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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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CHASE MANHATTAN BANK, N.A.

Plaintiff,

-against-

KENNETH CARNESI, DARIA CARNESI, BANK OF AMERICA NA, MAXIM'S NEW YORK RESTAURANT, INC., BROADWALK REGENCY CORP., CAREER BLAZERS, INC., TRIUMPH PARTS, INC., NEW YORK STATE DEPARTMENT OF TAXATION OF FINANCE, HNR INVESTMENTS N.V., JOHN MITCHELL TRUSTEE, UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE and OB/GYN ASSOCIATES OF L.I., P.C.,

Defendants.

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TRIAL PART: 50

INDEX NO.: 006881/02

MOTION DATE:9-1-06
SUBMIT DATE:9-1-06
SEQ. NUMBER - 006, 007 008 & 009

The following papers have been read on these motions directed to the Report of Referee Stephen G. Frommer, Esq., dated 7-31-06:

Notice of Motion-006, dated 8-14-06..... 1
Memorandum of Law in Support of 006, dated 8-28-06.....2
Affirmation in Opposition, dated 8-24-06..... 3
Notice of Cross Motion-007, dated 6-27-05 [sic](moving aff. 8-23-06).....4
Notice of Cross Motion-008, dated 8-25-06.....5
Notice of Cross Motion-009, dated 8-25-06.....6

Affirmation in Opposition to Cross-Motion of NYS Dept. Of Taxation and Finance, dated 8-31-06.....7
Affirmation in Opposition to Cross Motion of Carnesi, dated 8-31-06.....8
Affirmation in Support, dated 8-28-06.....9
Reply Affirmation, dated 8-31-06.....10
Affirmation in Support of Application to Disaffirm Referees Report, undated.....11

Upon the foregoing papers it is ordered that this motion to disaffirm the report of the surplus money proceeding Referee (seq. # 006), cross motion to confirm in part and modify in part (# 007), cross motion to modify in part (# 008) and cross motion to disaffirm (# 008), or for alternative forms of relief as set forth in the notice of motion and notices of cross motion, are decided as indicated in this decision and order.

Pursuant to orders of Justice Roberto dated July 28, 2005, August 8, 2005, November 22, 2005, and December 22, 2005, which bind this Court as the law of the case (*see, e.g., AIG Trading Corp. v Valero Gas Marketing, L.P.,* 254 AD2d 117 [1998]), [1] a surplus money proceeding was conducted, and the assigned Referee issued a report to the undersigned, bearing the date of July 31, 2006. His report indicates that after the foreclosure sale a surplus remained in the amount of $468,293.04; however, for purposes of this decision the Court will utilize the slightly different figure of $468,311.52, the amount stated to be on deposit as of May 18, 2005 in the Certificate of the Nassau County Treasurer, which whom the surplus was deposited.

The Referee recommends, in effect, that the surplus be considered as personalty belonging to Kenneth Carnesi and Daria Carnesi jointly, each entitled to one half, that one

[1] This matter was transferred to the undersigned on or after January 3, 2006.

judgment lien be satisfied from the joint fund where both are the judgment debtors, and that other judgment liens be satisfied from the half belonging to Kenneth Carnisi where he alone is the judgment debtor. The Referee further recommends that the surplus be distributed as follows: to the United States of America, $8,280.90, with statutory interest from February 15, 2006; to the New York State Department of Taxation and Finance (two tax liens), $300, 993.65 and $24,824.15, both with statutory interest from February 15, 2006; to Maxim's New York Restaurant, Inc., $13,740.00, with statutory interest from July 19, 2000. Judgment creditors Nassau Country Club and OB/GYN Associates of L.I., P.C. (both Kenneth and Daria Carnesi are judgment debtors) are to seek relief against the balance of the fund pursuant to CPLR 5225(b) [proceeding for payment of property not in possession of judgment debtor], and the claims of John Mitchell, Trustee and Westbury Jeep Chrysler, Inc. (Kenneth Carnesi alone is judgment debtor) are barred for failure to file a timely claim pursuant to RPAPL 1361.

The motion by defendant John Mitchell, Trustee ("Mitchell") whose counsel also states that he is making the motion on behalf of defendant HNR Investments, N.V. ("HNR") in an "of counsel" capacity to the attorney for that latter entity (seq. # 006), is granted to the limited extent that insofar as the report states that their claims are barred for failure to file pursuant to RPAPL 1361, it is disaffirmed, and their judgments may be enforced against the property of Kenneth Carnesi to the extent indicated below. The motion is otherwise denied.

