No. 137

Rondack Construction Services, Inc.,

Respondent,

v.

Kaatsbaan International Dance Center, Inc.,

Respondent,

TBays, LLC,

Nonparty Appellant.

Richard I. Cantor, for nonparty-appellant.

Malcolm S. Taub, for respondent Kaatsbaan International Dance Center, Inc.

GRAFFEO, J.:

In this case, we reaffirm Tiffany v St. John (65 NY 314 [1875]) and hold that a judgment debtor's tender to the sheriff before its property is auctioned at a judicial sale automatically discharges the execution lien, terminating the sheriff's

authority to sell the property.

In early 2006, plaintiff Rondack Construction Services, Inc. obtained a default judgment against defendant Kaatsbaan International Dance Center, Inc. for $105,631.05 based on Kaatsbaan's failure to pay a promissory note. When Kaatsbaan did not satisfy the judgment, Rondack delivered an execution directing the Dutchess County Sheriff to sell a 53-acre parcel owned by Kaatsbaan. The Sheriff scheduled a judicial auction and sale of the property for 11:00 A.M. on September 6, 2006.

The auction commenced as planned. Before bidding began, Kaatsbaan's Executive Director asked the lieutenant from the Sheriff's department whether the sale could be prevented by satisfying the judgment with a check. The lieutenant phoned the County Attorney's office for legal advice and, while awaiting its response, Kaatsbaan's agent offered him a cashier's check for $116,754.15, an amount sufficient to satisfy the judgment, together with interest, poundage and other related fees. After receiving instructions from the County Attorney's office, the lieutenant refused the tender and proceeded with the sale. A bid of $118,000 made on behalf of TBays, LLC was accepted as the highest bid.

On September 13th, Kaatsbaan moved to vacate the sale and compel the Sheriff to accept its check in full satisfaction of the judgment. TBays cross-moved to direct the Sheriff to execute and deliver the deed and related documents.

Supreme Court denied Kaatsbaan's motion and granted TBays' cross motion. The Appellate Division reversed, thereby granting Kaatsbaan's motion to vacate the sale and compel the Sheriff to accept the check (54 AD3d 924 [2d Dept 2008]). Relying on Tiffany, the court held that Kaatsbaan's pre-sale tender discharged the execution lien, and therefore, the Sheriff lacked capacity to sell the parcel.

In granting leave to appeal, the Appellate Division certified the following question: "Was the decision and order of this court dated September 23, 2008, properly made?" We now answer the question in the affirmative.

In Tiffany, the sheriff levied on a judgment debtor's boat pursuant to an execution and proceeded to sell it at a public auction. Before bidding began, the judgment debtor tendered to the sheriff an amount sufficient to satisfy the judgment and all associated costs. The sheriff refused the tender and sold the boat to the highest bidder. Analogizing to the common-law equity of redemption in the mortgage foreclosure context, this Court held more than a century ago that, under these circumstances, the tender was the equivalent of payment and had the "instantaneous effect" of discharging the lien created by the execution (65 NY at 318). Consequently, the sheriff lost the authority to sell the property, resulting in an improper conveyance.

TBays acknowledges that Tiffany compels an affirmance

if it remains good law. It urges, however, that the CPLR article 52 procedures relating to the enforcement of money judgments -- and CPLR 5236 and 5240 in particular -- abrogated the common-law rule articulated by Tiffany. We disagree.

CPLR 5236 delineates the procedures applicable to a sheriff's sale of a judgment debtor's real property. In Guardian Loan Co. v Early (47 NY2d 515 [1979]), we noted that CPLR 5236 abolished the debtor's statutory right (codified in the former Civil Practice Act) to redeem property after it had been sold at auction. The enactment of CPLR 5236, however, did not alter a debtor's right to recover property before a judicial sale. In fact, CPLR 5236 (a) preserves "a kind of 'redemption' period" because it requires at least an eight-week time frame between the posting of notice and the sale itself (10th Ann Rep of NY Jud Conf, at 123). We believe that Tiffany, which effectively permits a judgment debtor to redeem by tendering full payment to the sheriff before the property is sold at auction, is fully compatible with CPLR 5236 and remains an accurate statement of New York law.

TBays' reliance on CPLR 5240 is similarly misplaced. CPLR 5240 allows a court to issue a protective order "denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." We have observed that this provision "grants the courts broad discretionary power to control and regulate the enforcement of a money judgment under article 52

to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (Guardian, 47 NY2d at 519 [internal quotation marks and citation omitted]). But nothing in CPLR 5240 explicitly or implicitly supplants Tiffany. A property owner who desires to tender the appropriate amount before the actual sale is free to do so without the need to move under CPLR 5240. Stated differently, property owners possess a common-law right under Tiffany to redeem their property before sale without judicial intervention.

Here, as in Tiffany, Kaatsbaan timely tendered an amount sufficient to satisfy the judgment and all fees and expenses. Kaatsbaan's tender extinguished the lien and foreclosed the sale of the property. The Appellate Division therefore properly granted Kaatsbaan's motion to set aside the sale and compel the Sheriff to accept its check in full satisfaction of the judgment.

Accordingly, the order of the Appellate Division should be affirmed, without costs, and the certified question answered in the affirmative.

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Order affirmed, without costs, and certified question answered in the affirmative. Opinion by Judge Graffeo. Chief Judge Lippman and Judges Ciparick, Read, Smith, Pigott and Jones concur.

Decided December 15, 2009