

CPLR 5240: Court Indicates that Relief from a Completed Sale of Real Property Will Be Difficult to Obtain

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to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law."¹²⁵ The analogy to the *Seligman* case is quite clear. If the *Seligman* court's intent was to ignore the provision absolving the insurer from liability in *Seider*-type cases, the effect would be to impose a greater obligation than the insurer had agreed to assume. *Home Insurance* requires the state to show some interest in the case before it can do this.

As the *Seligman* case demonstrates, the *Seider* doctrine has a boundless propensity for creating new problems.¹²⁶ To ameliorate this situation, a recent legislative proposal would replace *Seider* with a direct action statute.¹²⁷ A right of action would be created against automobile liability insurers doing business or qualified to do business in New York. The action would be maintainable against the insurer regardless of any contrary provision in the policy but only in cases involving out-of-state automobile accidents where no basis of personal jurisdiction over the insured is present. The proposed statute would bar all attachment of liability policies. While an action under this statute might involve the voiding of provisions in out-of-state contracts, its limitation to automobile cases makes it less objectionable than the *Seider* doctrine which could conceivably have a wider application. More importantly, the direct action statute would avoid the quasi-in-rem nature of the proceeding,¹²⁸ thus eliminating the troublesome question of determining the value of the attached res. Hopefully, this proposal will soon become the law.

CPLR 5240: Court indicates that relief from a completed sale of real property will be difficult to obtain.

Too often the sale of a judgment debtor's home pursuant to CPLR 5236 results in a miscarriage of justice.¹²⁹ In many cases, a substantial

¹²⁵ *Id.* at 408.

¹²⁶ *Seider's* difficulties have inspired much critical comment. See, e.g., La Brum, *The Fruits of Babcock and Seider: Injustice, Uncertainty and Forum Shopping*, 54 A.B.A.J. 747, 751 (1968); Rosenberg, *One Procedural Genie Too Many Or Putting Seider Back Into Its Bottle*, 71 COLUM. L. REV. 660, 687 (1971); Stein, *Jurisdiction By Attachment of Liability Insurance*, 43 COLUM. L. REV. 1075 (1968); 7B MCKINNEY'S CPLR 5201, *supp. commentary* at 14-72 (1973).

¹²⁷ JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, REPORT TO THE 1973 LEGISLATURE IN RELATION TO THE CIVIL PRACTICE LAW AND RULES, PROPOSALS RELATING TO A RIGHT OF DIRECT ACTION AGAINST LIABILITY INSURANCE CARRIERS, MCKINNEY'S N.Y. SESSION LAWS 2046-50 (1973). This proposal was passed by the 1973 Legislature but was vetoed by the Governor.

¹²⁸ Professor David D. Siegel notes that most of the problems of the *Seider* doctrine arise from its quasi in rem mold. 7B MCKINNEY'S CPLR 5201, *supp. commentary* at 51-52 (1973).

¹²⁹ In 1963, both the right of redemption and the requirement that personal property

equity is sold for a small fraction of its market value while the judgment is left unsatisfied.¹³⁰ CPLR 5240, which gives the court broad equitable powers to supervise the enforcement procedures of article 52 of the CPLR,¹³¹ seems fully adequate to protect the debtor from abuse if prompt application is made to the court before the commencement of an execution sale.¹³² The real problem is that the victims of

be levied upon before real property were abolished. Possibly as a consequence of this change, a group of professional judgment collectors has arisen who buy judgments at a fraction of their value from reputable creditors for the purpose of levying upon the home of the debtor and buying it at a fraction of its true value. For excellent discussions of this development see *Lee v. Community Capital Corp.*, 67 Misc. 2d 699, 324 N.Y.S.2d 583 (Sup. Ct. Nassau County 1971) (Lynde, J.); 7B MCKINNEY'S CPLR 5236, *supp. commentary* at 161 (1969). The Appellate Division, Second Department, had an opportunity to correct some of the present abuses in *Concord Landscapers, Inc. v. Pincus*, 41 App. Div. 2d 759, 341 N.Y.S.2d 538 (2d Dep't 1973), but instead deferred to the Legislature. The court therein held that section 489 of the Judiciary Law does not prohibit the purchase of judgments for the purpose of execution and levy upon the real property of debtors pursuant to CPLR 5236 by professional judgment collectors. For a criticism of this decision see *The Quarterly Survey*, 48 *St. JOHN'S L. REV.* 159, 185 (1973).

