

THE HIGH COURT

[2011 No. 1406 S]

BETWEEN

JOHN BARRETT

PLAINTIFF

AND

MAURICE LEAHY

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered on the 25th day of November, 2015

1. In this motion the defendant seeks an order that the plaintiff be directed to remove and/or discharge from the Registry of Deeds a judgment mortgage entered on the defendant's lands at 16 Kiltragh Drive, Foxrock, County Dublin. The application raises a novel point of law.

Background

2. The application arises in the context of litigation between the parties in a number of proceedings. The plaintiff in these proceedings obtained an order on the 13th January, 2012 from the Master of the High Court granting him liberty to enter final judgment in the sum of €450,000 together with interest pursuant to the Courts Act 1981 on the said sum from the 4th April, 2011 until judgment or prior payment, together with an order for the costs of the proceedings when taxed and ascertained.

3. On the 25th January, 2012 the amount of the judgment was amended under O. 28 r. 11 to the sum of €455,000.

4. Judgment was entered on foot of these orders by the plaintiff on the 14th May, 2012.

5. Enforcement proceedings were commenced by the plaintiff against the defendant and the Dublin Metropolitan District Court made an order that the defendant do pay the sum of €4,500 per month to the plaintiff in respect of the judgment.

6. As a result of payments made on foot of that instalment order and of payment of the capital sum of €69,000 on foot of a separate order of garnishee, the outstanding balance stated to be owed by the defendant to the plaintiff, including interest as of the 6th July, 2015, was €426,602.41.

7. By motion dated the 6th July, 2015 the plaintiff sought *inter alia* an order pursuant to O. 42 r. 36 of the Rules of the Superior Courts for the attendance and examination of the defendant in aid of execution, and for the appointment of a receiver by way of equitable execution over the proceeds of sale of properties not relevant to this application. As a result of that application the defendant agreed to lodge "without admission of liability" into court the said sum of €426,602.41 by way of security for the balance of the judgment. This lodgement was made pursuant to the order made by me on the 16th July, 2015 and those monies stand to the credit of this suit pending further order. The instalment order made by the District Court has now been vacated.

8. No stay was placed on the order of the Master of the High Court giving liberty to enter judgment. The monies were not lodged in court in consideration of such a stay.

9. The defendant and his wife have issued two separate sets of proceedings against the plaintiff, summary proceedings bearing record number 2013/3715S and plenary proceedings bearing record number 2014/4092P by which they seek to recover a sum in excess of €11,000,000 from the plaintiff arising from financial and investment advice said to have been furnished to them by the plaintiff.

10. The defendant has asserted that the plaintiff is attempting to actively divest himself of assets which might be available to satisfy any judgment he might obtain from those proceedings with the intention of preventing him from recovering damages. He makes averments to this effect and gives examples of what he says are the intentional divesting of ownership in certain assets by the plaintiff in his replying affidavit sworn on the 10th July, 2015 to the motion for cross examination.

The application with respect of the judgment mortgage

11. The defendant is the joint owner with his wife of unregistered premises situate at and known as 16 Kiltragh Drive, Foxrock, County Dublin in which they reside. The plaintiff registered the judgment as a judgment mortgage over the interest of the defendant in those premises on the 7th October, 2012.

12. The defendant and his wife have agreed to the sale of this premises and it is anticipated that the judgment creditor will be paid in full from the proceeds of sale. The defendant however submits that the High Court should make an order cancelling or vacating the judgment mortgage having regard to the fact that the monies secured thereby have been lodged in the Central Office of the High Court to the credit of this suit, and it is argued that the plaintiff has as result "adequate security" for his judgment in the circumstances.

13. The plaintiff has refused a request in a letter of the 28th day of August, 2015 from the solicitors for the defendant to agree to vacate or discharge the judgment mortgage, and argues that as the lodgement into court by the defendant does not discharge the outstanding judgment, it does not as a matter of law affect the entitlement of the judgment creditor to maintain the judgment mortgage and to seek to enforce the security created thereby from the proceeds of sale. The plaintiff argues that the court has no jurisdiction to make the order sought.

