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Article 51

CPLR 5240: Protecting the Judgment Debtor from Abuses of Execution and Forced Sales

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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 predeceased the husband.

side the close family,"[144] noting that "[t]he creditor's legitimate security interest is really protected by its judgment lien."[145]

Holmes v. W. T. Grant, Inc.[146] involved a $500 judgment secured against a husband and wife who lived with their four infants in a home for which they received public assistance to satisfy the mortgage payments. While not commenting on the element of harassment in enforcing the judgment by means of execution and sheriff's sale, the court weighed the harm to the family against the benefit to the creditor and found that "an equitable priority exists in the continued use of the property to house the needy family."[147]

In both cases, the judgments and resulting creditors' liens remained valid, but not immediately enforceable.[148] In *Holmes*, the court ordered the husband and wife to pay monthly installments to the creditor until the judgment, with interest,[149] is satisfied, and granted the creditor leave to resume execution if they default in their payments. In *Hammond*, the creditor was advised to seek payment from the husband or to wait until the property is sold, vacated, or vested in him by right of survivorship before executing on his interest.[150]

In staying enforcement, these cases comport with the legislative intent and previous Nassau County Supreme Court decisions applying CPLR 5240 liberally wherever debtors require its protection.[151]

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144 71 Misc. 2d at 548, 336 N.Y.S.2d at 495. Since it could not gain immediate occupancy, the creditor would benefit only if the husband survived the wife or if the property were sold, which it would be better able to pressure the wife into doing.

145 *Id.*

146 *Id.* 486, 336 N.Y.S.2d 601 (Sup. Ct. Nassau County 1972) (mem.).

147 *Id.* at 488, 336 N.Y.S.2d at 603. The court cited Dime Savings Bank v. Barnes, 67 Misc. 2d 837, 325 N.Y.S.2d 365 (Sup. Ct. Nassau County 1971) (mem.), which also spoke of equities favoring the debtor, who lived with her aged and sick mother and could not afford to lose her home.

148 The effect on creditors was discussed in connection with the *Gilchrist* case in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 378 (1971), where it was noted that although the judgment is merely frozen when a court refuses to allow enforcement, in effect, the cancellation of the sale may approach "the point of divestiture of the creditor's substantive rights."

149 This is a condition frequently imposed when protective orders are issued pursuant to CPLR 5240. *See* 7B MCKINNEY'S CPLR 5236, supp. commentary at 155 (1972); *cf.* Dime Savings Bank v. Barnes, 67 Misc. 2d 837, 839, 325 N.Y.S.2d 365, 368 (Sup. Ct. Nassau County 1971) (mem.).

150 71 Misc. 2d at 548, 336 N.Y.S.2d at 495.

151 In Lee v. Community Capital Corp., 67 Misc. 2d 699, 701, 324 N.Y.S.2d 583, 584 (Sup. Ct. Nassau County 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 578 (1972), where a $20,000 home would have been sold to satisfy an underlying debt of several hundred dollars, the court noted:

> In Nassau County the real property generally involves personal residences of small debtors, the assignees [of the creditor] invariably selling the debtor's home at public auction for a fraction of the market value. This pattern has evolved into a practice reaching alarming proportions in Nassau and Suffolk counties; and this court, by the present decision, hopes to terminate such practice, to prevent the

ARTICLE 75 — ARBITRATION

CPLR 7503: Filing of notice of lien in violation of contractual lien waiver provision does not constitute waiver of right to arbitration.

Prior to the enactment of section 35 of the Lien Law,[152] filing a notice of lien was held to constitute a waiver of the right to arbitration,[153] and the opposing party was entitled to a stay of arbitration under CPLR 7503.[154] Since this rule was overturned by statute,[155] filing a notice of lien and commencing an action to foreclose on the lien have been included within the protection of section 35.[156]

Difficulties have arisen where a contract contains a broad arbitration clause and a provision waiving the right to file a lien. In *Sommer v. Anthony J. Quarant Contracting, Inc.*,[157] a contractor who filed a notice of lien in violation of such an agreement later sought to enforce the arbitration provisions of the breached contract. Rejecting several prior holdings,[158] the Appellate Division, First Department, unanimously reversed a stay of arbitration and directed the parties to proceed to arbitration. The court reasoned that the intent of section 35 was to protect a party's lien rights while allowing him to pursue arbitration, and that "[t]o engraft an exception to the statute because

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perpetuation of this injustice until the Legislature reviews the manifest inequities resulting from this practice.

The court also suggested that CPLR 5236, which affords this enforcement remedy, be revised to prevent the "legal chicanery" and "unjust forfeitures" resulting from forced sales. *Id.* at 702, 324 N.Y.S.2d at 585.

152 N.Y. LIEN LAW § 35 (McKinney 1966).

153 Young v. Crescent Dev. Co., 240 N.Y. 244, 148 N.E. 510 (1925).

154 A different result is obtained where a notice of lien is filed after a demand for arbitration. *See In re* Askovitz, 229 App. Div. 258, 241 N.Y.S. 394 (2nd Dep't 1930).

155 Manitt Constr. Corp. v. J.S. Plumbing & Heating Corp., 50 Misc. 2d 502, 270 N.Y.S.2d 716 (Sup. Ct. Queens County 1966).

156 A. Burgart, Inc. v. Foster-Lipkins Corp., 63 Misc. 2d 930, 313 N.Y.S.2d 831 (Sup. Ct. Monroe County 1970), *aff'd mem.*, 38 App. Div. 2d 779, 328 N.Y.S.2d 856 (4th Dep't), *aff'd mem.*, 30 N.Y.2d 901, 287 N.E.2d 269, 335 N.Y.S.2d 562 (1972). "Implicit in the right to file a lien is the right to continue it until completion of the arbitration proceedings." *Id.* at 931, 313 N.Y.S.2d at 832. *Accord, In re* Oxer, 36 Misc. 2d 314, 316, 233 N.Y.S.2d 697, 699 (Sup. Ct. Nassau County 1962) (action to foreclose lien is necessary protective measure in addition to arbitration). Sowalskie v. Cohoes Housing Authority, Inc., 69 Misc. 2d 665, 330 N.Y.S.2d 481 (Sup. Ct. Albany County 1968), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 178 (1972), has thus been discredited. Therein, the defendant successfully prevented a plaintiff who brought an action to foreclose a lien from pursuing any remedy by (1) obtaining a stay of foreclosure because their contract had provided for arbitration of all controversies, and (2) obtaining a stay of arbitration on the ground of waiver.

157 40 App. Div. 2d 95, 337 N.Y.S.2d 957 (1st Dep't 1972) (per curiam).

158 Sowalskie v. Cohoes Housing Authority, Inc., 69 Misc. 2d 665, 330 N.Y.S.2d 481 (Sup. Ct. Albany County 1968); Manitt Constr. Corp. v. J.S. Plumbing & Heating Corp., 50 Misc. 2d 502, 270 N.Y.S.2d 716 (Sup. Ct. Queens County 1966). It is not clear from the *Sowalskie* facts that a lien waiver provision was involved. Apparently, the court's underlying rationale was that foreclosure of a lien is not within the purview of Lien Law § 35.