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20-P-170

Appeals Court

HARTOG, BAER & HAND, A.P.C. vs. THOMAS H. CLARKE, JR.<sup>1</sup>

No. 20-P-170.

Suffolk. November 9, 2020. - April 9, 2021.

Present: Vuono, Meade, & Blake, JJ.

Real Property, Homestead. Practice, Civil, Judgment, Execution.  
Lien. Statute, Construction.

Civil action commenced in the Superior Court Department on September 4, 2018.

A motion to dissolve or terminate a levy on execution was considered by Jackie A. Cowin, J.

Jordan L. Shapiro for the defendant.

David C. Aisenberg for the plaintiff.

John Pagliaro & Martin J. Newhouse, for New England Legal Foundation, amicus curiae, submitted a brief.

Todd Kaplan & Robert Sable, for City Life/Vida Urbana, amicus curiae, submitted a brief.

VUONO, J. The question presented in this appeal is whether a judgment creditor may levy on an execution upon property

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<sup>1</sup> Individually and as trustee of the Clarke Survivors Trust.

protected by a declaration of homestead and then suspend any further action to collect on the execution until the homestead protection has lapsed or the homeowner's equity in the home exceeds the amount protected by the homestead exemption (\$500,000). A judge of the Superior Court concluded that such a levy was permissible, and consequently, she denied a motion brought by the defendant, Thomas H. Clarke, Jr., to dissolve a "suspended" execution levied on his residence, which is protected by a \$500,000 homestead exemption. See G. L. c. 188, § 1. We likewise conclude that the homestead exemption does not prohibit placing a lien on property protected by a homestead declaration where, as here, the lien is subject to the homestead estate.<sup>2</sup>

Background. We summarize the relevant and essentially undisputed facts contained in the record. The plaintiff, Hartog, Baer & Hand, A.P.C. (HBH), is a law firm located in Orinda, California. HBH holds a judgment in the amount of \$342,184.31 against Clarke, individually and as trustee of the Clarke Survivors Trust (collectively, Clarke), as a result of litigation in the county of Contra Costa in the State of California.<sup>3</sup> When Clarke failed to satisfy his obligation to pay

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<sup>2</sup> We acknowledge the amicus briefs submitted by New England Legal Foundation and City Life/Vida Urbana.

the judgment, HBH commenced this action in Massachusetts to enforce it. HBH also filed a motion for a real estate attachment on Clarke's property located at 20 Uncle Zlotis Road in Chatham (property). The property is subject to a homestead exemption of \$500,000. Clarke is the sole owner of the property, and a homestead declaration was recorded with the Barnstable registry of deeds on March 21, 2016. The motion for an attachment on the property was denied based on the homestead exemption, and a single justice of this court denied the plaintiff's petition seeking review of the order denying the motion. In the Massachusetts enforcement action, HBH thereafter prevailed on summary judgment, and on February 15, 2019, judgment entered in the amount of \$342,181.31,<sup>4</sup> plus interest. Clarke did not oppose HBH's motion for summary judgment and did not pursue an appeal.

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<sup>3</sup> HBH is the assignee of a judgment issued in favor of Nancy Texdahl, as trustee of the Clarke Family Trust, in an action captioned Nancy Texdahl, as trustee of the Clarke Family Trust vs. Thomas H. Clarke, Jr., as trustee of the Clarke Survivors Trust. HBH represented Texdahl in the litigation. The case proceeded to trial and a judgment issued against Clarke in the amount of \$342,184.31. Thereafter, Texdahl assigned and sold all her interest in the judgment to HBH.

<sup>4</sup> We note the three dollar discrepancy between the California and Massachusetts judgments. Neither party discusses it.

On April 4, 2019, an execution in the amount of \$390,371.50 issued on the judgment, and after delivery to a Barnstable County deputy sheriff, a levy on the execution was recorded at the registry of deeds. At the request of HBH, the sheriff suspended further action and returned the original execution to HBH. Clarke subsequently was served in hand with notice of the levy. Several months later, Clarke filed a motion to dissolve or terminate the levy on the ground that any levy was improper while the property was protected by the homestead exemption.<sup>5</sup> At the time Clarke filed his motion, the property had an assessed value of \$391,000, and there was an outstanding line of credit, secured by a mortgage on the property, with an unpaid balance of \$99,469.45. In light of these facts, the defendant argued, the amount of equity in the property could not exceed the amount of equity (\$500,000) protected by the homestead declaration. The motion was denied in a margin endorsement as follows:

"The plaintiff has not attempted to collect on the execution, and represents that it does not intend to collect on the execution while the homestead is in effect. By levying and suspending the execution, plaintiff has protected its interest in the value of the property without interfering with the protection afforded the defendant by the homestead. If plaintiff attempts to collect on the execution while the homestead is still in effect, the defendant can seek the court's intervention at that time based on the homestead."<sup>6</sup>

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<sup>5</sup> Clarke also sought attorney's fees and costs on the ground that the levy was illegal and therefore frivolous. See G. L. c. 231, § 6F.

