Homeowners In Philadelphia Can Pay Last Year's Real Estate Taxes Pending Tax Assessment Appeal

What many residential property owners in Philadelphia, however, do not realize is that the City of Philadelphia recently passed a law, granting them temporary real estate tax relief if they appealed to the Board of Revision of Taxes the increase of their real estate tax assessments from 2013 to 2014.

Under the new law, if a property owner of a residential property filed a timely tax assessment appeal to the Board of Revision of Taxes and the appeal is still pending, the property owner may pay what he or she paid in real estate taxes in 2013. If the property owner loses the tax assessment appeal, the property owner then has 30 days from the date of the administrative ruling to pay the remaining real estate tax arrearage without accruing any penalties or interest.

The City of Philadelphia's Department of Revenue is legally obligated to notify affected property owners in writing of this amendment to the Philadelphia Code. To the dismay of many, the Department of Revenue has not met its burden and, thus, many Philadelphians are unaware that their current real estate tax burden has not yet increased.

Nochumson Teaches at 12th Annual Residential Landlord-Tenant Law Seminar

Alan Nochumson served as a panelist on a continuing legal education seminar entitled "12th Annual Residential Landlord-Tenant Law".

At this seminar sponsored by Sterling Education Services, Inc., Nochumson spoke about the legal issues confronted by landlords and tenants alike when creating the landlord-tenant relationship and during the eviction process when that relationship falters.

Vertical Position 35%

Judicial Sale Doesn't Stifle Mortgage's Priority Lien Interest

What almost happened in *In re Estate of Landis*, 2014 Pa. Super. LEXIS 9 (Jan. 15, 2014), before the Pennsylvania Superior Court intervened is a cautionary tale as to why every attorney who practices law should "paper the file," so to speak, in order to ensure that a straightforward matter does not escalate into something much more and different than anticipated.

In 2004, Charles S. Landis obtained a mortgage loan of $138,450 on his residence located in Souderton, Montgomery

County, Pa., and the mortgage was duly recorded with the Montgomery County Recorder of Deeds office, the opinion said.

According to the opinion, in 2011, after Landis died, his will was probated. At the time of his death, PNC Bank N.A. held the mortgage encumbering the residential property and that mortgage was the first and only secured lien on the property, the opinion said.

Soon thereafter, Landis' executrix filed a petition, seeking leave from the Orphans' Court to sell the mortgaged property, pursuant to 20 Pa. C.S. § 3353, the opinion said. In the petition, the executrix estimated that the debts of the estate, including the balance then due on the residential mortgage, well exceeded its assets, thus, making the estate insolvent, the opinion said. In the petition, the executrix alleged that the balance of the mortgage loan was $117,320, the opinion said.

When PNC filed no objections to the petition or the sale, the Orphans' Court issued a decree, granting the petition, the opinion said. In its decree, the Orphans' Court authorized a "judicial sale" under 20 Pa. C.S. § 3353 and discharged all liens on the residential property, so it could be transferred with a clear title, the opinion said.

In 2012, the sale on the real property closed and the net sale proceeds of the sale was $120,761, the opinion said.

The executrix then filed an accounting of the estate that included a proposed distribution of the estate, in which the estate would first pay the costs of estate administration, the executrix's commission, the estate's attorney and accountant's fees, as well as outstanding funeral and medical expenses, and then pay PNC as an unsecured creditor of the estate, the opinion said.

After the accounting was filed, PNC filed a petition for distribution of the sale proceeds, arguing its entitlement to all of the sale proceeds, as the amount then due under the mortgage lien was $123,237, more than the sale proceeds being held by the estate, the opinion said.

PNC also filed objections to the executrix's accounting and proposed distribution of the estate's assets, the opinion said.

Afterward, the executrix filed a petition for adjudication, including the executrix's proposed schedule of distribution, the opinion said. In the proposed schedule of distribution, the executrix again listed PNC as an unsecured creditor, indicated its subordinated position in the distribution scheme to the claims of several unsecured creditors of the estate, and proposed an allocation of $18,223 or 99.6 percent of the remainder of the estate to PNC, the opinion said.

The Orphans' Court subsequently dismissed PNC's petition for distribution as unnecessary in light of its filed objections to the executrix's accounting and proposed schedule of distribution.

The Orphans' Court then entered an order confirming the executrix's accounting and ordered distribution of the estate per the executrix's proposal. In doing so, the Orphans' Court determined that the judicial sale extinguished PNC's lien outright, along with its right of first priority to distribution of the net sale proceeds.

