

BARBARA L. GONZALEZ, PLAINTIFF vs JUAN I.
GONZALEZ, DEFENDANT
Franklin County branch, Civil Action - Law No. F.R. 1991 -1159

Gonzalez v. Gonzalez

*Divorce- Equitable Distribution- Marital Residence- Mortgage Foreclosure Proceedings-
Application for Stay and for Receiver*

1. Divorce Court has no power under the Divorce Code to order a stay in a separate mortgage foreclosure proceeding pending in the same court where both parties to the divorce signed the mortgage agreement.
2. Where the only wrongdoing alleged is the husband's failure to make payments on a mortgage on which the wife was also an obligor, the court does not find circumstances warranting the appointment of a receiver.

Barbara B. Townsend, Esquire., Counsel for Plaintiff Juan I.,
Gonzalez, Defendant
Edward G. Puhl, Esquire, Council for Adams County National
Bank

OPINION AND ORDER

WALKER, P.J., January 17, 1995

Factual Background

The petitioner is Barbara L. Gonzalez, who is also the plaintiff in this divorce action. The respondent and defendant is Juan I. Gonzalez, her husband. The parties have been separated since 1989. Mr. Gonzalez resides in the marital residence.

In 1994, the parties signed a mortgage agreement with Adams County National Bank on the marital residence. The bank had no notice that the parties were separated. The bank began foreclosure proceedings in a separate action against both parties in November 1995 because no payments on the mortgage have been made since August 1995.

Mrs. Gonzalez claims that she received no notice of intention to foreclose on the mortgage, and no notice of homeowners' emergency mortgage assistance prior to being served with the foreclosure complaint.

Discussion

This petition represents a collateral attack on a mortgage foreclosure in which neither Mrs. Gonzalez nor her attorney have entered an appearance. Mrs. Gonzalez seeks to have the court appoint a receiver to collect alimony pendente lite, to be applied to the overdue mortgage, and to collect "monthly charges" from the husband. She also seeks an injunction staying the mortgage foreclosure action. For the reasons presented below, this court finds itself unable to issue even a rule to show cause upon the bank.

The most important remedy Mrs. Gonzalez seeks is a stay against the mortgage foreclosure action. The court finds that Mrs. Gonzalez has misunderstood the state of the law in Pennsylvania.

Courts have granted stays in mortgage foreclosure actions where the creditors of one spouse have attempted to reach marital property during the pendency of a divorce action which includes a count for equitable distribution. *Klebach v. Mellon Bank*, 388 Pa.Super. 203, 565 A.2d 448 (1989), *alloc. granted* 527 Pa. 647, 593 A.2d 420 (1990) (appeal discontinued before argument) However, the stays have come from the courts considering the mortgage foreclosure actions, not the courts considering the divorce actions. In fact, the Superior Court has said in *Kronz v. Kronz* that the matrimonial courts lack the power to affect the security rights of third party secured creditors. 393 Pa. Super. 227, 232, 574 A.2d 91, 94 (1990).

In *Kronz* Mr. and Mrs. Kronz had entered into a commercial mortgage with a bank. During the pendency of the divorce action, the bank brought a foreclosure action. The trial court at first entered a stay, then vacated it on requested remand after the bank appealed. The trial court then granted a petition by Mrs. Kronz to set aside the sheriff's sale. The Superior Court said that the Legislature protected third party creditors of both spouses with perfected security interests through the exclusion for them in the definition of marital property in 23 Pa.C.S. § 3501(a)(7). *Id.* The court went on to observe that "a court in which the execution proceedings are pending has an inherent power to stay the proceedings where it is necessary to protect the rights of the parties" citing Pa.R.C.P. 3121. *Id.* at 233, 574 A.2d at 94.

Thus, where a creditor's rights are not secured prior to the pendency of a divorce action, the court hearing the execution proceeding may properly enjoin the sale of a marital residence, because property under the jurisdiction of a court considering an equitable distribution proceeding is considered to be *custodia legis*, and therefore not subject to judicial liens. *Keystone Sav. Ass'n v. Kitsock*, 429 Pa.Super. 561, 633 A.2d 165 (1993). The same result applies where the creditor of a husband attempts to execute its judgment on a home held by husband and wife as tenants in common, after the wife has filed for divorce and gotten an order restraining the husband from alienating, transferring, conveying or encumbering any marital property. *Fidelity Bank v. Carroll*, 416 Pa.Super. 9, 610 A.2d 481 (1992).

This line of reasoning does not apply in this case. The bank is a secured creditor, and both Mr. and Mrs. Gonzalez are party to the mortgage. Therefore, under *Kronz*, this court, having jurisdiction over the divorce only, and the foreclosure proceeding not being properly before it, this court may not stay the execution.

With regard to the request for the appointment of a receiver, the court is in sympathy with Mrs. Gonzalez as to her plight, but finds that a receiver is not warranted. The standards for appointing a receiver were laid out in *McDougall v. Huntingdon & Broad Top R. & C. Co.*, 294 Pa. 108, 143 A. 574 (1928). The *McDougall* court said that a receiver would not be appointed unless the right to a receiver is free from doubt, the loss to the petitioner is irreparable, with no adequate legal remedy, and the receiver is necessary. *McDougall* at 117, 143 A. 578.

Here, the loss is that of the value of the marital residence above the value of the mortgage. Such a value is, of course, in money, the language of damages. The court is concerned as well about the duties of such a receiver, his or her powers, and the qualifications necessary. Mrs. Gonzalez has left the court in the dark as to these matters. Furthermore, alimony pendente lite, once paid by Mrs. Gonzalez, may be applied by Mrs. Gonzalez to the mortgage indebtedness, or in any other way she wishes. The court will not step in unless necessary.

As the Pennsylvania Supreme Court has said, the power to appoint a receiver should be exercised sparingly, with caution and circumspection, and only in an extreme case under extraordinary circumstances, or under such circumstances as demand or require summary relief. *Tate v. Philadelphia Transp. Co.*, 410 Pa. 490, 500, 190 A.2d 316, 321 (1963). Mrs. Gonzalez cites *Mayhue v. Mayhue*, 336 Pa.Super. 188, 485 A.2d 494 (1984) for the authority to appoint a receiver in divorce cases. In *Mayhue*, the husband repeatedly disobeyed orders of the court with regard to marital property, and removed assets from the businesses under his control. Because of the clear need to protect the wife from the husband's apparent intent to deprive the court of marital assets for equitable distribution, the Superior Court stated that it could not "conceive of a clearer factual situation justifying injunctive relief and the appointment of a trustee in receivership Mrs. Mayhue's need for injunctive relief was clear, immediate and necessary in order to prevent greater injury." 336 Pa. Super at 194, 485 A.2d at 497 (citations omitted).

The current case shows no such ongoing defiance of the court, and no businesses under Mr. Gonzalez control with disappearing assets. Instead, the only allegation is that Mr. Gonzalez failed to pay a debt *jointly owed* by both parties. This does not rise to the level of extraordinary circumstances justifying the appointment of a receiver.

ORDER OF COURT

January 17, 1995, the court, upon consideration of the petition for special relief of plaintiff Barbara L. Gonzalez, denies the stay of mortgage foreclosure proceedings, and further denies the appointment of a receiver.