UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ARLENE MC NALLY	CASE NO. 01-62985
Debtor	Chapter 7

APPEARANCES:

KOWALCZYK, TOLLES, DEERY & JOHNSTON Attorneys for Debtor 510 Bleecker Street Utica, New York 13501	ROBERT K. HILTON, III, ESQ. Of Counsel
GETNICK LIVINGSTON ATKINSON, GIGLIOTTI & PRIORE, LLP Attorneys for Eton Centers, Co. 258 Genesee Street, Suite 401 Utica, New York 13502	NICHOLAS S. PRIORE, ESQ.

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

The Court considers herein the motion filed by Arlene McNally ("Debtor") on June 26, 2001, seeking to avoid the judgment lien of Eton Centers Co. ("Eton") on Debtor's homestead, pursuant to § 522(f) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") and Rule 4003(d) of the Federal Rules of Bankruptcy Procedure. An affidavit in opposition was filed on July 18, 2001, on behalf of Eton.

The motion was heard at the Court's regular motion term on September 25, 2001, in Utica, New York and adjourned to October 23, 2001, for further argument. At the October 23, 2001 motion term, only Eton appeared, and the matter was again adjourned to November 27,

2001. On that date, the Court again heard limited argument and adjourned the motion to December 20, 2001. The Court indicated that a written decision would likely be entered in the interim.

JURISDICTIONAL STATEMENT

This Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(K).

FACTS

Debtor filed a voluntary petition for relief under chapter 7 of the Code on May 9, 2001. At the time of filing, Debtor owned her residence ("Residence") together with her non-filing husband as tenants by the entirety. *See* Affidavit of Debtor's Attorney, Robert K. Hilton, III, filed June 26, 2001, at ¶ 6. Pre-bankruptcy, a state court Judgment by Confession against only the Debtor was entered in Eton's favor in the amount of $35,704.48 on June 26, 2000. *See* Debtor's Motion, Exhibit D, Judgment by Confession.[1] Debtor now seeks to avoid Eton's judgment lien,

[1]According to Eton, Debtor had executed a Stipulation of Settlement on or about May 27, 1999, by which she acknowledged an indebtedness to Eton of $35,000.00, with interest in the amount of nine percent per annum from June 1, 1999. *See* Affidavit in Opposition of Eton's Attorney, Nicholas S. Priore, filed July 18, 2001, at ¶ 3. Simultaneously with the Stipulation, Eton asserts that Debtor executed and delivered to Eton a Judgment by Confession which was to be entered in the event that Debtor defaulted on her Stipulation payments. *See id.* at ¶ 5. Eton contends that the June 26, 2000, Judgment of Confession was the result of Debtor's failure to make her Stipulation payments. *See id.* at ¶ 7.

pursuant to Code § 522(f), insofar as that lien impairs Debtor's homestead exemption. Schedule D of Debtor's petition lists one mortgage with an outstanding balance of $51,000 encumbering the Residence. Schedule A fixes the value of the Residence at $79,900. This valuation reflects a price opinion conducted by a local real estate broker. *See* Debtor's Motion, Exhibit C, Broker's Price Opinion. Eton objects to this appraised value and requests an order requiring Debtor to produce a full appraisal by a licensed real estate appraiser and an order permitting Eton access to the Residence to conduct its own appraisal. *See* Affidavit in Opposition of Eton's Attorney, Nicholas S. Priore, filed July 18, 2001.

