

# FEDERAL STANDARD ABSTRACT

## TITLE NEWS

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### Creditors and Tenancy by the Entirety

Those who have practiced collections know to avoid executing judgments on property owned by tenants by the entirety (i.e., married couples) when the monetary judgment is only against one of the spouses. Tenancy by the entirety and joint-tenancy are similar in that in both cases the survivor of the owners takes sole title to the property. But that is where the similarities end. In a joint-tenancy, the survivor takes title as if the decedent conveyed his share upon death. This means that the decedent's share is encumbered by any liens that may have attached against the decedent. In a tenancy by the entirety, on the other hand, the surviving spouse takes title *as if the decedent was never in title*. This means that any liens that may have been on the decedent do not attach to the property upon the decedent's death. A judgment creditor can foreclose against the share of a joint-tenant, but not against the share of a tenant by the entirety. Now, for title insurance purposes, this doesn't mean that judgments against a tenant by the entirety don't matter. They may not matter for as long as both tenants by the entirety are alive, but they will matter if the judgment debtor is the survivor of the two.

Husband and wife owned a condominium unit. Years later, the husband had a monetary judgment entered against him. It appears that soon after the husband received notice of the judgment, husband and wife conveyed the property to themselves as trustees of a trust created for their benefit. When the creditor sought to levy on the condominium unit, it appears that the defendants argued (a) that the property was owned as tenants by the entirety, or benefited from that status being trust for the same purpose; and (b)

that the property could not be reached because it was owned by a trust and not the debtor.

As to the tenancy by the entirety, the court rejected the argument, apparently citing federal bankruptcy law that allows levying on property held in tenancy by the entirety. It is unclear why bankruptcy law would apply to the case. But the result is nonetheless somewhat ironic. If the condo unit had not been transferred into the trust, the protections of the tenancy by the entirety might have carried the case.

As to the argument that the condo unit was not owned by the husband, the court rejected it as well. Under Debtor Creditor Law §276, transfers of property intended to avoid a creditor's collection attempts may be disregarded for collection purposes. After reviewing the facts, the court concluded that the condo unit had been transferred with the intent to prevent execution by the judgment creditor. *Gard Entertainment v. Block*, 2012 N.Y. Slip Op. 51677 (New York Cty. Sup. Ct., 8/21/12).

## The Mortgagee and the Strawman Transaction

In 2006, the plaintiffs owned a four-family dwelling in Brooklyn but were unable to make their mortgage payments. A broker offered them a transaction to preserve their property. It consisted in transferring the property to a third party (the strawman) who would then use her credit to refinance the existing mortgage. After the transaction, the plaintiffs would remain as occupants of the property, make all payments, and a year or so later, once their credit was repaired, the strawman would convey the property back to them.

The transaction took place in 2006. It is unclear what happened in the following years, but it appears that the property was not conveyed back to the plaintiffs. The plaintiffs started an action seeking to undo the 2006 transaction; i.e., to recover title to the premises and to declare the new mortgages executed by the strawman void. The plaintiffs alleged that they mortgagee knew or should have known that the transfer of title was not for real because a representative of the mortgagee was present at the closing. The mortgagee cannot take a mortgage from the strawman and ignore the plaintiffs' property rights. The mortgage, the argued, is not a *bona fide* encumbrancer

for value because it was on notice of the plaintiffs' property rights.

In response, the mortgagee produced an affidavit from its "quality control fraud manager" identifying the procedures that the mortgagee followed to ensure that there was no fraud involved. The court found that the mortgagee was not on notice that the transaction had been a strawman transaction and ruled for the mortgagee. *Foster v. Bowles*, 2012 N.Y. Slip Op. 51554 (Kings Cty. Sup. Ct., 8/7/12).

Notably, the facts of the case reflect that the mortgage had been made to MERS as nominee for M & T Mortgage Corporation (which means that the mortgage and the promissory note were, in all likelihood, in different nominal ownership), and later on assigned by MERS to Wells Fargo Bank. The plaintiffs questioned the validity of the MERS assignment and called for the employee file of the signatory to check whether the signatory was an employee or officer of MERS at the time she executed the assignment. And yet the Kings County Supreme Court in this case did not seem to put much weight on such objections. MERS supporters should see this case as a victory).

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