

CPLR 5222: Liability of the Judgment Creditor Is Not Absolute

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based on the same transaction with other jury counterclaims,¹⁴³ the court held that both parties, by their conduct in delaying disposition of the issues through "an over-zealous adherence to procedural, preliminary detail,"¹⁴⁴ waived the right to a jury trial.¹⁴⁵

The parties amply demonstrated that they were not serious about their right to a trial by jury. Instead, their general behavior evinced an intention to waive this right — a waiver according to decisional law. Ironically, the county court felt compelled to return the case to the city court to determine whether it could dispose of the case without the use of a referee.¹⁴⁶

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5222: Liability of the judgment creditor is not absolute.

Under the CPA, money judgments were enforceable by execution or supplementary proceedings.¹⁴⁷ Consequently there were numerous inconsistencies within each procedure and many money judgments remained unsatisfied, or were satisfied only after extensive litigation involving the expenditure of substantial amounts of time and money.¹⁴⁸ CPLR 5222 was introduced to eliminate these dual procedures and to create a simple and consistent system for the enforcement of money judgments.¹⁴⁹ The rule provides in part that

[a] judgment creditor who has specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor, for any damages sustained by reason of the restraint¹⁵⁰

While disposing of one problem, the statute created a new one. Is the judgment creditor's liability absolute, or subject to a finding of irresponsibility or bad faith? The civil court, in *Stathopoulos v. Seaways Shipping Corp.*,¹⁵¹ chose the latter approach.

¹⁴³ *Academy Street Realty Corp. v. Young*, 25 App. Div. 2d 435, 266 N.Y.S.2d 906 (2d Dep't 1966); *Sue v. Homer*, 15 App. Div. 2d 729, 223 N.Y.S.2d 231 (4th Dep't 1962); *Liberty Bank of Buffalo v. Lansing*, 259 App. Div. 797, 18 N.Y.S.2d 311 (4th Dep't 1940); see also 7B MCKINNEY'S CPLR 4102, supp. commentary at 41 (1970). Professor Seigal notes that in such a situation a single fact-finder is required in order to preclude inconsistent determinations.

¹⁴⁴ 67 Misc. 2d at 476, 323 N.Y.S.2d at 892.

¹⁴⁵ See, e.g., *Phoenix Life Ins. Co. v. Conway*, 11 N.Y.2d 367, 183 N.E.2d 754, 229 N.Y.S.2d 740 (1962).

¹⁴⁶ 67 Misc. 2d at 477, 323 N.Y.S.2d at 894.

¹⁴⁷ 12 NEW YORK STANDARD CIVIL PRACTICE SERV. 60 (1963).

¹⁴⁸ *Id.* 59.

¹⁴⁹ 9 CARMODY-WAIT 2d 64:2, at 331 n.7 (1966).

¹⁵⁰ CPLR 5222(b).

¹⁵¹ 66 Misc. 2d 607, 321 N.Y.S.2d 717 (N.Y.C. Civ. Ct. N.Y. County 1971).

The defendant in *Stathopoulos* was a judgment creditor of George Stathos, who was then a co-plaintiff in another action. Upon learning of settlement of that action, and prior to entry of judgment thereon, defendant's attorney, pursuant to CPLR 5222, served a restraining notice on the attorney in possession of the settlement funds. Unknown to defendant, however, George Stathos had previously assigned his interest in the cause of action to his mother, the plaintiff in the present action. The Supreme Court, New York County, found for the defendant, but the Appellate Division, First Department, modified the judgment to give priority to plaintiff's assignment.¹⁵² The question remained, however, whether

... a judgment creditor, who serves a restraining notice pursuant to CPLR 5222 upon a third party, specifying property or debt which on its face belongs to the judgment debtor, in good faith and without any prior knowledge of an adverse claim to the property or debt, should be held liable to an adverse claimant for damages, in the event it is later established that the adverse claimant's interest is superior to that of the judgment creditor.¹⁵³

Upon consideration of related statutes,¹⁵⁴ the appellate court concluded that there could be no liability if a judgment creditor had pursued his claim in good faith, and could not, "in the normal exercise of reasonable care, determine [that] the restrained property was in fact the property of another."¹⁵⁵ The court reasoned that the Legislature did not intend to require an attorney to risk a damage suit against his client by executing on property which apparently belonged to the judgment debtor.¹⁵⁶ In view of the facts in the immediate case—(1) that the property in question was in the name of the judgment debtor, and (2) that the property had been privately assigned to his mother—the court held that defendant could not have known of the assignment and therefore was not liable for the resulting damage.¹⁵⁷

Undoubtedly the *Stathopoulos* decision is justified upon the facts presented. The assignment of property by a judgment debtor to a relative or close friend is usually undetectable by a judgment creditor. Then too, an assignment made with knowledge of an outstanding judgment against one's property might well be considered less than honest.