The judgment mortgage: how it is to be characterised

14. The Judgment Mortgage (Ireland) Acts 1850 and 1858 were repealed and replaced by the new simplified statutory provisions contained in Part II of the Land and Conveyancing Law Reform Act 2009 ("the Act of 2009") which make no alteration in substance to

the nature of the judgment mortgage.

15. A judgment may be registered as a mortgage against the estate or interest of a debtor in land pursuant to s. 116, and Section 117 of the Act expressly provides that registration of a judgment mortgage operates as a charge over the land. This is provided in s. 117(1):

"117.— (1) Registration of a judgment mortgage under section 116 operates to charge the judgment debtor's estate or interest in the land with the judgment debt and entitles the judgment mortgagee to apply to the court for an order under this section or section 31 ."

16. By s. 117(3) the judgment mortgage takes subject to any rights or incumbrance affecting the land whether registered or not.

17. A judgment mortgage is *sui generis* and a creature of statute, and the definition in s.3 of the Act of 2009 of a "*mortgage*" does not include a judgment mortgage, and the definition section contains a separate definition of "*judgment mortgage*" as

"a mortgage registered by a creditor under s. 116".

18. The defendant argues that a judgment mortgagee is a "volunteer" for all purposes, and that because the law recognises that a judgment mortgage is a process of execution only, that it is an "intermediary security" which terminates or has served its purpose once the monies secured thereby "become available or are realised". He argues that in that context the court is entitled in its discretion to consider whether the debt secured by the mortgage has been adequately met by other means, and if it is so satisfied to order that the registration be vacated.

Jurisdiction to vacate or cancel a judgment mortgage

19. Section 118 of the Act of 2009 provides as follows:

"118.— Registration in the Registry of Deeds of a certificate of satisfaction of a judgment in respect of which a judgment mortgage has been registered extinguishes the judgment mortgage."

20. This section re-enacts the provisions of s. 9 of the Act of 1850, as amended by s. 5 of the Act of 1858 relating to the satisfaction or discharge of the judgment mortgage, and provides the means by which a judgment mortgage on unregistered land is extinguished. There is no other statutory provision by which the court is empowered to extinguish or direct the cancellation of a judgment mortgage.

21. Counsel for the defendant argues that a broad jurisdiction has been recognised in a number of cases. He relies in particular on *Re: Strong* 1940 I.R. 382. That case concerned the nature of the interest which was affected by the registration of a judgment mortgage on registered land. The judgment mortgage was registered after the purchase monies had been paid over by a purchaser for value and after the transfer had been executed, but minutes before the transfer was lodged for registration. The Supreme Court held that the purchaser was entitled to have the judgment mortgage cancelled, because at the date of registration the judgment debtor had no interest which might be affected thereby. As a judgment mortgage can affect beneficial interests only, and as the judgment debtor had only the bare legal estate in the land, he had no interest against which a judgment mortgage might be registered. The Supreme Court ordered that the judgment mortgage be vacated.

22. It does not seem to me that the judgment of the Supreme Court is authority with regard to a general power of the court to direct cancellation or extinguishment of a judgment mortgage, save in circumstances such as those in that case, namely where the judgment mortgage did not as a matter of law capture any interest of the debtor, he having disposed of all relevant interests by the date of registration. The jurisdiction of the court to vacate the judgment mortgage in *Re: Strong* arose under the applicable Land Registration Rules 1937, r. 117 whereof permitted the Registrar of Titles to cancel a judgment mortgage if it can be shown "that the judgment debtor had no estate or interest in the property or no estate or interest capable of being affected by registration of the affidavit".

That is the jurisdiction invoked by the Supreme Court.

23. Thus I do not consider that *Re: Strong* is authority for the proposition that the court has a broad jurisdiction to extinguish a judgment mortgage.

24. Counsel also relies on the Supreme Court judgment in *Tempany v. Hynes* [1976] 1IR 101 and the dicta of Henchy J. at p. 101 of the judgment when he said as follows:

Since the judgment creditor by registering his judgment as a mortgage, could not acquire any greater estate or interest in the land than the registered owner had at the time of such registration, all that could pass to the judgment creditor here was the interest in the land which the registered owner had after the making of the contract to sell, namely an interest which would pass out of existence once the sale had been completed, the purchase money paid and the purchaser registered as full owner. It follows, therefore, that if the defendant completes the purchase and becomes registered as full owner, the post contract judgment mortgage will no longer affect the land and he will be entitled to have them cancelled from the folios.