ARGUMENTS

Eton does not contest Debtor's entitlement to avoid some portion of Eton's judgment lien pursuant to Code § 522(f). Rather, Eton challenges Debtor's method of computing the amount of the judgment lien to be avoided. According to Debtor, the equity in the Residence to which Eton's judgment lien can attach is only $4,450. This figure is the product of a computation, in which Debtor's homestead exemption is subtracted from one-half the equity in the Residence. Using this calculation, the non-exempt amount of equity to which Eton's judgment lien may attach is $4,450. This analysis assumes that, even though Debtor and her husband own the Residence as tenants by the entirety, the actual equity of each spouse in the property can be discerned as one-half.[2]

[2]In support of this argument, Debtor relies on *V.R.W. v. Klein*, 68 N.Y.2d 560 (1986) and *In re Laborde*, 231 B.R. 162 (W.D.N.Y. 1999). Neither of these cases proves adequate support for Debtor, however, because they both involve division of equity in tenancies by the entirety

Eton argues that each tenant by the entirety is deemed to be seized of the whole. For this reason Debtor's equity in the Residence is an undivided, one-half interest. Converting this theory to a lien avoidance calculation, the $10,000 homestead exemption is subtracted from the entire equity of both Debtor and her husband in the Residence. Assuming Debtor's appraised value of the property for the limited purpose of a computation example, the equity to which Eton's judgment lien can attach according to Eton's own analysis is $18,900. Eton acknowledges the principle that a judgment creditor of one spouse owning property as a tenant by the entirety can enforce its rights only if certain defined circumstances arise. Such circumstances occur if Debtor and her spouse divorced, Debtor's spouse predeceased Debtor, or if the spouses jointly conveyed the property. Since the judgment creditor cannot enforce its lien until the occurrence of some future event, Eton argues that attachment of its lien to the entire equity in the property would allow it to ultimately recover as much of its judgment as possible, given the likelihood that the overall property value will increase.

The differing theoretical interpretations of a tenancy by the entirety by Debtor and Eton result in equity calculations which vary significantly. To demonstrate the contrast between these two theories as applied, the suggested computations of both Debtor and Eton are set forth as follows:

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after divorce. The matter *sub judice* is factually distinguishable because Debtor was married to her husband at the time she filed her bankruptcy case.

Debtor		Eton	
Property Value:	$79,900.00	Property Value:	$79,900.00
First Mortgage:	-$51,000.00	First Mortgage:	-$51,000.00
	$28,900.00		$28,900.00
Divide to provide for non-debtor		Homestead exemption:	-$10,000.00
spouse's equity:	÷ 2		
	$14,450.00	Remaining equity subject to	
Homestead exemption:	-$10,000.00	Eton's lien:	$18,900.00
Remaining equity subject to Eton's lien:	$4,450.00		

DISCUSSION

The Court has considered the caselaw cited by both Debtor and Eton to support their respective positions. While both parties' submissions have assisted the Court in evaluating the arguments before it, none of the caselaw cited is on point with the matter *sub judice*, and consequently is an inadequate basis on which to render an ultimate decision.

Consequently, the Court's analysis must begin with an evaluation of New York State law regarding tenancy by the entirety under circumstances where a creditor holds a judgment lien against only one tenant-spouse. The pertinent law in New York State is best summarized as follows:

> [t]he law in New York clearly permits a [spouse]'s interest in a tenancy by the entirety to be sold under execution upon a judgment against him [or her]. The purchaser at such sale becomes a tenant in common with the debtor's [spouse], subject to [his or] her right of survivorship and is entitled to share in the rents and profits, but

> not the occupancy.

In re Weiss, 4 B.R. 327, 330 (S.D.N.Y. 1980) (citations omitted). Under the instant circumstances, Debtor is bankrupt and under the protection of the automatic stay provided for in § 362(a) of the Code. Eton is, therefore, precluded from executing on its judgment lien and selling Debtor's interest in the Residence as otherwise is permitted under New York law. The evaluation of Debtor's equity in the Residence, however, is necessary to determine the extent of Eton's judgment lien pursuant to Code § 506. Although New York State law adequately deals with the rights of judgment creditors against property owned as a tenancy by the entirety, little guidance exists for the creditor holding a judgment lien against a bankrupt tenant by the entirety. However, courts in states that treat judgment creditors similar to New York have addressed circumstances like those presently before this Court. Their analyses and conclusions are persuasive.

