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CPLR 5222(b): Service of Restraining Order Gives Judgment Creditor Rights Superior to General Creditors Who Subsequently Take Assignment Without Consideration

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judgment on the merits as the final determination of each party's rights[183] is deemed paramount to reevaluating the fairness of a decision in light of unanticipated posttrial developments.[184]

While the circumstances in *Miner* arouse sympathy for the defendants' plight, the decision seriously imperils the finality of judgments in actions where damages are based on future contingencies. The ramifications of general adoption by the courts of this practice are staggering; they include a constant relitigation of previously tried causes as the passage of time reveals the actual, as opposed to projected, consequences of each dispute.[185]

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5222(b): Service of restraining order gives judgment creditor rights superior to general creditors who subsequently take assignment without consideration.

CPLR 5222(b) prohibits a judgment debtor served with a restraining notice from transferring any of his property until the judgment is satisfied or vacated.[186] Any person violating this section subjects himself to a fine in contempt of court.[187] Moreover, as a result of the decision of

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N.Y.S.2d 291 (Sup. Ct. Kings County 1964), *aff'd without opinion*, 24 App. Div. 2d 704, 261 N.Y.S.2d 1012 (2d Dep't 1965) (reversal of prior judgment).

Even in *Miner*, the one Appellate Division Justice who considered the appropriateness of the vacatur, *see* note 166 *supra*, noted that:

> Usually, a new trial because of facts discovered after trial relevant to the recovery of damages is directed only where fraud or deceit was practiced at the trial . . . .

47 App. Div. 2d at 846, 368 N.Y.S.2d at 880 (Hopkins, J., dissenting) (citations omitted). Although he agreed that the verdict was excessive, Justice Hopkins concluded that the trial court's order granting a new trial because of a posttrial development should have been reversed. *Id.* at 847, 365 N.Y.S.2d at 881.

183 *See generally* 5 WK&M ¶¶ 5011.01, .03, .10-.13.

184 Nonetheless, "finality of judgments" is not an absolute rule to be followed blindly by the courts. For example, in Bardach v. Mayfair-Flushing Corp., 49 Misc. 2d 380, 267 N.Y.S.2d 609 (Sup. Ct. Queens County), *aff'd mem.*, 26 App. Div. 2d 620, 272 N.Y.S.2d 969 (2d Dep't 1966), the court, in its original judgment, had granted an easement. When the original purposes for the easement later became impossible to accomplish, and continued enforcement would only serve to impose a substantial hardship on the owner of the premises, the court refused to enforce the judgment. While the court relied in part on established property law doctrines, it also recognized its inherent discretionary power to properly vacate the judgment. 49 Misc. 2d at 383, 267 N.Y.S.2d at 612.

185 Carrying the *Miner* logic to its fullest extent would allow a plaintiff who outlived the life expectancy determined at trial to properly move to vacate the earlier judgment and seek a new trial as to his actual damages. Theoretically, such a motion could be made periodically until actual death.

186 CPLR 5222(b). The purpose of this section is to eliminate both the time and expense of an enforcement proceeding. *See* 9 CARMODY-WAIT 2d § 64:2, at 331 (1966).

187 CPLR 5251 states in pertinent part: "Refusal or willful neglect of any person to obey a . . . restraining notice . . . shall . . . be punishable as a contempt of court."

the Court of Appeals in *In re International Ribbon Mills, Ltd.*,[188] when a judgment debtor, subsequent to service upon him of such restraining notice, makes an assignment without consideration for the benefit of creditors, CPLR 5222(b) gives the judgment creditor a superior interest in the debtor's assets as against the assignee. Chief Judge Breitel, writing for the Court, reversed the holding of the Appellate Division, First Department, that mere service of the restraining notice did not create a lien against a subsequent transferee.[189]

The judgment creditor, Arjan Ribbons, Inc. (Arjan), had served a restraining notice on the judgment debtor, International Ribbon Mills, Ltd. (International), within eight days of obtaining the judgment. Some 18 days thereafter, International executed a general assignment for the benefit of creditors. In a special turnover proceeding, Arjan, claiming a superior lien, sought satisfaction of its judgment from International's accounts receivable then in the possession of the assignee, Sturtz. The Supreme Court, New York County, ordered the turnover in the amount of the judgment, but the Appellate Division, First Department, reversed and dismissed the petition.[190]

On appeal, Arjan contended that it had acquired a lien on the assigned property by virtue of the service of the restraining notice and by the issuance, pursuant to CPLR 5230, of a property execution to the sheriff. On the latter point, the Court was unable to determine from the record whether the execution had been returned unsatisfied,[191] an event which would have extinguished whatever lien had been created.[192] However, the Court held that service of a restraining notice inde-

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188 36 N.Y.2d 121, 325 N.E.2d 137, 365 N.Y.S.2d 808 (1975), *rev'g* 42 App. Div. 2d 354, 352 N.Y.S.2d 1 (1st Dep't 1973).

