



# THE LITIGATION NEWSLETTER

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# *The Sale of Real Property Pursuant to Judicial Levy in Michigan*

by: Scott Mancinelli\*

## **Introduction**

The sale of real property by a post judgment levy is a collection remedy which has been available to creditors in Michigan for well over one hundred years. Unfortunately, this remedy is rarely used and there are only a handful of cases elaborating on the procedure, most of which are seventy years old or more. This article will attempt to demystify the procedure and give step by step instructions for completing a sale by levy.

In Michigan, a Judgment Creditor must first obtain from the Court a Request and Order to Seize Property (SCAO Form MC19) for personal property before attempting to levy upon the debtor's real property. If the Request and Order to Seize Property comes back unsatisfied (as to personal property), then the Judgment Creditor may levy upon the debtor's real property. A levy executed on real property pursuant to MCL §600.6025, et.seq. is distinct from a judgment lien under MCL §600.2801 et. seq.<sup>1</sup> Even if the creditor does not presently wish to sell the real property, a levy can still be of substantial value in protecting a creditor's rights and should be recorded in all cases where real property of the debtor has been located.

It is important to conduct a preliminary investigation into the real property. You will want to verify the ownership and find out if any mortgages or liens are on the property by getting a title report and commitment for title insurance.

Generally, real property should not be levied upon unless sufficient personal property cannot be found within the county to satisfy the judgment.<sup>2</sup> MCL §600.6004. If it appears that an abundance of personal property was available, a debtor can have a

levy on real estate set aside if a suit is filed prior to the sale.<sup>3</sup> However, the requirement of first exhausting attempts to collect upon personal property (within the county) before resorting to levying upon real estate has not been taken too stringently.<sup>4</sup> The general presumption will be that the levying officer did his or her duty and did not levy on real estate unless there was insufficient personal property within the county to satisfy the judgment. The court officer has some discretion in this regard. A claim that there was sufficient personal property will not be considered if it is brought up after the execution sale.<sup>5</sup>

## **Steps Required for an Execution Sale on Real Property**

### **Preparing for the Sale**

First, send a letter to the levying officer (usually the officer in the county where the real estate is located) along with the Request and Order to Seize Property and a proposed Notice of Levy on the real estate to be filed with the Register of Deeds to perfect the levy. To be valid, a levy must ordinarily be recorded before the expiration of the Request and Order to Seize Property (which is 90 days from the date it is issued). There is a fee for service of the order and levy and also for the officer's mileage. The Register of Deeds charges a recording fee of \$14 for the first page and \$3 for each additional page for recording the lien.

A Notice of Levy on realty must describe the property with sufficient accuracy to give fair and adequate notice of rights asserted. A notice describing the property incorrectly is no better than a mortgage or a conveyance which is defective.<sup>6</sup>

After recording the Notice of Levy, the officer will send you a copy. The sale must be completed within five years from the date the levy is issued pursuant to MCL §600.6051.

Second, if the property is homesteaded and appears to be worth more than \$3,500, an appraisal of the real estate will be necessary. MCL §600.6025. The officer will sometimes send a notice to the debtor that an appraisal is being obtained and that the property will be auctioned off if the debtor does not satisfy the judgment within 60 days. This process can be skipped entirely for commercial property.

The appraisal required under MCL §600.6025 is not a detailed appraisal like that obtained by a bank in a foreclosure. The statute only requires six *“disinterested fee holders of the township or city where the property is located on oath administered by the court officer...shall make and sign an appraisal of the value of the property and the parts thereof, if it can be divided, and deliver such appraisal to the officer who shall deliver a copy of the appraisal to the debtor.”* MCL §600.6025(1)-(3).<sup>7</sup> The defendant has no right to choose the appraisers.

