

## CPLR 5223: Discovery of Joint Tax Returns of Judgment Debtor Who Was Outside Court's Jurisdiction Permitted

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## ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

*CPLR 5223: Discovery of joint tax returns of judgment debtor who was outside court's jurisdiction permitted.*

CPLR 5223<sup>180</sup> has been described as more extensive in scope than previous discovery statutes.<sup>181</sup> In providing for post-judgment disclosure, it is designed to permit a judgment creditor, aided by the power of subpoena,<sup>182</sup> to ascertain the capacity of a judgment debtor to satisfy the award entered against him.<sup>183</sup> The judgment creditor is permitted by the statute to "compel disclosure of all matter relevant to the satisfaction of the judgment."<sup>184</sup> In so providing, CPLR 5223 does not

180 CPLR 5223 provides:

At any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.

Unlike practice under the CPA, a judgment creditor may normally commence a disclosure proceeding under CPLR 5223 without court assistance. *See* 6 WK&M ¶ 5223.01.

181 *Oates v. Oates*, 33 App. Div. 2d 133, 135, 306 N.Y.S.2d 108, 111 (1st Dep't 1969). In *Oates*, Justice Capozzoli stated:

There can be no doubt that CPLR 5223 provides for a far broader examination of a third party than did its predecessor section 782 of the Civil Practice Act. The latter was limited to an examination of such party concerning property, money or other means of the judgment debtor for satisfying the judgment. CPLR 5223 is not so limited and expressly permits an examination of a third party to the extent that he may be compelled to disclose "all matter relevant to the satisfaction of the judgment."

*Id.* (Capozzoli, J., concurring). *See generally* 9 CARMODY-WAIT 2d, § 64:289, at 641 (1966).

182 At least one court in construing CPA 782, the predecessor of CPLR 5223, took the position that a subpoena should not be quashed merely because it departed from a specification of that statute, provided that the irregularity did not prejudice the rights of the individual served. *See Ruppert v. Delaney*, 184 Misc. 745, 55 N.Y.S.2d 23 (N.Y.C. City Ct. N.Y. County 1945), wherein the court held that if "the respondent was clearly informed by the subpoena that attendance in New York County was required . . . any irregularity in its caption does not affect the validity of the subpoena." *Id.* at 747, 55 N.Y.S.2d at 25. *See also In re Wyman*, 76 App. Div. 292, 78 N.Y.S. 546 (3d Dep't 1902); *Zwerdling v. Hamman Bldg. Corp.*, 145 Misc. 471, 259 N.Y.S. 593 (Sup. Ct. Kings County 1932).

183 *See* 6 WK&M ¶ 5223.05; *cf. Kiamesha Concord, Inc. v. Pullman*, 52 Misc. 2d 270, 275 N.Y.S.2d 86 (Sup. Ct. N.Y. County 1966). The *Pullman* court observed that "[t]he essential function of the disclosure provisions of article 52 of the CPLR . . . is . . . to require . . . [the debtor] to submit to examination for purposes of execution on his property." *Id.* at 271, 275 N.Y.S.2d at 88 (emphasis added).

Discovery under CPLR 5223 is not permitted unless a judgment has been entered against the defendant concerning whom examination is sought. *See Gelber v. New York Cent. Sys.*, 38 App. Div. 2d 686, 327 N.Y.S.2d 244 (4th Dep't 1971) (mem.); 6 WK&M ¶ 5223.04. However, CPLR 5229 allows a trial court, in its discretion, to order an examination of a potential judgment debtor after a verdict has been rendered, but before entry of judgment.

184 CPLR 5223. *See generally* 9 CARMODY-WAIT 2d, § 64:289, at 642 (1966). *See also* THIRD REP. 258, wherein it is stated that

distinguish between judgment debtors and third parties. Rather, "any person" may be subject to a post-judgment disclosure proceeding, including a third party, notwithstanding the fact that such party is not in possession of property owned by the debtor, nor indebted to him.<sup>185</sup> The statute merely requires that the information sought from the third party be relevant to the satisfaction of the judgment.<sup>186</sup>

In *Siemens & Halske GmbH. v. Gres*,<sup>187</sup> the judgment creditor subpoenaed the joint tax returns of the judgment debtor and her husband after the defendant had placed herself beyond the court's jurisdiction. From an examination of the returns, plaintiff sought to determine the nature and extent of the defendant's assets. The subpoenaed tax returns were in the possession of the defendant's accountant, who was subject to the jurisdiction of the court. The accountant moved to quash the subpoena, or in the alternative, to limit discovery to the defendant's 1971 and 1972 tax returns. The defendant's husband did not join in this motion, although he did object to the disclosure proceeding.<sup>188</sup>

The Supreme Court, New York County, concluded that the information contained in the joint income tax returns was relevant to the satisfaction of the plaintiff's judgment. Consequently, the accountant's motion to quash or limit the subpoena was denied.<sup>189</sup> In his opinion, Justice Markowitz emphasized that the defendant's absence<sup>190</sup> had forced the plaintiff to seek the disclosure of the tax returns held by the accountant.<sup>191</sup> The court did not directly consider the breach

[t]he phrase "all matters [*sic*] relevant to the satisfaction of the judgment" in Section 5223 is . . . designed to change the rule of those cases which have held that examination must be limited to material means for satisfying the judgment.

