of property to be conveyed by written deed and there is no recorded deed in the Debtor's name).

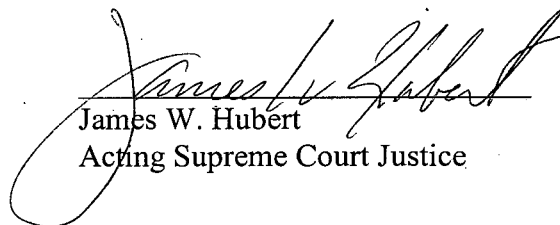
In the instant case, there is no recorded deed in Ms. D’Alessio’s name. The uncontroverted documentary proof leads to the conclusion that the Intervenor D’Alessio is not an

owner of the premises. Accordingly, the application to intervene and stay the sale of the subject premises is denied.

The Court has considered the other arguments raised by the applicant-Intervenor under CPLR § 5240 and finds them to be unavailing. The motion is therefore dismissed . The stay is extinguished by operation of law.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
June 25, 2014



James W. Hubert
Acting Supreme Court Justice

Jeffrey L. Klien, Esq.
Attorney for the Plaintiffs
445 Hamilton Avenue, Suite 405
White Plains, NY 10601

Lisa D'Alessio, Esq.
Pro se
3 Evergreen Row
Armonk, NY 10504