The appraisal can be a simple one page form. It is not clear if there needs to be six different appraisals, or that the appraisers can all sign off on the same single appraisal assuming they agree on the value. According to MCL §600.6025(4), appraisers are entitled to two dollars per day for their services, and six cents per mile for traveling, which can be added to the debt at the sale of the property. From a practical perspective, the extremely low amount of the fees in the statute may make it difficult to find people who would be willing to act as an appraiser. However, the requirements of the statute are so minimal that the court officer could simply knock on the doors of the neighbors to the respective property, ask them what they think the property is worth and if they would sign the appraisal. There are no other specific requirements for the appraisal.

Under MCL §600.6027 if the homestead is appraised at more than \$3,500, then the court officer shall de-

liver a notice with a copy of the appraisals to the debtor stating that unless the debtor pays the officer the surplus value of the property over and above the \$3,500 homestead exemption, or the amount due on the Request and Order to Seize Property/Levy (whichever is less) within 60 days, the premises will be sold. The statute does not specify the manner of service, but it does indicate that it could be delivered to a member of the family of suitable age to understand the nature of the matter (so substitute service is sufficient). If this notice is not complied with, the property can still be sold, provided that it brings more than \$3,500 at the sale and the homestead exemption in the amount of \$3,500 is paid to the debtor following the sale. MCL §600.6059. The statute provides no guidance as to when the \$3500.00 is paid to the debtor nor is there any case law on the subject. The most logical conclusion would be for the levying officer to pay it at the end of the redemption period, otherwise a redeeming debtor would receive a windfall. A creditor who is the highest bidder at the sale of the real property may not rely on the fact that it has a deficiency balance after credit for the sale to avoid paying the \$3,500, nor can a creditor attempt to give the debtor a credit on the debt by applying the \$3,500 exemption to the debt either. The \$3,500 homestead exemption is the debtor's as a matter of right and once paid is exempt from subsequent execution by the creditor for one year.

The practical effect of the homestead exemption requires a creditor that is conducting the levy sale of the real property to provide a check to the court officer for \$3,500 which will then be transferred to the debtor if that creditor intends to bid at the sale. The creditor may not add the \$3,500 amount paid to the debtor for the homestead exemption to the amount owed or when calculating their bid amount.

The third step is the notification of the sale. Prepare a Notice of Sale for posting and publication which includes the time and place of the execution sale and describes the property with common certainty. The notice must be displayed in three public places for at least six weeks prior to sale in the township or

city where the real estate is to be sold. Unlike a typical foreclosure, it is not necessary to put the amount owed in the Notice. A copy of the Notice must be published once each week for the six successive weeks prior to the sale in a newspaper printed in the county in which the property is located (if there is no newspaper, then print in a newspaper of an adjoining county). Counsel should prepare Affidavits for the posted notices and prepare an Affidavit of Publication from the newspaper publisher (these are similar to those used in a foreclosure by advertisement — sometimes the newspaper itself will prepare the Affidavits). The sale must occur between 9:00 A.M. and 4:00 P.M. at the courthouse or other place where circuit court is held in the county where the real property is located, pursuant to MCL §600.6053.

### Adjourning the Sale

If the officer who is conducting the sale adjourns the sale, he must give notice in the same newspaper where notice for the sale was published and post a notice at the location where the sale was to be held. MCL §600.6052(3). An execution sale may be postponed any number of times, as long as notice is given. MCL §600.6042. Thus, if settlement negotiations are in process with the debtor, the sale can be adjourned week to week until a deal is worked out.

### Conducting the Sale

Prepare a Bid Sheet, a Certificate of Sale, and a Sheriff's Deed and forward to the levying officer. The bid sheet (assuming your creditor wishes to bid) should include the principal of the judgment, interest accrued up to the date of the proposed sale date, fees for publication, officer's fees, recording fees, and attorney fees if your judgment allows for post-judgment attorney fees. A sale by levy is exempt from transfer tax under MCL §207.526(l). Under a similar provision in the county transfer tax statute, it would appear that the county transfer tax is also exempt. See MCL §207.505(j).<sup>8</sup>

A Certificate of Sale by Judicial Levy must contain the following information pursuant to MCL §600.6055: a

description of the property sold; the price bid for each distinct lot or parcel sold; the time when such sale shall become absolute, and the purchaser will be entitled to a deed (three months after the one year redemption period) *see MCL §600.6062 and MCL §600.6063. (6062 states three months after one year redemption period; 6063 states within three months after redemption period)*; the rate of interest borne by the judgment for which the execution was issued.