¹⁵² *Stathos v. Murphy*, 26 App. Div. 2d 500, 276 N.Y.S.2d 727 (1st Dep't 1966), *aff'd*, 19 N.Y.2d 883, 227 N.E.2d 880, 281 N.Y.S.2d 81 (1967), *overruled*, *Harold Moorstein & Co., Inc. v. Excelsior Ins. Co.*, 25 N.Y.2d 651, 254 N.E.2d 767, 306 N.Y.S.2d 466 (1969) (mem.).

¹⁵³ 66 Misc. 2d at 608, 321 N.Y.S.2d at 719.

¹⁵⁴ See 6 WK&M ¶ 5232.12.

¹⁵⁵ 66 Misc. 2d at 609, 321 N.Y.S.2d at 720.

¹⁵⁶ *Id.* at 610, 321 N.Y.S.2d at 720.

¹⁵⁷ *Id.* at 609-10, 321 N.Y.S.2d at 720.

Clearly, justice would not be served by imposing absolute liability on the unwary judgment creditor.

CPLR 5240: Court protects "interested" third party from execution sale.

CPLR 5240 was designed to enable the court, "at any time, on its own initiation or the motion of any interested¹⁵⁸ person," to "make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." This section empowers the court "to prevent unreasonable annoyance and abuse in the use of the provisions of article 52 of the CPLR in enforcing judgments."¹⁵⁹ But it does not authorize the court to ignore the procedures of article 52. It only permits "a certain amount of tinkering on the structure by the judicial handyman, . . . not . . . the construction of an entirely new wing using jurisprudential architecture."¹⁶⁰

In a recent case, *Gilchrist v. Commercial Credit Corp.*,¹⁶¹ petitioner sought an order, grounded upon CPLR 5240, to prevent the sale of her estranged husband's interest in a residence owned by them as tenants by the entirety and presently occupied by petitioner and her four infant children. The judgment, for \$502.74, had been entered against the husband almost six years ago and the execution, upon which the proposed sale was predicated, had been obtained in February, 1971. The court concluded "that to subject petitioner to the consequences that would flow from the transfer of her husband's interest to a third party and, perhaps more importantly, to subject her children to the risk that their home would be lost entirely if their mother did not survive their father is not warranted."¹⁶² It therefore granted the petition.

¹⁵⁸ "Interested" as used in CPLR 5240 would encompass any person, whether or not a party, who is in danger of suffering pecuniary loss or of being subjected to harassment through the use of an enforcement procedure." 6 WK&M ¶ 5240.02. Cf. *O'Brien v. Fago*, 54 Misc. 2d 203, 205, 282 N.Y.S.2d 295, 297 (Sup. Ct. Erie County 1967), where Aetna Insurance Company, as an interested party, brought a proceeding pursuant to CPLR 5240. The court held "that a surety who has made payments under a labor and material payment bond has superior rights to those of a judgment creditor to the funds in the hands of an owner earmarked for payment under a contract for work to be performed . . ." (Citations omitted.)

¹⁵⁹ *Cook v. H.R.H. Constr. Corp.*, 32 App. Div. 2d 806, 807, 302 N.Y.S.2d 364, 366 (2d Dep't 1969), discussed in *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 532, 574 (1970).

¹⁶⁰ *Kaplan v. Supak & Sons Mfg. Co.*, 46 Misc. 2d 574, 578, 260 N.Y.S.2d 374, 378 (N.Y.C. Civ. Ct. N.Y. County 1965).

¹⁶¹ 66 Misc. 2d 791, 322 N.Y.S.2d 200 (Sup. Ct. Nassau County 1971).

¹⁶² *Id.* at 793, 322 N.Y.S.2d at 202. This is especially true since petitioner has invested much more in the property than the amount represented by respondent's judgment. The court's action was predicated on the motion of an interested party. See note 1 *supra*.