

CPLR 6214: Property Seized by Sheriff Pursuant to Ineffective Levy May Be Retained Under Valid Order of Attachment Without Loss of Priority

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1970) "CPLR 6214: Property Seized by Sheriff Pursuant to Ineffective Levy May Be Retained Under Valid Order of Attachment Without Loss of Priority," *St. John's Law Review*: Vol. 44 : No. 3 , Article 34.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol44/iss3/34>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

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.

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).

Orders of attachment, when valid, have a continuing effect;²⁰⁷ *i.e.*, all debts of a third person due the defendant at the time of the levy, as well as those coming due thereafter, shall be subject to the levy.²⁰⁸ CPLR 6214(e), however, dictates that a levy on personal property becomes void “[a]t the expiration of ninety days after a levy is made by service of the order of attachment,” unless the levy falls within one of three exceptions to the ninety-day rule.²⁰⁹ If the levy is so voided under 6214(e), the defendant’s property may be subject to the rights of an intervening creditor, and the garnishor-plaintiff may not then obtain the priority he sought by originally employing the procedural device.

In *Freedom Discount Corp. v. Clune*,²¹⁰ plaintiff entered a default judgment on a cause of action to recover upon a retail installment-sale agreement, but defendant successfully moved to vacate the judgment. However, prior to the time the judgment was actually vacated, plaintiff obtained an order of attachment, and a sheriff levied on defendant’s wages; 10 percent of the wages then due the defendant were given to the sheriff.²¹¹ More than ninety days after the attachment order had been obtained, the plaintiff, insisting that the original judgment was still valid, had an income execution issued.²¹² Defendant’s employer thereupon remitted an additional sum of money to the sheriff.

The defendant moved to have the second sum of money returned to him. The motion was granted, and an appropriate order was entered. Special term, however, also held that plaintiff’s order of attachment had expired ninety days after the date it was issued. Immediately after this decision was rendered, plaintiff requested the sheriff to levy upon the second sum of money, which he was still holding pursuant to the original attachment order. Defendant then made a second motion to compel the plaintiff and sheriff to comply with the order of the special term, and this motion was also granted.

²⁰⁷ See 7A WK&M ¶ 6214.07 (1969).

²⁰⁸ CPLR 6214(b). This provision of the CPLR changed the former procedure. Under the previous provision, a levy was only valid as to property of the defendant “owing to him . . . [and] . . . held or owed by the person on whom it is served.” CPA 917(2).

²⁰⁹ A levy will remain effective beyond the ninety days in the following three instances: (1) the property or debts have been actually collected and received by the sheriff; (2) the property or debts have become the subject of a special proceeding; or (3) a court has extended the period. See 7A WK&M ¶ 6214.14 (1969).

²¹⁰ 32 App. Div. 2d 833, 320 N.Y.S.2d 465 (2d Dep’t 1969).

²¹¹ CPLR 5231(b) specifically provides that where any person is receiving or will receive more than thirty dollars per week, no more than ten percent of this amount may be issued and delivered to the sheriff.

²¹² See CPLR 5231.

On plaintiff's appeals from both orders, the Second Department held that the ninety-day expiration provision contained in CPLR 6214(e) pertains to a *notice of levy* and not an attachment order. Therefore, since the attachment order remained valid, the second sum of money could be retained pursuant thereto.

The result achieved is clearly correct. For, a determination that the attachment order expired at the end of the ninety days would contradict the provisions of CPLR 6224.²¹³ Moreover, a different result would have required the return of the money, a new levy and an additional seizure, and the plaintiff's claim might have been subordinated to the claim of an intervening creditor. Even though a court can now extend a notice of levy after the ninety-day period has expired,²¹⁴ there appears to be no justification for requiring a new seizure in circumstances such as these.

However, one should carefully scrutinize the facts present in the instant case. The default judgment was vacated, but the action was still pending. Had the action been *dismissed*, e.g., for lack of jurisdiction of the person, a different result would be warranted. In such an instance, and in similar situations, no justification would exist for giving the plaintiff priority over a creditor who attached property before the plaintiff could institute a new action.

ARTICLE 65 — NOTICE OF PENDENCY

CPLR 6513: Section is self-executing; court may not deny CPLR 6514 motion to cancel if notice of pendency is more than three years old.

New York at one time followed the common-law rule which declared that a notice of pendency was effective until the termination of the action.²¹⁵ However, with the enactment of the CPA²¹⁶ and the subsequent adoption of the CPLR,²¹⁷ a *lis pendens* is subject to a definite time limit unless extended by court order. CPLR 6513 mandates that "[a] notice of pendency shall be effective for a period of three years . . . [unless] . . . [a]n extension order shall be filed, recorded and indexed before expiration of the prior period."

²¹³ CPLR 6224 governs the expiration of an attachment order:

An order of attachment is annulled when the action in which it was granted abates or is discontinued, or a judgment entered therein in favor of the plaintiff is fully satisfied, or a judgment is entered therein in favor of the defendant. . . .

²¹⁴ See *Seider v. Roth*, 28 App. Div. 2d 698, 280 N.Y.S.2d 1005 (2d Dep't 1967). For an extensive analysis of the recent developments relating to CPLR 6214 see 7B MCKINNEY'S CPLR 6214, *supp. commentary* 33-34 (1968).

²¹⁵ See 7A WK&M ¶ 6513.01 (1969).

²¹⁶ CPA 121(a).

²¹⁷ CPLR 6513.