

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

RANDOM HOUSE, INC.,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2010-G-2963
JOE ESZTERHAS, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 M 000551.

Judgment: Affirmed in part, reversed in part, and remanded.

Patricia A. Foster and Susan Grogan Faller, Frost, Brown & Todd, L.L.C., 2200 PNC Center, 201 East Fifth Street, Cincinnati, OH 45202-4182 (For Plaintiff-Appellant).

Marvin A. Sicherman, Dettelbach, Sicherman & Baumgart, P.A., 1100 Amtrust Bank Center, 1801 East Ninth Street, Cleveland, OH 44114-3169 (For Defendants-Appellees).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Random House, Inc.¹, appeals the March 18, 2010 judgment of the Geauga County Court of Common Pleas. For the following reasons, the judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceedings.

1. Herein referred to as Random House.

{¶2} Random House filed its complaint on May 15, 2008, to recover an advance paid to appellees, Joe Eszterhas and Barbarian Ltd., his company, (herein referred to as “Eszterhas”), in 2001 for failure to deliver a manuscript for publication. Random House received an agreed judgment against Eszterhas in the amount of \$264,186.50, plus prejudgment interest. Thereafter, Random House commenced efforts to collect its judgment. Random House caused an execution by way of a levy to be served by the Sheriff of Geauga County, Ohio, thereby seeking to attach and sell the household goods and furnishings in Eszterhas’ home.

{¶3} The personal property of Eszterhas was tagged by the sheriff pursuant to the writ of execution. Eszterhas then designated the ownership of each tagged item, many of which were jointly owned by him and his wife, Naomi Eszterhas. Mrs. Eszterhas was not a judgment debtor in the underlying civil action or a party. Random House stipulated to Eszterhas’ designations of ownership of the personal property.

{¶4} The trial court ordered the sheriff to cause two disinterested householders to appraise the property pursuant to R.C. 2329.68. Upon completion of the appraisal, a hearing on exemptions was held. Random House attempted to offer evidence to contradict the fair market value of Eszterhas’ personal property as assigned by the two appraisers. In denying this evidence, the trial court stated:

{¶5} “The court further finds as a matter of law the appraisal made by two disinterested householders of the county, who had been selected and appointed by the sheriff, pursuant to Ohio Revised Code 2329.68 is the only official appraisal to be used to determine the values for purposes of allowance of the Debtor’s claims of exemptions

with respect to the property appraised, and that said appraisal may not be challenged by evidence presented by another appraiser.”

{¶6} Additionally, the trial court addressed the sale of the jointly-owned property, which had been designated as such by Eszterhas. The court stated, “as a matter of law that in the instance of a levy upon property jointly owned by a judgment debtor and his spouse, a sheriff in executing such levy can only sell the Debtor’s undivided one-half (1/2) interest.”

{¶7} It is from this March 18, 2010 judgment that Random House filed a timely notice of appeal. Random House’s first assignment of error states:

{¶8} “The trial court erred by refusing to permit Random House to provide any evidence and demonstrate that the value of Eszterhas[’] personal property far exceeded his claim to exemptions and far exceeded the valuation provided by the court-appointed appraisers and severely prejudiced Random House’s claim.”

{¶9} Under this assigned error, Random House maintains that it was error for the trial court to refuse “it the opportunity to present relevant evidence regarding the worth of Eszterhas[’] personal property that had been executed upon.” Random House takes issue with the appraisal of Eszterhas’ personal property, noting that it included sports and entertainment memorabilia which were undervalued by up to 100 percent. Random House bases this argument on the testimony of John Paul Fusco, a licensed real estate agent and auctioneer in the state of Ohio. Random House proffered the testimony of Mr. Fusco at the March 4, 2010 hearing.

{¶10} On appeal, Random House presents three issues for our review: (1) the plain language of R.C. 2329.68 does not prohibit relevant evidence to challenge the

appraisal of the householders, (2) Evid.R. 402 allows for the admissibility of all relevant evidence, and (3) the denial of such evidence deprives Random House due process.

{¶11} The statute at issue, R.C. 2329.68 (“appraisal of exempted property”), states:

{¶12} “When it is necessary to ascertain the amount or value of personal property exempt under sections 2329.63 to 2329.71 of the Revised Code, it shall be estimated and appraised by two disinterested householders of the county, who shall be selected by the officer holding the execution and sworn by the officer to impartially make the appraisement.”

