

CPLR 5240: Protecting the Abused Judgment Debtor

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defendant who causes delay in the formulation of a final judgment, will not be permitted to use this delay as an excuse for not paying interest during that time. He who procrastinates in the Second Department is now on notice that he will pay for the privilege.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5240: Protecting the abused judgment debtor.

All too often, pursuant to CPLR 5235, a levy of execution is made against the residence of an ignorant small judgment debtor who, although admittedly at fault for nonpayment of his debt, is nonetheless being treated with such indignity that he is, in effect, deprived of due process of law.⁸⁰ Subsequent to the sheriff's levy, the debtor's property is sold at public auction at a mere fraction of its fair market value.⁸¹ Had the debtor been counselled by an attorney at any time prior to the actual sale, such judicial abuses would never have materialized.⁸² But even assuming that such has not been the case, and further assuming that the debtor's property has already been sold pursuant to CPLR 5236, there still exists legal remedies available to the judgment debtor under CPLR 5240. Thereunder, the court may at any time, upon motion or on its own initiative, make any order regarding any enforcement proceeding of the CPLR. The court may deny, limit, condition, regulate, extend or modify the use of any enforcement proceeding of the CPLR.⁸³

A recent example of a court's willingness to aid the abused judgment debtor subsequent to the sheriff's sale of his residence was a refusal to sanction a deviation from the statutory norm of CPLR 5235. In *Community Capital Corp. v. Lee*,⁸⁴ a declaratory judgment action in which, had the sale been allowed, the plaintiff-buyer would have "come into a present equity of \$13,000 for the paltry sum of \$197.25," the court,

apparent disagreement with the finding in a recent federal decision, applying New York law, allowing only 6% interest on tort recoveries. *Caldecott v. Long Island Lighting Co.*, 417 F.2d 994 (2d Cir. 1969). See also *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 145, 164 (1970); *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 313, 340 (1969).

⁸⁰ 7B MCKINNEY'S CPLR 5236, supp. commentary at 153-54 (1970).

⁸¹ CPLR 5235 provides for restoration of the expired lien value of a judgment until the mechanics of CPLR 5236 have been finalized. It is important that the debtor understand exactly the action being taken against him. CPLR 5236 eliminates the equity of redemption, thereby preventing the judgment debtor from reaching the property subsequent to its sale. See 6 WK&M ¶ 5236.02.

⁸² 7B MCKINNEY'S CPLR 5236, supp. commentary at 154 (1970). See *Cook v. H.R.H. Constr. Corp.*, 32 App. Div. 2d 806, 302 N.Y.S.2d 364 (2d Dep't 1969), discussed in *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 532, 574 (1970).

⁸³ See 6 WK&M ¶ 5240.02.

⁸⁴ 58 Misc. 2d 34, 294 N.Y.S.2d 336 (Sup. Ct. Nassau County 1968), discussed in *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 688, 702 (1969).

strictly construing section 5235, held the sheriff's sale invalid. The language of section 5235, under the court's construction, allowed the filing of a notice of levy only after the original ten-year lien period had expired; the filing of one before the expiration of the lien period in the instant case was held to be invalid.⁸⁵ The court reasoned that since the CPLR eliminates the debtor's equity of redemption, the court must carefully scrutinize judicial sales, especially when there is a danger of inequity.⁸⁶

More recently, in *Lee v. Community Capital Corp.*,⁸⁷ a case involving the same parties, the court, pursuant to CPLR 5240, invalidated a later execution sale and underlying levy, where the judgment was assigned without consideration and on a contingent basis to a professional collector. Had the sale been valid, the debtor's equity of \$20,000 would have been involuntarily relinquished for only a few hundred dollars.

In June 1970, pursuant to petitioner's original application to vacate the execution and levy, the court, under CPLR 5240, granted the relief requested in the alternative and stayed the sheriff's sale upon the condition that the judgment debtor make payments of \$15 per week until the judgment plus interest was paid.⁸⁸ The petitioners later came into court praying that the execution and levy against their interests be vacated pursuant to CPLR 5240.