<sup>185</sup> See 6 WK&M ¶ 5223.03. Prior to the enactment of CPLR 5223, CPA 779(2) required that the judgment creditor have reason to believe that the third party he sought to examine possessed "property of the judgment debtor exceeding ten dollars in value, or is indebted to him in a like sum . . ." See *Strand v. Piser*, 291 N.Y. 236, 52 N.E.2d 111 (1943); *Issacs v. Issacs*, 272 App. Div. 326, 70 N.Y.S.2d 644 (1st Dep't 1947) (*per curiam*); *Douglas v. Fassoulis*, 17 Misc. 2d 911, 186 N.Y.S.2d 537 (Sup. Ct. N.Y. County 1959).

<sup>186</sup> See notes 180 & 184 *supra*.

<sup>187</sup> 77 Misc. 2d 745, 354 N.Y.S.2d 762 (Sup. Ct. N.Y. County 1973), *aff'd*, 43 App. Div. 2d 1021, 353 N.Y.S.2d 395 (1st Dep't 1974) (*mem.*).

<sup>188</sup> 77 Misc. 2d at 745, 354 N.Y.S.2d at 763. See note 191 *infra*.

<sup>189</sup> *Id.*

<sup>190</sup> CPLR 4501 provides in pertinent part:

A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish that he owes a debt or is otherwise subject to a civil suit.

Consequently, had the judgment debtor in *Gres* remained within the jurisdiction of the court, the existence of a judgment entered against her would not have allowed her to decline to respond to questions designed to elicit information relevant to the satisfaction of the judgment. See generally SECOND REP. 89.

<sup>191</sup> It should be noted that any assertion by the defendant's husband of an accoun-

of the nondefendant husband's privacy that would result from the production of the returns. However, in an apparent reference to this problem, the court observed that the husband's "willingness to file a joint return has created an instrument which is both his and his wife's and subject to production."<sup>192</sup>

Although not considered by the court in *Gres*, the requirement of CPLR 5223 that the information sought be "relevant to the satisfaction of the judgment,"<sup>193</sup> does impose limitations upon the power of the judgment creditor to compel disclosure in a post-judgment proceeding.<sup>194</sup> Little judicial scrutiny has been directed toward defining the restrictions implicit in the language of the statute. Perhaps the most thorough analysis of this area was contained in *Oates v. Oates*,<sup>195</sup> wherein Justice McGivern, in a dissenting opinion, expressed concern that a post-judgment discovery proceeding could become a "fishing expedition."<sup>196</sup> To avoid such a situation, Justice McGivern suggested that there be some initial display of the availability and need for the information sought to be produced before a court should sustain a subpoena issued under CPLR 5223.<sup>197</sup> Two pre-CPLR decisions reached the same conclusion, although their authority is suspect in

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tant-client privilege would have been unavailing, since New York accords no privilege to communications between an accountant and his client. See *In re Rae*, 319 F. Supp. 990 (S.D.N.Y. 1970); *In re Colton*, 201 F. Supp. 13 (S.D.N.Y. 1961), *aff'd*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1961). A recognized privilege, however, can be invoked in post-judgment discovery proceedings. See *In re Circle Floor Co.*, 36 Misc. 2d 634, 233 N.Y.S.2d 158 (Sup. Ct. Queens County 1962); note 194 *infra*.

<sup>192</sup> 77 Misc. 2d at 745, 354 N.Y.S.2d at 762. If the husband in *Gres* had possession of the joint tax returns in question, he would have been compelled to disclose them. The weight of authority, state as well as federal, is that a court may require the production of a copy of a federal income tax return in a discovery proceeding. See, e.g., *Jensen v. Boston Ins. Co.*, 20 F.R.D. 619 (S.D. Cal. 1957); *Court DeGraw Theatre, Inc. v. Loew's, Inc.*, 20 F.R.D. 85 (E.D.N.Y. 1957); *Paramount Pictures, Inc. v. Brandt*, 276 App. Div. 1002, 96 N.Y.S.2d 114 (1st Dep't 1950) (per curiam). In *Connecticut Importing Co. v. Continental Distilling Corp.*, 1 F.R.D. 190, 192 (D.C. Conn. 1940), the court observed that "[i]ncome tax returns . . . have a status no different from other items of evidence." See also *Ocean Accident & Guar. Corp. v. Marcus Contracting Co.*, 226 App. Div. 789, 234 N.Y.S.2d 854 (1st Dep't 1929) (mem.).