PNC appealed the Orphans' Court's ruling to the Pennsylvania Superior Court.

The appeal essentially involved the intersection of several statutory provisions.

In Pennsylvania, 42 Pa. C.S. § 8152 specifically provides that judicial sales of real property do not generally impair prior mortgage liens.

However, under Section 8152(b), a judicial sale may divest a mortgage lien if the Orphans' Court authorizes such divestiture under two sections of the Probate, Estates and Fiduciaries Code (PEF), 20 Pa. C.S. § 3353 and 20 Pa. C.S. § 3357.

Section 3353, which is titled "order of court," does not deal with the distribution of sale proceeds and provides only that the Orphans' Court may authorize a judicial sale if it finds the sale is necessary for the proper administration and distribution of the estate, while Section 3357, which is titled "title of purchaser," allows a court to discharge mortgage liens pursuant to a judicial sale only with the lienholder's written consent. Section 3392, which is titled "classification and order of payment," establishes an order of priority only for unsecured creditors against insolvent estates, while Section 3381, which is titled, "liens and charges existing at death impaired," provides that "nothing in this code shall be construed as impairing any lien or charge on real or personal estate of the decedent which existed at his death."

On appeal, PNC argued that the Orphans' Court erred in interpreting 42 Pa. C.S. § 8152 and the related PEF Code provisions to extinguish its mortgage lien by virtue of the judicial sale and to subordinate its claim against the estate to those of other unsecured creditors in the distribution of the sale proceeds.

The Superior Court first addressed whether the Orphans' Court erred in determining that the judicial sale extinguished PNC's priority lien interest in the real property.

Citing to Section 3357 of the PEF Code, the Superior Court concluded that the Orphans' Court may discharge existing mortgage liens upon the sale of the encumbered property if the mortgagee files its written consent with the Orphans' Court.

As the Superior Court observed, PNC did not consent in writing to allow the judicial sale to divest the real property of its lien. Although PNC allowed the judicial sale to take place, the Superior Court refused to interpret PNC’s non-opposition to the judicial sale as consent required under Section 3357. Rather, according to the Superior Court, following the judicial sale, the lien previously encumbering the real property attached to the sale proceeds, because the judicial sale occurred so that the estate could, among other things, use the sale proceeds to satisfy the secured lien against the previously mortgaged property.

As such, the Superior Court reasoned that PNC consented to the judicial sale but not to the extinction of its lien when it came to its right to collect the sale proceeds.

The Superior Court next discussed PNC’s lien priority status to the sale proceeds as compared to the estate’s unsecured creditors, such as the executrix and the estate’s attorneys and accountants, to name a few.

The Superior Court believed that the executrix’s reliance upon Section 3392 of the PEF Code was misguided. In its view, Section 3392 “determines only the relative rights of unsecured creditors” and “does not affect the ultimate priority of secured claims, such as mortgage liens and judgment liens properly recorded before the decedent’s death, which have first priority in an estate’s distribution.”

Relying upon Section 3381 of the PEF Code, the Superior Court concluded that the provisions of the PEF Code pertaining to unsecured claims upon an estate had no effect on the priority of PNC’s secured claim.

In a nutshell, the Superior Court recognized that PNC had a superior claim to the distribution of the sale proceeds as compared to any of the unsecured claims being made against the estate.

LESSONS LEARNED

The Superior Court's ruling in *Landis* highlights the necessity of strictly following the rules and procedures of our courts. While PNC did not object to the real property being disposed of at a judicial sale, it would have been more prudent if it had filed a formal response to the petition, setting forth in writing its lack of opposition to the judicial sale but its insistence that it maintain its priority lien interest as to the sale proceeds.

It seems to me that PNC's lack of formal response to the petition prior to the Orphans' Court issuing an order allowing the judicial sale to take place left open the door to some of the estate's unsecured creditors who were attempting to take advantage of the situation.

Alan Nochumson

Vertical Position 100%

Non-Compete Agreements: A Necessity For Your Business

Every business possesses a proprietary interest in its client base, which typically takes years to develop, and in its unique business plans, methods and intellectual property. To protect that interest, when hiring a new professional employee, a business should require the employee to sign an employment agreement which contains a confidentiality clause, prohibiting disclosure of confidential business information, as well as a non-compete/non-solicitation clause, detailing restrictions upon the ability of the employee to compete with the business, hire its other employees, and contact and solicit its customers in the event that the employment relationship ends.

