

SCAN

SHORT FORM ORDER

SUPREME COURT-STATE OF NEW YORK
PRESENT:

HON. BRUCE D. ALPERT

Justice

TRIAL/IAS, PART 9

FRANK CASSANO and ANN CASSANO,

Motion Sequence # 3
INDEX NO. 16212/00

Plaintiffs,

MOTION DATE:
October 15, 2001

-against-

DOLORES CASSANO and GREENPOINT
MORTGAGE CORP.

Defendants.

The following papers read on this motion for relief under CPLR 2221:

Notice of Motion	X
Opposing Affirmation	X
Reply Affirmation	X

Upon the foregoing papers it is ordered that this application by defendant, Dolores Cassano, for an order pursuant to CPLR 2221 resettling/rearguing, portions of the Order of this Court dated May 22, 2001 is granted to the extent hereinbelow set forth and in all other respects is denied.

The movant's contention that the Order at issue is internally inconsistent is incorrect. In any event, the following may clarify its terms. The Court held that since Dolores Cassano, a grantee of the subject premises, did not agree to assume the Greenpoint mortgage debt, she is not personally

liable on the note Ann Cassano tendered to Greenpoint Mortgage Corp. (see, G.O.L. §5-705) By parity of reasoning Dolores Cassano bears no personal liability for the mortgage debt or for any deficiency in the event the proceeds realized upon the property's sale are not adequate to satisfy the mortgage.

Nevertheless, when the property is sold in partition, the mortgage debt, since it both encumbers the entire premises and predated Dolores Cassano's acquisition of title, must be paid first out of the proceeds. (see, *Kmetz v DeRonde*, 231 NY 641; *Northeast Savings, F.A. v Bailey*, 143 AD2d 474 [3rd Dept.]; *Matter of Estate of Griffin*, 183 Misc2d 210) The balance remaining after payment of the mortgage would be divided fifty percent (50%) to Dolores Cassano and fifty percent (50%) to Ann Cassano and her husband.

Thus, for example, if the subject property sells for \$750,000, Greenpoint Mortgage Corp., which is owed approximately \$250,000 would be paid and, thereafter, the balance remaining (less applicable closing costs) would be paid fifty percent (50%) to Frank and Ann Cassano and fifty percent (50%) to Dolores Cassano. Conversely, if the property sells and only \$200,000 is realized, then the entire \$200,000 would have to be used to satisfy the Greenpoint mortgage, and Ann Cassano (who signed the note) would have to make up the difference of \$50,000 out of her own personal funds. Dolores Cassano's personal funds would remain insulated, as she was not a signatory on the note.

Were the court to follow the movant's reasoning and the property was sold for \$200,000,

then the entire proceeds would be paid to Greenpoint Mortgage Corp., plaintiff, Ann Cassano, would be obliged to pay the balance of \$50,000 due on the mortgage out of her own personal funds, and would be constrained to pay Dolores an additional \$100,000. In this scenario, it would cost Ann Cassano \$350,000, to sell a \$200,000 house. This would be unjust, unfair and incongruous result.

The applicant's position on point suggests a failure to appreciate the equitable nature of a partition action, an action which is controlled by equitable principles not in conflict with the statutory provisions (see, *Yeshiva University v Edelman*, 16 Misc2d 931, affd 7 AD2d 649 [1st Dept.])

The Order of May 22, 2001 is hereby amended nunc pro tunc to provide as follows:

1. Either party to the action may purchase at the auction sale.
2. The cross-moving defendant is directed to settle an Interlocutory Judgment on Notice based on the Order as amended herein within twenty (20) days of the latter's entry. The proposed Interlocutory Judgment shall include direction, inter alia, to ascertain creditors and provide for the manner of publication of notice of sale and terms of sale.

In all other respects, the Order dated May 22, 2001 shall remain in full force and effect.

DATED: November 26, 2001



ENTERED

NOV 28 2001

NASSAU COUNTY
COUNTY CLERKS OFFICE