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October 20, 2025

**Via eCourts Appellate**
Superior Court of New Jersey, Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08611

Re: Michael Wallace and Phillip Seligman, by Assignee, MMU, LLC, v. Scott Elberg
Docket No. A-003350-24, L-4043-19, J-008917-21
Sat below: Hon. Robert H. Gardner, J.S.C.
Attorney for Plaintiff's Assignee/Appellant: W. Peter Ragan, Sr., Esq.
Bar ID# 012621974; WPR@Raganlaw.com
Our File No. 25000861

Dear Judges of the Appellate Court:

I am counsel to Plaintiff's assignee and Appellant in the above captioned matter, MMU, LLC. This letter brief is submitted pursuant to the provisions of R. 2:6-2(b). **TABLE OF CONTENTS**:

**TABLE OF JUDGMENTS, ORDERS and RULINGS** being appealed:



## CONCISE PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Plaintiff entered judgment against Defendant Scott Elberg by means of a Consent Order for Judgment in the amount of $350,000.00 dated January 7, 2021, Pa-8, Exhibit "A". The full judgment, and interest, is due and owing (Pa-4,¶ 2.).

The aforesaid judgment was docketed as J-008917-21 on January 29, 2021, Pa-10.

The judgment was assigned to MMU, LLC by written assignment of

[1] Procedural History (R.2:6-2(a)(4)) and Statement of Facts (R.2:6-2(a)(5)) as they are closely related and if stated separately would be repetitive.

judgment filed on the docket February 10, 2025, Pa-11, Exhibit "C" .

Counsel entered an appearance on behalf of MMU, LLC which was filed on the docket February 10, 2025, Pa-16, Exhibit "D".

In pursuance of collection of the judgment counsel issued a post judgment Information Subpoena for the deposition of the judgment debtor February 10, 2025, Pa-17, Exhibit "E".

The above mentioned subpoena was personally served upon the judgment debtor, Scott Elberg, by Guaranteed Subpoena Service on February 12, 2025, Pa-20, Exhibit "F".

The judgment debtor made no appearance as required by the subpoena on February 26, 2025 (Pa-4, ¶8.).

Based upon the foregoing, on formal notice of motion to the judgment debtor, the Court entered an order enforcing litigant's rights compelling the judgment debtor, Scott Elberg, to appear as subpoenaed for depositions and production of documents March 14, 2025. Counsel served the order upon the judgment debtor March 19, 2025, Pa-21, Exhibit "G".

As a result of the above the judgment debtor Scott Elberg appeared for a ZOOM deposition on Thursday, April 24, 2025 (Pa-4 ¶10.). A copy of the

transcript is Pa-28-56, Exhibit "H" and referred to below as Transcript (1T.), Page (Pg.) and Line (Ln.). A review of the transcript reveals the judgment debtor testified that he has no nonexempt personal property from which the judgment could be satisfied.

For example, the judgment debtor is unemployed (1T. Pg.6, Ln. 21-22). He and the non-debtor spouse own and operate a consulting limited liability company, but there is no available data concerning its operations (1T. Pg. 8-9). Mr. Elberg has no other source of income (1T. Pg. 10, Ln. 1-3). He owns shares in a private company for which there is no stock certificate and no estimation of value (1T. Pg. 11, Ln. 21-25) and while he owned other shares of penny stock, these shares are now entirely owned by the non-debtor spouse (1T. Pg. 15, Ln. 2-4). There is no personal property outside the debtor's residence (1T. Pg. 17, Ln. 22-25) and all personal property in the residence is owned jointly with the non-debtor spouse (1T. Pg. 18, Ln. 15). In addition, the 2018 BMW 5 Series which Mr. Elberg drives is owned by the non-debtor spouse.

Note also that Plaintiff's assignee MMU, LLC is the judgment debtor's sole creditor (1T. Pg. 24, Ln. 9-14).

