

CPLR 5203: Prior Unrecorded Mortgage Has Priority Over Docketed Judgment

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cases which took into account the lack of any subsequent prejudice are overruled.¹³⁰

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5203: Prior unrecorded mortgage has priority over docketed judgment.

CPLR 5203 allows a judgment creditor to establish a lien on the judgment debtor's real property by docketing the judgment in the county of the property's location. A question may then arise as to whether the docketed judgment has priority over other interests in the debtor's real property, for example, a prior unrecorded mortgage.

In *Suffolk County Federal Savings & Loan Ass'n v. Geiger*,¹³¹ defendant, judgment creditor, asserted the superiority of its lien as a defense against a foreclosing mortgagee. The mortgage in question had been given after judgment had been rendered in defendant's favor but before it was docketed. However, the docketing preceded the recording of the mortgage. In deciding for the mortgagee the court reasoned that a judgment has only such lien effect as is given it by statute, for at common law judgments were not liens upon real estate.¹³² That plaintiff recorded subsequent to defendant's docketing was of no moment since the rationale behind the recording act is to protect those who part with value, *i.e.*, subsequent purchasers and mortgagees, not judgment creditors.¹³³ Thus, while the judgment did not become a lien on the property until it was docketed, the mortgage became a lien on the day it was made "as between the parties and against all others

¹³⁰ *Davis v. Lorenzo's, Inc.*, 258 App. Div. 933, 16 N.Y.S.2d 624 (4th Dep't 1939) (juror made outside investigation that was deemed harmless); *O'Connor v. Ames Transfer Co.*, 187 N.Y.S. 111 (Sup. Ct. Kings County 1931), *aff'd*, 200 App. Div. 845, 191 N.Y.S. 941 (2d Dep't 1932); *Haight v. City of Elmira*, 42 App. Div. 391, 59 N.Y.S. 193 (3d Dep't 1899) (jurors visited scene of accident after snow and ice had melted, unlike conditions at time of accident).

¹³¹ 57 Misc. 2d 184, 291 N.Y.S.2d 982 (Sup. Ct. Suffolk County 1968).

¹³² *See H.R. & C. Co. v. Smith*, 242 N.Y. 267, 269, 151 N.E. 448, 449 (1926); *Atlas Refining Co. v. Smith*, 52 App. Div. 109, 64 N.Y.S. 1044 (4th Dep't 1900).

¹³³ *Savings & Loan Ass'n v. Berberich*, 24 App. Div. 2d 187, 264 N.Y.S.2d 989 (3d Dep't 1965); *Blum v. Krampner*, 28 N.Y.S.2d 62 (Sup. Ct. Suffolk County 1940), *aff'd*, 261 App. Div. 989, 27 N.Y.S.2d 1000 (2d Dep't 1941). In R.P.L. § 290 "[t]he term 'purchaser' includes every person to whom any estate or interest in real property is conveyed for a valuable consideration, and every assignee of a mortgage, lease or other conditional estate." R.P.L. § 291 states that "[e]very such conveyance not so recorded is void as against any person who subsequently purchases or acquires by exchange or contracts to purchase or acquires by exchange. . . ."

who had at the time no equitable interest in the property, or who did not acquire rights as subsequent purchasers or incumbrancers for value."¹³⁴

In holding that the unrecorded mortgage had priority over the docketed judgment, the court cautioned that the result would be different if the mortgage had been given in fraud of creditors with knowledge by the mortgagee, or if it constituted a fraudulent conveyance under the Debtor and Creditor Law.¹³⁵

ARTICLE 55 — APPEALS GENERALLY

CPLR 5528: Court warns that abuse of appendix system cannot be tolerated.

CPLR 5528 specifies that an appeal may be taken by the appendix method, which requires reproduction of material portions of the record as opposed to reproduction of the whole record. This device was designed primarily to save costs and to ease the workload of practitioner and judge alike.¹³⁶ Recently, the appellate division, second department, has expressed displeasure at the failure of practitioners to fulfill the statutory requirements for appendix filing as set forth in CPLR 5528 and 5529.

In *Lo Gerfo v. Lo Gerfo*,¹³⁷ respondents moved for an order directing appellants to file an appendix in accordance with CPLR specifications. Respondent claimed that the pleadings and the appellants' bill of particulars were not contained in the appendix, that the appendix condensed a transcript of the trial testimony, which consisted of over 1100 pages, into 150 pages, that the reproduction of the transcript was so arranged that it was impossible to follow the testimony, and that the parts of the record on which appellant should reasonably assume respondent would rely were missing.

In granting respondent's motion, the court issued a forceful warning that abuse of the appendix method will not be tolerated. The offending practitioner will be required to submit a new appendix and may even be disallowed costs.¹³⁸

¹³⁴ *Sullivan v. Corn Exchange Bank*, 154 App. Div. 292, 294, 139 N.Y.S. 97, 99 (2d Dep't 1912).

¹³⁵ See *Billings v. Russell*, 101 N.Y. 226, 4 N.E. 531 (1886). See also DEBT. AND CRED. LAW. § 273.

¹³⁶ See generally 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶5528.01 (1965). See also *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 325-27 (1966).

¹³⁷ 30 App. Div. 2d 156, 290 N.Y.S.2d 1005 (2d Dep't 1968).

¹³⁸ See *Richard C. Mugler Co. v. A.C. Management Corp.*, 29 App. Div. 2d 548, 286 N.Y.S.2d 81 (2d Dep't 1967).