While these defendants, judgment creditors of Kenneth Carnesi, are correct in that as named parties to the foreclosure action their failure to file a claim with the County Clerk is

not fatal to their claim to the surplus (*Franklin Credit Mgt. Corp. v Pearlman,* 16 AD3d 617 [2005]), they still must prove they are entitled to priority based on their respective judgments (*U.S. v Hesselbarth*, 418 F Supp 2d 274 [2006]), and in this case the only priority that exists is that of Mitchell based on a renewal judgment it obtained sometime in late 2005, as indicated below. It is undisputed that Mitchell's initial lien dates from November 7, 1994, and that HNR's lien dates from March 14, 1995, when the judgments were docketed. The 10-year period during which such liens attached thus had expired by the time of the Referee's hearing on February 15, 2006. The Court must therefore find that Mitchell's claim to the surplus is superior only to HNR's, as all the other existing liens described in this order arose before the docketing of the 2005 renewal judgment, and the lien that arose on the docketing of Mitchell's original judgment in 1994 was no longer in existence by that time. HNR enjoys no priority whatsoever.

Mitchell's position is fixed by prior orders of the Court. In his order dated November 22, 2005, Justice Roberto denied Mitchell's request for extension of its lien after it had expired. Justice Roberto's decision and order dated December 22, 2005 denied renewal of the motion that led to the November 22, 2005 order, which later motion was based upon the presence of a renewal judgment. As noted, these determinations are now the law of the case and cannot be disturbed here. It is apparent from the December 22 order that the renewal judgment was docketed sometime in 2005, and a new lien arises therefrom; Mitchell's claim is thus superior to that of HNR, as the latter enjoys no judgment lien at all, but to no one else's. Although Mitchell's attorney mentions this renewal judgment in his papers, a copy is not annexed and the Court thus cannot provide the dates here. However, as stated in

Justice Roberto's prior orders this judgment does not revive the original 1994 judgment's priority. It should be noted that the running of interest on the judgment is not affected by the expiration of the lien.

With respect to HNR, its lien continued until March 15, 2005, after the foreclosure sale on December 10, 2004, as the surplus stands in the place of the land for all purposes of distribution among persons having vested interests or liens upon the land (*Shankman v Horosko,* 291 AD2d 441 [2002]). However, as noted the ten years expired by the time the Referee opened the hearing, and HNR had made no attempt beforehand to avail itself of any of the options it had to insure that this did not happen (*see* CPLR 5203(b); CPLR 5014; CPLR 5235; Siegel, Practice Commentaries [McKinney's Cons Laws of NY, Book 7B, CPLR C5235:1). There is no authority cited, and the Court's own research has revealed none, to the effect that a judgment lien's expiration date is tolled by and after the foreclosure sale.

Indeed, two factors militate strongly against such a conclusion. The first is that because the surplus fund takes the place of the real property, there is no logical reason to treat a lien that formerly existed against the property any differently once that lien is transferred to the fund, including treatment that concerns matters of time. The other is that there are several statutory provisions that provide for extending a judgment lien, and the silence of the CPLR or RPAPL in favor of a lienor in HNR's position should preclude such a toll under the principle of *expressio unius est exclusio alterius* – that is, the inclusion by the Legislature of statutory exceptions to the 10-year life of a judgment lien indicates that no others were intended (*see, Matter of Cavallaro v Nassau County Bd. of Elections,* 2 Misc 3d 880, 884

[2003], *affd as modified* 307 AD2d 1003 [2003]).

Thus, as both Mitchell's (original) judgment lien and HNR's judgment lien are no longer in existence, and were not at the time of the surplus money hearing, any liens of other claimants to the surplus money fund must be satisfied first. Mitchell's renewal judgment is superior to HNR's, but to no other claimant's, and HNR is relegated to sharing in any remainder as a judgment creditor of Kenneth Carnesi, without priority (*see, Bennardo v Del Monte Caterers, Inc.*, 27 AD3d 503, 506 [2006]).

So much of the motion that seeks rejection of the Referee's report based on the absence of a stenographic record and a remand to him is denied. Although it may have been the better practice to have conducted the hearing on a full transcribed record, the Referee nevertheless had before him all that was needed to report as directed by the Court. Further, he has filed with the Court all documents submitted to him at the hearing to the Court for review, which shall form part of the record herein (*see* CPLR 4320). The Court notes that there is no requirement that he make copies of these documents for all appearing parties at the hearing; indeed, any attorney who submitted documents to him at such hearing should have been the one to provide copies to all other counsel.

Finally, and most important here, there is no dispute concerning the dates that judgments were docketed, nor with the contents of Justice Roberto's earlier orders, which are conclusive as to priority. To the extent that the Referee may not have filed his oath before proceeding, the same will be required, but even assuming that this was not accomplished beforehand it cannot affect the ultimate disposition of the movants' claims on these applications. The Court itself can establish the priorities – which has in fact

been sought as alternative relief in the motion and cross motions – as it has the statutory power to do so even in the complete absence of a reference (RPAPL 1361 ["the court, by reference *or otherwise*, shall ascertain... the priority of the several liens thereon and order distribution of surplus monies." (emphasis supplied)]). Thus, even if a claim could be made that the Referee could not properly proceed without his oath being filed, the same is no bar to the findings made here.

