

## CPLR 5222: Section Does Not Mandate the Red-Carpet Treatment of Judgment Creditors

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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.<sup>129</sup> A recent case, *Chemical Bank New York Trust Co. v. Brown*,<sup>130</sup> 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 notice<sup>131</sup> 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.<sup>132</sup> 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."<sup>133</sup>

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

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<sup>129</sup> 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).

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

<sup>131</sup> 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).

<sup>132</sup> 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).

<sup>133</sup> 63 Misc. 2d at 343, 312 N.Y.S.2d at 346.

judgment creditor commenced a special proceeding against it under CPLR 5227. Under this section, notice of the proceedings would be sent to the judgment debtor and any adverse claimant would be permitted to intervene to protect his rights.<sup>134</sup> Moreover, the bank would have an opportunity to assert its reason for refusing to give the property to the sheriff.<sup>135</sup> In this manner, all of the rights of the parties could be adjudicated and the bank could confidently pay out any money due the judgment creditor.

*CPLR 5231(h): Section does not apply to two different employers.*

Once an attempt to secure payment from a judgment debtor proves futile,<sup>136</sup> a judgment creditor may direct the sheriff to serve an income execution on the debtor's employer.<sup>137</sup> Under CPLR 5231(h), where two or more income executions, each specifying the same employer, are issued against a judgment debtor, they are to be satisfied, one at a time,<sup>138</sup> in the order of delivery to the sheriff.<sup>139</sup> Even if a judgment creditor is the first to deliver his income execution to a sheriff, however, a recent case, *Lischer v. Halsey-Reid Equipment, Inc.*,<sup>140</sup> posits that the priority will be lost by the failure to renew the income execution each time the debtor changes employers.

In *Lischer* the Marine Midland Trust Company (Marine) obtained a judgment against one Spencer. Subsequently, Lischer also procured a judgment against Spencer. In May of 1968, Marine caused an income execution to be served on Spencer's employer. In August of the same year, Spencer terminated his employment with that employer and began working for respondent, who ultimately was served with an income execution in the name of Lischer. When the employer failed to withhold a portion of Spencer's salary, a special proceeding was commenced to recover the amount. Petitioner's motion for summary judgment was granted: the fact that a prior judgment creditor had served the sheriff

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<sup>134</sup> CPLR 1013.

<sup>135</sup> 7B MCKINNEY'S CPLR 5238, commentary at 199 (1963).

<sup>136</sup> The machinery in CPLR 5231 was designed to avoid harassment of the judgment debtor who is willing to make regular installment payments to satisfy the judgment. 6 WK&M ¶ 5231.02.

<sup>137</sup> CPLR 5231(d). The employer so served has a duty to withhold ten percent of the judgment debtor's salary or be personally liable for any amount not withheld. See *Royal Business Funds Corp. v. Rooster Plastics, Inc.*, 53 Misc. 2d 181, 278 N.Y.S.2d 350 (Sup. Ct. N.Y. County 1967).

<sup>138</sup> See 6 WK&M ¶ 5231.29.

<sup>139</sup> The same rule applies to an income execution delivered to a sheriff prior to the filing of a wage assignment. See *Beneficial Fin. Co. v. Baker*, 43 Misc. 2d 546, 251 N.Y.S.2d 556 (Sup. Ct. Monroe County 1964); see also 6 WK&M ¶ 5231.29.

<sup>140</sup> 63 Misc. 2d 637, 313 N.Y.S.2d 136 (Sup. Ct. Erie County 1970).