At the sale, the officer should read the information from the Notice of Sale, including the legal description. The officer or his deputies cannot bid at the sale. As in a typical foreclosure, there does not appear to be any prohibition on the officer receiving a bid in advance from the creditor.

Pursuant to MCL §600.6056, if the sale includes multiple tracts, parcels or lots (such as in a real estate development), the levying officer must separately expose each for sale and no more lots, tracts, or parcels may be sold than is necessary to satisfy the execution, as well as costs and expenses of the sale. The judgment debtor may direct which parcel must be directed for sale first. If the judgment debtor has an undivided interest in several undivided or unpartitioned tracts with the same parties, then the debtor's interest may be sold as a single parcel. If the highest bidder refuses to pay, the levying officer may immediately resell the property. MCL §600.6054.

By statute, the court officer gets a percentage of the amount obtained at the sale. Under MCL §600.2559(h) and (i), the court officer will be entitled to the following fees: a) \$35 plus round trip mileage; b) actual and reasonable expenses in seizing and keeping the property; and c) 7% of the first \$5,000 of the payment or settlement and 3% of the payment or settlement amount exceeding the first \$5,000. The court officer's fees may be added to the redemption amount. If there is a settlement prior to the sale, the court officer is still entitled to the statutory percentage of the settlement amount.

## After the Sale, the Levying Officer Must Do the Following

When the execution is fully paid, satisfied or discharged, the officer must give each purchaser a copy of the Certificate of Sale (which counsel previously prepared and sent to the levying officer) at the sale and record the original with the Register of Deeds within 10 days. MCL §600.6055. When a payment is made to acquire the interest, title passes from the original execution sale purchaser to any purchasing creditor and to any other subsequent purchasing creditor. MCL §600.6066.

The final step in the execution sale is payment to the lien holders and judgment creditor. Pursuant to MCL §600.6044, if the property sold was subject to a valid lien (i.e. a mortgage), then the secured creditor gets paid first. Next is judgment debtor's exemption for exempt property sold (the homestead exemption on property less than three acres is \$3,500 pursuant to MCL §600.6033). Third, the levying officer is paid his fees. Fourth, proceeds sufficient to satisfy the judgment are disbursed to judgment creditor. If the judgment creditor bid in a portion of the judgment, then the judgment would be reduced by that amount. Finally, if there are any remaining proceeds after the judgment is fully satisfied, then they are paid to the debtor. The debtor should receive a credit on the judgment for the amount of the winning bid as of the day of the sale. If the debt is satisfied, then a satisfaction of judgment should be filed with the court. (If the creditor is the high bidder, then it is prudent to wait until the end of the redemption period before filing the satisfaction.)

If the winning bidder is the judgment creditor, then the judgment creditor must submit payment to the levying officer based on the percentages set forth in MCL §600.2559(h) & (i).

## The Debtor's Right of Redemption

Pursuant to MCL §600.6062, the debtor may redeem the property within one year. However, the creditor (or winning bidder) may verbally extend the time of redemption. The redemption amount is the bid price (at the execution sale) plus interest and cost of the sale (all officer fees, posting, publication, and appraisal fees). Interest is computed at the annual rate set forth in the judgment pursuant to MCL §600.6062(1) and MCL §600.6041. If the debtor redeems the property, then counsel for the creditor should send a letter to the officer telling him to cancel the sale and record a Release of the Levy and a Release of the Certificate of Sale with the Register of Deeds (if the property is redeemed, the sale is null and void). An Agreement for Release of Levy could also be used to inform the officer.

