

# CPLR 5231(d): Service Upon Judgment Debtor as Agent of Corporation Held Ineffective

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court implied that it would exercise its fact-finding authority in a proper case.<sup>135</sup>

The requirement of CPLR 4213(b) is sound and well settled. To insure intelligent appellate review there must be a sufficient factual basis upon which to pass. Exceptions have been made by appellate courts where there is a sufficient record although inadequate findings of fact, and the decision is compelling.<sup>136</sup> However, the present case comes well within the proscription of CPLR 4213(b), since the total absence of an oral or written decision and findings of fact left the appellate court with a *tabula rasa* to review.

#### ARTICLE 50 — JUDGMENTS GENERALLY

*CPLR 5003: Interest on a judgment is not a basis for a separate action.*

In *Ferguson v. City of New York*,<sup>137</sup> the Supreme Court, Orange County, was called upon to determine "whether a separate action can be maintained to fix the amount of interest due on a judgment while an appeal is pending, such appeal having been instituted by the plaintiffs in the collateral action."<sup>138</sup> The court reasoned that

[i]nterest on a judgment has no independent existence from the judgment upon which it is predicated and cannot be the basis for a new and separate action which seeks to modify either the amount, or the rate of interest previously awarded.<sup>139</sup>

Plaintiffs, dissatisfied with the interest awarded to them, were advised to appeal or to apply for modification of their judgments.<sup>140</sup>

#### ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

*CPLR 5231(d): Service upon judgment debtor as agent of corporation held ineffective.*

Income execution against money which a judgment debtor is receiving or will receive is available under CPLR 5231(d). The procedural safeguards for this remedy include service upon the judgment debtor if possible and service upon the third party against whose debt

<sup>135</sup> See *Power v. Falk*, 15 App. Div. 2d 216, 222 N.Y.S.2d 261 (1st Dep't 1961), where reasons were assigned for not exercising the court's fact-finding authority. The present case approved the *Falk* rationale.

<sup>136</sup> E.g., *Mellon v. Street*, 23 App. Div. 2d 210, 259 N.Y.S.2d 900 (3d Dep't 1965); *Weidman v. Klot*, 11 App. Div. 2d 641, 201 N.Y.S.2d 476 (1st Dep't 1960) (holding that the trial testimony and documents received in evidence were a sufficient basis upon which to make findings of fact).

<sup>137</sup> 67 Misc. 2d 812, 324 N.Y.S.2d 894 (Sup. Ct. Orange County 1971).

<sup>138</sup> *Id.* at 814, 324 N.Y.S.2d at 896.

<sup>139</sup> *Id.* at 815, 324 N.Y.S.2d at 897.

<sup>140</sup> *Id.*

to the judgment debtor the judgment will be executed. When the third party is a corporation with which the debtor is a building superintendent, may service upon the corporation be effectuated by service upon the debtor as its agent?

This issue was resolved in the negative in *St. Francis Hospital v. Tudor Apartments*.<sup>141</sup> The Supreme Court, Orange County, stated therein that the execution should have been served upon "an executive officer, or some agent of the corporation whose duties are of sufficient importance to make it reasonably probable that process will be brought to the attention of the corporation."<sup>142</sup> Service upon a judgment debtor in his alleged capacity as agent of a corporation was understandably characterized as imprudent.<sup>143</sup>

#### *CPLR 5240: Protecting the abused judgment debtor.*

In deciding the foreclosure proceedings of *Dime Savings Bank of New York v. Barnes*,<sup>144</sup> the Supreme Court, Nassau County, has again utilized CPLR 5240 in an effort to minimize judicial abuse.<sup>145</sup> It is within the purview of 5240 that the court may at any time, upon a 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 found therein.<sup>146</sup>

In *Barnes*, plaintiff-bank had properly declared the defendant-mortgagor in default and accordingly was granted summary judgment of foreclosure. However, mindful of defendant's attempts to make the mortgage account current and of the age and ill health of defendant's mother, with whom defendant lived, the court determined this case to be "a proper case for the exercise of the court's discretion, in the interest of justice, as provided in CPLR 5240. . . ."<sup>147</sup> In so finding, the court stayed the enforcement of its judgment upon the express condition that the defendant pay the entire arrearages due the plaintiff

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<sup>141</sup> 67 Misc. 2d 803, 325 N.Y.S.2d 599 (Sup. Ct. Orange County 1971).

<sup>142</sup> *Id.* at 804, 325 N.Y.S.2d at 600, citing 9 CARMODY-WAIT 2d § 64:253 (1966).

<sup>143</sup> 67 Misc. 2d at 804, 325 N.Y.S.2d at 600.

<sup>144</sup> 67 Misc. 2d 837, 325 N.Y.S.2d 365 (Sup. Ct. Nassau County 1971) (mem.).

<sup>145</sup> In *Lee v. Community Capital Corp.*, 67 Misc. 2d 699, 324 N.Y.S.2d 583 (Sup. Ct. Nassau County 1971), discussed in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. —, — (1972), this same court utilized CPLR 5240 in order to invalidate an execution sale where, had the sale been allowed, the debtor's equity of \$20,000 would have been lost for failure to pay only a few hundred dollars.

<sup>146</sup> *E.g.*, *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). See 6 WK&M 5240.02.

<sup>147</sup> 67 Misc. 2d at —, 325 N.Y.S.2d at 368.