If such an agreement is not entered into when an employee is initially hired, an employer can still include the aforementioned provisions in a severance agreement. However, under no circumstances should a business allow an employee to leave without these protective measures in place. If a former employee is not so restricted, that employee could utilize the knowledge, information and unique skills that the employee acquired at the business to compete with the business by soliciting its clients and employees. In that case, if the former employee is not bound by some kind of non-compete/non-solicitation clause, the business would likely not have legal recourse against the former employee and could see its competitive advantage erode.

How Obamacare Will Impact Your Business This Year

Starting this year, the federal government is imposing a new tax on health insurance carriers based upon their share of the so-called “fully-insured market”, which is primarily comprised of the type of health insurance plans commonly purchased by small businesses. Although imposed upon health insurance carriers, this will operate as a *de facto* tax upon small businesses as many of these carriers have already acknowledged that they will pass the added cost onto employers, potentially resulting in an increase in insurance premiums of 2% to 2.5%.

On the positive side, businesses with fewer than 25 employees will be able to take advantage of a tax credit of 50% of the cost of their health insurance plans if they opt to buy the plans from the new government-run small-business exchange.

Additionally, as of this year, for businesses with no more than 50 employees, health insurance carriers will be prohibited from basing premiums for new plans upon certain criteria, such as the company's industry, claim history or the gender of their employees. Furthermore, health insurance carriers will not be able to refuse health insurance coverage based upon the health status or a pre-existing condition of a company's employees or their dependents.

There are several provisions of Obamacare which have been deferred into the future, however. The most significant one is the so-called "employer mandate", pursuant to which businesses with 50 or more employees would otherwise be required to offer sufficient health insurance coverage starting in 2014 or face the imposition of a fine. The Obama Administration announced that it would refrain from penalizing employers which do not comply with this mandate in 2014, thus deferring the mandate until the start of 2015.

The United States Department of Labor also announced that it would defer requiring businesses with 200 or more employees to start automatically enrolling new hires into their health insurance plans or imposing penalties on businesses which wait longer than 90 days to allow new employees to enroll in the company's health insurance plan.

Longtime Property Owners In Philadelphia May Be Eligible For Substantial Tax Relief

Under LOOP, property owners who saw their certified market valuations more than triple from 2013 to 2014 will save money on their property taxes for the next 10 years if they qualify.

In order to qualify for LOOP, the property owner must have owned the property since July 1, 2003 and be current on their property taxes or up-to-date on a payment plan or have an application for a payment agreement pending. Furthermore, the property owner must reside at the property, the property must be either a single family or a multi-unit property with no more than 3 residential units and 1 commercial unit, the property cannot be subject to a tax abatement, and there are income limits based upon household size.

An application for property tax relief under LOOP must be submitted before February 17, 2014 in order to get the benefit for this year.

To download an application, you should visit:

http://www.phila.gov/loop/PDF/LOOPApplicationEnglish.pdf

Court Untangles Real Estate Transaction That Goes Awry

Unlike many other states, in Pennsylvania, there is no formal process in place for an attorney to review an agreement of sale in a real estate transaction. For instance, in New Jersey, an agreement of sale is merely voidable once entered into by the seller and buyer and will not become binding upon the parties until each of them have the opportunity to have an attorney review and comment on the agreement of sale. This process not only encourages “attorney review” as it is called from the inception of the real estate transaction, but once an attorney is retained the parties will likely have the benefit of legal counsel during the due diligence period and beyond.

A judgment recently issued by a trial court judge in Westmoreland County, Pa., in *Martello v. Stoner*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 203 (September 20, 2013), illustrates why parties to a real estate transaction should always retain an attorney.

In *Martello*, shortly after Anthony Martello purchased the piece of property, Raymond J. Stoner made an offer to purchase the property for an amount higher than for what the property was purchased and that offer was then accepted, the opinion said.

In order to memorialize their understanding, in late 2006, Stoner prepared the written agreement of sale, which the parties executed. The agreement of sale contained a “time of the essence” clause, but no fixed time for Stoner to purchase the property, the opinion said.

Under the agreement of sale, Stoner was obligated to pay $1,000 to Martello in the form of a security deposit, the opinion said. According to the opinion, the agreement of sale provided for a liquidated damages clause, whereby the parties agreed that Martello would retain the security deposit paid by Stoner to Martello in the event Stoner did not purchase the property.

