

CPLR 5222: Given Lien Value

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and recently held constitutional in *Simpson v. Loehmann*.¹⁹⁵ In the instant case, however, unlike *Seider* and *Simpson* neither plaintiff nor defendant was a New York resident. The accident occurred in North Carolina, and the defendant was insured by an Ohio insurance company authorized to do business in New York. Thus, the only contact with New York was the rather tenuous one that the defendant's insurance company was authorized to do business in New York.

In a rare application of the doctrine of *forum non conveniens* in an *in rem* case,¹⁹⁶ on the basis of the fact that neither party was a New York resident,¹⁹⁷ the appellate division, second department, vacated the attachment. The decision significantly narrows the scope of *Seider's* potential operation and will allay, to some extent, the fear that almost every accident case occurring anywhere in the nation will be triable in New York.¹⁹⁸

CPLR 5222: *Given lien value.*

CPLR 5222(b) provides that "[a] judgment debtor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interfere with any property in which he has an interest. . . ." It is expressly provided that transfers in violation of the notice may be punished by contempt, but the effect of a transfer is not clearly delineated. In the preliminary draft, it was expressly provided that no transfer in violation of the notice would be valid against the judgment creditor who served the notice.¹⁹⁹ The elimination of this provision from the present section has created some confusion as to the effect of the statute.²⁰⁰

In a recent case, *In re Nassau Expressway*,²⁰¹ the supreme court, Queens County, has given lien effect to the section as

¹⁹⁵ 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1968). But see *Podolsky v. DeVinney*, 281 F. Supp. 488 (S.D.N.Y. 1968).

¹⁹⁶ See 7B MCKINNEY'S CPLR, supp. commentary 25-26 (1966).

¹⁹⁷ Important factors in a *forum non conveniens* discussion are (1) whether or not the parties are subject to personal jurisdiction; (2) convenience to parties and witnesses; (3) differences in conflict of law rules; and (4) special circumstances. See 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶301.07 (1965).

¹⁹⁸ See *Simpson v. Loehmann*, 21 N.Y.2d 305, 318, 234 N.E.2d 669, 676, 287 N.Y.S.2d 633, 643 (1968) (dissenting opinion):

[I]llustrative of the type of case *Seider* would appear to invite into our courts is the *Vaage* case. . . . What purpose allowing suit to be brought here, other than possibly increasing Vaage's hoped for damage award, is beyond me.

¹⁹⁹ THIRD REP. 61.2(b).

²⁰⁰ See 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 5222.20, 5222.21 (1965).

²⁰¹ 56 Misc. 2d 602, 289 N.Y.S.2d 680 (Sup. Ct. Queens County 1968).

presently written. A transfer for the benefit of creditors was held ineffective as to a previously executed restraining notice. In deciding the case, the court made note of the intentional deletion of the lien clause, but stated that to deny the superiority of the judgment creditor who issued the notice would be to "make a mockery of the provisions of CPLR 5222."²⁰²

The decision of the court is a great aid to plaintiffs in collecting judgments, and the practitioner should follow this case closely in the appellate courts to see if this interpretation of CPLR 5222 will receive further judicial sanction.

ARTICLE 55 — APPEALS GENERALLY

Motion to reargue may not be used to extend time to appeal.

In *Liberty National Bank & Trust Co. v. Bero Construction Corp.*,²⁰³ plaintiff made a motion for reargument of its motion to strike defenses after its time to appeal had expired. The appellate division, fourth department, relying on *In re Huie*,²⁰⁴ reversed special term's order which had granted plaintiff's motion. The holding of *Huie*, was reasserted. A motion to reargue cannot be used to extend the time to appeal; such a motion must be made before the time to appeal has elapsed.²⁰⁵

Allowing a reargument is within the discretion of the court,²⁰⁶ but it now appears, that the time limitation for appeal is also the limitation period for a motion to reargue. An appeal or motion to reargue will be granted after the time limit has expired only under the special circumstances treated in CPLR 5015, e.g., the discovery of new evidence, fraud, or lack of jurisdiction.

The practitioner is thus advised, if the situation warrants, to file his notice of appeal first, and then if he desires, he may move for reargument.²⁰⁷

²⁰² *Id.* at 605, 289 N.Y.S.2d at 684.

²⁰³ 29 App. Div. 24 627, 286 N.Y.S.2d 287 (4th Dep't 1967).

²⁰⁴ 20 N.Y.2d 568, 232 N.E.2d 642, 285 N.Y.S.2d 610 (1967). See *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 140, 165 (1968).

²⁰⁵ See 2 CARMODY-WAIT 2d, CYCLOPEDIA OF NEW YORK PRACTICE §8:81 (1965).

²⁰⁶ *Ellis v. Central Hanover Bank & Trust Co.*, 198 Misc. 912, 102 N.Y.S.2d 337, 338 (Sup. Ct. N.Y. County 1951).

²⁰⁷ See 7B MCKINNEY'S CPLR 2221, supp. commentary 18 (1967).