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Joint Tenancy is Not Severed by Judgment Lien - Execution is Necessary - Eder v. Rothamel

Casenotes

JOINT TENANCY IS NOT SEVERED BY JUDGMENT LIEN — EXECUTION IS NECESSARY

Eder v. Rothamel[1]

The appellant, (plaintiff below), secured a judgment against William H. Rothamel for $800 with interest and costs on January 15, 1940. On January 10, 1952, he caused to be issued out of the Superior Court of Baltimore City a writ of *Scire Facias* against the heirs, administrators and terre tenants of said judgment debtor to keep alive and in force the said judgment and lien thereon. At the time of the docketing of the judgment the debtor had been seized and possessed of an undivided interest as a joint tenant in certain fee simple property in Baltimore City with three other such tenants. Without any execution having been attempted on the judgment, the debtor died on January 18, 1941. One of the surviving tenants subsequently died on October 28, 1947, and the two survivors thereafter on May 15, 1951, conveyed the property to a bona fide purchaser for value. The subsequent purchaser and various interested parties defended against the action, which was heard on an agreed statement of facts. The sole question on appeal was: Will the interest of one joint tenant, who is a judgment debtor upon his death, pass to his surviving joint tenant free from the lien of the judgment, when no execution on the said judgment had been made during the lifetime of the judgment debtor? In rendering judgment for the defendants the Superior Court (Carter, J.) held that the right of survivorship prevailed over that of the encumbrance and once the judgment lien was subordinated to this vested equity there remained no property of the deceased debtor which could be subject to execution.

In an excellent review and analysis of similar proceedings in other jurisdictions and the text authorities,[2] Judge Carter was led to the sound opinion that the mere burden of a judgment lien, without execution, upon the interest of one of several joint tenants will not interrupt any of the characteristic unities of that tenancy so as to effect a sever-

[1] 95 A. 2d 860 (Md., 1953).
[2] TIFFANY, REAL PROPERTY (3rd Ed., 1939), Sec. 425, and others.

ance that would retain such a property interest in such tenant's heirs as would be subject to execution.[3]

The rights of judgment creditors being derived wholly from statute, the appellant on appeal contended that the history of those pertinent Maryland statutes had been to subordinate the right of survivorship in favor of the right of encumbrance. In support of this statutory interpretation the appellant argued for a strict construction of the Statute of 1732[4] and Art. 26 of the 1951 Code in order to exclude this equity of survivorship. The essence of such contention was that inasmuch as these statutes made no distinction as to what type of defendant debtor's property interest would be subject to the lien and/or execution, it would be improper to delete joint tenancies from the scope of the statutes, in the absence of specific exceptions. The appellant relied in part on the case of *Coombs v. Jordan*,[5] wherein the Court of Appeals, in examining the historical basis and significance of the Act of 1732, held that in order to satisfy a judgment an undivided interest in a tobacco warehouse and proceeds should be applied in satisfaction.

However, upon further examination of the *Coombs* case it would appear that the Court in that case did not intend to have their decision extended as far as the appellant contended, for, by dictum, the Court made the definite point that judicial liens upon real estate or equitable interests in lands are subject to any prior liens or equities, as to order of satisfaction. The rule of the *Coombs* case was merely a restatement of the proposition that property of a judgment debtor is generally liable to be seized and sold for the satisfaction of a judgment. Such generalization is not in point on the present issue, nor did the Court in that case intend the scope of that generalization to extend to the present issue. This distinction seems readily justified in view of the specific language in the case of *Lee v. Keech*.[6] In this later case the Court, in holding that a judgment creditor of an heir did not have sufficient interest in the estate to contest a will, stated that the statutory lien of a judgment:

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[3] 2 COKE UPON LITTLETON, Sec. 286, p. 184b (1853); 2 BLACKSTONE COMMENTARIES (Lewis's Ed., 1902), Sec. 185; 2 TIFFANY, REAL PROPERTY (3rd Ed., 1939), Sec. 425; Zeigler v. Bonnell, 52 Cal. App. 2d 217, 126 P. 2d 118 (1942); Van Antwerp v. Horan, 390 Ill. 449, 61 N. E. 2d 358, 161 A. L. R. 1133 (1945); Musa v. Segelke & Kolhaus Company, 224 Wis. 432, 272 N. W. 657, 111 A. L. R. 168 (1937).