The cross motion by defendant New York State Department of Taxation and Finance ("State") (seq. #007) is granted to the extent indicated in this and the following paragraph. The Referee shall submit his notarized oath and a copy of the notice of hearing. So much of the cross motion that sought filing of the exhibits has been accomplished and is thus denied as moot. The report is modified to the extent that the appearance of Leandre John, Esq. of Cohen and Slamowitz, for defendant OB/GYN of L.I., P.C. is noted.

Consistent with the Referee's correct evaluation of the status of the surplus funds as initially belonging to the former owners as tenants in common (*see, Mojeski v Siegmann,* 57 AD2d 549 [1977], *affg* 87 Misc 2d 690 [1976]), the report is further modified to provide that Kenneth Carnesi, and Daria Carnesi, as former owners, are each entitled to $234,155.76, as of February 15, 2006, before consideration of the claims made by judgment creditors. Finally, the report is modified by directing that the priority and payment of judgments funds be made as follows, in the order indicated, after addition of any accrued interest in the account maintained by the Treasurer of Nassau County, and

after deduction of the Treasurer's fees and the Referee's fees, as set forth below: [2]

1). To the State, $300,393.65, with interest on $187,538.04 from February 15, 2006, payable in equal measure from the shares owned by Kenneth Carnesi and Daria Carnesi; [3]

1[a]). To the State, $24,824.18, with interest on $14,481.34, from February 15, 2006, payable from the share owned by Kenneth Carnesi, with interest on from February 15, 2006;

2). To Maxim's New York Restaurant, Inc., $13,740.00, with interest from July19, 2000, from the share owned by Kenneth Carnesi;

3). To the United States of America (Department of Justice, for defendant Internal Revenue Service), $8,280.90, with interest on $7,924.03 from February 15, 2006, from the share owned by Kenneth Carnesi;

4). To Nassau County Club, $11,075.58, with interest from May 20, 2003, jointly from the shares owned by Kenneth Carnesi and Daria Carnesi;

5). To Westbury Jeep Chrysler Dodge, $3,022.07, with interest from December 19, 2003, from the share owned by Kenneth Carnesi;

6) To Mitchell, from the share owned by Kenneth Carnesi, funds in satisfaction or partial satisfaction of the new judgment obtained after the lapse of the initial lien, with interest thereon from November 7, 1994, the filing of the initial judgment;

7). To Daria Carnesi, so much of her share that remains after deduction of her obligation under judgments described in 1and 4;

8) To HNR, any remaining funds, without priority, from Kenneth Carnesi's share (*see Bennardo v Del Monte Caterers, Inc.*, 27 AD3d 503, 506, *supra*).

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[2] The priority reflects date of docketing of the various judgments in favor of the judgment creditors within the last ten years, as required (CPLR 5203). Both State liens date from November 23, 1998; as they favor the same claimant, and in the absence of time of day should be considered to share the first priority. Figures and computations of interest, to the extent interest is represented in such figures, have not been challenged by any party to these applications. They have been drawn from the submissions made by the parties on these present applications, or from the submissions made to the Referee.

[3] While accepting as unchallenged the interest calculation on their judgments made by the State and the United States to February 15, 2006 (priority #s 1, and 3), the Court notes that the interest calculated thereafter must be on the stated base judgment amounts to prevent an "interest on interest" calculation. Statutory interest is simple, not compound, in nature.

The Court notes that at the hearing the attorney for defendant OB/GYN Associates of L.I. presented copies of a summons and complaint and indicated that "we are currently in the process of obtaining a copy of the judgment." Although it is apparent that a judgment was docketed (in that this entity is named as a party defendant based on a judgment title search), OB/GYN has submitted no papers on this application or to the Referee indicating what, if anything, is still owed. Accordingly, the Court can grant no relief to this party.

The cross motion by Daria Carnesi (seq. # 008) is granted as indicated above, and is otherwise denied. She adopts the State's positions, except to the extent it seeks to enforce the first-priority tax judgment, in which she is named as a judgment debtor. She claims the status of an "innocent spouse." However, there is no factual or legal support advanced in support of this aspect of her application, and indeed this effectively constitutes a collateral attack on the judgment that cannot be entertained in the present procedural context.

The cross motion by Westbury Jeep Chrysler Dodge (seq. # 009) is granted to the extent indicated above.

Finally, upon a review of his affirmation of services, the report, and the all relevant factors as revealed by the submissions made on these applications, the Court awards the Referee a fee in the amount of $ 9,015, inclusive of disbursements.

This shall constitute the Decision and Order of this Court

ENTERED

DATED: October 10, 2006

OCT 1 2 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER

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Acting Supreme Court Justice

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