

## Outside Counsel

# Enforcing Judgments Against 'Homestead' Properties

Judgments can be enforced against any property interest of a judgment debtor, including real property owned and occupied by the debtor as his or her homestead. However, there are many issues to consider when pursuing homestead property and navigating through Article 52 of the Civil Practice Law and Rules, which governs judgment enforcement, can be challenging.

The natural starting point is CPLR 5206(a), which defines a "homestead" as real property "owned and occupied as a principal residence." Real property that may qualify as a homestead includes land with a dwelling thereon, shares of stock in a cooperative apartment, units of a condominium apartment, and mobile homes.

Unlike commercial and investment property, on which a sheriff may levy without a court order (see CPLR 5201(b)), homestead property may be levied on and sold only pursuant to what is commonly referred to as a "homestead order." See CPLR 5206(e).

## Ownership of a Homestead

The issue of ownership is straightforward enough. Ownership means having good legal title, whether acquired by deed (See *In re de Kleinman*, 172 B.R. 764, 772 (Bankr. S.D.N.Y. 1994)) or operation of statute (See *In re Martinez*, 392 B.R. 530, 532 (Bankr. E.D.N.Y. 2008) (ownership vested under New York's EPTL)).

However, counsel for the judgment creditor should consider the nature of the judgment debtor's ownership interest in the property. If ownership is outright in the debtor's name, there is no reason for concern.

Where, instead, there is joint ownership with a spouse, it is almost certainly a tenancy by the entireties. This form of ownership presents a significant hurdle for the

By  
**Steven G. Yudin**



judgment creditor. While a judgment creditor can execute on and sell the judgment debtor's one-half undivided interest in the real property (see, e.g., *Matter of Sklar v. Gestetner*, 190 A.D.3d 750, 751-52 (2d Dep't 2021); *In re Weiss*, 4 B.R. 327, 330 (Bankr. S.D.N.Y. 1980)), this may not accomplish much. The purchaser at an execution sale would become a co-tenant with the non-judgment debtor spouse but would have no right of occupancy. See *Matter of Sklar v. Gestetner*, 190 A.D.3d at 751-52.

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Moreover, the purchaser would not be able to bring a partition action to force a sale of the property because the spouse would continue to have a right of survivorship. See *V.R.W., Inc. v. Klein*, 68 N.Y.2d 560, 564 (1986). The non-debtor spouse, upon the judgment debtor's death, would become owner of the whole property, extinguishing the interest acquired by the purchaser at the execution sale.

The upshot here is that a meaningful execution sale of a judgment debtor's ownership interest in marital property is unlikely.

## Post-Judgment Transfers

It is important to note, in the context of discussing the issue of ownership, that once a judgment is entered and docketed, and a judgment lien, by operation of law,

attaches to real property owned by the debtor in the county where the judgment is entered (see CPLR 5203(a); *Cadle Co. v. Calcador*, 85 A.D.3d 700, 702 (2d Dept. 2011)), the debtor will not be able to avoid the reach of the judgment by divesting himself of ownership.

Post-judgment transfers of a judgment debtor's interest in real property are ineffective as against the judgment creditor. See CPLR 5203(a); *Cadle Co. v. Calcador*, 85 A.D.3d at 702. The judgment lien on a debtor's real property remains intact despite a post-judgment transfer and any transferee, even a purchaser for fair value, would take subject to the lien.

## Occupancy of a Homestead

The issue of occupancy gets a lot of attention in bankruptcy court where a debtor may opt out of the federal exemption laws and elect to exempt what is allowed under state law. See *In re Issa*, 501 B.R. at 226; *In re Ward*, 595 B.R. 127, 137 (Bankr. E.D.N.Y. 2018). Although bankruptcy courts typically examine the issue of occupancy from the standpoint of whether a debtor is entitled to a homestead exemption, the analysis is equally applicable when considering a creditor's petition for a homestead order.

Several important principles emerge from the analysis. First, real property is considered "occupied" as a principal residence, for purposes of CPLR 5206(a), where there is occupancy of the premises on a regular basis, more than any other residence, with an intent to remain in occupancy. See *In re Lynch*, 2022 U.S. Dist. LEXIS 91195, \*20 (E.D.N.Y. 2022); *In re Issa*, 501 B.R. 223, 226 (Bankr. S.D.N.Y. 2013). A debtor cannot have more than one principal residence. See *In re Bace*, 364 B.R. 166, 182 (Bankr. S.D.N.Y. 2007). Dwellings which are owned and maintained, but not occupied by a debtor on a regular basis, such as vacation homes and investment properties, are not homesteads. See *In re Miller*, 103 B.R. 65, 67 (Bankr. N.D.N.Y. 1989).

Second, occupancy is measured, in bankruptcy cases, as of the date of the filing of the bank-

STEVEN G. YUDIN is senior counsel at Bernard D'Orazio & Associates, P.C. in Manhattan, and can be reached at [yudin@dorazio-law.com](mailto:yudin@dorazio-law.com).