[4] 5 George 2, c. 7, 2 ALEXANDER'S BRITISH STATUTES (Coe's Ed., 1912) 964 — "An Act for the more easy Recovery of Debts in his Majesty's . . . Colonies in *America*" — 1732; considered in Coombs v. Jordan, 3 Bland 282 (1831). Codified in Md. Code (1951), Art. 26, Sec. 21.

[5] *Ibid.*

[6] 151 Md. 34, 37, 139 A. 529 (1926).

> ". . . 'gives the judgment creditor no right to the land nor any estate in it' . . . 'Such lien secures the creditor neither *jus in rem* nor *jus ad rem*' . . . 'A judgment lien on land . . . constitutes no property or right in the land itself. It confers only a right to levy on same' . . . It has no effect on prior, undisclosed equities, for the judgment creditor is neither in fact or in law a *bona fide* purchaser."

And as to the basis of this lien the Court said:

> "Except for the passage of the Act 1904, Ch. 535, embodied in Code, Art. 16, Sec. 152, the judgment creditor would not, as a general rule, be even a proper party in a proceeding to partition real estate in which the debtor is interested. And what the judgment creditor has is rather in the nature of a remedy, than of an estate; and as such it is subject to legislative control and may be changed by statute without any constitutional inhibition."[7]

In Wisconsin, the case of *Musa v. Segelke and Kolhaus Co.*,[8] citing as supporting authority *Lee v. Keech*,[9] held that the right of a joint tenant was subject to and limited by the right of survivorship, and unless the joint tenancy was destroyed during the life time of the joint tenants by an effective severance the interest of the deceased would pass to the survivor and there would no longer exist any estate or property rights in the deceased, the mere docketing of a judgment not of itself being sufficient interruption of any of the unities to effect such severance.

Also, in California, the case of *Zeigler v. Bonnell*,[10] held that until a levy is made upon a judgment the property is not affected by an execution. In discussing the effect of a judgment lien upon property held in joint tenancy, the California Court said that if such creditor did not wish to immediately execute he could:

> ". . . keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost. If the creditor sits back to await this contingency, as re-

[7] *Ibid*, 37.
[8] *Supra*, n. 3.
[9] *Supra*, n. 6.
[10] 52 Cal. App. 2d 217, 126 P. 2d 118 (1942).

spondent did in this case, he assumes the risk of losing his lien."[11]

In Illinois, this view was enunciated in *Spikings v. Ellis*,[12] wherein it was stated:

> "The law seems to be well settled that a creditor by proper action can reach the interest or title to property held by the debtor in joint tenancy, if he does it before the life tenant dies, but the same cannot be reached after the debtor's death, because the title then has become vested in the other joint tenant."

A Canadian court in *Power v. Grace*,[13] held that a joint tenancy was not severed so as to defeat the right of survivorship by the mere filing of a writ of *fi. fa.* in the sheriff's office by a judgment creditor against a joint tenant. The court cited as authority *Abergavenny's Case*,[14] which is perhaps the oldest case of record upon the point in concern, wherein it was held that two joint tenants for life could not defeat the execution of a creditor of one of the tenants by a release before execution, but if such judgment debtor died before execution, the survivor would hold the estate discharged of any such lien or execution.

Thus, a review of the authorities seems to establish that a judgment does not of itself contain sufficient import so as to effect a severance of a joint tenancy merely from its docketing, and that in order to defeat the right of survivorship which arose with the initiation of that tenancy, the judgment must be satisfied before that equity has had the opportunity of vesting. Such a conclusion seems to be a logical application of the principles involving joint tenancies. In order to have a joint tenancy there are four essential elements necessary, which elements are known as "the four unities". These are: unity of interest, unity of title, unity of time and unity of possession. In other words, each of the tenants must have one and the same interest, conveyed by the same act or instrument, which is to vest at one and the same time, except in cases of uses and executory interests; and each must have entire possession of every parcel of the property held in joint tenancy as well as of the whole, for each joint tenant holds the whole jointly but nothing in severalty *(Per my et per tout)*. A joint