It was known that the judgment debtor has an ownership in real estate by virtue of a property search commissioned by MMU, LLC, Pa-57, Exhibit "I", and

that the property is valued by Zillow at $1.259MM, Pa-59, Exhibit "J". Mr. Elberg testified that this property, 35 Oak Place, North Caldwell, Essex County, NJ is his residence (1T. Pg. 6, Ln. 11-13) and that the one and only (1T. Pg. 16, Ln. 19-25) mortgage has a balance of approximately $475K (1T. Pg. 17, Ln. 16-18).

Thus, the debtor's interest in his real property has a value of approximately $392,000.00. Yet, Mr. Elberg has made no credible offer to pay or settle MMU, LLC's judgment. Pa-6,¶12.

Based upon the above the Plaintiff sought the Court's order granting relief pursuant to R. 4:59-1(d)(1) allowing the levy and sale of the judgment debtor's personal property interests (Pa-1).

Upon formal motion the relief sought was denied, Pa-60. However, the trial judge did not allow oral argument as requested by the movant and the order of denial contained a sparse one sentence opinion with no further findings on the record and further misapplied the ruling in Jimenez v. Jimenez, 454N.J. Super. 432 (App. Div. 2018).

Plaintiff/Appellant filed a Motion for Reconsideration (Pa-62) resulting in an Order dated June 26, 2025 (Pa-64). While this Order granted re-consideration

the Court again failed to set forth adequate findings of fact and conclusions of law, mis-applied N.J.S.A.46:3-17.4 and Jimenez , *supra*, and used the wrong standard for R. 4:50-1(d)(1) relief. Thus, Plaintiff/Appellant now appeals (Pa-65) the Orders dated May 23, 2025 (Pa-60) and June 19, 2025 (Pa-64).

The Transcript of the motion hearing before the Court June 19, 2025 is referred to herein as 2T., Page (Pg.) and Line (Ln.)

## LEGAL ARGUMENT

### POINT I

### TRIAL COURT OPINION LACKED ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Pa-60, Pa-64, 2T, Pg.9, Ln. 15-25, Pg. 10, Ln.1)

The gravamen of Plaintiff/Appellant's motion for relief under R. 4:59-1(d)(1), Pa-1, was that it had made a good faith and diligent effort to locate personal property of the judgment debtor from which the judgment could be satisfied. Counsel set forth those efforts in minute detail with voluminous exhibits, Pa 4-59. However, while the Court held MMU, LLC did not "exhaust execution on all the personal property" (Pa-60) the finding lacked factual findings and reasoning and was insufficient as required by R. 1:7-4(a).

*"..."an articulation of reasons is essential to the fair resolution of a case."* Schwarz v. Schwarz, *328 N.J.Super. 275, 282, 745 A.2d 592, 596 (App.Div.2000). Indeed, R. 1:7–4(a) specifically provides that a court shall "find the facts and state its conclusions of law ... on every motion decided by a written order that is appealable as of right." More particularly, R. 1:6–2(f) provides in relevant part that [i]f the court has made findings of fact and conclusions of law explaining its disposition of the motion, the order shall so note indicating whether the findings and conclusions were written or oral and the date on which they were rendered. If no such findings have been made, the court shall append to the order a statement of reasons for its disposition if it concludes that explanation is either necessary or appropriate....*

*As our Supreme Court has noted in another context, "[f]ailure to perform that duty 'constitutes a disservice to the litigants, the attorneys and the appellate court.' " Curtis v. Finneran, 83 N.J. 563, 569–70, 417 A.2d 15, 18 (1980) (quoting Kenwood Assocs. v. Bd. of Adj. Englewood, 141 N.J.Super. 1, 4, 357 A.2d 55, 57 (App.Div.1976)). We have, as well, repeatedly referred to this observation and to similar sentiments in the context of appeals from dispositive orders. E.g., CNA Ins. Co. v. Cave, 332 N.J.Super. 185, 187, 753 A.2d 141, 142 (App.Div.), certif. denied,*

