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ANALYSIS**Creating and Enforcing Judgment Liens on Real Property**

The relative ease of beginning a real property execution does not mean this step should be taken in all cases. This article discusses the significant issues to be considered.

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By Bernard D'Orazio

Judgment enforcement against personal property often is difficult. Enforcement against real property has certain advantages, including that it cannot be moved or hidden, ownership records are public, and it can be quite valuable. Further, enforcement against real property can be simple. The judgment creditor's lawyer signs and delivers a document called an execution to the sheriff, which begins a streamlined process for placing the real property up for sale at a public auction, which can happen in a few months. A court order is not required to sell real property by execution, except if it is the judgment debtor's homestead. See CPLR 5206(e).

The relative ease of beginning a real property execution does not mean this step should be taken in all cases. There are significant issues to be considered, including the expense of advertising the notice of sale four times, CPLR 5236(c), and the potential liability of the judgment creditor and his counsel for the sheriff's poundage on a settlement, which is up to 5%. See CPLR 8012(b)(1)-(2); *McCloskey v. Brill*, 286 A.D. 143 (1st Dept.) ("It has long been the law of this state that an attorney is liable in a plenary action to the sheriff for fees incident to the execution of a process delivered by the attorney to the sheriff"), affirmed 1 N.Y.2d 755 (1955).

Furthermore, a judgment creditor must have a valid judgment lien to execute on real property. A judgment lien is created by "docketing" a money judgment with the county clerk in a county where the judgment debtor has an interest in real property. See CPLR 5203(a). New York does not maintain a central repository of judgment liens. Rather, judgment liens are recorded separately in each of the state's 62 counties.

“Docketing” a judgment is not the same thing as “entering” a judgment, though the two terms are often mistakenly used interchangeably. “Entering” a judgment is the act by the clerk of court that creates a legally enforceable instrument. “Entering” occurs when the clerk of the court makes an appropriate entry in his records (known as the minute book) and invariably memorializes this act with a stamp on the document itself, which is placed (i.e., filed) into the case file. See CPLR 5016(a).

“Docketing” is a separate act by the county clerk, the sole purpose of which is to create a judgment lien on any real property in that county in which the judgment debtor has an interest. See CPLR 5018(a) (“Immediately after filing the judgment-roll, the clerk shall docket a money judgment, and at the request of any party specifying the particular adverse party or parties against whom docketing shall be made, the clerk shall so docket a judgment affecting the title to real property”); CPLR 5018(c) (“A judgment is docketed by making an entry in the proper docket book as follows: (1) under the surname of the judgment debtor first named in the judgment,...”). In Supreme Court, the county clerk is also the clerk of the court. See CPLR 105(e).

Docketing is done by the clerk making an entry in her “docket book,” an alphabetized index of the names of all persons against who money judgments have been entered in that county. CPLR 9702(5) (clerk is required to maintain a book “properly indexed...to contain the docket of judgments”); County Law §920 (“The clerk of each of the counties within the city of New York, so long as he deems it expedient, may continue the *alphabetical indices* of...of judgment debtors whose names appear on record.”); County Law §525 (county clerks shall provide at the expense of the county, all books, files and other necessary equipment for the filing, recording and depositing of documents, maps, papers in actions and special proceedings of both civil and criminal nature, *judgment and lien dockets and books for the indexing of the same* as directed or authorized by law.”)

Docketing is done seamlessly and automatically by the county clerk immediately after a Supreme Court judgment is entered, without request by the judgment creditor. The docket book is designed so that anyone interested can determine whether there is a judgment lien encumbering a person’s interest in real property in that county, a critical fact for anyone considering purchasing or acquiring a consensual lien (e.g., mortgage) against a parcel of property.

If the property is located in a county other than the one where a Supreme Court judgment was entered, if the judgment originates in a lower court such as New York City Civil Court or the Nassau or Suffolk County District Courts, or from a federal court in New York, one must obtain and then file a “transcript of judgment” with the county clerk to obtain a judgment lien. See CPLR 5018(a); D. Siegel & P. Connors, *New York Civil Practice* §§421-422 (6th ed. 2018). In other words, a lower or federal court judgment is not a judgment lien unless the transcript procedure is used.

The transcript procedure may also be used to file judgment liens in multiple counties if the debtor has multiple properties in different counties. Remember that New York City contains five separate counties.