While Stoner paid the security deposit of $1,000 to Martello, the parties never closed on the real estate transaction, the opinion said. Instead, the parties entered into a lease agreement in early 2008, whereby Stoner agreed to lease the property from Martello. The lease agreement provided for a month-to-month tenancy, with each party being able to terminate the term of the lease upon advance notice of 30 days, the opinion said.

While occupying the property, Stoner expended significant sums of money to make improvements to the property, the opinion said. According to the opinion, this work was performed without the benefit of governmental permits.

Because Stoner failed to pay the rent due under the lease agreement, Martello evicted him from the property in mid-2012, the opinion said.

Martello also filed a complaint against Stoner seeking the amount owed under the lease agreement for the unpaid rent. In response, Stoner filed a counterclaim in order to compel Martello to sell the property to him, for reimbursement of the money he claimed he paid to Martello under the agreement of sale, and for Martello to pay him for the improvements he made to the property.

After a bench trial took place, the trial court judge issued a memorandum opinion.

The trial court judge first pointed out that the agreement of sale was drafted by Stoner and, as the drafter of the agreement of sale, the terms of the agreement of sale would be strictly construed against him.

The trial court judge noted that the agreement of sale did not contain a date in which Stoner had to purchase the property. However, since the agreement of sale included a “time of the essence” provision, the trial court judge concluded that Stoner had to purchase the property within a reasonable period of time and, because he failed to do so, Stoner defaulted under the terms of the agreement of sale he had drafted and, thus, was not entitled to purchase the property from Martello any longer.

The trial court judge also believed that the parties intended for the lease agreement to override the agreement of sale.

With that being said, while the trial court judge found that Stoner defaulted under the agreement of sale by failing to purchase the property, he did not believe Martello was entitled to the security deposit of $1,000 that Stoner paid him under the agreement of sale. Rather, the trial court judge reasoned that, since the lease agreement served to replace and extinguish the agreement of sale, the $1,000 should be applied toward the lease agreement.

It is unclear from the opinion whether Stoner occupied the property after the agreement of sale was executed by the parties and if he made any payments to Martello, other than the already-mentioned security deposit of $1,000, prior to the parties entering into the lease agreement.

Nonetheless, the trial court judge concluded that all payments made by Stoner to Martello were made pursuant to the lease agreement, not the agreement of sale, and Stoner was not entitled to reimbursement of these payments because he had, in fact, received the benefit of leasing the property from Martello.

Furthermore, the trial court judge held that Stoner owed Martello money under the lease agreement for the unpaid rent.

As for the improvements made by Stoner, the trial court judge refused to credit him for all of the improvements he made to the property.

First of all, the judge pointed out that Stoner did not have a contract with Martello to perform this work on the property and, as such, Stoner would only be equitably entitled to the value of the benefit he gave to Martello for the work performed.

At trial, Stoner submitted invoices for the materials he purchased and proof of purchase as evidence of the benefit he conveyed to Martello.

The judge stated that the proof of value of the benefit conferred is not established by the amount of money expended by Stoner for the materials purchased and the work performed, but rather must be shown through an increase in the value of the property as the result of the improvements being made.

While the judge did not dispute the amount of money Stoner paid for the materials and that work was performed on the property, the judge did not believe Stoner increased the value of the property as much as he argued since most of the work was cited as being deficient and without governmental approval by the local government.

In doing so, the trial court judge only credited Stoner for a fraction of the cost for the work he performed on the property.

In the end, the trial court judge entered a judgment in favor of Martello and against Stoner because the amount of money Stoner owed under the lease agreement for unpaid rent exceeded what the judge believed was the increased value of the property for the work Stoner performed.

LESSONS LEARNED

The trial court's ruling in *Martello* illustrates why every party to a real estate transaction should be represented by legal counsel.

It seems to me that at the time the lease agreement was entered into by the parties in *Martello*, they should have clearly terminated the agreement of sale either by expressly providing for that in the lease agreement or by entering into a separate termination agreement. This would have avoided any potential misunderstanding going forward as to the relationship between the parties.

As for the work performed on the property, this is not an uncommon occurrence. Many times, tenants or individuals in possession of a property perform work on the property. It is incumbent upon the individual performing the work to obtain the written approval of the owner of the property, in order to ensure what compensation is received for the work performed. On the flip side, a property owner must be vigilant when such work is being performed. In addition to making sure governmental approval is obtained, the property owner must confirm that there is adequate insurance that covers the property owner should an accident occur while the work is being performed.