[11] *Ibid*, 120-121.
[12] 290 Ill. App. 585, 8 N. E. 2d 962, 965 (1937).
[13] (1932) Ont. Rep. 357, (1932) 2 D. L. R. 793.
[14] 6 Co. Rep. 78b, 77 Eng. Rep. 373 (1607).

tenancy once established may be terminated or severed by any voluntary or involuntary act which would destroy one or more or the unities; provided, however, that such severance occurs before the death of the joint tenant whose interest is to be alienated (thereby creating a tenancy in common), and before the surviving joint tenant becomes owner of the whole by virtue of his right of survivorship, which would immediately become operative and vested on death of the deceased joint tenant.

The legal soundness and practical necessity of agreeing with the weight of authority becomes quite apparent if one examines the circumstances involving the question of severance by a mortgage by one joint tenant of his undivided interest in the estate, rather than the docketing of a judgment against such a party. Attention is drawn to dictum in the principal case wherein the Court stated:

> "The joint tenant may mortgage his interest. The joint tenancy will be destroyed by this conveyance. *Wolf v. Johnston,* 157 Md. 112, 145 A. 363; . . ."[15]

In those jurisdictions, including Maryland, which adhere to the "title theory" in regard to the legal import of a mortgage, such dictum is a logical conclusion, for the mortgage would interrupt the unity of title and effectively sever the joint tenancy in accordance with the apparent legal intention of the subscribing parties. The consequence is that a subsequent release of the mortgage would not of itself automatically reinstate the pre-existing joint tenancy, but a new conveyance would be necessary for such reestablishment, even though the parties may have actually only contemplated the mortgage as a security measure without interruption of the nature of their estate. In contrast one would expect a mortgage to have a somewhat different effect in those states which subscribe to the "lien theory". The logical application of the legal principles applied in the judgment cases would seem to infer that the mere lien would not effect a severance and destroy the survivorship until foreclosure, although in Indiana, a "lien theory" state, the contrary has been held in the case of *Wilken v. Young.*[16] The theory, application, and practical effect of a judgment operating upon the interest of a joint tenancy, lies somewhere in the realm between these two mortgage theories. The ultimate beginning and end of any such inquiry will rest upon the determination of the intended judicial nature

[15] *Supra,* n. 1, 862.
[16] 144 Ind. 1, 41 N. E. 68 (1895).

of a judgment — namely, whether it is intended to be in the nature of a remedy or in the nature of an estate itself.

In following the decided weight of authority it appears that the Court of Appeals, in the principal case, has practically and judicially avoided the hardship that would arise if a docketed judgment were to be given any other effect. The revelant benefit to be gained would be slight as compared with the possible pitfalls that might well occur if the Court had departed from the prevailing view. The only material and apparent advantage offered would be to aid judgment creditors who have delayed exercising their remedy, either at their own election or due to some exceptional circumstances peculiar to the particular case; whereas, by adopting the rule set forth in the principal case, the law penalizes the creditor for his delay in obtaining satisfaction of his judgment, so as not to disturb the intent of the joint tenants through a procedure which, unbeknown to them, would defeat their purposes and original intentions. The undesirable possibilities that might result from a contrary holding were pointed out by the appellees in their brief on appeal.[17] For example, if the docketing of the judgment severed the joint tenancy, satisfaction of the judgment would not have the effect of re-establishing such tenancy, but rather a new conveyance would be necessary. Also, it would be necessary to conduct much more extensive and exhaustive back searches of the judgment dockets, for all judgments would have to be searched whether satisfied or unsatisfied at the time of the title search and without regard to the age of the joint estate. The result could be to create an undesirable situation where a mere nominal judgment would destroy all intended rights of survivorship in a joint tenancy of considerable value, solely from the docketing of such a judgment.

From balancing the respective advantages and disadvantages that might arise under varying circumstances, it would appear that the common law adage that "The right of survivorship is preferred to encumbrances", is today as sound, in theory and practice, as it was in the early development of the law when joint tenancies enjoyed a far more preferred position than that of today.

[17] Appellee's Brief, p. 11.