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CPLR 5227: Judgment Debtor Entitled to Jury Trial in Special Proceeding Brought by Judgment Creditor

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light of the liberalization of post-judgment discovery embodied in CPLR 5223.[198] 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.[199]

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.' "[200] 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

198 *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.

199 *See* note 194 *supra*. One such recognized privilege operates in the context of an attorney-client relationship. *See* Circle Floor Co. v. Silton Corp., 36 Misc. 2d 634, 233 N.Y.S.2d 158 (Sup. Ct. Queens County 1962). In *Silton*, 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).

200 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).

indebted to the judgment debtor." Should the creditor be successful, the third party, upon maturity of the debt, will be required to pay the creditor either the entire debt or as much of it as is necessary to satisfy the judgment.[201] Unlike its predecessor statute,[202] CPLR 5227 permits the court to settle disputed questions of fact, including a dispute as to the third party's indebtedness.[203] Although, where appropriate, the proceeding contemplates resolution of factual disputes at trial, it has remained unclear as to when a trial by jury is obtainable.[204]

The CPLR 5227 proceeding is a hybrid of law and equity. To the extent that it is aimed at collecting a debt, it is legal in nature.[205] However, since the judgment creditor seeks to collect from one not actually indebted to him, the creditor is deemed to invoke the equitable powers of the court and thereby waives his right to a trial by jury.[206] In *Leedpak v. Julian*,[207] the Supreme Court, New York County, considered the issue of whether the third party, as well as the creditor, forfeits his right to demand a jury trial in such a proceeding.

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201 CPLR 5227.

202 CPA 794(2).

203 *See* Ruvolo v. Long Island R.R., 45 Misc. 2d 136, 256 N.Y.S.2d 279 (Sup. Ct. Queens County 1965); 10 CARMODY-WAIT 2d § 64:63, at 15 (1966); *The Biannual Survey*, 40 ST. JOHN'S L. REV. 125, 170 (1965).

Although CPLR 5227 is designed to permit the reception of factual disputes at trial if necessary, there is a limit as to the types of disputes the court can handle. On this point see Colonial Press of Miami, Inc. v. Bank of Commerce, 71 Misc. 2d 987, 337 N.Y.S.2d 817 (App. T. 1st Dep't 1972) (per curiam) (factual issues should be limited to questions of possession of property or indebtedness to the judgment debtor).

In a recent case involving a section 5227 special proceeding, the Supreme Court, Bronx County, affirmed the principle that, inasmuch as CPLR 410 provides for their trial, disputed issues of fact do not require a dismissal. Suffolk Auto Liquidators, Inc. v. Eastern Auto Auction, Inc., 74 Misc. 2d 411, 343 N.Y.S.2d 806 (Sup. Ct. Bronx County 1973).

The interrelationship between CPLR 5225, 5227, and 5239 should be noted. These sections provide for special proceedings (1) by the judgment creditor against a third party holding property in which the judgment debtor has an interest, CPLR 5225; (2) by the judgment creditor against a third party indebted to the judgment debtor, CPLR 5227; and (3) by a third party against the judgment creditor to determine adverse claimants' interests in the property or debt, CPLR 5239.

204 7B MCKINNEY'S CPLR 5225, supp. commentary at 114 (1974).

205 The question of indebtedness is traditionally resolved by an action at law in which a right to jury trial is guaranteed. *See In re* Estate of Garfield, 14 N.Y.2d 251, 256, 200 N.E.2d 196, 198, 251 N.Y.S.2d 7, 10 (1964), *citing* N.Y. CONST. art. I, § 2.

206 Leedpak, Inc. v. Julian, 78 Misc. 2d 519, 521, 356 N.Y.S.2d 1011, 1013 (Sup. Ct. N.Y. County 1974); *see In re* Estate of Garfield, 14 N.Y.2d 251, 200 N.E.2d 196, 251 N.Y.S.2d 7 (1964); Di Menna v. Cooper & Evans Co., 220 N.Y. 391, 115 N.E. 993 (1917).

"[Post law-equity] merger cases have held that when a plaintiff either joins legal and equitable causes of action arising out of the same transaction or seeks both legal and equitable relief for the same cause of action, he has no right to a jury trial." 4 WK&M ¶ 4101.36. This rule was crystallized by then Judge Cardozo in Di Menna v. Cooper & Evans Co., 220 N.Y. 391, 115 N.E. 993 (1917), and has been firmly adhered to in later decisions.

207 78 Misc. 2d 519, 356 N.Y.S.2d 1011 (Sup. Ct. N.Y. County 1974).

In *Leedpak*, petitioner had obtained a judgment in an earlier action. He then sought to enforce that judgment in a special proceeding authorized by CPLR 5227. Respondent contested his indebtedness to the judgment debtor, claiming that the money had been advanced to him not as a loan but as a contribution to a joint venture to which CPLR 5227 does not apply.[208] Triable issues of fact having been raised, the court held that although petitioner had waived his right to a jury trial by commencing the special proceeding, respondent could nonetheless demand that a jury resolve such issues.[209]

In granting the alleged debtor the right to a jury trial, the court relied on *V P Supply Corp. v. Normand*.[210] Under similar circumstances, the Appellate Division, Fourth Department, refused to make a summary determination due to disputed issues of fact.[211] The court recognized that correct procedure mandated a trial of the contested issues and, though not demanded by either party, reserved the possibility of a jury trial.[212]