25. *Tempany v. Hynes* also related to the nature of the interests captured by a judgment mortgage, and Kenny J., while he acknowledges circumstances where a person may be entitled to have a judgment mortgage cancelled from a folio, does not identify a general jurisdiction, whether in equity or as a matter of common law, to require a judgment creditor to forego his security by vacating the judgment mortgage.

26. The jurisdiction of the court to direct cancellation of a judgment mortgage has also been recognised as existing when the judgment mortgage has not been properly registered in *Re Murphy v. McCormack* [1931] 1 IR 322, but such a jurisdiction is one that arises where a defect in registration can be shown, and the court is vested with the jurisdiction to declare whether a judgment mortgage, or indeed any other burden registered on land, validly affects that land.

27. Counsel for the defendant argues that the High Court has in its inherent and original jurisdiction, and in the interest of achieving justice between the parties, a residual jurisdiction to direct that the judgment mortgage be vacated. Apart from the judgments mentioned above, which I do not consider to be on point, he has identified no case law which would support such a broad proposition. What in essence the defendant seeks is an order that the judgment creditor forego his security, and he has not sought to argue that

the judgment mortgage was not properly registered, or that at the time of registration the judgment debtor had no interest which it might have captured.

28. In that context I consider that the court may not ignore the fact that a judgment mortgagee, while he does not have a mortgage to which the provisions of Part 10 of the Act of 2009 apply, does have rights and remedies. I turn now to examine these.

The rights of the judgment mortgagee

29. Although the procedure under s. 117 has the effect that registration of a judgment mortgage operates to charge the interest or estate of a debtor in land, the judgment mortgagee has limited rights of enforcement against that land until an order of the court is made under s. 117(2) by which the court, having if necessary assessed the respective priorities of incumbrances, may make an order for enforcement whether by means of sale or otherwise. Thus, while the judgment mortgagee has the benefit of a charge over the land, the charge is one which does not entitle the judgment mortgagee to sell the land, seek possession of the land or appoint a receiver, unless an order of the court is made to permit such means of enforcement. The registration of a judgment mortgage, then, is no more than one step in execution and the involvement of the court is required so that a process of execution may be fully effected, and a judgment mortgage is not a mortgage which carries with it the benefit of the statutory remedies available to a mortgagee under Part 10 of the Act.

30. The fact that registration of the judgment mortgage merely operates to charge the debtor's interest in land, and that the remedies of the judgment mortgagee are subject to an order of the court, does not mean that a judgment mortgage is not a security, and the statutory provisions make it clear that the registration of a judgment mortgage does charge the land, albeit subject to equities such that the priority of a judgment mortgage may be affected by matters of which the judgment mortgagee has no knowledge or notice.

31. A wide range of remedies is available to a judgment mortgagee, including an order for sale and/or partition or other relief under s. 31 of the Act of 2009. Further, the practical effect of the registration of a judgment mortgage, and the existence of a judgment mortgage is an encumbrance on title, and the owner of land may not make good title if his or her interest is charged with the judgment mortgage.

32. It is precisely that practical effect that has crystallised in this case and the purchaser who has signed a contract to purchase the premises at Foxrock, Co. Dublin requires, and is contractually entitled to, an unencumbered title, and this can only be achieved if the monies secured by the judgment mortgage are made available to the judgment creditor or other arrangements are made with him so as to provide a satisfaction for lodging in the Registry to clear the title.

33. Further the judgment mortgagee may have the right to seek remedies in aid of his security. This had been established in a number of cases. By way of illustration I point to the judgment of Henchy J., hearing an appeal from the Circuit Court, in *Gowrie Park Utility Society Ltd v. Fitzgerald* [1963] IR 436 where he identified the right of a judgment mortgagee to seek an order for possession against a person deriving title under the mortgagor and to bring ejectment proceedings against a third party.