As in New York, New Jersey courts have held that a debtor spouse's interest in an entirety estate is subject to judgment liens and execution for his or her individual debts.[3] *See In re*

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[3]*In re Jordan* sets forth New Jersey law regarding judgment creditors holding liens on residential property owned by husband and wife as tenants by the entirety:

> Under New Jersey law, such a judgment creditor may cause the interest of a debtor spouse to be levied upon and sold at a judicial sale. The purchaser at such a judicial sale would acquire both the judgment debtor's right of survivorship and the debtor's interest as a tenant in common with the non-debtor spouse, for the joint lives of the spouses. In the usual case involving residential property, the purchaser at the sale may cause neither a physical partition of the property nor a partition by sale of the life estate. . . . Clearly the creditor of one spouse may not defeat the non-debtor spouse's right of survivorship.

Jordan, 5 B.R. at 62 (citations omitted).

Jordan, 5 B.R. 59, 62 (Bankr. D.N.J. 1980). In *Jordan*, the United States Bankruptcy Court for the District of New Jersey addressed this law in the context of a debtor who had filed a petition for bankruptcy relief. *Jordan* involved a debtor who owned his residence with his non-filing wife as tenants by the entirety. *See Jordan*, 5 B.R. at 60. Prior to the debtor's bankruptcy filing, a judgment was entered against him in state court and a levy was made on his real property. *See id.* Once he filed his petition pursuant to chapter 13 of the Code, the debtor sought partial avoidance of the judicial lien pursuant to Code § 522(f). *See id.* at 61. In order to minimize the judgment creditor's lien in *Jordan*, the debtor argued that the starting point for valuing the creditor's claim was one-half the equity remaining in the premises after deducting the balance due on the first mortgage. *See id.* at 61-62. In opposition the creditor contended that, because the property was owned as a tenancy by the entirety, and the creditor could succeed to the debtor's right of survivorship, the whole equity should be considered in valuing the secured claim. *See id.* at 62.

Addressing the arguments before it in the context of New Jersey law, the *Jordan* court concluded debtor's rationale to be the more sound. In reaching this result, the Jordan states:

> [The creditor's] proposal for utilization of the secured claim makes no sense. It would give to [the creditor] presently more than he could obtain by enforcing his state law rights. Even the debtor's proposal appears generous by state law standards because its premise gives credit to [the creditor] for what would be available if the entire fee were partitioned [sic] a remedy not allowed . . . .

Consequently, the *Jordan* court found that the debtor's valuation method was more appropriate

than that proposed by the creditor.[4] *See id.*

This result is supported by the analysis in *In re Dionne*, 40 B.R. 137 (Bankr. D.R.I. 1984).[5] *Dionne* involved the attachment of a judgment against a chapter 7 debtor's real property, which he owned with his wife as tenants by the entirety. *See Dionne*, 40 B.R. at 137. The debtor sought to avoid the judicial lien to the extent it impaired his exemption, and the issue became the extent of the debtor's equity in the real property at issue. *See id.* at 138. As in *Jordan*, the creditor argued that the debtor's equity was the total equity in the property by operation of the tenancy by the entirety. *See id.* In opposition, the debtor argued that his equity was only one-half of the total. *See id.* Relying on *Jordan*, the *Dionne* court decided that the debtor's equity computation was the more appropriate. In reaching this conclusion, *Dionne* noted the inequities that could conceivably result if the creditor's analysis were accepted and the debtor's equity in the property were deemed to be the whole.[6] *See id.* at 139.

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[4]The fact that *Jordan* involved a chapter 13 debtor, whereas the present matter involves chapter 7, is immaterial and the *Jordan* decision assured that the conclusion "comport[ed] with what creditors could expect to receive in the event of a liquidation under chapter 7 of the Code." *Jordan* 5 B.R. at 62.