*165 N.J. 678, 762 A.2d 659 (2000); Schwarz v. Schwarz, supra, 328 N.J.Super. at 282, 745 A.2d at 596; Dep't of Transp. v. Barton Inv. Assocs., 326 N.J.Super. 282, 287, 741 A.2d 131, 133–34 (App.Div.1999); Chambon v. Chambon, 238 N.J.Super. 225, 231–32, 569 A.2d 822, 825–26 (App.Div.1990).* Raspantini v. Arocho, 364 N.J. Super. 528, 532 (App. Div. 2003).

## POINT II

## TRIAL COURT MIS-APPLIED N.J.S.A. 46:3-17.4 and Jimenez v. Jimenez, 454 N.J. Super. 432 (App. Div. 2018)

(2T, Pg. 10, Ln. 14-16, Pg. 11, Ln. 6-13)

Further, the Court's opinion cited N.J.S.A. 46:3-17.4 as prohibiting R. 4:59-1 (d)(1) relief as to the judgment debtor's interest in the subject property (Pa-60). It is respectfully asserted that the Court mis-applied N.J.S.A. 46:3-17.4 as the decision in Jimenez v. Jimenez, 454 N.J. Super. 432 (App. Div. 2018) makes apparent. That ruling holds that a judgment creditor may be permitted to execute, levy and sell the judgment debtor's tenancy by the entirety, undivided one half interest, i.e. right of survivorship, in the property but that there can be no partition of the property. The ruling does not prevent the levy and execution sale but rather prevents partition and right to possession.

In Jimenez, *supra* the creditor sought the court's order allowing a sale and partition of the judgment debtor's interest in the marital home. The Court framed the issue as "...the legal question of whether N.J.S.A. 46:3-17.4 ...precludes a spouses unsecured creditor from obtaining the forced partition of real property the spouse and his non-debtor spouse own together as tenants by the entirety." Jimenez, at 433. Here, the relief sought by Plaintiff was (and is) completely different. Plaintiff in this action seeks only to levy and sell the debtor's interest, i.e. the right of survivorship in the property, there is no request for partition.

In fact, the Jimenez court held (at pg. 436):

"'[A] tenant by the entierty can alienate his or her right of survivorship, and **a judgment creditor of either spouse may levy and execute such right**,'..." N.T. B., 442 N.J. Super. At 218, 121 A. 3d 910 (quoting Asterbadi, 339 N.J. Super. At 227, 912 A.2d 191). Critically to the present case, however, "neither tenant may force the involuntary partition of the subject property during the marriage." *Ibid.* (citing Asterbadi, 389 N.J. Super. At 227, 912 A.2d 191.(**bold** added).

The dual character of a "tenancy by the entirety" was similarly recognized in In re Weiss, 638 B.R. 543 (Dist. NJ 2022), as a spouses interest in a tenancy by the entirety consists of: (1) the joint right of possession protected by N.J.S.A. 46:3-17.4 and separately; (2) a right of survivorship not protected by N.J.S.A. 46:3-17.4 which either spouse may alienate, and a creditor may reach via levy and execution sale.

Notwithstanding, the transcript of the trial court's opinion on the record June 19, 2025 (2T) shows that the Court considered Jimenez, *supra*, but without conclusion (2T, Pg. 10) and further found that "...N.J.S.A. 4[6]:3-17-4 precludes the...forced sale of the real estate because the defendant and his wife owned it by tenants by the entirety." 2T, Pg. 11, Ln. -10. The Court finally concluded that the R. 4:50-1(d)(1) relief sought had to be denied because the property was owned by the judgment debtor and non-debtor spouse as tenants by the entirety (2T, Pg. 12.).