If the property is not redeemed within a year, then the purchaser's interest may be acquired three months later. MCL §600.6062. The officer must convey via a Sheriff's Deed any unredeemed real property to the purchaser pursuant to MCL §600.6069. The purchaser's sheriff's deed must be recorded within ten years – otherwise the Certificate of Sale shall become null and void.

If the Officer has not returned an original Sheriff's Deed following the sale, the winning bidder should write to the Officer immediately upon the expiration of the redemption period requesting that the original Sheriff's Deed be delivered. The winning bidder may then record the deed fifteen months and one day after the sale. Practically speaking, unless some previously unknown environmental contamination has been discovered, the winning bidder should always record the Sheriff's Deed promptly. If the property is vacant, the winning bidder may take possession at that time. If it is still occupied by the debtor or someone claiming a right by or from the debtor, an unlawful detainer action must be filed.

**END NOTES**

1. Judgment liens (SCAO form MC94) will apply even to real property that the debtor acquires after the Notice of Judgment is entered. MCL §600.2803. The statute does not address whether the lien attaches to property acquired in other counties, so a creditor must record a separate lien for each county that it believes the debtor owns property. However, a judgment lien is of minimal value, the only real effect it has is to cloud the title and prevent potential purchasers from getting a warranty deed and title insurance on any transaction on the property. Under MCL §600.2807(3) if a property subject to a judgment lien is sold or refinanced, the proceeds of the sale/refinancing due to the judgment creditor are limited to the judgment debtor's equity in the property at the time of the sale or refinancing, after all liens senior to the judgment lien, property taxes, costs and fees necessary to close the sale or refinancing are paid. Consequently, a savvy debtor who is aware of the law could still push forward with the sale or refinancing if he is willing to forgo the equity payment that he might receive. Even worse, Judgment Liens are dischargeable in bankruptcy under MCL §600.2809(d) simply by the judgment debtor recording a copy of his discharge in the bankruptcy case with the respective Register of Deeds Office. A levy can survive a bankruptcy filing to the extent that there is equity in the property and the lien does not impair an exemption of the debtor.
2. A court officer is not required to search for personal property outside the county. *Atwood v. Bears*, 45 Mich. 469 (1881).
3. *In re Dissolution of Field Body Corp.*, 240 Mich. 29 (1927).
4. See *Duro Steel Products, Inc. v. Neubrecht*, 303 Mich. 175, 6 N.W. 2d 474 (1942).
5. *Luton v. Sharp*, 94 Mich. 202 (1892); *Duro Steel Products, Inc. v. Neubrecht*, 303 Mich. 175, 6 N.W. 2d 474 (1942).
6. *Beyschlag v. VanWagoner*, 46 Mich. 91 (1881).
7. The requirement that the appraisers all be from the same township is not stringently enforced. See *Vanden Bogert v. May*, 334 Mich. 606, 55 N.W. 2d 115 (1952)(refusing to grant equitable relief from sale even though one of the appraisers was not a resident of the city in which the property was located where debtor failed to show any prejudice).
8. Although there is no case law on the subject, one treatise has indicated that a sale by levy is not exempt from transfer taxes. See MICHIGAN PRACTICE GUIDE: ENFORCING JUDGMENTS AND DEBTS (2006) § 6:317, Judge James D. Gregg, Linda C. Scheuerman, and Stephen S. LaPlante ["There is an exemption for a judgment or order of a court making or ordering a transfer of real property, unless the court specifies or orders specific monetary consideration for the transfer. [MCL § 207.526(l)]. While a transfer pursuant to execution sale would seem to fall within the spirit of this law, it does not fall within its letter. Not all counties, and not all clerks in all counties, will impose the tax for a transfer pursuant to an execution sale. The transferee's counsel should ask for the exemption (note that the debtor/transferor is unlikely to pay such a tax, so the transferee will normally pay)."]

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