{¶13} The exempted interests and rights are outlined in R.C. 2329.66. In the instant case, the exemptions that may apply include, inter alia, the following:

{¶14} “(A)(4)(a) The person’s interest, not to exceed five hundred twenty-five dollars in any particular item or ten thousand seven hundred seventy-five dollars in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, firearms, and hunting and fishing equipment that are held primarily for the personal, family, or household use of the person;

{¶15} “(b) The person’s aggregate interest in one or more items of jewelry, not to exceed one thousand three hundred fifty dollars, held primarily for the personal, family, or household use of the person or any of the person’s dependent.

{¶16} “(5) The person’s interest, not to exceed an aggregate of two thousand twenty-five dollars, in all implements, professional books, or tools of the person’s profession, trade, or business, including agriculture[.]” R.C. 2329.66.

{¶17} Although in relation to real property, case law from the 1800's characterizes the importance of independent appraisals of property before execution of a sale.

{¶18} "The policy of appraising lands levied on by execution in satisfaction of judgments, and requiring them to sell for a certain proportion of the appraised value, was early adopted, and since constantly adhered to in Ohio. It has been found, as it was expected, beneficial on the whole to both creditor and debtor. To creditor, by preventing the debtor, in the name of a friend, from purchasing a large estate for a trifle, leaving the debt unsatisfied, and removing many of the inducements the debtor had to cover up his estate, and prevent it from a forced sale for what it would bring; to debtor, by preventing the sacrifice, in a time of a general scarcity of money, of his real estate, for a sum greatly below its just value." *Allen v. Parish* (1827), 3 Ohio 187, 199.

{¶19} Random House is not seeking to attack the appraisals based on fraud or that the householders were biased or nonresidents of the county. Instead, Random House is attempting to introduce evidence to dispute the value placed on Eszterhas' property by "two disinterested householders of the county," who were properly appointed under R.C. 2329.68.

{¶20} In its judgment entry, the trial court determined that, as a matter of law, the appraisal, made by two disinterested householders of the county and in compliance with R.C. 2329.68, could not be challenged by evidence presented by another appraiser. We disagree.

{¶21} The statutory scheme requires two disinterested householders of the county to appraise the amount or value of personal property exempt under sections

R.C. 2329.63 to 2329.71. R.C. 2329.68. However, the courts of this state have jurisdiction to provide a remedy by exercising appropriate equity powers. Therefore, the trial court, under its broad equity powers, may, in its discretion, permit additional evidence to challenge the appraisal of the appointed householders.

{¶22} The character of much of the property at issue was unique. Since Random House provided sufficient information regarding the disparity of the actual value versus the appraised value, the trial court could have conducted a hearing to determine whether equity should demand a new, more accurate appraisal. The trial court indicated it was without any authority whatsoever to make such a finding. However, this is incorrect. Therefore, Random House’s first assignment of error has merit to the extent indicated, and we remand this matter to the trial court to determine, in its sound discretion, whether such action would be justified.

{¶23} As its second assignment of error, Random House alleges:

{¶24} “The trial court erred when it declared that Random House could only sell Eszterhas['] one-half interest in jointly-owned personal property, which eliminated any sale value in that property, to the severe prejudice of Random House in execution on its judgment against Eszterhas.”

{¶25} Random House maintains that “Ohio law regarding execution on personal property does not prohibit the sale of the non-debtor’s fractional interest.” To support this argument, Random House cites to *White v. Parks*, 9th Dist. No. 24391, 2009-Ohio-703. That case, however, is inapposite to the instant case as it involved a joint survivorship interest in real property—not co-ownership of personal property. In *White*, supra, the Parks argued that the Whites sought to enforce a judgment lien against

property co-owned by Mr. and Mrs. Parks, although the Whites did not have a lien against Mrs. Parks. Mrs. Parks was made a party to the foreclosure action, as prescribed by statute. The trial court granted the Whites' motion for summary judgment and ordered the property to be sold at sheriff's sale. Finding no error on appeal, the appellate court relied upon R.C. 5302.20(C)(4), located under Title 53 of the Ohio Revised Code ("real property"). The court noted that R.C. 5302.20(C)(4) unambiguously sets forth how a judgment creditor should enforce its lien against a debtor who owns property as a joint tenant with rights of survivorship, as the Parks' real estate was titled. Consequently, *White*, supra, is inapplicable to the instant case.