¹³⁰ A case in point is *Morgan v. Maher*, 60 Misc. 2d 642, 303 N.Y.S.2d 575 (Sup. Ct. Nassau County 1969), wherein a bidder at an execution sale brought an article 78 proceeding to compel a sheriff to accept a bid of \$174.43 for an interest in real property of undisclosed value. The sheriff had refused to honor the bid and had returned the execution unsatisfied. The court held that the sheriff had exceeded his authority since he had no knowledge of the property's value. The effect of the decision was to wipe out the debtor's equity while leaving a \$4,386.89 judgment unsatisfied. The sheriff explained his actions as follows:

Several of the other bidders, although they did not bid, were those involved in situations in the past where a low bid took away an interest in real property worth thousands of dollars. The Sheriff, taking into consideration the extremely low bid made, and the fact that no other executions had been filed against the real property on sale, thereupon used his discretion in refusing to accept the one bid made, which in his estimation was too low.

Respondent's Memorandum of Law at 6. The suggestion of collusion among bidders provides one possible explanation for the low sales prices received at these sales.

¹³¹ CPLR 5240 reads in pertinent part:

The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure. . . .

¹³² The courts appear quite willing to prevent or postpone a CPLR 5236 sale to avoid injustice. A typical instance where relief under CPLR 5240 has been granted has been where creditors have sought to levy and execute upon an estranged husband's interest in a family residence held as a tenancy by the entirety. See *Seyfarth v. Bi-County Elec. Corp.*, 73 Misc. 2d 363, 341 N.Y.S.2d 533 (Sup. Ct. Nassau County 1973); *Hammond v. Econo-Car of the N. Shore, Inc.*, 71 Misc. 2d 546, 336 N.Y.S.2d 493 (Sup. Ct. Nassau County 1972), *discussed in The Quarterly Survey*, 47 *St. JOHN'S L. REV.* 580, 603 (1973); *Gilchrest 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). In each case, the court restrained the sale to prevent hardship to the debtor's wife and family. The courts reasoned that the proceeds of such a sale were certain to be small due to the peculiar and uncertain nature of the interest levied upon. Compare *Lover v. Fennell*, 14 Misc. 2d 874, 179 N.Y.S.2d 1017 (Sup. Ct. Queens County 1958) (*dictum*) (purchaser of husband's one-half interest in a tenancy by the entirety at an execution sale has the right to be put into possession with the wife), with *Berlin v. Herbert*, 48 Misc. 2d 393, 265 N.Y.S. 2d 25 (Dist. Ct. Nassau County 1965) (wife is entitled to occupy the whole property to the exclusion of the purchaser of the husband's interest). The only real value to the creditor of an immediate sale in such a case is to pressure the wife into paying a debt which was

unjust execution sales frequently fail to retain counsel in time to invoke the statute's protection.¹³³

A recent case, *Murphy v. Grid Realty Corp.*,¹³⁴ illustrates this problem in vivid detail. Judgments were docketed against a debtor's interest in a family residence owned by him and his wife as tenants by the entirety. The debtor deeded his interest, subject to the judgment liens, to his wife. Subsequently the couple was divorced. A judgment creditor levied and executed upon the one-half interest in the home to which his lien had attached. The wife was advised by a sheriff's notice that she could avoid the sale by paying \$920.74. Instead of paying this sum, she bid \$1,000 at the execution sale but lost to another bidder who purchased the interest for \$2,336. The value of the interest was conceded to be \$7,657.¹³⁵ When the successful bidder sought to partition the property, the wife commenced a special proceeding in the Supreme Court, Nassau County, seeking to have the court vacate the execution sale pursuant to its powers under CPLR 5240. In her verified petition she stated that she first became aware of any liens on the property when a collection agency called her demanding payment of a judgment of \$654.05. She claimed that she later discovered that judgments totaling \$4,500 were docketed against the one-half interest in the property formerly owned by her ex-husband. She further stated that when she received notice that the interest deeded to her by her ex-husband was to be executed upon, she mistakenly believed that she could buy the levying creditor's judgment at the sale. She claimed that she bid all the money she could raise and retained an attorney only after losing the property to another bidder.¹³⁶ The court, however, refused

not hers, something she may ill-afford to do, or to compel her to sell the house to pay the judgment, something the court is justifiably reluctant to force her to do.