The *Leedpak* court found additional support for its decision in *In re Estate of Garfield*,[213] wherein the Court of Appeals had granted respondent-executrix a jury trial in a Surrogate Court proceeding for an accounting for services performed on behalf of the decedent prior to his death. The proceeding against the estate, wherein petitioners sought recovery for legal fees, was held to be an action at law for work, labor, and services for which the New York Constitution[214] guarantees a right to trial by jury.[215] Although *Garfield* did not involve a CPLR 5227 proceeding, the *Leedpak* court found a suitable analogy in that both cases involved equitable proceedings wherein the court had been empowered to adjudicate actions that were formerly cognizable at law.[216] In such a case, the court reasoned, it would seem unfitting to deprive a respondent of his right to a jury trial where the claim "is traditionally the subject matter of an action at law . . . ."[217] As the respondent in *Leedpak* could have demanded a jury trial had he been

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208 *Id.* at 519-20, 356 N.Y.S.2d at 1012. The respondent also raised the issue as to whether the money was owed to the corporation which issued the checks or to the judgment debtor individually, if indeed the payments were found to be loans. *Id.*

209 *Id.* at 521, 356 N.Y.S.2d at 1013.

210 27 App. Div. 2d 797, 279 N.Y.S.2d 124 (4th Dep't 1967) (mem.).

211 *Id.* at 798, 279 N.Y.S.2d at 125.

212 *Id.*

213 14 N.Y.2d 251, 200 N.E.2d 196, 251 N.Y.S.2d 7 (1964).

214 N.Y. CONST. art. I, § 2.

215 14 N.Y.2d at 258, 200 N.E.2d at 199, 251 N.Y.S.2d at 12.

216 78 Misc. 2d at 520-21, 356 N.Y.S.2d at 1012-13.

217 *Id.* at 520, 356 N.Y.S.2d at 1013. *Contra*, First Small Business Inv. Corp. v. Zaretsky, 46 Misc. 2d 328, 259 N.Y.S.2d 700 (Sup. Ct. Queens County 1965).

sued on the debt by the judgment debtor, the court felt this right should not be forfeited when the judgment creditor in effect substitutes as plaintiff.[218]

In so holding, *Leedpak* is at odds with the decision of the Supreme Court, Queens County, in *First Small Business Investment Corp. v. Zaretsky*,[219] involving a special proceeding instituted under CPLR 5225(b).[220] Offering no rationale for its decision, the *Zaretsky* court summarily denied both parties a right to a jury trial of the disputed issues.[221]

The decision in *Leedpak* appears to be the better view.[222] It is well settled that when a plaintiff joins a prayer for equitable relief with a legal claim, the defendant is not deprived of the right to a jury trial.[223] Likewise, in a special proceeding pursuant to CPLR 5227, combining, as it does, legal and equitable elements in one cause of action, a respondent should not be deprived of a jury trial on issues clearly legal in nature.[224]

ARTICLE 62 — ATTACHMENT

CPLR 6201: Federal court declares New York's attachment statute unconstitutional.

The New York attachment statute, CPLR 6201,[225] was designed

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218 78 Misc. 2d at 521, 356 N.Y.S.2d at 1013. *See* 7B McKINNEY'S CPLR 5225, supp. commentary at 113-14 (1974).

219 46 Misc. 2d 328, 259 N.Y.S.2d 700 (Sup. Ct. Queens County 1965).

220 CPLR 5225(b) deals with the judgment debtor's personal property in general while CPLR 5227 specifically controls where the property involved is a debt owed to the judgment debtor. The provisions are so analogous that decisions affecting one will, more than likely, apply equally to the other. *See* 7B McKINNEY'S CPLR 5227, commentary at 124 (1963). *See also* note 203 *supra*.

221 The *Zaretsky* court gave no reason for denying a jury trial, stating summarily that "in this case the parties are not entitled as of right to a jury trial of the disputed issues," 46 Misc. 2d at 331, 259 N.Y.S.2d at 703, *citing* American Sur. Co. v. Conner, 251 N.Y. 1, 166 N.E. 783 (1929). *American Surety* merely abrogated the rule that a creditor need wait for his debt to mature and then obtain a judgment and lien prior to maintaining a suit in equity to annul a fraudulent conveyance. The Court, however, reserved comment as to the proper mode of trial where the debt is in dispute. The decision offers scant support for the position taken by the *Zaretsky* court.

222 *See* 7B McKINNEY'S CPLR 5225, supp. commentary at 113 (1974).

223 *See* Di Menna v. Cooper & Evans Co., 220 N.Y. 391, 396, 115 N.E. 993, 994 (1917); L.C.J. Realty Corp. v. Back, 37 App. Div. 2d 840, 326 N.Y.S.2d 28 (2d Dep't 1971) (mem.); 4 WK&M ¶ 4101.37.

224 *See In re* Estate of Garfield, 14 N.Y.2d 251, 258, 200 N.E.2d 196, 199, 251 N.Y.S.2d 7, 11 (1964). *See also* 7B McKINNEY'S CPLR 5225, supp. commentary at 114 (1974). Professor David D. Siegel has commented that where the right to trial by jury is given for a dispute, "the right ought not to be divested when the identical dispute appears in a modified procedural context." *Id.* CPLR 410 acknowledges the fact that jury trials may be necessary in special proceedings and consequently allows parties to a jury trial to demand one. *Id.*

225 Attachment is said to be an extraordinary remedy in that it allows the defendant's