Why is “docketing” required? Because in New York, judgment liens are not filed against specific parcels of real property. Rather, they extend to all property interests held by the debtor in the county where the judgment is docketed. See CPLR 5203(a); *Grygorewicz v. Domestic & Foreign Disc.*, 179 Misc. 1017 (Sup. Ct. 1943) (“A judgment isn’t docketed against any particular property, but solely against a name.”). Thus, the only way to determine if a parcel of real property is encumbered by a judgment lien is to search the docket book for judgments entered against parties in the chain of title.

Note that the docket book does not contain a copy of the actual judgment. Rather, it contains basic information about the judgment, including the court, name and addresses of the parties and counsel, index number, date of entry, and amount, all taken from the judgment when it is examined

by the docket clerk. This information enables a searcher to locate the judgment and verify its status. Docket clerks occasionally make errors when making docket book entries. Also, parties may unwittingly obtain a judgment against a person without having their correct name, or at least the name of that person as indicated on a deed or other instrument. In either case, the rule is that if the name error made it unlikely that a diligent searcher could locate the judgment in the docket book, a court will likely find that the judgment creditor has no lien. See, e.g., *We Buy Now v. Cadlerock Joint Venture LP*, 46 A.D.3d 549 (2d Dept. 2007), lv. denied, 10 N.Y.3d 713 (2008) (no lien established where clerk's docket entry lacked judgment debtor's correct sur-name and thus could not be located); *Matter of Kapitaj v. Hampshire Abstract*, 187 A.D.3d 1017 (2d Dept. 2020) (judgment docketed under name "Nazeer Ahamed" failed to create a lien on property owned by "Nazeer Ahmed"); *Bernstein v. Schoenfeld*, 37 Misc. 610 (Sup. Ct. New York County 1902), affirmed, 81 A.D. 171 (1st Dept. 1903) (no lien where judgment was docketed against "Mrs. Dr. Annie Maurer, first name fictitious"; true name of the judgment debtor was "Aurora Maurer"); *Grygorewicz v. Domestic & Foreign Discount*, 179 Misc. 1017 (Sup. Ct. Kings County 1943) (judgment docketed against "Mary A. Pender" failed to give notice of judgment lien to purchaser from "Alice Mary Pender"); *Berkowitz v. Dam*, 122 Misc. 143 (Sup. Ct. Kings County 1923) (judgment docketed against "Max Sorcher" did not create a lien against "Max Soicher").

Some name errors have not invalidated judgment liens. For example, in *Matter of Accounts Retrievable System v. Conway*, 83 A.D.3d 1052 (2d Dept. 2011), a judgment was docketed under the name "Bob Conway." The debtor's correct name was "Robert Conway" but the error in the debtor's given name was held not to invalidate the lien because the court found "Bob" is a common derivative of "Robert." In *Matter of Soressi v. SWF, L.P.*, 81 A.D.3d 1143 (3d Dept. 2011), a judgment docketed against "Jack McCabe of 12 Elmwood Road, Menands" was held to be a valid lien against "John McCabe" of "237 Swift Road, Voorheesville"; court holding "where the first name is reflected in the docket and does not match the first name of the debtor, but the first names are commonly known derivatives of one another, the docketing has been held sufficient to create a lien on the debtor's real property."

Errors not involving the debtor's name are not fatal to the lien. See, e.g., *Sears v. Burnham*, 17 N.Y. 445 (1858) (lien upheld despite error in transcript of judgment as to the date the judgment originally was entered); *Deutsche Bank Nat. Tr. Co. v. Gonzalez*, 26 Misc.3d 1219(A) (Sup. Ct. Richmond County 2010) (incorrect address of judgment debtor did not invalidate judgment lien). These rulings are consistent with analogous holdings in cases involving information required to be in a notice of pendency, which the courts have held is "directory in nature," which means that strict compliance is not required for the notice to be effective if it is properly indexed and can be located. See *Mechanics Exch. Sav. Bank v. Chesterfield*, 34 A.D.2d 111 (3d Dept. 1970).

This brings us to the recent case of *Myrtle 684 LLC v. Tauber*, 189 A.D.3d 1431 (2d Dept. 2020), lv. denied, 37 N.Y.3d 912 (2021), where the Appellate Division upheld a judgment lien despite an error in the clerk's docket entry not involving the judgment debtor's name.

In *Myrtle*, the error involved the amount of the judgment. The docket clerk's entry indicated it was for \$16,050 when in fact it was for \$217,245. The entry was accurate in all other respects, with the correct name of the debtor. The judgment was located during a routine title search when the property was under contract to be sold, but rather than pay the judgment, the seller (who had discovered the docket book error) persuaded the title company to remove its exception to this title defect in consideration of the seller posting an escrow of twice the amount of the *incorrect* amount of the judgment. The seller remained silent about the docketing clerk's error and, not surprisingly, made no effort to satisfy the judgment after the closing.

