

CPLR 5222: Restraining Notice Is Not Cancelled by Ex Parte Stay of Execution

St. John's Law Review

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Recommended Citation

St. John's Law Review (1973) "CPLR 5222: Restraining Notice Is Not Cancelled by Ex Parte Stay of Execution," *St. John's Law Review*: Vol. 47 : No. 3 , Article 50.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol47/iss3/50>

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holding, the court noted that a lien represents an integral part of the lienor's interest even though a lien is not property within the meaning of CPLR 5201(b).¹³³ On the sale of the debt by the sheriff, the purchaser is therefore entitled to possession of the scrap metal with the right to sell it if the petitioner fails to satisfy the debt.¹³⁴

CPLR 5222: Restraining notice is not cancelled by ex parte stay of execution.

A CPLR 5222 restraining notice allows a judgment creditor to prevent his debtor or a third party from disposing of the debtor's assets before execution.¹³⁵ A third party who disposes of a judgment debtor's assets in violation of a restraining notice is subject to contempt sanctions and liable to the creditor for damages.¹³⁶ Third parties, therefore, should not assume that a restraining notice has ceased to be effective. This point was illustrated in *Nardone v. Long Island Trust Co.*¹³⁷

In *Nardone*, a judgment creditor served a restraining notice on a bank pursuant to CPLR 5222. The judgment debtor moved to open the default judgment and obtained an *ex parte* order staying execution. The bank informally received a copy of this order and permitted the debtor to write checks against his account. When the sheriff attempted to execute the judgment, the account was overdrawn. The creditor sued the bank for damages for violating the restraining notice. Unanimously reversing a judgment for the respondent and granting the petitioner's motion for summary judgment, the Appellate Division,

¹³³ 71 Misc. 2d at 1018, 337 N.Y.S.2d at 782, citing *Merritt v. Bartholick*, 36 N.Y. 44 (1867); *Beak v. Walts*, 266 App. Div. 900, 42 N.Y.S.2d 652 (4th Dep't 1943) (mem.).

There is support, however, for the proposition that a lien itself is property.

[A] lien is property in the broad sense of that word, and although it has no physical existence it exists by operation of law so effectively as to have pecuniary value, and to be capable of being bought and sold.

Haebler v. Myers, 132 N.Y. 363, 368, 30 N.E. 963, 965 (1892). See also *Yarmak v. Perry*, 182 Misc. 268, 43 N.Y.S.2d 304 (N.Y. City Ct. N.Y. County 1943).

¹³⁴ "At any time during this procedure, [the lienee] may redeem its property by paying to the sheriff the amount of the artisan's lien." 71 Misc. 2d at 1019, 337 N.Y.S.2d at 782-83. By requiring the purchaser to sell the property to satisfy the lien, the lienee is afforded the protections of article 9 of the Lien Law, including notice of sale and the right of redemption.

¹³⁵ See 6 WK&M ¶ 5222.01.

¹³⁶ CPLR 5251 expressly provides for contempt sanctions against violators of CPLR 5222. Without express statutory authority, courts have held that the remedy of damages is also available. See *Mazuka v. Bank of North America*, 53 Misc. 2d 1053, 280 N.Y.S.2d 495 (N.Y.C. Civ. Ct. Queens County 1967), discussed in *The Quarterly Survey*, 42 St. JOHN'S L. REV. 436, 466 (1968). See also *Sumitomo Shoji New York, Inc. v. Chemical Bank New York Trust Co.*, 47 Misc. 2d 741, 263 N.Y.S.2d 354 (Sup. Ct. N.Y. County 1965), *aff'd mem.*, 25 App. Div. 2d 499, 267 N.Y.S.2d 477 (1st Dep't 1966) (dictum), discussed in *The Biannual Survey*, 40 St. JOHN'S L. REV. 303, 348 (1966).

¹³⁷ 40 App. Div. 2d 697, 336 N.Y.S.2d 325 (2d Dep't 1972) (mem.).

Second Department, held that the *ex parte* stay did not suspend the effectiveness of the restraining notice but merely prevented the creditor from executing the judgment. A hearing was ordered on damages, which were limited to the amount in the account at the time of the service of the restraining notice plus costs.¹³⁸

Since the judgment creditor in *Nardone* was not secured in any way,¹³⁹ the court's decision seems justified. As the court noted,¹⁴⁰ a contrary holding would provide judgment debtors with a simple means of freeing assets from restraint, thus frustrating the intent of CPLR 5222.

CPLR 5240: Protecting the judgment debtor from abuses of execution and forced sales.

Pursuant to CPLR 5240, courts have broad discretionary powers to deny, modify, or limit the use of any enforcement procedure.¹⁴¹ Recently, the Supreme Court, Nassau County, applied this provision in two cases to protect recipients of public assistance who were in danger of losing their homes as a result of execution and forced sales.

In *Hammond v. Econo-Car of the North Shore, Inc.*,¹⁴² a creditor of a husband executed against his interest in the family home. Because the creditor had not shown to the court's satisfaction that it had tried to collect the \$1400 debt from the delinquent husband first, and because those to suffer most from execution would be the estranged wife and children who were living in the home and being assisted by public funds, the court restrained enforcement of the judgment.¹⁴³ The court emphasized that the harassment effect of enforcement outweighed "any substantive value in immediate occupancy rights to anyone out-

¹³⁸ *Id.*, 336 N.Y.S.2d at 327.

¹³⁹ When a judgment is appealed, the judgment debtor may obtain an automatic stay of execution by filing an undertaking as security pursuant to CPLR 5519. Authorities contend that an automatic stay granted under CPLR 5519 suspends the effectiveness of a restraining notice. See 7B MCKINNEY'S CPLR 5222, commentary at 79 (1963); 6 WK&M ¶ 5222.03. Their rationale is that the judgment creditor is adequately protected by the debtor's undertaking. In *Nardone*, the judgment debtor was not appealing a judgment but was seeking to open one. Therefore, there was no requirement that an undertaking be filed.

¹⁴⁰ 40 App. Div. 2d at 697, 336 N.Y.S.2d at 327.

¹⁴¹ See *Dime Savings Bank v. Barnes*, 67 Misc. 2d 837, 325 N.Y.S.2d 365 (Sup. Ct. Nassau County 1971) (mem.), discussed in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 768, 791 (1972); 7B MCKINNEY'S CPLR 5240, commentary at 203 (1963); 6 WK&M ¶ 5240.01. Cf. CPLR 3103.

¹⁴² 71 Misc. 2d 546, 336 N.Y.S.2d 493 (Sup. Ct. Nassau County 1972) (mem.).

¹⁴³ The court cited *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), which paralleled the facts in this case and in which the court emphasized the risk to the children of the loss of their home if the wife pre-deceased the husband.