

## CPLR 5240: Court Protects "Interested" Third Party from Execution Sale

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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 interested<sup>158</sup> 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."<sup>159</sup> 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."<sup>160</sup>

In a recent case, *Gilchrist v. Commercial Credit Corp.*,<sup>161</sup> 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."<sup>162</sup> It therefore granted the petition.

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<sup>158</sup> "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.)

<sup>159</sup> *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).

<sup>160</sup> *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).

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

<sup>162</sup> *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*.

An order was entered to cancel the sale and to prohibit the execution of the judgment except by leave of the court.

The court order in *Gilchrist* is the furthest extension of the authority conferred by CPLR 5240 to fashion the enforcement remedies according to the circumstances in each case.<sup>163</sup> The judgment has not been abolished; rather, in the name of justice its execution has been frozen.<sup>164</sup> Nevertheless, it should be noted that this decision approaches the point of divestiture of the creditor's substantive rights.

#### ARTICLE 71—RECOVERY OF CHATTEL

*CPLR 7102: Contractual waiver of the right to notice and a hearing deemed ineffective for the ex parte seizure of certain types of property.*

The "blessing of age"<sup>165</sup> has failed to obstruct recent salutary changes in the procedural requirement of the ancient writ of replevin.

The tension between pretrial seizures of personal property and the constitutional requirements of due process had previously caused the courts little difficulty. Traditionally, the rationale for the constitutionality of pretrial seizures was as follows: although a person can not be deprived of his property absent a judicial hearing, the legislature may determine at what stage of the proceedings a hearing is required, provided that the person is not unreasonably inconvenienced.<sup>166</sup>

Prior to its recent amendment,<sup>167</sup> article 71 of New York's CPLR<sup>168</sup>

<sup>163</sup> See 7B MCKINNEY'S CPLR 5236, *supp.* commentary at 145 (1969): "[CPLR 5240] is designed to protect judgment debtors from abuses accruing from the apparently lawful application of article 52 devices." (Emphasis in original.) However, the Court of Appeals has not yet passed on the scope of CPLR 5240.

<sup>164</sup> [T]he court can, with no more than an application of CPLR 5240, postpone the sale for any specified time or, upon any reasonable conditions, cancel it out entirely and give the judgment debtor a brand new chance to pay. Nevertheless, CPLR 5240 has not been generally used.

It just seems to be a matter either of the lawyers not pressing for that section's application, or the judges not taking it as the broad source of authority it was intended to be.

*Id.*

<sup>165</sup> *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716, 723 (N.D.N.Y. 1970).

<sup>166</sup> See *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 174 (1861).

<sup>167</sup> L. 1971, ch. 1051, at 1806-10, *eff.* July 2, 1971.

<sup>168</sup> The former CPLR 7101-7112 read, in part, as follows:

7102(a) Seizure of chattel. The sheriff shall seize a chattel without delay when the plaintiff delivers to him an affidavit, requisition and undertaking and, if an action to recover the chattel has not been commenced, a summons and complaint.

7102(c) Affidavit. The affidavit shall clearly identify the chattel to be seized and shall state: 1. that the plaintiff is entitled to possession by virtue of facts set forth; 2. that the chattel is wrongfully held by the defendant named; 3. whether an action to recover the chattel has been commenced, the defendants served. . .

7102(d) Requisition. The requisition shall be deemed the mandate of the court and shall direct the sheriff of any county where the chattel is found to seize the chattel described in the affidavit.