## POINT III

## "EXHAUSTION" OF PERSONAL PROPERTY WAS NOT THE PROPER STANDARD (Pa-60)

The Court's opinion stating that "There is no showing that Plaintiff has exhausted execution on all personal property"(Pa-60) is not the test for compliance with the requirements of R. 4:59-1(d)(1). Actually:

**"[T]he test for compliance with N.J.S.A. §2A:17-1 is not whether all possible measures to locate personalty have been exhausted, but rather whether the judgment creditor has exerted "reasonable efforts" constituting a 'good faith attempt' to do so."** Sklar v. Cont'l Cas. Co. (In re Mariano), 339 B.R. 344, 350 (2006 Bankr.) (**bold** added).

In Sklar, the United States Bankruptcy court for the District of New Jersey found that the actions of the judgment creditor "in obtaining an RAGAN & investigative report and in issuing an Information Subpoena constitute[d] reasonable efforts" to locate debtor's personal property and are "entirely consistent with the cases that have addressed the sequence of execution requirements in N.J.S.A. §2A:17-1." Id.

In order to comply with the requirements of *N.J.S.A.* 2A:17-1, the judgment creditor must make a good faith attempt to ascertain the location of the debtor's personalty within the county and supply this information to the sheriff along with the writ of execution. *Raniere v. I & M Invs. Inc.*, 159 N.J. Super. 329, 337, 387 A.2d 1254 (Ch.Div.1978), *aff'd*, 172 N.J. Super. 206, 411 A.2d 719 (App.Div.), *certif. denied*, 84 N.J. 473, 420 A.2d 1298 (1980). **"The proper focus is not whether there are assets in the county, or the amount of those assets, but rather whether a good faith effort was made to locate the assets."** *Ponticelli v. Dobin*, 99 Fed. Appx. 414, 416 (3d Cir.2004). (**bold** added).

*Rule* 4:59-1(e)[now (d)]delineates the permissive supplementary proceedings available to a judgment creditor in aid of execution. As noted, **the test is not whether all possible measures to locate personalty have been undertaken, but rather has the judgment creditor exerted "reasonable efforts" in good faith to locate personal property**. *In re Mariano*, 339 B.R. 344, 350 (Bankr.D.N.J.2006); *Pojanowski, supra*, 127 N.J. at 242, 603 A.2d 952; *Raniere, supra*, 159 N.J. Super. at 337-38, 387 A.2d 1254. Borromeo v. Di Florio, 409 N.J. Super. 124, 137 (App.

## CONCLUSION

For all of the foregoing reasons this Court should vacate the decisions below and enter an order finding the Plaintiff has indeed made a good faith and diligent attempt to locate personal property of the judgment debtor from which the judgment can be satisfied allowing the levy and judgment execution sale of the judgment debtor's interest in the subject property pursuant to R. 4:59-1(d)(1).

Respectfully submitted,

*/s/ W. Peter Ragan, Sr.*

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| MICHAEL WALLACE and PHILLIP SELIGMAN, by ASSIGNEE, MMU, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>SCOTT ELBERG,<br><br>Defendant. | SUPERIOR COURT OF NEW JERSEY, LAW DIVISION<br><br>Docket No. ESX-L-4043-19 |
| MICHAEL WALLACE and PHILLIP SELIGMAN, by ASSIGNEE, MMU, LLC,<br><br>Appellants,<br><br>v.<br><br>SCOTT ELBERG,<br><br>Appellee. | SUPERIOR COURT OF NEW JERSEY<br>Appellate Division<br><br>Appellate Div. No. A-003350-24 |

# RESPONDENT'S BRIEF

Dated: November 26, 2025

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## PRELIMINARY STATEMENT

Scott Elberg (the "Appellee" or "Judgment Debtor") by this Brief, responds to Appellant's initial brief filed on or about October 20, 2025

In this appeal, Appellant asks this Court to consider and reverse two orders of the trial court, that is, those dated May 23, 2025 and June 19, 2025, on the basis that (i) the trial court's opinions lacked adequate findings of fact and conclusions of law as required by court rule; (ii) the trial court misapplied the applicable court rules and jurisprudence regarding the necessary factual and legal prerequisites to allow a sheriff's sale of real property; and (iii) in the context of that finding, the court misapplied the required concept of "exhaustion" of personal property.