Alan Nochumson

Vertical Position 100%

Court Won't Consolidate Separate Judgments Against Spouses

In Pennsylvania and with most states, assets owned by married couples have their own recognized form of ownership; namely, tenancy by the entireties.

Under this form of ownership, one spouse cannot encumber any portion of the property without the permission of the other spouse. This legal characteristic causes particular grief to judgment creditors who have a judgment against one spouse but not the other one. If, for instance, the judgment is only against one spouse but not the other, and the married couple maintains all of their assets in their names jointly, the judgment creditor has no recourse in executing upon the judgment.

Most times, however, when the judgment is in the name of both spouses, the judgment creditor can rest assured that, if the married couple has unencumbered assets, the judgment creditor will be able to attach these assets in execution proceedings.

In a ruling handed down last month, the Superior Court of Pennsylvania in *Customers Bank v. Rajaratnam*, 2013 Pa. Super. 304 (Nov. 25, 2013), in a case of first impression, refused to consolidate separate judgments entered against a husband and wife so that assets held as tenants by the entireties may be executed upon to satisfy joint indebtedness.

In 2005, Customers Bank’s predecessor-in-interest made a construction loan of almost $7 million to finance a condominium conversion in Philadelphia, the opinion said. As part of the construction loan, the principal of the entity that owned the property agreed to guaranty the indebtedness of the loan obligations, the opinion said.

According to the opinion, the term of the loan expired in 2007. Prior to the loan maturing, the parties modified the loan so that the term of the loan was extended. As part of this loan modification, both the entity’s principal and his wife jointly entered into a new guaranty agreement with Customers Bank’s predecessor-in-interest, the opinion said.

When the loan went into default, in 2009, Customers Bank's predecessor-in-interest sought and obtained a confession of judgment in its favor and against the husband only under the guaranty agreement entered into by him in 2005.

The following year, Customers Bank's predecessor-in-interest filed a complaint against the wife only based upon her obligation under the guaranty agreement she entered into in 2007.

In 2012, the trial court conducted a bench trial in the action against the principal's wife, after which it found that she was bound by the terms of the guaranty agreement and judgment was subsequently entered against her and in favor of Customers Bank, according to the opinion.

Customers Bank then moved to consolidate the judgments obtained against the husband under the guaranty agreement entered into by him in 2005 and against the wife based upon the guaranty agreement she entered into with her husband in 2007.

When the trial court denied Customers Bank's motion to consolidate the judgments, Customers Bank then appealed the trial court's ruling to the Superior Court.

At the outset, the Superior Court pointed out that, while Rule 3025.1 of the Pennsylvania Rules of Civil Procedure authorizes the consolidation of multiple judgments entered against the same person, there is no procedural mechanism to consolidate judgments against different people.

The Superior Court then quickly rejected the notion that the trial court had the ability to consolidate the two judgments in *Rajaratnam* based upon the inherent power of trial courts to modify their own judgments.

Regardless, the Superior Court believed that "even if a procedural mechanism did exist for consolidating judgments against different people, Pennsylvania substantive law would not permit consolidation in this case."

The Superior Court first analyzed the state Supreme Court's ruling in *Beihl v. Martin*, 84 A. 953 (1912).

In *Beihl*, a married couple sought to sell a property they owned as tenants by the entireties to a third party even though the husband (but not his wife) had been declared bankrupt and had unpaid judgments outstanding against him.

The Supreme Court in *Beihl* "observed that any disposition of property held as tenants by the entireties must be based upon a 'joint act' of husband and wife together." Since the judgments against the husband in *Beihl* were not the products of "joint acts" by the married couple, the Supreme Court ruled that the liens against him individually had no effect on the married couple's ability to sell their marital property to a third party free and clear from the judgments obtained against the husband only.

The Superior Court in Rajaratnam noted that, while the Supreme Court in *Beihl* established the requirement of "joint action" by a married couple to permit execution on property held as a tenancy by the entireties, it did not address what type of "joint action" is required to create a joint debt to permit an encumbrance. In other words, according to the Superior Court, "*Beihl* does not resolve the question of whether the 'joint action' requirement must be satisfied by the performance of a single act performed by husband and wife together, or if instead separate acts resulting in the same indebtedness will suffice."