In other cases, courts have adopted judicial sales even though the debtors themselves resided in the homes levied upon. Emphasizing the hardship that results from loss of a residence, the courts in three such cases vacated executions on the condition that the debtor pay off the debt in installments. See *Shapiro v. DeLeonardes*, 170 N.Y.L.J. 97, Nov. 20, 1973, at 20, col. 1 (Sup. Ct. Nassau County); *Holmes v. W.T. Grant, Inc.*, 71 Misc. 2d 486, 336 N.Y.S.2d 601 (Sup. Ct. Nassau County 1972) (two adults and four children on public assistance); *Dime Sav. Bank v. Barnes*, 67 Misc. 2d 837, 325 N.Y.S.2d 365 (Sup. Ct. Nassau County 1971), discussed in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 768, 791 (1972) (mortgage foreclosure — seventy-eight-year-old woman in ill health).

¹³³ "Seeing to it that these matters are brought to the court's attention, and setting up a statutory scheme to that end, would seem the most fertile ground of legislative correction of these abuses." 7B MCKINNEY'S CPLR 5236, supp. commentary at 164 (1969). Professor David D. Siegel recommends that the court or a clerk of the court be required to hold a conference with a judgment debtor before his residence is sold to inform him of the impending sale and to determine whether some form of relief under CPLR 5240 is appropriate. *Id.* at 163.

¹³⁴ 73 Misc. 2d 1071, 343 N.Y.S.2d 670 (Sup. Ct. Nassau County 1973).

¹³⁵ Petitioner's Petition at 11; conceded in Respondent's Petition at 2.

¹³⁶ Petitioner's Petition.

to consider her explanation¹³⁷ and denied the relief sought on the ground that she could have avoided her plight by paying the judgment before the sale.¹³⁸ While purporting not to express any opinion on the scope of the powers granted by CPLR 5240, the court gratuitously opined that:

If it were the intention of the Legislature that the Court should be empowered to vacate a proper execution sale for equitable reasons, it should have made an explicit provision to that effect in the statute and should have provided for a time limit with respect to an application for such relief as it did with respect to CPLR § 2003.¹³⁹

It seems clear that had the petitioner in *Murphy* sought relief pursuant to CPLR 5240 before the execution sale, she would have been successful. In a strikingly similar case, *Koshar v. Koshar*,¹⁴⁰ a wife, threatened with the imminent sale at execution of an ex-husband's former interest in a family residence, made a pre-sale application to a court for relief under CPLR 5240. The court enjoined the sheriff's sale, emphasizing that the wife was not the debtor and that there had been no showing of any attempt to enforce the judgment against the husband. The court granted the creditor leave to later execute on the family residence upon a showing of a change of circumstances. In similar cases, where timely application was made under CPLR 5240, courts have avoided the drastic consequences of a sheriff's sale by ordering payment of judgments in installments.¹⁴¹ Professor David D. Siegel has suggested that even if a sale cannot be postponed, a judgment debtor

¹³⁷ The court did allude to the possibility that the petitioner might actually have been attempting to wipe out the liens of other judgments docketed against the property at a price less than that which would be required to pay them off. 73 Misc. 2d at 1072, 343 N.Y.S.2d at 671. This appears unlikely, however. At the time of the sale, only \$1500 worth of executions had been delivered to the sheriff. Since the conceded value of the equity sold was \$7,657, it would have been well worthwhile for the petitioner to have bid in excess of \$1500. Once the price was bid above \$1500, the petitioner could bid as high as she desired at no extra cost because the excess above this amount would revert to her. The fact that she failed to bid any higher than \$1000 indicates that she either did not understand the situation or, as she claimed, simply could not raise sufficient money to clear the property.

