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Due Diligence Helps with Recovery from Married Judgment Debtor

By Allison Doucette

Anthony & Partners has continued its tradition of helping its clients in sophisticated judgment collection efforts, including a recent victory against a judgment debtor seeking protection from creditors by claiming 'tenancy by the entireties' ownership on all of his bank accounts, totaling more than $700,000 in two accounts.

Tenancy by the entirety allows spouses to own property together as a single legal entity. It provides for joint ownership of title by husband and wife giving both the right to the entire property, and upon the death of one, the right of survivorship to the other. When executed properly, tenancy by the entirety limits the ability of a creditor of one spouse to reach property owned as tenancy by the entirety.

When collecting a judgment against a married individual, a creditor may not be able to reach assets that are appropriately titled as tenancy by the entireties unless the creditor has a judgment against both spouses. Florida law creates a broad presumption in favor of ownership by the entireties for married couples; however, if a couple explicitly holds assets under another form of ownership—for example, 'tenants in common'—a creditor may reach a debtor's spouse's interest in those assets. This often comes up in the context of bank accounts.

In 2011, the Florida Supreme Court issued its seminal decision on tenancy by the entireties for bank accounts in Beal Bank, SSB v. Almand & Associates, 780 So. 2d 45 (Fla. 2001). The decision held that if the signature card of a bank account does not expressly disclaim tenancy by the entireties ownership for an account established by husband and wife, a presumption arises in favor of tenancy by the entireties.

In Anthony and Partner's most recent success, the signature cards were laid out in a menu format, which included several ownership choices, including single-party, multiple-party, multiple-party tenancy by the entireties, and a non-specified blank option. The defendant checked and initialed 'multiple-party account,' rather than 'multiple-party account – tenancy by the entireties.' The court found that by failing to check 'multiple-party account – tenancy by the entireties,' the debtor expressly disclaimed any intent to own the account as tenants by the entireties with his spouse.

In accordance with Beal Bank, absent evidence of fraud, this disclaimer ended the inquiry and the court declined to consider any other indications of the debtor's intent, including the self-serving testimony of the debtor and his wife that the garnished bank was to blame for the allegedly erroneous paperwork.

When striking gold on a writ of garnishment, it is important to immediately request the account signature cards to determine ownership status and identify weaknesses in the debtor's position on ownership. Many sophisticated judgment debtors have engaged in asset protection, some even getting married simply to enjoy the benefits of tenancy by the entireties. If their paperwork is not appropriately filled out, whether intentionally or unintentionally, it may provide a diligent judgment creditor with an opportunity to recover in an efficient, fair, and predictable manner.

CASE NOTES

Statute of Limitations Issues Continue in Florida Foreclosure Cases

In HSBC Bank USA v. Karzen, 2015 WL 798946, the lender's amended complaint was dismissed. The trial court ruled it did not relate back to the filing of the original complaint for purposes of the statute of limitations. HSBC filed its original complaint in January 2008. The defendant was Karen Karzen, who had executed the note and mortgage. The lender also named the unknown spouse of Karen Karzen. Karen Karzen and Donald Raybuck filed an amended answer in May 2008 through counsel, identifying Raybuck as Karzen's spouse, and advancing Raybuck's homestead interest in the mortgage property as a defense to the foreclosure. Raybuck subsequently obtained his own counsel, who moved to dismiss.

The court granted the motion in June 2013 with leave for the lender to amend the complaint within 30 days. Prior to the trial, Raybuck's attorney moved to dismiss the complaint due to the time bar of the statute of limitations, alleging he had not been named as a party defendant prior to the amended complaint, which was filed outside of the five-year limitations period. While the trial court dismissed based on this claim, the appellate court reversed, stating that the filing date of the amended complaint related back to the date of the original complaint for purposes of limitations, since Raybuck clearly had notice of the action in 2008 when the first answer was filed jointly with Karzen.

In Deutsche Bank Trust Company v. Beauvais, 2014 WL 7156961, the lender was unable to convince the court that its claim survived a bar by the statute of limitations. In this case, a condominium loan had gone into default in September 2006 and the lender sent a demand letter accelerating amounts due. The condominium association foreclosed on the property as a result of failure to pay condominium fees and acquired the property in February 2011. The initial action on the mortgage was filed in January 2007, but in December 2010, the trial court dismissed the action without prejudice because the lender had failed to appear at the case management conference. The lender then filed a new action in December 2012 seeking to foreclose on the property.

In the complaint, the lender alleged that the debtor had defaulted by failing to make the October 2006 payment, as well as all subsequent payments. The association moved for summary judgment, arguing that the lender's claim was barred by the statute of limitations. Despite the dismissal without prejudice of the initial action, the lender had never withdrawn its acceleration of the debt or otherwise reinstated the installment nature of the payments. The appellate court ruled that the involuntary dismissal without prejudice of the initial action had no legal effect on the acceleration of the debt and did not reinstate the installment terms of the note. Accordingly, no new statute of limitations began to run from that date. The court ruled that an affirmative act is necessary to decelerate a note and that it must be clearly communicated by the lender to the borrower. No such action was taken in this case.

MEMBER PROFILE

Barbara Hardy Luikart
Partner & Member

Barbara Hardy Luikart has joined Anthony & Partners as a partner in the firm's real estate and finance practice. She represents developers, lenders, borrowers, businesses, individuals, commercial landlords and tenants. Ms. Luikart has more than 28 years of experience in negotiating, documenting and closing the acquisition, development, financing, sale and lease of commercial and residential properties. Her background includes deep expertise with apartment, hotel, restaurant, retail, office, golf course, vacant land and mixed-use developments.

Ms. Luikart graduated from Indiana University with highest honors and holds a J.D. degree with honors from University of Florida. She is a member of the American Bar Association, The Florida Bar, Hillsborough County Bar Association and CREW Tampa Bay. She is AV Preeminent Peer Review Rated by Martindale-Hubbell and is listed in Best Lawyers in America for Real Estate Law.

ANTHONY & PARTNERS NEWS

Attorney News

Attorney John Anthony, pictured below with Judge Caryl Delano, was chosen to debate the topic *Welcome to the Laundromat! Can 363 Orders Scrub all Future Claims?* at the 39th Annual Alexander L. Paskay Bankruptcy Seminar on March 6, 2015. The seminar featured prominent regional and national speakers, as well as bankruptcy judges, who discussed commercial and consumer bankruptcy issues.

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