While, according to the Superior Court, no Pennsylvania appellate court has addressed this issue, the U.S. Court of Appeals for the Third Circuit in *A. Hupfel's Sons v. Getty*, 299 F. 939 (3d Cir. 1924), applying Pennsylvania law, considered whether separate acts by spouses resulting in a joint indebtedness may result in the encumbrance of marital property under the principles set forth in *Beihl*.

In *A. Hupfel's Sons*, the husband, a saloonkeeper, borrowed money to, among other things, purchase beer, and provided a bond and a chattel mortgage to secure his debt. After he defaulted on the loan, a judgment was obtained in favor of the lender and against him. The wife then entered into an agreement with the lender, whereby she agreed to take over her husband's indebtedness if money was advanced to permit her to purchase a liquor license. The wife then defaulted upon her loan obligation and the lender obtained a judgment against her.

With these two judgments unsatisfied, the married couple sold their marital property to a third party. When the lender issued writs of execution against the marital property to satisfy its judgments, a quiet title action was commenced as to what effect the judgments had against the marital property.

The Third Circuit in *A. Hupfel's Sons* "failed to find joint action in any sense." In so finding, the Third Circuit pointed out that the husband first gave security to the lender based upon a consideration of existing indebtedness, which was one transaction, and that the wife, desiring money with which to obtain a liquor tax certificate and embark in business for herself, assumed her husband's indebtedness, which was another transaction. As such, the Third Circuit concluded that the obligations arising from these separate transactions were, therefore, not joint, but rather separate, both in point of time and purpose.

The Superior Court cited the following passage of the Third Circuit's ruling: The married couple "w[as] without doubt mutually interested in the transactions which resulted in the two judgments. But mutuality of interest in separate transactions out of which have grown separate obligations based upon different considerations does not amount to joint action within our understanding of the law of *Beihl*."

Relying upon the rationale employed by the Third Circuit in *A. Hupfel's Sons*, the Superior Court agreed that separate actions by spouses resulting in separate judgments are not sufficient to encumber marital property. The Superior Court held that "to establish a joint debt that may serve as the basis for a lien on entireties property, the two spouses must act together in the same transaction and in so doing incur a joint liability," and "only by acting together will the spouses satisfy *Beihl's* 'joint action' requirement, as their mutual decision to incur a joint debt demonstrates a willingness to 'strip the estate of its attributes and create a wholly different estate in themselves.'"

In refusing to consolidate the judgments in *Rajaratnam*, the Superior Court emphasized that the judgments were entered pursuant to separate documents, in separate transactions, and for separate considerations.

As noted by the Superior Court, the judgment against the husband resulted from his execution of a guaranty agreement entered into by the parties in 2005, which he signed to secure the initial loan for his business, while the judgment against his wife resulted from her execution of a guaranty agreement she signed in 2007 in part to obtain a change in terms of the loan, including an extension of the maturity date.

The Superior Court rejected the argument made by Customers Bank that, although it has two separate judgments based upon liability under two different agreements, the facts nevertheless satisfy the "joint action" requirement because the married couple both signed the guaranty agreement in 2007 and, thus, jointly agreed to be liable for the construction loan.

Rather, the Superior Court stated that the judgment against the husband is not based upon any obligations under that guaranty agreement and there has never been any judicial determination that he has any liability arising from that document.

The Superior Court, in a strongly worded passage of its ruling, played Monday morning quarterback. In doing so, the Superior Court reiterated that, at the time judgment was confessed against the husband, Customers Bank's predecessor-in-interest could have simply filed suit against the husband and wife in an effort to obtain a joint judgment for liability under the guaranty agreement entered into by the parties in 2007. Since no attempt was made to establish his potential liability under that guaranty agreement, the Superior Court bluntly concluded that this "doomed any future attempt to execute against property held by the" married couple.

LESSONS LEARNED

The Superior Court's ruling in *Rajaratnam* will send a chill down the spine of attorneys representing financial institutions throughout the state. It is clear that the wife was added as an additional guarantor to the construction loan because Customers Bank's predecessor-in-interest required additional security should a loan default occur. Because how the judgments against the husband and wife were obtained, Customers Bank, unless the Superior Court's ruling is overturned by our Supreme Court, will now be precluded from liquidating marital assets that could further satisfy these judgments.

