

CPLR 5014(1): Action to Revive Lien on Realty Dismissed as Premature

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In *Williams*, an assault action was brought for injuries allegedly caused by the use of excessive force by a city police officer. After trial of the liability issue the jury returned a verdict for the defendant. The Supreme Court, Kings County, gave judgment upon the verdict, precluding plaintiff's presentation of evidence of his injuries. On appeal, the Appellate Division, Second Department, reversed the judgment "in the exercise of discretion" and ordered a new trial on the combined issues of liability and damages. It reasoned that "under the circumstances of this case, the issue of liability, insofar as it involved the question of the use of excessive force by the police officer . . . and the issue of the injuries sustained and attributable to such excessive force were inseparable."¹⁷³ Exclusion of the evidence of plaintiff's injuries to the use of excessive force, the court concluded, was tantamount to denial of a fair trial.¹⁷⁴

The United States Supreme Court case of *Gasoline Products Co., Inc. v. Champlin Refining Co.*¹⁷⁵ provided the framework for the *Williams* holding. Therein, an error in the measure of damages awarded to the defendant on his counterclaim necessitated retrial of the damage issue raised by said counterclaim. The Court believed that the question of damages could not be submitted to a jury independently of the question of liability without confusion. Accordingly, it issued an order for the retrial of liability and damages together.¹⁷⁶

In departing from the accepted practice of separately trying issues of liability and damages, the *Williams* court is in accord with precedent, which establishes that the interests of justice may favor joint retrial of the issues of damages and liability,¹⁷⁷ especially where the two issues are not intelligibly separable.¹⁷⁸

ARTICLE 50 — JUDGMENTS GENERALLY

CPLR 5014(1): Action to revive lien on realty dismissed as premature.

Under CPLR 5014, with certain exceptions herein not relevant, "an action upon a money judgment entered in a court of the state may only be maintained between the original parties to the judgment

¹⁷³ 36 App. Div. 2d at 620, 318 N.Y.S.2d at 537; see generally *Mercado v. City of New York*, 25 App. Div. 2d 75, 265 N.Y.S.2d 834 (1st Dep't 1966).

¹⁷⁴ *Id.*

¹⁷⁵ 283 U.S. 494 (1931).

¹⁷⁶ *Id.* at 500-01.

¹⁷⁷ *E.g.*, *Culley v. City of New York*, 25 App. Div. 2d 519, 267 N.Y.S.2d 282 (1st Dep't 1966) (mem.); *Klein v. Pavarine Constr. Co.*, 24 App. Div. 2d 486, 260 N.Y.S.2d 688 (2d Dep't 1965) (mem.); *Ruina v. Nu Car Carriers, Inc.*, 2 App. Div. 2d 179, 154 N.Y.S.2d 504 (2d Dep't 1956) (mem.).

¹⁷⁸ See 4 WK&M ¶ 4011.06.

where: 1. ten years have elapsed since the first docketing of the judgment. . . ." The primary purpose of the provision is to permit the judgment creditor to revive the lien on the judgment debtor's real property that he obtains under CPLR 5203(a).¹⁷⁹

In *Brookhaven Memorial Hospital, Inc. v. Hoppe*,¹⁸⁰ plaintiff instituted an action on a money judgment through personal service of a summons and complaint upon defendant some three months before ten years had expired from the first docketing of the judgment. The District Court, Suffolk County, dismissed the action without prejudice as premature, on the ground that the expiration of ten years is a condition precedent to the action.¹⁸¹

To prevent establishment of a superior lien immediately after expiration of the ten-year period, the action should be allowed slightly prior to expiration. Entry of judgment could be delayed to take effect upon said expiration.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5228(a): Section utilized to permit indirect action by injured party against insurance company.

Under CPLR 5228(a), a judgment creditor can move for the appointment of a receiver to administer property of the judgment debtor "or to do any other acts designed to satisfy the judgment." Such a motion is addressed to the court's discretion.¹⁸² The section is ordinarily utilized when management of the judgment debtor's property by another is more expedient,¹⁸³ but may be invoked in special circumstances to expedite satisfaction of a judgment.

A novel use of CPLR 5228(a) is illustrated by *In re Krelloff*,¹⁸⁴ wherein petitioner obtained appointment of a receiver to bring suit against an insurance company as legal representative of respondents.¹⁸⁵ The company had not appeared or defended on behalf of respondents, and petitioner had recovered a judgment substantially in excess of

¹⁷⁹ See 7B MCKINNEY'S CPLR 5014, commentary at 573 (1967); 5 WK&M ¶ 5014.04.

¹⁸⁰ 65 Misc. 2d 1000, 319 N.Y.S.2d 564 (Dist. Ct. Suffolk County 1971).

¹⁸¹ *Id.* at 1001-02, 319 N.Y.S.2d at 566-67, citing *Underhill v. Phillips*, 30 App. Div. 238, 51 N.Y.S. 801, 802 (2d Dep't 1898); *Frontuto v. Frontuto*, 206 Misc. 214, 131 N.Y.S.2d 735, 737 (Sup. Ct. Monroe County 1954); *Susskind v. Freund*, 147 Misc. 486, 488, 263 N.Y.S. 300, 302 (N.Y.C. Munic. Ct. 1933); *Heyman v. Wick*, 142 Misc. 577, 255 N.Y.S. 356, 358 (N.Y.C. Munic. Ct. 1932). These cases were decided under the predecessor statute, CPA 484.

¹⁸² *E.g.*, *Drucker v. Drucker*, 53 Misc. 2d 446, 448, 278 N.Y.S.2d 645, 647 (Sup. Ct. Queens County 1967); see 6 WK&M ¶ 5228.04.

¹⁸³ See 7B MCKINNEY'S CPLR 5228, commentary at 137 (1963).

¹⁸⁴ 65 Misc. 2d 692, 319 N.Y.S.2d 51 (Sup. Ct. Bronx County 1971).

¹⁸⁵ *Id.* at 693, 319 N.Y.S.2d at 53.