34. There is some authority for the proposition that a judgment mortgagee may seek that the court would appoint a receiver and this is found in *Re Martin's Estate: Ex Parte Bewley* [1884] 13 L.R. Ir 43. That decision of the Land Judges was made on foot of the equitable jurisdiction of the court to grant mandamus or an injunction and under the particular provisions of ss. 19 and 20 of the Judgment Mortgage Act 1850.

35. Professor Wylie in his annotations and commentary on the Land and Conveyancing Law Reform Act of 2009 (Bloomsbury 2009) at para. 169 suggests that similar powers are vested in the court under s. 117(2)(c), and I consider that he is correct in this, and that the subsection gives the power to the court to make an order for "enforcement of the judgment mortgage as the court thinks appropriate", thus importing a broad discretion to make an order in aid of enforcement.

36. Accordingly, a judgment mortgage carries rights and remedies which cannot be described as insubstantial.

Equitable principles?

37. The defendant has shown no authority for the general proposition advanced by him that the court has the power to direct the extinguishment of the judgment mortgage save where it can be shown that the judgment mortgage was not properly registered, either arising from a defect in procedure or because there was no interest of the debtor that it might have captured.

38. The defendant argues however that because a judgment mortgagee is a volunteer that equity can intervene to require the mortgage to be vacated.

39. That a judgment mortgagee is not a "purchaser" is evident from the old pre 2009 law and from the provisions of s. 117(3), in that a judgment mortgage is subject to any right or incumbrance affecting the land, including any unregistered incumbrance and any incumbrance of which the judgment mortgagee had no notice. Section 117(4) makes it clear that certain claims against the interest or estate of the debtor in land, including certain claims under matrimonial legislation, may constitute an equity or right to which the judgment mortgage is subject, and notwithstanding that such proceedings have not yet concluded.

40. The Supreme Court in *Re Strong* also made the comment, often quoted, that a judgment mortgagee is not a purchaser for valuable consideration and a judgment mortgage is a mere process of execution. It is often said too that a judgment mortgagee is a "volunteer", and I consider that phrase to be shorthand for the proposition that a judgment mortgage may lose priority to other rights in the land, even unregistered rights and those of which the judgment mortgagee had no notice. Therefore, to describe a judgment mortgagee as a "volunteer" is merely to identify the means by which its priority is established over other claims, and not to say that the judgment mortgagee has no rights, or that any rights accrued by registration sound in equity only.

41. While registration of a judgment mortgage does not create in the hands of the judgment mortgagee the full statutory benefits and remedies available under that Act to a mortgagee, registration does create a charge on the land, albeit a charge of a singular statutory effect and of a wholly statutory origin. While the judgment mortgage differs from another type of mortgage in that it does not have any effect upon the land until the affidavit is registered, it is still a charge which carries rights which derive from its statutory origin. Such discretion as arises in the court comes from the discretion of the court to grant relief in aid of enforcement, and imports a general discretion to interfere with the rights of the mortgagee.

42. While the discretion of the court may be called in aid of an application under s. 117 for the enforcement of a judgment mortgage, this does not mean that the judgment mortgage sounds in equity only and that a judgment debtor may seek the removal or vacation of a judgment mortgage by appealing to the equitable jurisdiction of the court.

43. Insofar as the defendant relies on the principles of equity, I consider that no equitable principles arise. The court has a discretion as regards to the reliefs it may grant following registration of the judgment mortgage, and, as outlined above, the court has the power to direct that the judgment mortgage be vacated or extinguished, but that is not to say that the courts of equity have a general role in regard to the continued maintenance by a judgment creditor of a judgment mortgage against the interest of a debtor in registered or unregistered land. The right to register a judgment mortgage is a statutory right, and the rights created thereby are statutory in origin, and no equitable principles are in play.

44. Furthermore, it seems to me that there is no impediment on a creditor seeking to avail of different means of enforcing a judgment, and a judgment creditor may seek to register the same judgment over several properties, seek execution by means of an instalment order, seek in a suitable case an order of garnishee or an order for the appointment of an receiver by way of equitable execution. Thus, the general law does not limit these rights and cannot be called in aid by the defendant.

