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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 businesss 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 occuring 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

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[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]

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[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).