

CPLR 5208: Sheriff Is Permitted To Sell Real Property after Judgment Debtor's Death Provided that Execution Was Issued before Death

St. John's Law Review

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Recommended Citation

St. John's Law Review (1971) "CPLR 5208: Sheriff Is Permitted To Sell Real Property after Judgment Debtor's Death Provided that Execution Was Issued before Death," *St. John's Law Review*: Vol. 45 : No. 3 , Article 23.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol45/iss3/23>

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prima facie case the court properly concluded that a 3213 motion did not lie.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5208: Sheriff is permitted to sell real property after judgment debtor's death provided that execution was issued before death.

CPLR 5208 provides that "after the death of a judgment debtor, an execution upon a money judgment shall not be levied upon . . . any property in which he has an interest, nor shall any enforcement procedure be undertaken with respect to such . . . property, except upon leave of the surrogate's court." In *Oysterman's Bank & Trust Co. v. Weeks*,¹²⁴ the Appellate Division, Second Department, held that as long as an execution on real property has been issued before the death of the judgment debtor, CPLR 5208 does not prevent the completion of the enforcement procedure by publication and sale after the judgment debtor's death.

In *Oysterman's* a judgment was entered against defendant, Weeks, on August 1, 1968, and was docketed in Suffolk County one week later. On December 13, 1968, an execution was issued to the sheriff of Suffolk County against defendant's interest in certain real property which was situated there. Defendant died on May 13, 1969. When the sheriff advertised the property for sale in September of 1969, the instant proceeding was commenced to stay the sale.¹²⁵

The court focused on two phrases contained in CPLR 5208: "an execution . . . shall not be levied upon"¹²⁶ and no "enforcement procedure shall be undertaken." With regard to the first phrase, the court was convinced that the sheriff was not attempting to levy on the execution. Since a judgment is a lien upon real property in the county where it is docketed,¹²⁷ it was not necessary for the sheriff to make a formal levy before he sold the property.¹²⁸ With regard to the second phrase, the court reasoned that the sheriff had not *undertaken* any enforcement

¹²⁴ 35 App. Div. 2d 580, 313 N.Y.S.2d 535 (2d Dep't 1970).

¹²⁵ If prior law is adopted, an attempt at sale in contravention of section 5208 will be treated as a nullity. 6 WK&M ¶ 5208.10, citing *Prentiss v. Bowden*, 145 N.Y. 342, 40 N.E. 13 (1895).

¹²⁶ As originally proposed, the phrase read thusly: "an execution upon a money judgment shall not be issued . . ." THIRD REP. 126. The wording of the section was altered in an attempt to resolve problems raised in *Wood v. Morehouse*, 45 N.Y. 368 (1871). FINAL REP. A-198. In *Wood* the Court of Appeals ruled that the death of the judgment debtor after an execution had been issued would not affect its validity. It should be noted, however, that *Wood* was limited to the facts at hand: the case involved realty and the sheriff had commenced sale proceedings prior to the debtor's death. 6 WK&M ¶ 5208.05.

¹²⁷ CPLR 5203(a).

¹²⁸ *Wood v. Colvin*, 5 Hill 228 (1843); see also 9 CARMODY-WAIT 2D CYCLOPEDIA OF NEW YORK PRACTICE § 64:159 (1966).

proceedings; he was merely continuing the procedure which was commenced before the death of the judgment debtor. Accordingly, the lower court's order staying the sheriff's sale was reversed.

CPLR 5222: Section does not mandate the red-carpet treatment of judgment creditors.

A garnishee served with a restraining notice pursuant to CPLR 5222(b) is forbidden to sell, assign or transfer to any person other than the sheriff "[a]ll property in which the judgment debtor is known or believed to have an interest then in or thereafter coming into the possession or custody" of such garnishee. The failure to obey the restraining notice is punishable by contempt under CPLR 5251.¹²⁹ A recent case, *Chemical Bank New York Trust Co. v. Brown*,¹³⁰ involved an interesting turn to the procedure under CPLR 5222(b). In essence, the court found that the actions taken by the garnishee were less than adequate given the interests to be protected.

The plaintiff bank was served simultaneously with a subpoena duces tecum and a restraining notice¹³¹ specifying an account held in the name of one Catherine Brown rather than the judgment debtor, Morton Jacobs. Although she was aware of the restraining notice, defendant withdrew substantially all of the funds held on deposit by issuing checks which the bank inadvertently paid.¹³² Subsequently, without notifying or consulting the defendant, the bank paid the sum of \$90 to the sheriff in full settlement of its liability. The bank then sought to recover the amount from defendant.

In dismissing the complaint, the court likened the bank's actions to the assumption of contractual liability for the defendant without her knowledge or authority. Indeed, the bank was chastised for its red-carpet treatment of the judgment creditor which set "a dangerous precedent which could lead to great abuses, putting in jeopardy the bank accounts of all relatives of judgment debtors."¹³³

As pointed out by the court, the bank should have waited until the

¹²⁹ Similarly, the garnishee may be liable for loss resulting to the judgment creditor through its failure to honor the restraint. H. WACHTELL, *NEW YORK PRACTICE UNDER THE CPLR* 332 n.32 (3d ed. 1970).

¹³⁰ 63 Misc. 2d 341, 312 N.Y.S.2d 343 (N.Y.C. Civ. Ct. N.Y. County 1970).

¹³¹ Since the subpoena does not prohibit the transfer of property, it is good practice to serve therewith a restraining notice. H. PETERFREUND & J. McLAUGHLIN, *NEW YORK PRACTICE* 1240 n.22 (2d ed. 1968).

¹³² Under CPLR 5222, a bank is forbidden to honor withdrawals from an account specified in a restraining notice, except pursuant to court order. *Matter of Sumitomo Shoji New York, Inc. v. Chemical Bank New York Trust Co.*, 47 Misc. 2d 741, 263 N.Y.S.2d 354 (Sup. Ct. N.Y. County 1965).

¹³³ 63 Misc. 2d at 343, 312 N.Y.S.2d at 346.