Discussion. "An estate of homestead 'is a provision by the humanity of the law for a residence for the owner and his family,' free from attachment or levy on execution by creditors up to the amount allowed by law." Ladd v. Swanson, 24 Mass. App. Ct. 644, 646 (1987), quoting Bates v. Bates, 97 Mass. 392, 395 (1867). "Homestead laws are designed to benefit the homestead declarant and his or her family by protecting the family residence from the claims of creditors." Shamban v. Masidlover, 429 Mass. 50, 53 (1999). Such laws "are based on public policy that favors preservation of the family home regardless of the householder's financial condition." Id. In light of this policy and the purpose of the statutes, homestead laws are to be construed "liberally in favor of debtors." Id.

The Massachusetts Homestead Act, G. L. c. 188, §§ 1-14 (act), was enacted in 1851 and was substantially revised in 2010. See Boyle v. Weiss, 461 Mass. 519, 525 (2012). The revised act provides for three types of homestead exemptions: (1) an automatic homestead exemption; (2) a declared homestead exemption; and (3) a declared homestead exemption for elderly or disabled persons. See G. L. c. 188, §§ 1-3. The homestead exemption at issue here falls into the third category. This

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<sup>6</sup> We reject as not persuasive Clarke's argument that the judge confused the homestead statute with G. L. c. 209, § 1.

type of homestead protects a person's principal residence "against attachment, seizure, execution on judgment, levy and sale for payment of debts and legacies" to the extent of \$500,000. G. L. c. 188, § 2 (a). The protection benefits each member of an owner's family who occupies and enjoys the home. See Shamban, 429 Mass. at 53. However, the act does not provide protection in all circumstances. General Laws c. 188, § 3 (b), provides:

"An estate of homestead shall be exempt from the laws of conveyance, descent, devise, attachment, seizure, execution on judgment, levy and sale for payment of debts or legacies except as follows:

"(1) for a sale for federal, state and local taxes, assessments, claims and liens;

"(2) for a lien on the home recorded prior to the creation of the estate of homestead;

"(3) for a mortgage on the home as provided in sections 8 and 9;

"(4) upon an order by a court that a spouse, former spouse or parent shall pay a certain amount weekly or otherwise for the support of a spouse, former spouse or minor children;

"(5) where buildings on land not owned by the owner of the estate of homestead are attached, levied upon or sold for the ground rent of the lot upon which they are situated; and

"(6) upon an execution issued from a court of competent jurisdiction to enforce its judgment based upon fraud, mistake, duress, undue influence or lack of capacity."

Clarke argues, as he did in the Superior Court, that the plain language of the act precludes HBH from placing a lien on

his property. According to Clarke, the mere existence of the lien -- whether or not HBH attempts to collect on the judgment -- is a cloud on his title because it impacts his ability to sell the property or refinance his mortgage loan. The act, Clarke asserts, is intended to give him complete protection against a levy that can cause him any harm, including the possibility that he will not have access to financing and that he will be dependent on HBH's cooperation in order to sell, refinance, or otherwise encumber the property.

We are unpersuaded by Clarke's reasoning. It is true that the lien was not recorded prior to the recording of Clarke's estate of homestead, see G. L. c. 188, § 3 (b) (2), and that HBH's complaint does not plead with particularity "fraud, mistake, duress, undue influence or lack of capacity" underlying the judgment, G. L. c. 188, § 3 (b) (6); see Mass. R. Civ. P. 9 (b), 365 Mass. 751 (1974). The lien thus does not come within the exceptions to the homestead exemption listed in G. L. c. 188, § 3 (b). However, by virtue of the immediate suspension of the lien, HBH has effectively "protected [Clarke's homestead estate] against attachment, seizure, execution on judgment, [and] levy and sale for payment of debts and legacies." G. L. c. 188, § 2 (a). Moreover, assuming, without deciding, that Clarke will encounter the difficulties he alleges, we do not agree that public policy or the purpose of the statute is to

protect Clarke's ability to sell or refinance without inconvenience or increased cost. Rather, the purpose of the act, and the reason for construing such laws liberally, is to protect families from creditors' demands so that, notwithstanding outstanding debts, families can remain in their homes. See Shamban, 429 Mass. at 53. Here, as the levy on execution was suspended, Clarke is protected from HBH's demand. Clarke continues to reside in his home, and as the judge observed, if HBH attempts to levy upon execution, Clarke may appropriately seek judicial intervention at that point.

Next, Clarke argues that because the equity in his home is less than the amount protected by the homestead (\$500,000), the lien is invalid as a matter of law. In other words, Clarke asserts that HBH should have to wait until his equity surpasses \$500,000 before recording notice of its suspended execution. This reasoning is similarly unpersuasive. Clarke is entitled to protection up to \$500,000, but HBH also has a right to lawfully secure payment of its judgment against Clarke from any overage upon a sale or other triggering event. Indeed, as Clarke acknowledges, HBH is entitled to levy and execution on equity that exceeds \$500,000. Here, HBH has done nothing more than fix its priority relative to other creditors who may later have claims against Clarke, should there come a time, by whatever

circumstance, when the equity in the home exceeds \$500,000 or the homestead estate is removed or lapses.

Order denying motion to  
dissolve or terminate levy  
affirmed.