Alan Nochumson

Vertical Position 100%

Charitable Exemption For Real Estate Taxes May Change

Recent bills sponsored by some members of Philadelphia City Council will send a chill down the spine of many charitable organizations that own real estate in the city of Philadelphia.

In Pennsylvania, “institutions of purely public charity” may be exempt from taxation based upon Section 2 of Article VIII of the Pennsylvania Constitution. However, because the Pennsylvania Constitution did not define what constitutes “institutions of purely public charity” and our legislature did not do so until 1997, Pennsylvania courts were forced to interpret what our founders meant by that section of the Pennsylvania Constitution.

In the seminal case of *Hospital Utilization Project v. Commonwealth*, 487 A.2d 1306 (Pa. 1985), the Supreme Court of Pennsylvania developed a five-part test for the purpose of defining what should be deemed a “purely public charity” for tax-exempt purposes.

The five factors of what is now commonly referred to as the “HUP test” are: (1) advances a charitable purpose; (2) donates or renders gratuitously a substantial portion of its services; (3) benefits a substantial and indefinite class of people who are legitimate subjects of charity; (4) relieves the government of some of its burden; and (5) operates entirely free from private profit motive.

For a better part of a decade after the Supreme Court’s ruling in *Hospital Utilization Project*, municipalities across the state began to dramatically challenge the tax-exempt status of charitable organizations doing business in Pennsylvania. Many charitable organizations believed that the factors set forth in the HUP test were too inflexible and subjective, leading to inconsistent and inequitable results.

A rise in public concern that truly public charitable organizations began running afoul of the HUP test led to the passage in 1997 of the Institutions of Purely Public Charity Act, 10 P.S. § 371 *et seq.* which is commonly known as Act 55.

Section 5 of Act 55 sets forth detailed criteria that a charitable institution must meet in order to be deemed a purely public charity.

According to our legislature, the purpose of Act 55 is to include uniform and consistent guidance to charitable organizations seeking to qualify for tax-exempt status.

For years, the effect and enforceability of Act 55 raised concerns with the courts. All of that came to a head in 2012 when the Supreme Court of Pennsylvania in *Mesivtah Eitz Chaim of Bobov v. Pike County Board of Assessment Appeals*, 44 A.3d 3 (Pa. 2012), held that charitable institutions applying for tax-exempt status first had to satisfy the HUP test without regards to the statutory regime created by Act 55. In *Bobov*, the majority of the Supreme Court stated that, "If you do not qualify under the HUP test, you never get to the statute."

Based upon the Supreme Court's ruling in *Bobov*, City Council is now considering Bills No. 130009 and No. 130123, which, in City Council's own words, "will help nonprofits and the city, by clarifying tax liabilities, improving information gathering, and giving the city direction in realizing unpaid tax liability from organizations working outside of their established charitable mission."

While City Council states that "these bills do not change current tax law," but rather "clarify existing law and add a sensible annual certification," a cursory glance of these bills indicates otherwise when it comes to tax-exempt status with regards to real estate owned by charitable institutions within the city limits.

According to these bills, the city will only grant tax exemptions to real estate owned by a charitable organization if: (1) the exempt entity has legal or equitable title to the property; (2) the property is occupied and actually and regularly used by the exempt entity for the purposes that entitled the exempt entity for the tax exemption; and (3) the exempt entity receives no income from the property other than the recipients of the bounty of the exempt entity.

What should be of considerable concern to charitable organizations owning real estate in the city is the third condition set forth by the city. As pointed out by City Council, charitable organizations cannot “sublease their property to for-profit entities (‘lobby Starbucks,’ offices, etc.)” if they wish to receive tax-exempt status on the property.

If either of these bills is enacted in law, it will clearly change the way the city taxes real estate owned by charitable organizations. Presently, if a charitable organization subleases a portion of the real estate it owns, then only that portion of the property that is used for for-profit purposes will be subject to taxation.

Furthermore, these bills require the exempt entity to provide a sworn statement to the city on an annual basis verifying its status as a purely public charity and to detail the uses of its property and the way those uses support the charitable mission. This annual certification process is yet another way for the city to capture revenue it is clearly missing every year when the use of the property fluctuates from year to year.

It is clear the city’s finances are in dire straits and it is trying to raise revenue by changing the way it taxes real estate owned by charitable organizations.

Alan Nochumson

Pennsylvania Supreme Court Relaxes Foreclosure Standards

In a case of first impression, the Supreme Court of Pennsylvania has issued an opinion that will make it easier for banks to foreclose on delinquent properties.