{¶26} Random House also cites *Johnson v. Cromaz* (Dec. 23, 1999), 11th Dist. No. 98-G-2151, 1999 Ohio App. LEXIS 6240 for the proposition "that the proper measure of a joint owner/non-debtor's interest in foreclosed property is the ability to participate in the disbursement of the funds raised by the foreclosure sale." In *Johnson*, the appellees had a judgment certified against Mr. Cromaz, and, eventually, foreclosure proceedings were initiated against Mr. and Mrs. Cromaz' home. *Id.* at *1-2. The foreclosure complaint named both Mr. and Mrs. Cromaz as defendants, and both parties were served with the summons and complaint. *Id.* at *2. Mrs. Cromaz failed to answer the foreclosure complaint. *Id.* On appeal, this court determined that Mrs. Cromaz was entitled to share in the monetary distribution, as "her legal and equitable interest in the real property was conceded by [the] appellees in the complaint." *Id.* at *10-18.

{¶27} *Johnson*, supra, however, is also inapposite to the instant case. In *Johnson*, Mrs. Cromaz was served with a complaint and summons and was able to

defend such action. As previously noted, however, Mrs. Eszterhas was not made a party to this or the underlying action for judgment. Additionally, *Johnson* dealt with real property, not personal property.

{¶28} Random House also argues that the sale of one-half interest in a piece of personal property would diminish its value. Random House states that at the hearing, Eszterhas' attorney "acknowledged that the analogous procedure for selling real estate in bankruptcy empowers the trustee to compel a sale of jointly owned property once it is determined that sale of a half interest will dramatically depress the price."

{¶29} In his brief, however, Eszterhas outlines a section of the Bankruptcy Code, specifically Section 363(h), which permits the sale of property of the estate along with the interest of a co-owner of the property when certain criteria are met. To obtain approval pursuant to 363(h) for the sale of both the interest of the estate and the interest of a co-owner of property, however, an adversary proceeding must be initiated which is governed, when applicable, by the Federal Rules of Civil Procedure. As such, a complaint is filed and service is issued, ensuring that the co-owner of property is afforded due process.

{¶30} In this case, Eszterhas designated the ownership of each item of *personal* property. Numerous items of personal property were designated as being jointly owned by Mrs. Eszterhas. Random House does not dispute that it stipulated to such ownership designation. Mrs. Eszterhas, however, was not made a party to the action, did not receive proper notice of this action, nor does Random House have any monetary claim against her. The judgment was solely against Eszterhas.

{¶31} The husband and wife owned the joint property essentially as partners. Ohio law sets forth a specific procedure to foreclose on the interest of a debtor partner, while protecting the interest of the non-debtor partner in the asset. R.C. 1776.50 sets forth the process of obtaining a charging order against the property:

{¶32} “1776.50 (RUPA 504) Partner’s transferable interest subject to charging order,” states:

{¶33} “(A) On application by a judgment creditor of a partner or of a partner’s transferee, a court having jurisdiction may charge the economic interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances of the case may require.

{¶34} “(B) A charging order constitutes a lien on the judgment debtor’s economic interest in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.

{¶35} “(C) At any time before foreclosure, an interest charged may be redeemed by any of the following:

{¶36} “(1) The judgment debtor;

{¶37} “(2) One or more of the other partners by using property other than partnership property;

{¶38} “(3) One or more of the other partners, with the consent of all of the partners whose interests are not so charged, by using partnership property.

{¶39} “(D) Nothing in this chapter deprives a partner of any right under exemption laws with respect to the partner’s interest in the partnership.

{¶40} “(E) This section provides the exclusive remedy by which a judgment creditor of a partner, or partner’s transferee, may satisfy a judgment out of the judgment debtor’s economic interest in the partnership.”

{¶41} This process ensures that the non-debtor’s partner is protected and afforded due process in the disposition of the partnership asset.

{¶42} Based on the foregoing, Random House’s second assignment of error is without merit.

{¶43} The judgment of the Geauga County Court of Common Pleas is hereby affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

DIANE V. GRENDALL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.