

# CPLR 5236: Purchase of Judgment by Professional Collector for Purposes of Execution on Real Property Held Permissible

St. John's Law Review

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### Recommended Citation

St. John's Law Review (1973) "CPLR 5236: Purchase of Judgment by Professional Collector for Purposes of Execution on Real Property Held Permissible," *St. John's Law Review*: Vol. 48 : No. 1 , Article 21.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol48/iss1/21>

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rate was lower, not higher, than the one previously appended to the verdict. But Judge Harnett in the instant case deemed *Rachlin* to be authority for fragmenting the interest periods according to the effective date of the amendment, and thus applied the new CPLR 5004 prospectively. The court also relied on the presumption of prospective construction<sup>130</sup> and on prior case law sustaining fragmentation of time periods for interest purposes in other contexts.<sup>131</sup> The holding was further supported by policy considerations, for, as correctly noted by the court, "retroactive imposition of the six percent rate as a substitute for the prior seven and one-half figure would bring a windfall to the judgment debtor who has delayed satisfying his outstanding obligations."<sup>132</sup>

Although the amendment to CPLR 5004 is silent as to unsatisfied judgments entered prior to its effective date, or as to actions accruing theretofore, the *Rachlin* holding was seen as a barometer for future First Department action.<sup>133</sup> It is hoped that the *Yamamoto* court's utilization of this method of fragmenting time periods for interest purposes will encourage other courts to follow the same approach when confronted with this issue.

#### ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

*CPLR 5236: Purchase of judgment by professional collector for purposes of execution on real property held permissible.*

By enacting CPLR 5236, the Legislature eliminated the equity of redemption in execution sales, which was designed to ensure a fair sale price<sup>134</sup> and to give the judgment debtor an opportunity to raise

<sup>130</sup> 73 Misc. 2d at 595, 342 N.Y.S.2d at 37, citing *Mulligan v. Murphy*, 14 N.Y.2d 223, 199 N.E.2d 496, 250 N.Y.S.2d 412 (1964); *Graziano v. Donohue*, 33 App. Div. 2d 578, 304 N.Y.S.2d 121 (3d Dep't 1969), *aff'd mem.*, 25 N.Y.2d 955, 252 N.E.2d 852, 305 N.Y.S.2d 353 (1969).

<sup>131</sup> 73 Misc. 2d at 595, 342 N.Y.S.2d at 37, citing *City of Buffalo v. J. W. Clement Co., Inc.*, 34 App. Div. 2d 24, 311 N.Y.S.2d 98 (4th Dep't 1970); *Stull v. Joseph Feld, Inc.*, 34 App. Div. 2d 655, 309 N.Y.S.2d 985 (2d Dep't 1970) (mem.). See also *O'Brien v. Young*, 95 N.Y. 428 (1884); *Rachlin & Co. v. Tra-Mar, Inc.*, 33 App. Div. 2d 370, 308 N.Y.S.2d 153 (1st Dep't 1970).

<sup>132</sup> 73 Misc. 2d at 596, 342 N.Y.S.2d at 38, citing *Emigrant Indus. Sav. Bank v. Sexton*, 284 N.Y. 57, 29 N.E.2d 469 (1940).

<sup>133</sup> 5 WK&M ¶ 5004.01:

In the First Department it would seem that the determination in *Rachlin* would prevail and interest will be computed at the various rates in effect during the periods in which interest properly could be charged. In the remaining Departments the question of what are the applicable rates for periods prior to September 1, 1972 may yet have to be determined.

<sup>134</sup> Paradoxically, the [redemption] provisions have probably had an exactly op-

funds to pay his judgment. These purposes are now served by the provisions for notice of the sale to creditors (CPLR 5236(a)) and for an eight week pre-sale waiting period (CPLR 5236(c)).<sup>135</sup> Further protection is afforded the judgment debtor by CPLR 5240<sup>136</sup> which empowers a court to make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure.

Despite these safeguards, abuses have arisen out of the current practice of assigning small judgments to professional collectors who thereupon, "[b]y the use of technically valid legal steps, and the sale for which CPLR 5236 provides, [sell] the debtor's home . . . at public auction for but a fraction of its worth. The result is a serious miscarriage of justice. . . ."<sup>137</sup> In an effort to end this practice, courts in Nassau County, where the abuse is widespread, have held that these assignments violate section 489 of the Judiciary Law, which prohibits the purchase of a claim by corporations or collection agencies for the purpose of bringing an action or proceeding thereon.<sup>138</sup> These courts

posite effect. The right of redemption is rarely exercised because of the failure of debtors and their judgment creditors to understand the complicated redemption laws. But would-be execution sale purchasers are reluctant to bid at such sales because of the threat of redemption.

Note, *Execution Priorities Between Real Estate and Personal Property in Illinois*, 47 Nw. U.L. REV. 548, 550-51 (1952), quoted in 6 WK&M ¶ 5236.02.

<sup>135</sup> See 6 WK&M ¶ 5236.02.

