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CPLR 5222(b): Judgment Creditor Obtaining a Restraining Order Held Subordinate to Later Assignee for Benefit of Creditors

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Although there exists little precedent directly supporting the *Kane* decision,[93] the "increasing expansion and liberalization of the rules of disclosure"[94] in New York, as evidenced by the enactment of CPLR article 31,[95] affords substantial support for the court's conclusion. Requiring a defendant-physician to testify as an expert witness at an examination before trial may expose the defendant to searching inquiry, thereby affording the plaintiff an early tactical advantage not otherwise obtainable. However, as Justice Harnett noted, this

> is the very purpose intended [by the CPLR], viz., to eliminate surprise at trial which often entails deflating one side by revealing in full the issues and facts to be presented at trial. The sporting theory of trial practice has long since been discredited in favor of complete, open and mutual disclosure of evidence to be presented, or required, at trial.[96]

Accordingly, limitations on pre-trial discovery which are merely formal, and which do not serve a useful purpose, should be cast aside.[97]

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5222(b): Judgment creditor obtaining a restraining order held subordinate to later assignee for benefit of creditors.

CPLR 5222(b) prohibits a person served with a restraining notice from the "sale, assignment, transfer or interference with any property in which he has an interest . . . until the judgment [against him] is satisfied or vacated."[98] By facilitating the collection of monetary judg-

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93 Kennelly v. St. Mary's Hosp., 52 Misc. 2d 352, 275 N.Y.S.2d 597 (Sup. Ct. Rensselaer County 1966), involved the issue of requiring a defendant-physician to testify at an examination before trial. *See* text accompanying note 85 *supra*. Unfortunately, the case only represents trial court authority. By way of dictum, the court in Charlton v. Montefiore Hosp., 45 Misc. 2d 153, 156 n.1, 256 N.Y.S.2d 219, 223 n.1 (Sup. Ct. Queens County 1965), stated that *McDermott* made it "obvious" that a defendant-physician could be compelled to give expert testimony at an examination before trial.

94 3A WK&M ¶ 3101.36.

95 In Rios v. Donovan, 21 App. Div. 2d 409, 411, 250 N.Y.S.2d 818, 820 (1st Dep't 1964), the court observed that "the function of the disclosure devices [contained in CPLR article 31] is no longer limited to the perpetuation of testimony in those relatively infrequent instances when there is impending danger that it will be lost before trial." Pre-trial disclosure is designed "to advance the function of a trial [which is] to ascertain truth and to accelerate the disposition of suits." 7B MCKINNEY'S CPLR 3101, supp. commentary at 10 (1970). *See also* 3A WK&M ¶ 3101.01 and cases cited at footnote 1a therein.

96 77 Misc. 2d at 177, 352 N.Y.S.2d at 398.

97 *See* Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406, 235 N.E.2d 430, 431, 288 N.Y.S.2d 449, 451 (1968); 3 WK&M ¶ 3101.36.

The Legislature did not distinguish between disclosure before and during trial in enacting CPLR 3101. SIXTH REP. 294. Given this lack of legislative intention to distinguish the two phases of disclosure, the application of the *McDermott* rule to examinations before trial appears to be all the more appropriate.

98 CPLR 5222(b).

ments, the section seeks to eliminate the necessity for expensive and time-consuming enforcement proceedings.[99] In *In re International Ribbon Mills, Ltd.*,[100] however, the Appellate Division, First Department, emasculated the force and effect of the provision by upholding an assignment for the benefit of creditors executed subsequent to service of a restraining notice upon the assignor.

Arjan Ribbon, two days after obtaining a judgment against International Mills, mailed a restraining notice to the judgment debtor.[101] Eighteen days thereafter, International executed an assignment for the benefit of creditors to Sturtz.[102] As a result of its prior service of notice, Arjan, as judgment creditor, claimed a superior lien to that of the assignee. The Supreme Court, New York County, in granting Arjan's petition, required the assignee to turn over a sum sufficient to satisfy the judgment.[103]

The Appellate Division reversed the lower court, noting that mere service of a restraining notice no longer creates a lien,[104] and that Sturtz, as assignee for the benefit of creditors, was a transferee who acquired the property for fair consideration, *i.e.*, the payment of all antecedent debts, prior to its being levied upon.[105] International, in violating the restraining notice by assigning its assets to Sturtz,[106] however, became subject to contempt proceedings under CPLR 5251.[107] In reaching its conclu-

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99 *See* 9 CARMODY-WAIT 2d, § 64:2, at 331 (1966).