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ruptcy petition (see *In re Ward*, 595 B.R. at 137-38; *In re Lynch*, 2022 U.S. Dist. LEXIS 91195, at \*19-20 ("[u]nder the "Snapshot Rule," courts look at the debtor's ownership and occupancy of the homestead as of the petition date")) and by all appearances similarly in state court, as of the date of the filing of the creditor's application for a homestead order (see *In Matter of Ofek Rachel Ltd. v. Suky*, 209 A.D.3d 498, 498 (1<sup>st</sup> Dept. 2022)).

Third, occupancy survives a judgment debtor vacating his or her residence where (i) the debtor is forced to leave because of injury to or destruction of the residence and he or she returns within one year (see CPLR 5206(c)), and (ii) the debtor is married but separated and living outside of the marital residence pending a final resolution of rights to the residence and the non-debtor spouse remains in occupancy (see *In re Issa*, 501 B.R. at 227).

**Homestead Exemption**

With a homestead order comes the judgment debtor's entitlement to a statutory exemption. The homestead exemption is the amount of money the judgment debtor is allowed to retain from the sale proceeds of his or her homestead—above mortgages and other non-judicial liens—before a judgment creditor may collect any money. See CPLR 5206(a); *In re Ward*, 595 B.R. at 137. The judgment creditor's lien attaches to the surplus, if any. See CPLR 5206(d).

The exemption, close to \$180,000 in counties in and around New York City (and less in upstate counties), reflects the legislative policy to provide a judgment debtor with a "fresh start." See *Westinghouse Credit Corp. v. Central Trust Co.* (*In re Leonardo*), 11 B.R. 453, 455 (Bankr. W.D.N.Y. 1981).

**Securing a Homestead Order**

In most cases (and in most, but not necessarily all, counties), counsel for the judgment creditor can self-certify to a sheriff that a property is not a homestead and thus, can be levied on without further judicial intervention. At the same time, in all cases where counsel believes that a property is a homestead, a homestead order must be sought (in the county where the subject property is located).

The application for a homestead order should be made by filing a special proceeding pursuant to CPLR 5206(e), with a Notice of Petition, Verified Petition and supporting Affirmation (with evidentiary proof). See *Matter of Sklar v. Gestetner*, 190 A.D.3d at 750.

While a court may accept and rule on a post-judgment motion for a homestead order under an existing case index number, the better practice is to commence a special proceeding (and purchase a new index number). See *Matter of Braz v. Shvartsman*, 300 A.D.2d 582, 583 (2d Dep't 2002) (court dismissed the petition for a homestead order where the petitioner failed to file a new special proceeding and secure a new index number).

A special proceeding is treated like a summary judgment motion, requiring the petitioner to lay bare its proof in admissible form. See CPLR 409(b); *Friends World College v. Nicklin*, 249 A.D.2d 393, 394 (2d Dep't 1998). Thus, the judgment creditor must support its application for a homestead order with sufficient evidence, including (i) proof of its judgment, (ii) proof of the judgment debtor's ownership of the subject property (usually, with a written deed), (iii) proof of the market value of the property (ideally, with a valuation from a licensed property appraiser), and (iv) proof of any existing mortgage liens against the property (typically, obtained by a title report).

The failure to marshal evidence and offer sufficient proof could lead to a denial of the petition for relief. See *Reda v. Voges*, 192 A.D.2d 611, 612 (2d Dept 1993).

**Judicial Assessment of a Homestead Application**

The purpose of the special proceeding is to determine whether a homestead order would fairly balance the competing interests of the judgment creditor to collect on its judgment and the judgment debtor to remain in his or her principal residence. See *Travis v. 29-33 Convent Avenue HDFC*, 19 Misc.3d 749, 753-54 (Sup. Ct. New York County 2008).

Courts have broad discretion in ruling on a homestead application and may consider a myriad of factors, including whether the judgment can be satisfied by other means, the value of the property, the amount of the judgment, and the rights of other persons in the property (through liens or encumbrances).

The analysis almost always turns on whether there is sufficient equity in the real property, above existing mortgages (and other non-judicial liens) and the applicable homestead exemption, to ensure the just and legal distribution of sale proceeds. See *In re Bellafore*, 492 B.R. 109, 115 (Bankr. E.D.N.Y. 2013); *Komarov v. Leyberson*, 2011 N.Y. Misc. LEXIS 927, at \*3 (Sup. Ct. New York County 2011).

Where there is sufficient equity in the property, a court typically will grant relief under CPLR 5206(e). See *In re Bellafore*, 492 B.R. at 115. On the other hand, where the judgment debtor's equity is little more than the exemption amount (thus, leaving the judgment creditor with hardly any recovery after the execution sale, while having displaced the judgment debtor from his or her home) or where an execution sale would satisfy only a small judgment, relief likely will be denied.

**Takeaway**

A judgment creditor with a lien on a judgment debtor's property should not hesitate to execute upon it. But success in this endeavor, as in judgment enforcement in general, requires knowledge of the rules, persistence, and patience.