Later, when the plaintiff moved forward to enforce his judgment by an execution sale, the two involved title insurance companies filed an action to clear a cloud on title in which they claimed that the plaintiff's judgment lien was limited to the incorrect amount of the judgment as stated in the docket book entry. Extensive research by the parties failed to uncover any meaningful precedents involving the incorrect amount of a judgment in a docket book entry, presumably because such errors would normally be discovered before closing and rectified.

*Myrtle* was unusual because multiple grantees elected to take title subject to a known title defect and sharp dealing. First, the seller who discovered the incorrect docket book entry failed to disclose this to the title company and instead persuaded it remove its exception to this defect and accept instead an escrow based on the incorrect amount of the judgment, signing a false affidavit of title to close the deal. Then, a series of subsequent purchasers elected to continue the escrow and take title subject to the lien, undoubtedly hoping the judgment creditor would do nothing to enforce the judgment before his lien expired after 10 years. If that happened, the escrow would have been released to the title holder, gaining them a windfall.

The Appellate Division noted that CPLR 5018(c)(1) lists the information required to be included in a docket book entry, including the amount of the judgment, but does not indicate the consequences if a docket book entry fails to comply with each of the stated requirements. The court acknowledged that a judgment creditor who seeks to create a lien on real property "has the duty to ensure that the judgment reflects the full name of the judgment debtor," which the plaintiff had done.

The court explained that the fundamental purpose of the docket book index was thus achieved because "the judgment docket indices at issue provided notice of the existence of judgments that could potentially be clouds on the title of the respective properties, as an unsatisfied judgment of record against a seller of property renders the title unmarketable at the time of closing." Having located the judgment, these parties were charged with constructive notice of the correct amount of the judgment lien, because the "judgment docket index is merely notice of a lien."

The court concluded that neither the present owner or mortgagee "can demonstrate that they were prejudiced by the incorrect amount set forth in the docket index where, as here, they have constructive notice of [the plaintiff's] judgment and chose to take their interests in the property without first ensuring that the judgment was satisfied."

The court held that "any reasonable inquiry into the details of the judgment" would have revealed that the \$16,050 amount set forth in the judgment docket index was incorrect and that the actual amount of the judgment was \$217,245. The result: The title insurance companies had to tender payment in full to plaintiff of the correct amount of the judgment, plus interest, to clear the title defect.

How can a judgment creditor's attorney ensure that a judgment is properly docketed? It is not as easy as it should be. The county clerk when docketing a judgment does not provide counsel with a copy of his entry or any other documentation. Even though the docket book is a public record, it is not easily accessed. Docket books are not generally available by online searches and thus can only be searched by visiting the county clerk's office or ordering a search from an abstract company. Counsel also should take steps to determine that the name of the judgment debtor matches the name of the property owner in question. This too can be done by ordering a title search. If your judgment bears a different name, even slightly so, a motion to amend the judgment may be prudent. See CPLR 5019.

Does a party who lost a lien because a judgment was mis-docketed have a remedy against the county clerk? The answer is unclear. In *National Westminster Bank v. State of New York*, 155 A.D.2d 261 (1st Dept. 1989), affirmed, 76 N.Y.2d 507 (1990), a negligence claim was filed in the Court of Claims based on a county clerk's failure to timely docket a judgment. The Appellate Division

rejected the state's claim of sovereign immunity and the Court of Appeals affirmed. That would seem to have settled the matter, but in 2013, the Second Department in *Flagstar Bank FSB v. State of New York*, 11 A.D.3d 138 (2d Dept. 2013), declined to follow *National Westminster*, concluding that subsequent Court of Appeals cases on state liability in other lines of cases on the "special duty" rule suggest the Court of Appeals will eventually overrule *National Westminster*. The claim in *Flagstar* was dismissed and not appealed further. There have been no reported cases on this point since.

One other important issue must be mentioned: the duration of a judgment lien. While judgments have a 20-year life span, CPLR 211(b), a judgment lien on real property is only effective for 10 years, CPLR 5203(a). However, a judgment lien can be renewed and extended for another 10 years by commencement of an action seeking that relief within one year prior to the expiration of the lien. See CPLR 5014(1). It may (and should given the tight time frame) be filed as a special proceeding seeking summary judgment in lieu of complaint under CPLR 3213 ("When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint").

The real property execution can be a potent judgment enforcement technique, provided the judgment creditor has a proper judgment lien. Attorneys should carefully consider this tool when engaging in judgment enforcement, beginning with ensuring that a proper judgment lien has been filed.

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