

SCAN

MEMORANDUM

SUPREME COURT, COUNTY OF NASSAU, IAS PART 4

CALEDONIA MOBILE PARK LLC, CANANDAIGUA
MOBILE HOME PARK LLC, COUNTRY MEADOWS
MOBILE HOME PARK LLC, EAST AVENUE MOBILE
HOME PARK LLC, EVERGREEN ACRES MOBILE
HOME PARK LLC, FARMINGTON MOBILE HOME
PARK LLC, FOREST LAWN MOBILE HOME
PARK LLC, LAKEVIEW MOBILE HOME PARK LLC,
SALISBURY MOBILE HOME PARK,

Petitioners,

-against-

MICHAEL SHAMAILOV, LANA SHAMAILOV,
FIRST CENTRAL SAVINGS BANK and
BANK OF AMERICA, N.A.,

Respondents.

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Index No. 2287/06
BY: **HON. BRUCE D. ALPERT**

Motion Sequence Nos. 1-2

Motion Date: March 29, 2006

DATED: June 27, 2006

In this special proceeding initiated under CPLR 5206, the petitioners, as a judgment creditors of the respondent, Michael Shamailov, seek to compel the sale of real property to satisfy a portion of an extant judgment.

In response thereto, respondents Shamailov apply for relief under CPLR 5240 based, primarily, on two factors: 1) that the petitioner holds a judgment against only respondent, Michael Shamailov; and 2) that title to the realty at issue in East Hills, New York is held jointly by the Shamailovs who are husband and wife.

As gleaned from a review of the transcript of the deposition of respondent, Michael Shamailov, taken pursuant to CPLR 5224, the Shamailovs reside at their East Hills home together with their nine year old son. It also appears therefrom that the property at issue is encumbered with mortgage debt in excess of \$1,200,000.00. The fair market value of the underlying realty is asserted to be \$1,582,300.00

The original judgment in the sum of \$998,289.26 was entered against respondent, Michael Shamailov, on May 18, 2005, and thereafter docketed in this County on July 13, 2005. That the judgment remains unsatisfied is not in dispute.

In pertinent part the controlling 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." (CPLR 5240)

“In CPLR 5240 the Legislature has created a broad supervisory power in the judiciary to deny, limit, condition, regulate, extend, or modify the use of any enforcement procedure. The establishment of this statute was intended to prevent unreasonable annoyance and abuse in the use of the provisions of article 52 of the CPLR in enforcing judgments (see *Cook v H.R.H. Constr. Corp.*, 32 AD2d 806, 807). ”(*Roosevelt Hardware v Green*, 72 AD2d 261, 264)

“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. (See *Gilchrist v. Commercial Credit Corp.*, 66 Misc 2d 791; *McKinney's Cons. Laws of N. Y.*, Book 7B, CPLR 5236, 1969 Supplementary Practice Commentary; Bloom, *The Trouble With Lawyers*, ch. 5, pp. 95-108 [1st ed., 1968].)” (*Seyfarth v Bi-County Electric Corp.*, 73 Misc 2d 363, 365)

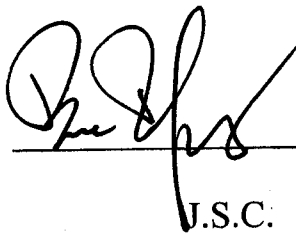
In this regard, the Court notes the “[p]urchaser at an execution sale of a spouse's interest in an estate by the entirety takes subject to the other's spouse's right of survivorship, and where the latter spouse survives the other, such spouse takes the entire property free from the lien of the judgment and the rights of the purchaser...”.(24 NY Jur2d, *Cotenancy and Partition* §99; see also, *In re Rizzo*, 21 B.R. 913)

In light of the extent of mortgage debt, the \$50,000.00 homestead exemption to

which the judgment debtor is entitled and the manner in which title to the property was taken, it is unlikely that the sale contemplated would realize the sums necessary under CPLR 5206.

Accordingly, under the totality of the circumstances, the petitioners' application is denied, the underlying petition is dismissed and the cross-application is granted to the extent that the petitioners are restrained from executing on the interest respondent, Michael Shamailov, has in the property located at 48 Willow Gate East Hills, New York until the house becomes vacant, is sold, Lana Shamailov predeceases her husband or the respondents' minor child(ren) attain(s) the age of majority.

Settle judgment on notice.



J.S.C.
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