100 42 App. Div. 2d 354, 352 N.Y.S.2d 1 (1st Dep't 1973).

101 Arjan had also delivered several property executions to the sheriffs of New York City and Nassau County, pursuant to CPLR 5202, but they were returned unsatisfied prior to the assignment. *Id.* at 355-56, 352 N.Y.S.2d at 3.

102 Ordinarily, mere delivery of an execution to a sheriff, until returned, vests the judgment creditor with rights superior to those of any subsequent transferee not protected by CPLR 5202(a). Among the persons protected by section 5202(a) is "a transferee who acquired the debt or property for fair consideration before it was levied upon." *See* 6 WK&M ¶ 5202.12. Satisfaction of an antecedent debt is considered to constitute "fair consideration," unless the judgment creditor can show that the transfer was either not made in satisfaction of a debt or was made with intent to defraud. DEBT. & CRED. LAW § 272 (McKinney 1945). In *International Ribbon*, Arjan could show neither. Therefore, since the accounts receivable assigned to Sturtz for the benefit of creditors constituted payment of antecedent debts, the assignee became a transferee protected by CPLR 5202(a).

103 42 App. Div. 2d at 355, 352 N.Y.S.2d at 3.

104 42 App. Div. 2d at 358, 352 N.Y.S.2d at 5. *See In re* Joseph H. Fisher & Co., 43 Misc. 2d 821, 252 N.Y.S.2d 390 (Sup. Ct. Nassau County 1964); Rinzler v. New York City Transit Authority, 37 Misc. 2d 77, 234 N.Y.S.2d 904 (Sup. Ct. Kings County 1962); 6 WK&M ¶ 5222.21.

105 *See* note 102 *supra.*

106 *See* Rossman Corp. v. Polizzi, 231 App. Div. 872, 246 N.Y.S. 849 (2d Dep't 1930) (mem.); *In re* Nassau Expressway, 56 Misc. 2d 602, 289 N.Y.S.2d 680 (Sup. Ct. Queens County 1968).

107 CPLR 5251 states in part: "Refusal or wilful neglect of any person to obey a subpoena or restraining notice issued . . . shall . . . be punishable as a contempt of court." *See* note 113 *infra.*

sion, the First Department noted that while the original draft of CPLR 5222(b) would have made the transfer ineffective as against a judgment creditor who had served the restraining notice,[108] that provision was deliberately omitted from the final version.[109] Thus, while it might be argued that the language of the statute is still mandatory and a transfer therefore void, in the face of a deliberate deletion of just that provision, the legislative intent must be construed otherwise.[110]

Justice Kupperman, in dissenting, relied upon *In re Nassau Expressway*,[111] wherein the Supreme Court, Queens County, five years earlier had decided a similar case in favor of the judgment creditor. The court therein felt that to "give superior effect to the assignment executed in violation of the restraining notice is to make a mockery of the provisions of CPLR 5222."[112] *Nassau Expressway* has also been cited favorably by Professor David D. Siegel, who notes that a contrary holding in such a situation would afford the judgment creditor a "near impotent remedy."[113] He concludes that CPLR 5234, which governs priorities among creditors, does not control in the present context since no order or execution is involved. Therefore, the equities between the parties should determine the outcome.[114] Clearly, a creditor who diligently reduces his claim to judgment against the debtor deserves preference over competing creditors who fail to so act.

While the restraining notice remains an attractive enforcement device,[115] it should be recognized that it is "no longer effectual to affect priorities, as was the case under the decisional precedents under the Civil Practice Act."[116] Despite the apparent inequities in such a deci-

108 THIRD REP. 252 had provided:

> While a restraining notice is in effect, no transfer, whether by the garnishee or by the judgment debtor, of property or of a debt subject to the notice shall be effective against the judgment creditor who served the notice, except as otherwise provided by law or order of the court.

CPA 799-a provided similar protection to the judgment creditor.

109 FIFTH REP. 562.

110 *See* 6 WK&M ¶ 5222.20.