In vacating the decision of June 1970 this court has gone further than any prior one; all payment pursuant to the prior decision was required to be refunded to the judgment debtor. This was done, however, with great reservation.⁸⁹ Indeed, had this case not involved an assigned

⁸⁵ A lien acquired upon the docketing of a judgment is effective for a period of ten years from the time the judgment-roll is filed (CPLR 5203(a)). However, the judgment stands as a debt for twenty years and is not terminated at the ten-year expiration of the lien (CPLR 211(b)). CPLR 5235 therefor permits the judgment creditor to levy on real property after the passage of the ten-year period. This levy acts as a temporary lien effective from the time it is filed until the execution is returned. It is doubtful, however, that the Legislature intended to prohibit the judgment creditor from restoring his lien prior to the expiration of the ten-year period. If it were, the judgment creditor would be subject to losing his lien priority. 7B MCKINNEY'S CPLR 5236, *supp.* commentary at 157-58 (1970). It would appear, therefore, that the court, in its desire to protect the judgment debtor from judicial abuse, although not applying the benefits of CPLR 5240, nonetheless found it within its discretion to avoid an unconscionable sale. It would further appear that a similar result would have been reached by this court regardless of the adequacy of price as the court has the inherent power to set aside an execution sale when it yields a grossly inadequate price. *See generally* Fisher v. Hersey, 78 N.Y. 387 (1879); Empire State Dev. Co. v. Lambert, 15 App. Div. 2d 511, 222 N.Y.S.2d 681 (2d Dep't 1961), *modified mem.*, 15 App. Div. 2d 936, 227 N.Y.S.2d 891 (2d Dep't 1962), *aff'd mem.*, 11 N.Y.2d 913, 183 N.E.2d 75, 228 N.Y.S.2d 669 (1962).

⁸⁶ *See* note 81 *supra*.

⁸⁷ 67 Misc. 2d 699, 324 N.Y.S.2d 583 (Sup. Ct. Nassau County 1971).

⁸⁸ *Id.* at 700, 324 N.Y.S.2d at 584.

⁸⁹ The court stated:

By the present decision, this Court is attempting to invalidate the assignment,

judgment without consideration on a contingent basis to a professional collection agency, a transaction perhaps violative of public policy embodied in section 489 of the Judiciary Law,⁹⁰ the court probably would have declined to hold so broadly.

Consequently, the impact of *Lee* is not readily discernible. It would appear, from the wording of section 5240, that the court has the broadest possible discretion with regard to the use of CPLR enforcement proceedings.⁹¹ The court's reliance, however, upon section 489 of the Judiciary Law in conjunction with the assignment and its basis, leads one to a different conclusion. The issue has never been before the Court of Appeals. Significantly, Professor Siegel has concluded:

The problem has not been that CPLR 5240 does not supply such power. 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.⁹²

ARTICLE 62 — ATTACHMENT

CPLR art. 62: Is the New York attachment procedure constitutional?

We live in an era in which the special problems of the indigent and consumer have become the target of popular crusades.⁹³ Recognizing this, the courts have begun to remedy many of the long-neglected inequities facing this sector of the populace. A new balance in the creditor-debtor relationship is being forged. *Sniadach v. Family Finance Corp.*,⁹⁴ a decision with broad implications for the consumer in general and the poor in particular, commenced the reevaluation of this relationship.

At issue in *Sniadach* was the constitutionality of a state garnishment statute which permitted creditors to garnish wages as security for their claims without prior judicial scrutiny, notice to the defendant, or a preliminary hearing on the merits of the attachment. Defendant *Sniadach* attacked the procedure whereby notice was given subsequent to the garnishment, contending that it violated her right of due process

without consideration and on a contingent basis, of these judgments to a professional collector. This may prohibit the practice of consummating assignments of these judgments on a contingent basis. This, however, does not prevent an assignment of these judgments for a nominal consideration, which may circumvent the proscription of the import of this decision. In order to avoid a CPLR 5236 sale of real property by the professional collector, the legislature should, in effect, prohibit a CPLR 5236 sale by an assignee of such judgments.

Id. at 703, 324 N.Y.S.2d at 587.

⁹⁰ *Id.* at 701, 324 N.Y.S.2d at 584-85.

⁹¹ 7B MCKINNEY'S CPLR 5236, supp. commentary at 155-56 (1970).

⁹² *Id.* at 155.

⁹³ For a discussion of this broad area of the law, see *Symposium: Law and Poverty*,

32 ALBANY L. REV. 1 *et seq.* (1968).

⁹⁴ 395 U.S. 337 (1969).