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CPLR 5234: Stipulation Between Parties Incorporated in Court Order Is Held To Establish Priority of Creditor

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> damages exceed the policy limits and the insured is without funds to pay the excess. We would hope that realization of the complexities of such problems and the considerations urged in our brother ANDERSON'S dissent might stimulate the reexamination of *Seider*. . . .[194]

Thus, while sustaining the constitutionality of the *Seider* doctrine, the *Minichiello* court has joined the ranks of those who criticize the decision because of the myriad of problems it has created.[195]

CPLR 5234: Stipulation between parties incorporated in court order is held to be insufficient to establish priority of creditor.

Priority among judgment creditors is determined by CPLR 5234(c) where the attached res is in the possession of a third party, and, generally speaking, priority is obtained by the creditor who files his court order first. However, a creditor's judgment will not be deemed prior unless he obtains a turnover order[196] pursuant to either CPLR 5227 or CPLR 5225(b) directing a third party indebted to the judgment debtor,[197] or holding money or property belonging to the debtor,[198] to pay what is owed, or so much of it as will satisfy the judgment, to the judgment creditor. The procurement and service of a restraining order, or any other steps taken by the creditor, no matter how diligent, are insufficient in themselves to qualify for priority.[199]

A question of priority between judgment creditors arose in *Cook v. H.R.H. Construction Corp.*,[200] wherein the plaintiff (Cook) sought an adjudication declaring his claim against funds held by defendant H.R.H. Construction Corporation (H.R.H.) to be superior to the claim of defendant-creditor Goldman.

On August 12, 1966, Cook had served a restraining notice on H.R.H. with respect to property in which Grunwald, the plaintiff's judgment debtor, and Grunwald's business concern, conducted under the name of Shur-Fit Metal Products Corporation (hereinafter Shur-Fit), had an interest. H.R.H. moved for an order vacating the restraining notice, and Cook, in opposition to that motion, moved for a turnover order. Before the court ruled on these motions, however, the

194 410 F.2d at 119.

195 *See, e.g.*, 7B McKINNEY'S CPLR 5201, supp. commentary 18 (1965-69).

196 As used in the present discussion, a "turnover order" is an order to deliver or pay the property or money, or an order to transfer such, to a receiver. *See* 6 WK&M ¶ 5234.17 (1969).

197 CPLR 5227.

198 CPLR 5225(b).

199 City of New York v. Panzirer, 23 App. Div. 2d 158, 259 N.Y.S.2d 284 (1st Dep't 1965).

200 32 App. Div. 2d 806, 302 N.Y.S.2d 364 (2d Dep't 1969).

parties entered into a stipulation whereby they each agreed to withdraw their motions, and H.R.H. agreed to withhold a specified sum of money from the payments it was oblilgated to make to Shur-Fit. This stipulation was incorporated in a court order dated September 23, 1966. However, subsequent to these proceedings, defendant Goldman prevailed in an independent action against Shur-Fit, and the judgment obtained by Goldman was executed against H.R.H. on June 23, 1967, on the basis of that company's indebtedness to Shur-Fit.

In the instant action, Cook contended that his stipulation and the court order incorporating it were superior to defendant Goldman's subsequent execution. Cook argued that he had pierced the corporate veil in his original suit against Grunwald, and that he had achieved priority by means of CPLR 5240.

The second department found it unnecessary to deal with the plaintiff's contention that he had pierced the corporate veil, reasoning that CPLR 5240 was intended to empower the courts to prevent unreasonable and abusive usage of the provisions of CPLR article 52 and was not intended to be an alternative means for achieving priority. Although this approach was not incorrect,[201] the plaintiff's stipulation with H.R.H., and the court order incorporating it, would have qualified for priority under 5234(c) had the court given them the effect of a turnover order obtained pursuant to either CPLR 5225(b) or CPLR 5227. The court, however, refused to give Cook's court order such effect because, in its view, it could not be interpreted as an order for the delivery of payment of a debt owed to the judgment creditor. Therefore, since defendant Goldman had obtained an actual turnover order, and Cook had merely reached an agreement with H.R.H., Goldman's claim was deemed to have priority.

As noted previously, Cook had moved for a turnover order before he and H.R.H. had entered into their stipulation. The withdrawal of Cook's motion (which, if granted, would have resulted in an order satisfying any priority requirement of CPLR article 52) was entirely contingent upon H.R.H.'s entering into the agreement to withhold Grunwald's money. Naturally, had the plaintiff known that a court would subsequently refuse to give turnover order effect to the court order judicially sanctioning its agreement, he would not have withdrawn his motion, and an amicable settlement would not have been entered into.

By impliedly informing future litigants that efforts undertaken

201 *See* 7B McKINNEY'S CPLR 5240, commentary 203 (1963).

to stipulate will be of limited effect, the *Cook* decision forces adversary proceedings in situations where the parties might otherwise be amenable to early settlement. If no evidence of fraud exists in a situation such as this, there is no reason whatsoever for denying priority to the litigant who aids himself and thereby reduces the courts' burden.

ARTICLE 55 — APPEALS GENERALLY

CPLR 5514(a): Time extension unnecessary when appeal is transferred pursuant to New York State Constitution.

The Court of Appeals decision in *Ryan v. Freeman*[202] is illustrative of an appellate court's duty to transfer an appeal pursuant to Article 6, section 5b, of the New York State Constitution.[203] In *Ryan*, the plaintiff erroneously appealed to the Court from an order of the Civil Court of the City of New York denying his motion for a jury trial. Obviously realizing his error, he made a motion in the Court to transfer the appeal to the appellate term or, in the alternative, to have the appeal dismissed without prejudice in accordance with CPLR 5514(a).[204] The Court of Appeals granted the motion to transfer pursuant to section 5b of the state constitution's judiciary article.

It should be noted that a dismissal pursuant to CPLR 5514(a) invokes that section's time-extension provision, and an appellant would then have thirty days from the date of dismissal to appeal to the proper court.[205] However, this saving provision is superfluous when article 6 governs since the necessity of a new appeal is obviated due to the fact that a *transfer*, and not a dismissal of the appeal or denial of the motion to appeal, is mandated.[206]

ARTICLE 62 — ATTACHMENT

CPLR 6214: Property seized by sheriff pursuant to ineffective levy may be retained under valid order of attachment without loss of priority.

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202 24 N.Y.2d 942, 250 N.E.2d 67, 302 N.Y.S.2d 579 (1969).

203 N.Y. CONST. art. VI, § 5b:

> If any appeal is taken to an appellate court which is not authorized to review such judgment or order, the court shall transfer the appeal to an appellate court which is authorized to review such judgment or order.

204 CPLR 5514(a) provides that

> [i]f an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial, unless the court to which the appeal is sought to be taken orders otherwise.

205 CPLR 5513. 7 WK&M ¶ 5514.01 (1969).

206 7 WK&M ¶ 5514.01 (1969).