In response, the Judgment Debtor asserts that the trial court properly considered the record before it and ruled, based upon prevailing caselaw, that the Appellant's motion should be denied for the reasons set forth in (i) the order of May 23, 2025; and (ii) the order of June 19, 2025, which, specifically, included as reasons, the record before the court. That record is set forth, in detail, in the transcript of the reconsideration motion at pages 8:15 through 12:20. There is no transcript of the earlier motion before the court in the appellate record.

## THE ORDERS SUBJECT TO THIS APPEAL

Appellant's appeal applies to each order and therefore it is appropriate to consider the relief granted by the court.

Following a motion by Appellant to allow the Judgment Creditor to conduct a sale of the real property belonging to Judgment Debtor Scott Elberg, within the concept of ownership as a married couple as tenants by the entirety, the court denied the motion and found "There is not showing that Appellant has exhausted execution on all the personal property of the Judgment Debtor per N.J.S.A. 4:59-1(d)(1); also as the property is held by tenants by the entirety and both spouses are not parties to this action, the motion is denied per N.J.S.A. 46:3-17.4."

Subsequently, Appellant moved for reconsideration of that prior order. Following the hearing, the court entered an order granting reconsideration, but again denying the motion to vacate the prior order "for the reasons set forth on the record on June 19, 2025." In that transcript of the court's findings, the trial court did not revisit (i) the issue of the possible lack of oral argument in the prior motion, because here there was oral argument; nor (ii) the necessary due diligence as to exhaustion of his personal property.

The court ruled that although the New Jersey statutes and caselaw permit levy upon the Judgment Debtor's interest in marital property owned as tenants by the entirety, the revised 1988 statute precluded partition of the undivided jointly held interest in the whole. As Appellant admits in its brief at the bottom of page 2 ("The ruling does not prevent the levy and execution sale <u>but rather prevents partition and right to possession [sic]</u>.") (emphasis added)

## I. THE LOWER COURT'S FINDINGS AS TO FACT AND THE LAW MEET THE REQUIRED APPELLATE STANDARD AND SHOULD BE UPHELD.

In reviewing a trial court's factual findings, an appellate court applies the deferential "clearly erroneous" standard. A trial court's finding of fact is entitled to "great deference," and it should "not be disturbed unless it is clearly erroneous or shows an abuse of discretion." *Balsamides v. Protameen Chemicals, Inc.*, 160 N.J. 352, 368 (1999). "We do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 N.J. 474, 484 (1974).

An appellate court reviews de novo a trial court's interpretation of the law and the legal consequences that flow from established facts. *Diamond Beach, LLC v. March Assocs., Inc.*, 457 N.J. Super. 265, 282 (App. Div. 2018) (citing *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995)).

### A. The Court Considered the Complete Record as a Part of the Reconsideration Motion

Although the Court had not entertained oral argument with regard to the initial order, it did so with regard to the motion for reconsideration. The transcript of that latter hearing, as a part of the appellate record, makes clear that the Judgment

Creditor had the opportunity to address and the Court to consider the factual and legal record.

## B. The Court Properly Found that the Plaintiff Had Failed to Meet its Due Diligence Requirements with Regard to the Personal Property at the Time of the Application as a Pre-Condition to the Sheriff's Sale of Real Property

Here, the Court properly analyzed and considered the facts as presented in the then record. He found that, with regard to the required due diligence to review personal property, that the efforts made by the Judgment Creditor were insufficient.

Critically, and as part of the proceedings in the trial court, but not yet a part of this appellate record, following the Court's May 27, 2025 decision, the Judgment Creditor took additional acts to attempt to review and/or effect an interest on the Judgment Debtor's personal property.