¹³⁸ The court stated that "[h]er failure to make that payment does not justify the requested interference by the Court with an enforcement procedure which is not claimed to have been conducted except in full compliance with the requirements of CPLR article 52." 73 Misc. 2d 1071, 343 N.Y.S.2d 670, 671 (emphasis added). Contrast with this the following statement by the United States Supreme Court in 1886:

It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law.

Graffam v. Burgess, 117 U.S. 180 (1886).

¹³⁹ 73 Misc. 2d at 1071, 343 N.Y.S.2d at 672.

¹⁴⁰ 170 N.Y.L.J. 25, Aug. 6, 1973, at 13, col. 5 (Sup. Ct. Nassau County).

¹⁴¹ See cases cited *supra* note 132.

should at least be able to persuade a court to modify the sale-procedure to ensure a fair price.¹⁴²

The rigid approach adopted by the *Murphy* court with respect to relief from a completed execution sale does not appear to be justified either by the intent underlying CPLR 5240¹⁴³ or by case law. Courts of equity have long been willing to set aside judicial sales when the price was inadequate or when there was evidence of mistake, inadvertence, ignorance, or a suspicion of unfairness.¹⁴⁴ A price so low as to shock the conscience of the court has in itself, and absent any other factors warranting relief, been considered sufficient to justify judicial intervention.¹⁴⁵ Unfortunately, the *Murphy* court's refusal to consider these possible factors indicates that relief will be much more difficult to obtain after the sale is completed than before.

Clearly legislative action to remedy abuses of the execution sale procedure is in order. When the Legislature abolished the right of redemption in 1963,¹⁴⁶ its intent was to increase purchase prices at exe-

¹⁴² Professor Siegel has recommended that courts entertain "a kind of 5228-5240 motion, combining a request for a protective order staying the execution as a remedy and asking instead for the appointment of a receiver to sell the property." 7B MCKINNEY'S CPLR 5240, supp. commentary at 182 (1973). Presently, the language of CPLR 5228 would allow only the creditor to get such an appointment, but the broad powers given by CPLR 5240 to regulate, extend, or modify the use of any enforcement procedure appear sufficient to permit an appointment for the debtor's benefit.

¹⁴³ The rule is stated as broadly as possible and is designed to replace the diverse, overlapping, overly technical and inconsistent provisions relating to the manner in which enforcement procedures may be modified, vacated, and regulated. THIRD REP. 314.

¹⁴⁴ See, e.g., *Fitzpatrick v. Federer*, 315 S.W.2d 826 (Mo. 1958) (arrangement between bidders to purchase at less than the fair market value); *King v. Platt*, 37 N.Y. 155 (1867) (circumstances gave rise to a suspicion that free competition was interfered with); *Zouppas v. Yannikidou*, 16 App. Div. 2d 52, 225 N.Y.S.2d 557 (1st Dep't 1962) (partition sale set aside where price was inadequate and terms of the sale were indefinite and contrary to the judgment); *Wright v. Caprarella*, 205 App. Div. 559, 199 N.Y.S. 864 (2d Dep't 1923) (property worth \$5000, purchased for \$1900, and mortgagor failed to appear at the sale on time through the negligence of his attorney); *Commercial Bank v. Catto*, 13 App. Div. 608, 43 N.Y.S. 777 (4th Dep't 1897) (sale set aside because price inadequate); *Goldberg v. Feltman's of Coney Island, Inc.*, 205 Misc. 858, 130 N.Y.S.2d 723 (Sup. Ct. Kings County 1954) (sale set aside because price inadequate). See also *Colonial Steel Corp. v. Piquin, Inc.*, 74 Misc. 2d 273, 344 N.Y.S.2d 505 (N.Y.C. Civ. Ct. Queens County 1973) (suspicious sale of personalty set aside).

¹⁴⁵ See, e.g., *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 446 (1934) (dictum); *Ballentyne v. Smith*, 205 U.S. 285 (1907); *Hawkins v. Snellings*, 255 Ala. 659, 53 So. 2d 552 (1951) (price less than one-half the amount of the original loan on the mortgage); *Schaeffer v. Moore*, 262 S.W.2d 854 (Mo. 1953) (purchased for 4.7% of the reasonable market value at sheriff's sale); *Fisher v. Hersey*, 78 N.Y. 387 (1879); *Holness v. McGillian*, 161 N.Y.L.J. 6, Jan. 9, 1969, at 19, col. 6 (Sup. Ct. Westchester County 1969) (property purchased by creditor for one-sixtieth of its fair market value at the sheriff's sale); *Alben Affiliates v. Astoria Terminal, Inc.*, 34 Misc. 2d 246, 226 N.Y.S.2d 1007 (Sup. Ct. Queens County 1962) (property worth \$350-400,000, purchased by mortgagee for \$24,000 — but the true cost to the mortgagee was the value of the mortgage, \$236,000).

