

# CPLR 5226: Installment Payment Order Available Despite Existence of Prior Outstanding Income Executions

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value of the policy attached in New York,<sup>54</sup> and it was provided that the defendant and his insurer would be released from all liens to which the sheriff might be entitled on the attached policy in New York.

The plaintiffs moved under CPLR 6223 to vacate the order of attachment upon the ground that the attachment was unnecessary to their security. The Sheriff of the City of New York opposed the motion and cross-moved for an order directing the plaintiff to pay poundage fees.<sup>55</sup> The cross-motion was granted. The court felt that violence would be done to the letter and spirit of the statutory provisions if plaintiffs were allowed to vacate an attachment on the basis of a settlement without payment of poundage.<sup>56</sup>

As the instant case illustrates, *Seider* plaintiffs, who use the services of a sheriff to obtain quasi-in-rem jurisdiction in New York, must now anticipate the payment of poundage fees. Poundage will be exacted despite the fact that a settlement is procured in a foreign state in personam action.

*CPLR 5226: Installment payment order available despite existence of prior outstanding income executions.*

CPLR 5226 allows a judgment creditor, upon motion and notice thereof to the judgment debtor, to request the court to order specified installment payments based upon the judgment debtor's ability to pay. Relief may be granted under the section despite the existence of prior outstanding income executions.

In *Schwartz v. Goldberg*,<sup>57</sup> a judgment creditor applied for an installment payment order and the debtor argued that such an order

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<sup>54</sup> The Court of Appeals has designated the face value of the attached policy as the limit of the quasi-in-rem jurisdiction. See *Simpson v. Loehmann*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).

<sup>55</sup> It should be noted that the defendant is not liable for sheriff's fees if he has obtained a vacatur of an attachment order. See, 7A WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶6223.01 (1968). (See also CPLR 8012 (b)(3) providing the court with power to order the party at whose insistence the order of attachment was granted to pay the sheriff's fees where the order is vacated or set aside.

<sup>56</sup> In *American Broadcasting-Paramount Theatres, Inc. v. E. & E. K. Enterprises, Inc.*, 231 N.Y.S.2d 633 (Sup. Ct. N. Y. County 1962), *aff'd*, 18 App. Div. 2d 975, 238 N.Y.S.2d 663 (1st Dep't 1963) plaintiff had attached property in New York and then attached property in California. Plaintiff informed the New York Sheriff that he had abandoned the action in New York. The Sheriff moved to affix poundage and the motion was denied. The court held that there must be a collection or the facts must come within the purview of a statutory exception, *i.e.*, settlement. In this case, the California action was still pending and no settlement had been made at the time of motion. It would appear that plaintiff by giving notice of abandonment before any judgment or settlement outside New York could escape the burden of poundage. See also *Personeni v. Aquino*, 6 N.Y.2d 35, 159 N.E.2d 559, 187 N.Y.S.2d 764 (1959).

<sup>57</sup> 58 Misc. 2d 308, 295 N.Y.S.2d 245 (Sup. Ct. Bronx County 1968).

would grant a preference over other judgment creditors who held income executions in compliance with CPLR 5231. In rejecting this defense, the Supreme Court, Bronx County, held that priority of income executions does not preclude an application by any judgment creditor for an installment order. The court reasoned that CPLR 5226 and CPLR 5231 are separate and distinct devices and that priority within each device is on a "first come-first serve basis."

The holding allows a judgment creditor with a judgment against a debtor who already has been served with an income execution to receive, perhaps, some money immediately.<sup>58</sup> If an earlier judgment creditor does not avail himself of 5226 this in no way affects a later judgment creditor from seeking the benefits of its provisions.<sup>59</sup>

*CPLR 5235: Court scrutinizes judicial sale.*

A judgment creditor's lien and priority attach to any interest the judgment debtor may have in real property which is subject to the satisfaction of a money judgment.<sup>60</sup> CPLR 5203 provides that the rights of a judgment creditor in the real property of the judgment debtor accrue either upon docketing or, after the expiration of ten years from the filing of the judgment roll, upon the filing of a notice of levy.

The lien acquired upon docketing is effective for a period of ten years from the date the judgment roll is filed. The judgment, however, stands as a debt for a period of twenty years and is not terminated by the expiration of the judgment lien.<sup>61</sup> In recognition of this anomaly CPLR 5235 permits the judgment creditor to levy on real property upon the passage of ten years after the filing of the judgment roll. This levy provides a temporary lien which is effective from the time notice of levy is filed until the execution is returned.

The provisions of the CPA allowing the debtor to redeem any realty sold under an execution were an attempt to bring about fairer judicial sales by the realization of a price closer to the full

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<sup>58</sup> CPLR 5226 directs "the court to take into consideration the reasonable requirements of the judgment debtor . . . any payments required to be made by him or deducted from the money he would otherwise receive in satisfaction of other judgments and wage assignments. . . ."

<sup>59</sup> See *Caruso v. Schilingo*, 23 App. Div. 2d 627, 257 N.Y.S.2d 719 (4th Dep't 1965) (upholding the concept, although the case was improper for the relief sought).

<sup>60</sup> 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶5203.02 (1968); *Rogers v. Banner*, 45 N.Y. 379 (1871); *Benadan v. Antonio*, 10 App. Div. 2d 40, 197 N.Y.S.2d 1 (1st Dep't 1960).

<sup>61</sup> CPLR 211 (b). See also 7B MCKINNEY'S CPLR 5235, commentary 187 (1963).