On or about August 18, 2025, the Judgment Creditor filed a motion to attach the interests of the Judgment Debtor in a certain limited liability company in Wyoming. That motion was granted by Order dated October 10, 2025. See Order in Respondent's Appendix at RA158.

Further, by action commenced on July 10, 2025, the Judgment Creditor commenced an action for an alleged fraudulent transfer by the Judgment Debtor to his wife. That action is still pending. See, for example, the docket sheet for Docket No. ESX-C-153-25 in Respondent's Appendix at RA160.

To the extent that the Judgment Creditor took additional actions to perform due diligence as to the Judgment Debtor's personal property, it is clear that the trial judge properly found what had then been an insufficient demonstration of such due diligence.

With regard to the law, Judgment Debtor argues that the court properly recognized existing jurisprudence under New Jersey law. Judge Gardner specifically cited to the requirement of a judgment creditor to make a good faith effort to resolve and locate property, see *Borromeo v. DiFloria*, 409 N.J. Super. 124, 137 (App. Div. 2009).

However, Appellee recognizes that, if the lower court were to consider these additional efforts, there could arguably be a factual basis for a finding of adequacy. If this Court were to remand these issues, the Judgment Debtor would respectfully reserve his rights.

### C. The Court Properly Understood The Nature Of Tenancy By The Entirety

Courts have recognized the interests of a spouse holding property as tenants by the entirety includes both (i) a right of survivorship, which is alienable and subject to levy; and (ii) an undivided interest in the entireties property which, specifically, is not subject to levy and execution. *See*, *generally*, *In re Weiss*, 638 B.R. 543 (Bankr. D.N.J. 2022). (Where in an exhaustive legal review of the status of tenants by the entirety in New Jersey and the *Jimenez v. Jimenez*, 454 N.J. Super. 432 (App.

Div. 2018) and *State v. Reiter*, 2020 N.J. Super. Unpub. LEXIS 103 (N.J. App. Div. January 15, 2020) cases, the Honorable Stacey L. Meisel specifically referenced the 1988 change in the New Jersey statute, N.J.S.A. 46:3-17.4, which precluded a partition but did not preclude levy on the survivorship interest of a judgment debtor.)

The trial court here properly referenced controlling New Jersey jurisprudence and specifically discussed the case of *Jimenez* and the effect of that 1988 statutory change in New Jersey, N.J.S.A. 46:3-17.4, as well as the Chancery Court opinion in *Capital Finance Company of Delaware Valley v. Asterbadi*, 389 N.J. Super. 219, 227 (Ch. Div. 2006) (aff'd in part and remanded in part, 398 N.J. Super. 299, 942 A.2d 21 (App. Div.), certif. denied, 195 N.J. 521, 950 A.2d 907 (2008)).

The lower court also cited authority with regard to the issues concerning tenancy by the entirety, including *NTB v. BDB*, 442 N.J. Super. 205 at 218 (App. Div. 2015).

*Jimenez* itself did not specifically deal with the effect of the statute on third-party creditors. Judge Gardner recognized that *Jimenez* did postulate that if the initial transfer of the deed to the married couple was fraudulent, then the creditor could assert a fraudulent transfer. However, the Court noted in the transcript, at 11:22 through 12:7, that the deed in the instant case was filed substantially before the issues involving the current party and therefore he recognized that such fraudulent transfer exception would not apply.

Further, the lower court recognized that a tenant by the entirety "can alienate his right of survivorship, and a judgment creditor may levy against, - - upon such right, but neither tenant may force the involuntary partition of the subject property during the marriage." (10:2-8). (citing *Capital Finance Company of Delaware Valley v. Asterbadi*, 389 N.J. Super. 219, 227 (Ch. Div. 2006)) (which considered the rights of a third-party following an execution sale of that interest).