<sup>136</sup> In 7B MCKINNEY'S CPLR 5236, supp. commentary at 153-55 (1972), Professor Siegel interpreted CPLR 5240 as granting a court the power to delay an execution sale to give a judgment debtor additional time to pay a judgment. This provision has been used to protect judgment debtors and their families from the unnecessary sale of their residences. See *Seyfarth v. Bi-County Elec. Corp.*, 73 Misc. 2d 363, 341 N.Y.S.2d 533 (Sup. Ct. Nassau County 1973) (mem.); *Hammond v. Econo-Car of the North Shore, Inc.*, 71 Misc. 2d 546, 336 N.Y.S.2d 493 (Sup. Ct. Nassau County 1972) (mem.); *Holmes v. W. T. Grant, Inc.*, 71 Misc. 2d 486, 336 N.Y.S.2d 601 (Sup. Ct. Nassau County 1972), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 580, 604 (1973); *Gilchrist v. Commercial Credit Corp.*, 66 Misc. 2d 791, 322 N.Y.S.2d 200 (Sup. Ct. Nassau County 1971), discussed in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 378 (1971).

<sup>137</sup> 7B MCKINNEY'S CPLR 5236, supp. commentary at 153 (1972).

This practice has evolved because of the reluctance of reputable firms, department stores, and professional individuals who although they reduce a legitimate obligation to judgment are unwilling to resort to a CPLR 5236 sale of real property because of the adverse publicity that may result.

*Lee v. Community Capital Corp.*, 67 Misc. 2d 699, 703, 324 N.Y.S.2d 583, 587 (Sup. Ct. Nassau County 1971), discussed in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 578 (1972).

<sup>138</sup> *Bottenus v. Blackman*, 71 Misc. 2d 583, 336 N.Y.S.2d 790 (Sup. Ct. Nassau County 1972), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 530, 600 (1973); *Blackman v. Pincus*, 167 N.Y.L.J. 18, Jan. 26, 1972, at 15, col. 3 (App. T. 2d Dep't), *rev'd sub nom.*, *Concord Landscapers, Inc. v. Pincus*, 41 App. Div. 2d 759, 341 N.Y.S.2d 538 (2d Dep't

found support for their decisions in the statute's language<sup>139</sup> and underlying policy considerations.<sup>140</sup>

Unfortunately, in *Concord Landscapers, Inc. v. Pincus*,<sup>141</sup> the Appellate Division, Second Department, has ruled against this application of the statute. Reversing lower court orders enjoining the sale of the debtor's home by a professional judgment collector, the Second Department held that the enforcement procedures of CPLR article 52 are not "actions or proceedings"<sup>142</sup> within the meaning of section 489 of the Judiciary Law. While noting the serious abuses involved in CPLR 5236 sales, the court confined itself to an appeal to the Legislature for amendments to the relevant statutes.

Clearly an execution sale pursuant to CPLR 5236 should be considered a "proceeding" within the meaning of Judiciary Law section 489. The policy against the practice of law by corporations and professional collectors embodied in section 489<sup>143</sup> is as applicable to the elaborate CPLR 5236 procedure as it is to other "proceedings." Rather than looking to the legislature for further statutory protections, New York courts should apply the present provisions liberally to prevent abuses.

1973) (mem.); cf. *Lee v. Community Capital Corp.*, 67 Misc. 2d 699, 324 N.Y.S.2d 583 (Sup. Ct. Nassau County 1971).

<sup>139</sup> See *Bottenus v. Blackman*, 71 Misc. 2d 583, 336 N.Y.S.2d 790 (Sup. Ct. Nassau County 1972) (holding that the word "proceedings" in Judiciary Law section 489 encompasses the enforcement procedures in CPLR article 52). Affirming an order of the First District Court of Nassau County, the Supreme Court, Appellate Term, reasoned that

since the section excepts from its operation the purchase or assignment of "judgments or other things in action" from certain enumerated estates "through court actions, proceedings or otherwise," by necessary implication this proscribes the acquisition of claims or judgments by individuals, corporations or collection agencies in any other manner.

*Blackman v. Pincus*, 167 N.Y.L.J. 18, Jan. 26, 1972, at 15, col. 3 (App. T. 2d Dep't).

<sup>140</sup> The considerations of using the attorney's edge are part of the statutory vice as is the use of legal process to harass. The essential policy considerations of Section 489 apply fully to the case at bar.

*Bottenus v. Blackman*, 71 Misc. 2d 583, 587, 336 N.Y.S.2d 790, 795 (Sup. Ct. Nassau County 1972).

<sup>141</sup> 41 App. Div. 2d 759, 341 N.Y.S.2d 538 (2d Dep't 1973).

<sup>142</sup> The first case to decide the issue appears to have been *People v. Berlin*, 65 Misc. 2d 245, 317 N.Y.S.2d 191, *dismissed*, 66 Misc. 2d 1034, 323 N.Y.S.2d 349 (Nassau County Ct. 1971) (holding in the context of a criminal prosecution under Judiciary Law section 489 that the statute does not encompass enforcement proceedings initiated by professional judgment collectors). Both the *Berlin* court and the Appellate Division in *Concord* relied on early cases which held that the predecessor of Judiciary Law section 488 did not prohibit an attorney from purchasing a judgment for the purpose of enforcing it. These early interpretations of the predecessor of section 488, which spoke only of the bringing of "actions," should not control the interpretation of section 489 which refers to "actions or proceedings."

<sup>143</sup> See *Transbel Inv. Co. v. Roth*, 36 F. Supp. 396, 399 (S.D.N.Y. 1940).