The monies in court

45. I consider that the defendant has made that no arguable case that the lodgement by him of the monies necessary to meet the amount of the plaintiff's debt is equivalent to a discharge of that judgement debt. The purpose of the lodgement in court was for the defendant to avoid the cumbersome procedure of execution already commenced by the plaintiff. The defendant did not tender the amount of the judgment to the plaintiff, but rather offered to lodge the money in court on the basis that the monies in would in due course, and subject to an order of the court, be paid out to the plaintiff. It is not therefore correct to say that the monies in court are "available" to the plaintiff, although they may eventually become available to the plaintiff if an order of the court is made to that affect. The court is effectively holding the monies lodged by the plaintiff in a class of escrow pending further application or order.

46. I reject the argument of the defendant that the monies lodged in court "replace" the security represented by the judgment mortgage. It is not the case that the monies in court are immediately available to the plaintiff, whereas it can be said that the proposed sale of the premises may make the amount of the judgment available earlier than the plaintiff anticipated.

Conclusion

47. I consider that the registration of a judgment mortgage creates in the judgment mortgagee certain rights, including the rights to seek well charging relief and consequential orders for sale and other orders provided in the Act of 2009, but a judgment mortgage also creates a right, which has crystallised in the instant case, where the owner of the land needs to clear the judgment mortgage off title for the purpose of the sale. While the powers vested in a judgment mortgagee by virtue of registration do not include the right to enforce the security by requiring that the owner of the lands sell the property, and such can only occur following the making of a well charging order and an order of the court, the judgment mortgagee has the benefit of a form of security which can crystallise on a sale. Accordingly, while the judgment creditor's rights are constrained by statute, and enforcement requires the assistance of the court, the practical effect of the judgment mortgage can offer a source of funds from the proceeds of sale should the owner of the land choose to sell.

48. While the discretion of the court may be called in aid of an application under s. 117 for the enforcement of a judgment mortgage, this does not mean that the judgment mortgage sounds in equity and that a judgment debtor may seek the removal or vacation of a judgment mortgage by appealing to the equitable jurisdiction of the court.

49. The judgment mortgage is a creature of statute and the power of the court conferred by s. 117, while it confers a wide discretionary power with regard to enforcement, and certain powers to require the vacation of the judgment mortgage, does not contain a general power in the court to require the vacation of the judgment mortgage other than when the circumstances outlined in the Act have been met. Furthermore, no equitable jurisdiction exists in the court to interfere with what is undoubtedly a right created by the registration of the judgment mortgage. The defendant has not persuaded me that such an equitable jurisdiction exists and indeed it would be difficult to find the source of that equitable jurisdiction in regard to what is a wholly statutory method of enforcement.

Mareva Injunction?

50. It seems to me that what the defendant is seeking to do is obtain a class of *Mareva* injunction by seeking the judgment creditor would abandon his right to the benefit of the registered judgment mortgage, and to substitute that right for a claim against the monies lodged in court. The monies have been lodged in court "without admission of liability", and in the somewhat unusual circumstances where a judgment has been obtained, no stay was made on the order for judgment, various execution processes have commenced, and what is sought in practical terms is that the plaintiff in these proceedings would not recover the amount of the judgment already ordered until other proceedings have concluded. The defendant, in essence, seeks against the plaintiff an order that the plaintiff would retain certain monies, pending the resolution of the proceedings commenced by the defendant and his wife. The relief then is classic *Mareva*-type relief in respect of which the court has an established jurisprudence. The defendant is entitled to seek in his own proceedings such *Mareva*-type relief in respect of the proceeds of sale which will come into the hands of the plaintiff following the sale of the premises at Foxrock.

51. The test of whether a *Mareva* injunction lies in respect of any assets of the plaintiff must be met and must be sought by the defendant in his proceedings and not by way of seeking to prevent enforcement of the judgment already obtained in these proceedings. As no stay has been granted, the effect of the relief sought would be to stay the enforcement of judgment when the test for a stay has not been met.

52. Accordingly, I refuse the relief sought.