189 42 App. Div. 2d 354, 352 N.Y.S.2d 1, *discussed in The Survey*, 49 ST. JOHN'S L. REV. 170, 188 (1974). *Accord*, City of New York v. Panzirer, 23 App. Div. 2d 158, 162, 259 N.Y.S.2d 284, 288 (1st Dep't 1965); *In re* Joseph H. Fisher & Co., 43 Misc. 2d 821, 822, 252 N.Y.S.2d 390, 391 (Sup. Ct. Nassau County 1964); Rinzler v. New York City Transit Auth., 37 Misc. 2d 77, 78, 234 N.Y.S.2d 904, 906 (Sup. Ct. Kings County 1962); 6 WK&M ¶ 5222.21.

190 *See* 42 App. Div. 2d at 355, 358, 352 N.Y.S.2d at 1, 5. The First Department was influenced by the deletion of a sentence from the original draft of CPLR 5222(b) which 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.

THIRD REP. 252. One authority has stated that this omission was not merely an oversight on the part of the legislature, but a deliberate decision that service of a restraining notice should not effect a lien. *See* 6 WK&M ¶ 5222.20.

191 36 N.Y.2d at 124, 325 N.E.2d at 138, 365 N.Y.S.2d at 810. Such a situation was possible because there is no requirement that the clerk of the issuing court record the return of an unsatisfied execution. *See* 5 WK&M ¶ 5021.11.

192 *See generally* 6 WK&M ¶ 5202.12.

pendently entitled the judgment creditor to a priority, obviating the need to remit the case to Special Term for resolution of the contradictory assertions regarding whether the judgment had been returned unsatisfied.[193]

Much of the confusion over whether CPLR 5222(b) creates a lien in property subsequently transferred in violation of that section was caused by the deletion of a sentence from an original draft which expressly provided that a restraining notice renders subsequent transfers ineffective.[194] Noting this omission, the *International Ribbon* Court concluded that "in this respect, CPLR does not afford judgment creditors the same priorities enjoyed under prior law . . . ."[195] Nonetheless, the absence of specific statutory authority did not, in the Court's opinion, preclude a finding that a lien was created, since, as the Court explained further, a judgment creditor's rights as against a bare assignee are not exclusively derived from the CPLR.[196]

> It is elementary ancient law that an assignee never stands in any better position than his assignor. He is subject to all the equities and burdens which attach to the property assigned because he receives no more and can do no more than his assignor . . . . The principle applies with equal or greater force to an assignee for the benefit of creditors who asserts rights to property against a judgment creditor which, prior to the assignment, had served a restraining notice on its assignor . . . .[197]

Moreover, as Chief Judge Breitel pointed out, to subject a debtor to contempt for transferring property in violation of a restraining notice while giving his assignee without consideration priority in such property over a judgment creditor would be against sound public policy.[198]

Stressing the equities, the Court pointed out that Arjan had acted promptly and diligently in collecting its judgment. On the other hand, since the belated assignment had been without consideration, it was the Court's view that there could be no appealing equities in favor of the assignee.[199] Consequently, the rights of the judgment creditor were held

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193 36 N.Y.2d at 124, 325 N.E.2d at 138, 365 N.Y.S.2d at 810.

194 *See* note 190 *supra*. CPA 779-a, a provision similar to CPLR 5222(b), created a lien in the debtor's funds in the hands of a third party. Davis & Warshow, Inc. v. S. Iser, Inc., 30 Misc. 2d 528, 534, 220 N.Y.S.2d 818, 826 (Sup. Ct. N.Y. County 1961). Correspondingly, it was a violation of the restraining notice for the judgment debtor to make a subsequent assignment for the benefit of creditors. *See* Rossman Corp. v. Polizzi, 231 App. Div. 872, 246 N.Y.S.2d 849 (2d Dep't 1930) (mem.).