In *Beneficial Consumer Discount v. Vukman, No. 29 WAP 2012* (Pa. Sept. 25, 2013), the plaintiff mortgage holder, Beneficial Consumer Discount Co., filed a mortgage foreclosure complaint against the property owner, Pamela A. Vukman. Prior to the filing of the complaint, Beneficial had provided Vukman with the so-called Act 91 notice. The parties eventually agreed to a settlement whereby Beneficial received judgment for the accelerated amount due on the mortgage, but, in turn, agreed not to execute on the judgment as long as Vukman made regular payments. Subsequently, Beneficial filed an affidavit alleging Vukman had defaulted on her obligations under the settlement agreement and filed a praecipe for writ of execution. The property was ultimately sold at a sheriff’s sale, with Beneficial as the property’s successful bidder.

In turn, Vukman filed a motion to set aside the sheriff's sale, alleging that Beneficial had failed to comply with the requirements of Act 91. Specifically, Vukman alleged the Act 91 notice that Beneficial gave her failed to inform her of the option of a face-to-face meeting with Beneficial.

The trial court determined that the Act 91 notice was deficient based upon this omission and concluded that this stripped it of subject-matter jurisdiction, which cannot be waived. Beneficial appealed the trial court's ruling to the Superior Court of Pennsylvania, which affirmed the trial court's ruling based upon its own previous rulings holding that foreclosure notices are jurisdictional in nature and a failure to comply therewith will deprive a court of jurisdiction to act.

In granting allocatur, the Supreme Court of Pennsylvania reversed and ultimately concluded that Act 91 notice does not implicate the jurisdiction of the court.

In 2006, when Beneficial filed its complaint, Act 91 required a mortgagee who desired to foreclose to send notice to the mortgagor "advis[ing] the mortgagor of his delinquency … and that such mortgagor has 30 days to have a face-to-face meeting with the mortgagee who sent the notice or a consumer credit counseling agency to attempt to resolve the delinquency … by restructuring the loan payment schedule or otherwise."

The Supreme Court initially pointed out that as the notice sent by Beneficial lacked this clause, the notice was deficient under the statute. However, the analysis did not end there. According to the Supreme Court, the issue presented was whether Act 91 imposes jurisdictional prerequisites, which "relate solely to the competency of the particular court … to determine controversies of the general class to which the case … belongs" or whether they are procedural requirements, which impact "the ability of a [court] to order or effect a certain result" in mortgage foreclosure cases.

The Supreme Court pointed out that, although it had never addressed this precise issue, the Supreme Court of New Jersey had rejected the argument that a defect in pre-foreclosure notice violated a jurisdictional precondition and renders any resulting judgment void. Our Supreme Court found that its sister Supreme Court was persuasive, as New Jersey's pre-foreclosure notice was substantially similar to Act 91.

In reaching its ultimate conclusion, the Pennsylvania Supreme Court pointed out that the trial courts have unlimited original jurisdiction over all proceedings in the state unless otherwise provided by law and that, in the absence of a clear legislative mandate, laws are not to be construed to decrease the jurisdiction of the courts.

Our Supreme Court soundly rejected Vukman's argument as relying on the incorrect assumption that a cause of action in mortgage foreclosure included a mortgagee's compliance with Act 91.

Rather, the Supreme Court emphasized that the cause of action was actually dependent on a mortgagor's default on a mortgage and did not include the procedural requirements of acting on that cause.

Utilizing the definition of "procedure" and "procedural law" found in Black's Law Dictionary, the Supreme Court found Act 91 notice requirements to be procedural in nature as they set forth the steps a mortgagee with a cause of action must take prior to the filing for foreclosure. The court concluded that Act 91 notice requirements do not sound in jurisdiction as they do not affect the classification of the case as a mortgage foreclosure action, a conclusion further supported by the lack of explicit language in Act 91 prescribing that such requirements are jurisdictional.

The Supreme Court held that Vukman's failure to pay the mortgage according to Beneficial's terms gave Beneficial its cause of action and, to act on that cause of action, it was required to give notice under Act 91. Although the Supreme Court held that the Act 91 notice given by the mortgage holder in the instant case was defective and the procedural requirements were not met, that defect did not affect the subject-matter jurisdiction of the court to hear the matter.

Alan Nochumson

Vertical Position 100%