Likewise, the court properly analyzed and utilized the court's decision in *Jimenez* and recognizes the change in statute. As noted above, the court also indicated that there was no basis for any kind of allegation of a fraudulent transfer of the deed in the first instance. The court denied what it perceived to be the request by the Judgment Creditor to levy and execute without providing notice to the non-judgment debtor wife.

However, critically, courts recognize the interests of the non-judgment debtor spouse in any action which would affect that interest. *See generally*, *United States v. Kogan*, 2022 U.S. Dist. LEXIS 145659 (S.D.N.Y. 2022), where the court reviewed both New Jersey and New York law concerning the creation of tenants by the entirety. She cited, among other things, *Jimenez* and *Reiter* and emphasized that, in addition to the individual right of survivorship to the entire fee, the tenants by the entirety includes, as quoting *Reiter*, "an undivided interest … that encompasses the

entire property and 'holds his or her title independently of the other.'" Citing *Reiter*, K*ogan* at *6. Judge Failla emphasized the rights of the non-judgment debtor spouse:

> As in New Jersey, each spouse has the right to 'sell, mortgage, or otherwise encumber his or her rights in the property,' but such action is 'subject to the continuing rights of the other.

*Kogan* at *7 (emphasis added by *Kogan* court) (citing *Goldman v. Goldman*, 95 N.Y.2d 120, 122, 733 N.E.2d 200, 711, N.Y.S.2d 128 (2000) (quoting *V.R.W., Inc.*, 68 N.Y.2d at 565, 503 N.E.2d 496, 510 N.Y.S.2d 848))

## D. While Recognizing the Controlling Caselaw, the Trial Judge Found that Implementation of the 1988 New Jersey Statute Required that the Affected Non-Debtor Spouse Be Provided Notice and Opportunity to be Heard Consistent With Procedural Due Process

Accordingly, given the totality of the two orders, it appears that the trial judge has met the concern of the Judgment Creditor in reconsidering the facts and record before the court and has read the controlling statute and caselaw, including *Jimenez* to require due process notice to the non-judgment debtor spouse whose rights are affected by the proposed levy and execution sale. As the court in *Kogan* recognized, there exists a continuing interest for the non-debtor spouse in the context of a tenant by the entirety.

Although the record is not clear as to the reasoning behind the requirement of inclusion of the non-debtor spouse, the court read the controlling jurisprudence to provide the non-debtor spouse an opportunity to be heard with regard to the application to levy and conduct an execution sale of the husband's interest.

At the least, this Court should consider remanding the case to the trial court so that the Judge can explain why he thought it was necessary, under the applicable statute, to give notice to the non-debtor spouse. For example, in a bankruptcy context, the bankruptcy trustee has the authority to sell all interests in property owned by tenants by entirety pursuant to the Bankruptcy Code. *See*, *generally*, 11 U.S.C. § 363(h), which allows a bankruptcy trustee to sell the entirety even in the case of tenancy by the entirety, with, of course, the appropriate proceeds going to the non-debtor spouse. Certainly, in that circumstance, the non-debtor spouse would get notice. Here, due process should provide the wife notice of the impending sale.

Certainly, it would appear that when the legislature changed the statute in 1988 to ensure that partition could not occur, it was concerned about the effect of any potential action upon the non-debtor spouse. Presumably, that should include, at a minimum, the procedural due process to know what is going on, that is, notice and an opportunity to be heard.

## CONCLUSION

Wherefore, for the reasons set forth above, Judgment Debtor respectfully requests this Court to remand to the findings with regard to exhaustion of personal property and decide whether, as a matter of law, the non-judgment debtor spouse is entitled to notice and an opportunity to be heard with regard to the relief requested.

**RABINOWITZ, LUBETKIN & TULLY, LLC**
*Attorneys for Appellee*

By: */s/ Jeffrey A. Cooper*
JEFFREY A. COOPER

Dated: November 26, 2025