Furthermore, if the judgment debtor's husband had possession of the tax returns and, because of a fear of possible criminal prosecution, refused to produce them for examination on the ground that his privilege against self-incrimination would be violated, CPLR 5211 would have permitted the court to grant him immunity from state criminal prosecution. See 6 WK&M ¶ 5211.01.

<sup>193</sup> See note 180 *supra*.

<sup>194</sup> Any of the recognized privileges can be invoked in a post-judgment examination to protect confidential information. . . . The evidentiary privileges are not the only limitations on the scope of disclosure. Trade or business secrets and matters of a peculiarly personal nature cannot be inquired into unless they are directly relevant to the satisfaction of the judgment and even then, the court may impose limitations on the creditor's right of inquiry.

6 WK&M ¶ 5211.01.

<sup>195</sup> 33 App. Div. 2d 133, 306 N.Y.S.2d 108 (1st Dep't 1966).

<sup>196</sup> *Id.* at 138, 306 N.Y.S.2d at 113 (McGivern, J., dissenting).

<sup>197</sup> *Id.*

light of the liberalization of post-judgment discovery embodied in CPLR 5223.<sup>198</sup> In at least one area, there is no question that restrictions upon the use of CPLR 5223 exist. A judgment creditor may not violate a recognized confidential relationship between the judgment debtor and the third party whom the creditor seeks to examine.<sup>199</sup>

The *Gres* court stated that it was public policy “to put no obstacle in the path of one seeking to secure the enforcement of a judgment of a court of competent jurisdiction.”<sup>200</sup> Clearly, courts should assist in the enforcement of such judgments. Other considerations should be given weight, however, when a judgment creditor attempts to compel disclosure in a post-judgment proceeding. For example, as *Gres* illustrates, a third party's right to privacy can easily be invaded in such a proceeding. Moreover, CPLR 5223 can be used by a judgment creditor as an instrument of harassment. Ideally, the relevancy requirement contained in the statute affords a witness some protection in either of these circumstances. Unfortunately, the existing decisional law under CPLR 5223 has done little to develop the relevancy requirement as a protective device. The *Gres* court was presented with the opportunity to explore this area, but failed to do so. In the future, courts should be sensitive to the need to more precisely define the scope of CPLR 5223.

*CPLR 5227: Judgment debtor entitled to jury trial in special proceeding brought by judgment creditor.*

CPLR 5227 permits a judgment creditor to initiate a special proceeding against a third party “who it is shown is or will become

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<sup>198</sup> See *Omaha Cold Storage Co. v. Chas. H. Nolte, Inc.*, 264 App. Div. 740, 34 N.Y.S.2d 433 (2d Dep't 1942) (mem.); *In re Schwartz*, 175 Misc. 860, 25 N.Y.S.2d 742 (N.Y.C. City Ct. Kings County 1941). Both *Omaha Cold Storage* and *Schwartz* suggested that the judgment creditor must act on more than mere surmise in seeking to compel production of information in a discovery proceeding. However, with the enactment of CPLR 5223, it has been argued that the more cautious approach to discovery reflected in these two decisions need not be followed. See 7B MCKINNEY'S CPLR 5224, commentary at 97 (1963). See generally 6 WK&M ¶ 5223.05.

<sup>199</sup> See note 194 *supra*. One such recognized privilege operates in the context of an attorney-client relationship. See *Circle Floor Co. v. Sifton Corp.*, 36 Misc. 2d 634, 233 N.Y.S.2d 158 (Sup. Ct. Queens County 1962). In *Sifton*, the court permitted the attorney of the judgment debtor to be examined in a post-judgment proceeding, subject to the proviso that there be an opportunity “to raise the question of privilege at the point where it appears that the witness is about to be asked a question which may disclose confidential communication.” *Id.* at 635, 233 N.Y.S.2d at 160. It should be noted that the attorney-client privilege has not been extended to situations where an attorney holds the property or money of his client, without performing professional services. In such circumstances, the courts believe the attorney merely functions as an agent for the client. See *L. Michel Plumbing & Heating Corp. v. Randall Ave. Theatre Corp.*, 179 Misc. 998, 39 N.Y.S.2d 830 (N.Y.C. City Ct. N.Y. County 1943).

<sup>200</sup> 77 Misc. 2d at 745, 354 N.Y.S.2d at 762, quoting *Leonard v. Wargan*, 55 N.Y.S.2d 626, 627 (Sup. Ct. Bronx County 1945).