[5]The *Dionne* decision involved Rhode Island law, which is sui generis in its treatment of tenancies by the entirety. Unlike many states, Rhode Island allows a creditor of one spouse to attach entireties property. *See Dionne*, 40 B.R. at 139 n.5. However, Rhode Island is not quite as generous to creditors as New York because, unlike in New York, attachment in Rhode Island "[m]ay not be levied and implemented by execution until and unless the debtor spouse survives the nondebtor spouse." *Id.* (citations omitted). Although Rhode Island does not permit execution on the property, its allowance of attachment is the focus of the bankruptcy court in determining interests of secured parties pursuant to Code § 506. Consequently, this Court finds the analysis in *Dionne* to be applicable to the tenancy by the entirety issue of equity *sub judice*.

[6]For example, *Dionne* listed various ways that a tenancy by the entirety can be partitioned and noted the deprivation of property without due process that would result to a non-debtor spouse where a bankruptcy court had already allocated one hundred percent of the equity to the debtor spouse. *See Dionne*, 40 B.R. at 139.

Finally, although factually distinguishable, the decisions of *In re Ignasiak*, 22 B.R. 828 (Bankr. E.D. Mich. 1982) and *In re Blair*, 151 B.R. 849 (S.D. Ohio 1992) provide further support for the general conclusion that a debtor's equity in property owned as a tenancy by the entirety is only one-half of the total. *Ignasiak* involved a joint filing by both of the tenants by the entirety, but it nonetheless required an analysis of each debtor's equity in the property. *See Ignasiak*, 22 B.R. 829-30. Each spouse was found to have an equity interest of one-half. The *Ignasiak* court found this to be the logical conclusion given the principle that each spouse is deemed entitled to an undivided one-half interest in the equity of the property where a tenancy by the entirety has been severed. *See id.* In comparison, *Blair* involved a creditor who held a judgment lien against both spouses as tenants by the entirety, but only one spouse filed for bankruptcy relief. *See Blair*, 151 B.R. at 850-51. For purposes of judgment lien attachments, the chapter 7 trustee in *Blair* determined the debtor's equity in the property by dividing the total equity into two equal parts for the debtor and non-debtor spouses. *See id.* at 850 n.1. The one-half equity that was applied to the bankruptcy estate was then reduced by the debtor's homestead exemption. *See id.* The debtor's spouse contested this method of calculation and argued that the entire equity in the real property was exempt. *See id.* at 850-51. The *Blair* court found that argument to be "misguided" and concluded that the chapter 7 trustee's calculations were appropriate. *See id.* at 852. Consequently, the debtor's spouse's interest in the entireties property was fixed at fifty percent, leaving the debtor with the remaining fifty percent.[7] *See id.*

The caselaw set forth herein demonstrates that those states treating tenancies by the

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[7]Although *Blair* notes that the debtor and her spouse were involved in divorce proceedings at the time of the *Blair* decision, they were treated as married for the analysis of their equity in the property owned as tenants by the entirety. *See Blair*, 151 B.R. at 850, 851-52.

entirety as they are treated in New York have consistently held bankrupt debtors' individual equity in marital property to be one-half. This Court finds the rationale of those decisions to be convincing. The caselaw favoring a division of the equity for purposes of exemption is particularly persuasive in light of the absence of caselaw to the contrary in either New York or other states with property laws similar to those of New York. Consequently, the Court finds that Debtor's calculation of her equity in the subject property comports with the analyses and rationale of the applicable caselaw.

Based on the foregoing, it is hereby

ORDERED that Debtor's equity in the Residence owned with her husband as tenants by the entirety is for purposes of Code § 522(f) one-half the total equity in the property; and it is further

ORDERED that at a motion term to be held on December 20, 2001, at Utica, New York the Court will address Eton's additional objection to Debtor's valuation of the Residence.

Dated at Utica, New York

this 18th day of December 2001

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STEPHEN D.GERLING
Chief U.S. Bankruptcy Judge