195 36 N.Y.2d at 125, 325 N.E.2d at 138, 365 N.Y.S.2d at 810 (citations omitted).

196 *Id.*, 325 N.E.2d at 139, 365 N.Y.S.2d at 811, *citing In re* Nassau Expressway, 56 Misc. 2d 602, 605, 289 N.Y.S.2d 680, 684 (Sup. Ct. Queens County 1968).

197 36 N.Y.2d at 126, 325 N.E.2d at 139, 365 N.Y.S.2d at 811 (citations omitted).

198 *Id.* at 125, 325 N.E.2d at 139, 365 N.Y.S.2d at 811.

199 *Id.* at 126, 325 N.E.2d at 139, 365 N.Y.S.2d at 811.

superior to those of the assignee. The Court did not address the question of whether such rights would be superior to those of a purchaser for fair consideration. In all likelihood, the equitable approach would conversely require that the rights of the judgment creditor be subordinated to those of such a purchaser.[200] Although its decision might be criticized for misreading, if not ignoring, legislative intent, there can be little doubt that the Court achieved results which were not only fair, but also commendable since the vitality of an otherwise "impotent remedy"[201] was restored.

INSURANCE LAW

Ins. Law §§ 670-77: 90-day notice held "as soon as practicable" under no-fault.

When the New York Legislature instituted no-fault insurance by enacting the Comprehensive Automobile Insurance Reparations Act,[202] commentators criticized the concept on both constitutional and equitable grounds.[203] Recently these views found support in a Supreme Court, Kings County, decision declaring the no-fault act unconstitutional.[204] Few critics, however, have anticipated the manifold procedural problems arising in the day-to-day operation of the Act.[205]

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200 An analogy may be made to CPLR 5202(a) which provides that a judgment creditor who has delivered an execution to the sheriff has rights superior to those of a transferee who received the property for less than fair consideration. A purchaser for fair consideration, however, is expressly not affected by these rights. CPLR 5202(a)(1). *See* 6 WK&M ¶¶ 5202.19, 5202.21.

201 *In re* Nassau Expressway, 56 Misc. 2d 602, 605, 289 N.Y.S.2d 680, 684 (Sup. Ct. Queens County 1968). Under prior decisions, CPLR 5222(b) was held to no longer afford judgment creditors priorities formerly enjoyed under the CPA. *See, e.g.*, City of New York v. Panzirer, 23 App. Div. 2d 158, 163, 259 N.Y.S.2d 284, 288 (1st Dep't 1965).

Of course, a contempt action against the wrongful judgment debtor has always been available. CPLR 5251. Concededly, were the judgment creditor to show in the contempt proceeding that the misconduct of the judgment debtor was responsible for an actual loss, the court could impose a fine sufficient to reimburse him. *In re* Nassau Expressway, 56 Misc. 2d 602, 604, 289 N.Y.S.2d 680, 683 (Sup. Ct. Queens County 1968). The likelihood of collecting this sum from a person who had previously divested himself of all assets, however, would be remote. *See id.* at 605, 289 N.Y.S.2d at 684. On the other hand, if the judgment creditor were to fail to sustain this burden of proving actual loss, the imposed fine could not exceed the costs incurred by him in bringing the motion for contempt. McDonnell v. Frawley, 23 App. Div. 2d 729, 257 N.Y.S.2d 689 (1st Dep't 1965).

202 N.Y. INS. LAW §§ 670-77 (McKinney Supp. 1974).

203 *See, e.g.*, Note, *No-Fault Insurance in New York: Another Hazard for the Innocent Driver*, 40 B'KLYN L. REV. 689 (1974). The New York no-fault plan is described as a "palpably unfair, inadequate, and inherently unconstitutional compromise which will not only fail to correct the defects of the present system, but is likely to compound them." *Id. See also* Comment, *New York Adopts No Fault: A Summary and Analysis*, 37 ALBANY L. REV. 662, 710-15 (1973).

204 Montgomery v. Daniels, 81 Misc. 2d 373, 367 N.Y.S.2d 419 (Sup. Ct. Kings County 1975).

205 *See* Schwartz, *No-Fault Insurance: Litigation of Threshold Questions Under the*