¹⁴⁶ CPLR 5236 replaced most of the elaborate provisions for the sale and redemption of real property contained in CPA 708-755.

cution sales, thus benefiting both creditors and debtors.¹⁴⁷ This benefit could be insured by amending CPLR 5236 to provide for greater court supervision.¹⁴⁸ Until the Legislature acts, courts should not hesitate to fashion remedies even after the sale when circumstances warrant relief.

ARTICLE 75 — ARBITRATION

CPLR 7501: Court of Appeals adopts separability approach where a broad arbitration clause is present.

New York has required that the issue of fraud in the inducement of a contract containing an arbitration clause be determined by the court and not the arbitrators. The law stems from a 1957 decision of the Court of Appeals in *Wrap-Vertiser Corp. v. Plotnick*.¹⁴⁹ Implicit in the Court's decision was the assumption that arbitration clauses were not separable from the principal contract; therefore, if the contract were tainted with fraud, the entire contract was invalid, including the arbitration clause.¹⁵⁰ The application of this approach affected the nature of the remedy sought: if the party's complaint prayed for damages under the contract, he was said to have ratified the contract rendering the arbitration clause therein enforceable; only if the party elected to rescind the contract could he avoid arbitration.¹⁵¹

¹⁴⁷ See generally 6 WK&M ¶ 5236.02. One rationale for the abolition of the right of redemption is that the purchaser at an execution sale will pay more for an absolute title than for a title which is subject to redemption. As one authority has noted, however, redemptive rights do have certain advantages.

The utility of these statutes [allowing redemption] arises out of the fact that the most frequent customer at a foreclosure sale is the mortgagee himself, being thereby the purchaser from whom redemption is to be made. . . . These statutes offer a strong inducement to the mortgagee to bid a price commensurate with the value of the land.

3A R. POWELL, *THE LAW OF REAL PROPERTY* § 470 (P. Rohan ed. 1973).

Just as the mortgagee is frequently the purchaser at a foreclosure sale, the judgment creditor is often the buyer at execution sales. When the creditor buys property at less than its market value, he receives a windfall unless the full fair market value of the property is credited against his judgment. While the CPLR makes no express provision for this, one New York court has held that CPLR 5240 gives the court power to grant such a credit. See *Wandschneider v. Bekeny*, 75 Misc. 2d 32, 346 N.Y.S.2d 925 (Sup. Ct. Westchester County 1973), discussed in *The Quarterly Survey*, 48 ST. JOHN'S L. REV. 159, 188 (1973); cf. RPAPL § 1371.

¹⁴⁸ See note 133 *supra*.

¹⁴⁹ 3 N.Y.2d 17, 143 N.E.2d 366, 163 N.Y.S.2d 639 (1957) (4-3).

¹⁵⁰ *Aksen, Prima Paint v. Flood & Conklin — What Does It Mean?* 43 ST. JOHN'S L. REV. 1, 10-11 (1968) [hereinafter cited as *Aksen*]. The traditional view is espoused by Professor Corbin: "It would seem that if the alleged defect exists, it effects the provision for arbitration just as much as it affects the other provisions." 6A A. CORBIN, *CONTRACTS* § 1444 at 449 (1962) [hereinafter cited as *CORBIN*].

¹⁵¹ *Wrap-Vertiser Corp. v. Plotnick*, 3 N.Y.2d 17, 19, 143 N.E.2d 366, 367, 163 N.Y.S.2d 639, 640 (1957).

Where an action for rescission is brought to recover the benefits conferred by the wronged party as a result of the transaction, and the court exercises its equitable powers to avoid the contract *ab initio*, there is no difficulty in reasoning that "[i]f there has never