111 56 Misc. 2d 602, 289 N.Y.S.2d 680 (Sup. Ct. Queens County 1968) (mem.).

112 *Id.* at 602, 289 N.Y.S.2d at 684.

113 7B MCKINNEY'S CPLR 5222, supp. commentary at 96 (1968). Although the fine in the contempt proceeding would be the equivalent of the damages caused by the divestiture, *i.e.*, the amount owed to the creditor, the cause of action is against the debtor who has just disposed of his assets. Clearly, the likelihood of recovery of the fine at this point is minimal.

114 *Id.*

115 Advantages of the restraining notice include the availability of service by mail and duty-free filing. However, one author has noted that "the best that can be accomplished with a restraining notice is to immobilize property or debts." Donohue, *Enforcement of Judgments Other Than by Execution Under the CPLR*, 9 N.Y.L.F. 300, 316 (1963). That advantage seems to have vanished with the *International* decision.

116 City of New York v. Panzirer, 23 App. Div. 2d 158, 163, 259 N.Y.S.2d 284, 288 (1st Dep't 1965).

sion, it may nevertheless have a beneficial result by encouraging "the judgment creditor to take affirmative steps to satisfy his judgment...."[117] Yet, the potential advantages of the present application do not render the *International* decision less harsh or inequitable. Since the Appellate Division has correctly applied the law as it currently exists, a legislative reevaluation would seem appropriate.

ARTICLE 62 — ATTACHMENT

CPLR 6220: Disclosure order obtained where the assets of a defendant held by a factoring agent were attached.

Following the procurement of an order of attachment, CPLR 6220 allows a plaintiff to request that the court issue an order of disclosure requiring the defendant, or the holder of the defendant's assets, to reveal the nature and extent of the property subject to attachment.[118] Every order of attachment need not be accompanied by an order of disclosure since the requirement of disclosure rests within the discretion of the court.[119] However, when a disclosure order is obtained, its validity rests upon the validity of the underlying order of attachment.[120]

In *Buy Fabrics, Inc. v. ADA Co.*,[121] the plaintiff brought an action to recover the balance due on goods sold and delivered to the defendant. In order to secure any available assets of the defendant, the plaintiff, pursuant to CPLR 6202,[122] attached the defendant's accounts receivable held by a Georgia bank under a factoring agreement[123] between it and

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117 6 WK&M ¶ 5222.21.

118 CPLR 6220 provides:

> Upon motion of any interested person, at any time after the granting of an order of attachment and prior to final judgment in the action, upon such notice as the court may direct, the court may order disclosure by any person of information regarding any property in which the defendant has an interest, or any debts owing to the defendant.

119 The use of the word "may" in CPLR 6220 suggests the discretionary nature of the disclosure order. *See* 7A WK&M ¶ 6220.02.

120 *See* Fisher v. Nash, 47 App. Div. 234, 62 N.Y.S. 646 (4th Dep't 1900); Cronan v. Schilling, 100 N.Y.S.2d 474 (Sup. Ct. N.Y. County 1950); Clinton Trust Co. v. Compania Azucarera Central Mabay S.A., 172 Misc. 148, 14 N.Y.S.2d 743 (Sup. Ct. N.Y. County), *aff'd*, 258 App. Div. 782, 15 N.Y.S.2d 721 (1st Dep't 1939) (mem.).

121 76 Misc. 2d 607, 351 N.Y.S.2d 522 (Sup. Ct. N.Y. County 1973).

122 CPLR 6202 allows the attachment of any debt or property against which a money judgment may be enforced pursuant to CPLR 5201. CPLR 5201(b) provides that a money judgment may be enforced against any debt "whether it was incurred within or without the state, to or from a resident or non-resident...."

123 A factor is a financing organization which engages in the purchase of trade receivables. The function of a factor is to advance credit for its client. In the typical factoring arrangement, the client, immediately after a sale, sends the invoice of sale to the factor. Upon receipt of the invoice, the factor transfers cash, equivalent to the invoice price less an appropriate discount, to the client. Thereafter, the factor collects the amount due from the client's sale. *See* G. WELSCH, C. ZLATKOVICH & J. WHITE, INTERMEDIATE ACCOUNTING 431 (1968). Statutory provisions concerning factoring are contained in N.Y. PERS.