

CPLR 5235: Court Scrutinizes Judicial Sale

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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.⁵⁸ 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.⁵⁹

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.⁶⁰ 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.⁶¹ 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

⁵⁸ 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. . . ."

⁵⁹ 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).

⁶⁰ 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).

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

value of the property.⁶² Paradoxically, they had precisely the opposite effect. CPLR 5236 eliminates the equity of redemption thereby preventing both the debtor and his creditors from reaching the property subsequent to sale. It is hoped that this new procedure will more effectively achieve the goals of the former redemption power.⁶³ Since the CPLR abandons the debtor's equity of redemption, the courts have felt constrained to scrutinize judicial sales, especially when there is a danger of inequity. The result of such scrutiny has been a rigid insistence upon adherence to the statutory requirements.

A recent example of a court's refusal to sanction even the most technical deviation from the statutory norm is *Community Capital Corp. v. Lee*.⁶⁴ Here the judgment creditor delivered an execution to the sheriff five days prior to the expiration of the judgment lien. On the same date a notice of levy was filed in the County Clerk's office. Pursuant to the execution, a sheriff's sale was held eight weeks later and was bid in by the plaintiff-purchaser. In holding the sale invalid the court noted a deviation from the statutory norm. As CPLR 5236 requires publication of at least eight weeks notice of sale, no sale could be effected until after the judgment lien had expired. In situations such as this, the judgment creditor is afforded the protection of CPLR 5203(b) which allows, upon motion, an extension of the judgment lien where such is "necessary to complete advertisement and sale of real property in accordance with section 5236."

Strictly construing section 5235, the court observed that the section permits filing of a notice of levy only *after* the expiration of the judgment lien and hence does not authorize the filing of one *before* the lien expires, as was done in the instant case. Thus, inasmuch as the procedure followed by the judgment creditor was unauthorized, the sale was held to be invalid.

The full impact of the *Community Capital* case is not readily discernible. It is to be noted that a court has the inherent power to set aside an execution sale when, as in the present case, it yields a grossly inadequate price.⁶⁵ The court's reliance, however, upon failure to conform to the technical requirements of section 5235 would seem to indicate a similar result, regardless of the adequacy of price. The judgment creditor in situations where

⁶² See 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5236.02 (1968). See also Note, *Execution Priorities Between Real Estate and Personal Property in Illinois*, 47 Nw. U.L. REV. 548, 550-51 (1952).

⁶³ 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5236.02 (1968).

⁶⁴ 58 Misc. 2d 34, 294 N.Y.S.2d 336 (Sup. Ct. Nassau County 1968).

⁶⁵ See generally *Fisher v. Hersey*, 78 N.Y. 387 (1879); *Empire State Development Co. v. Lambert*, 15 App. Div. 2d 511, 222 N.Y.S.2d 681 (2d Dep't 1961), *mod. mem.*, 15 App. Div. 2d 936, 227 N.Y.S.2d 891 (2d Dep't 1962), *aff'd mem.*, 11 N.Y.2d 913, 183 N.E.2d 75, 228 N.Y.S.2d 669 (1962).

execution is issued too close to the termination of the judgment lien has recourse, therefore, only to the express statutory alternatives:⁶⁶ he may issue execution upon the judgment lien allowing at least eight weeks for the termination thereof; pursuant to section 5203(b) he may move for an extension of the lien for the time necessary to complete advertisement and sale in accordance with section 5236; or he may file notice of levy *after* the expiration of the judgment lien.

ARTICLE 75 — ARBITRATION

CPLR 7501: Court may order consolidation of arbitrations.

Under the CPA, arbitration of a controversy was itself a special proceeding.⁶⁷ Consolidation could be directed pursuant to CPA 96 which generally empowered the courts to consolidate special proceedings. As a result of CPLR 7502, which eliminated the concept that arbitration itself is a special proceeding, a question has arisen as to whether courts can order consolidation of arbitrations with a common party upon the application of such party. Since there is no "action" pending, may the court order consolidation?

In *Matter of Chariot Textiles Corp.*,⁶⁸ the appellate division, first department, held that a court could not order consolidation. It adopted the view that no motion to consolidate could be made because there would be no action pending at the time.⁶⁹

The dissent took the position that the courts had not been divested of the power to order consolidation by virtue of 7502. In its view, Chariot's application to the court for consolidation "transmuted each of the arbitrations into a special proceeding since it was 'used to bring before a court the first application arising out of an arbitrable controversy. . . .'"⁷⁰ Support for this view was found in CPLR 7501, which provides that "[a] written agreement

⁶⁶ Apparently the levy lien under CPA 512 could be resorted to while the judgment lien was still in effect. See 7B MCKINNEY'S CPLR 5235, legislative studies and reports 188 (1963). As at common law, judgments were not liens against property, conformity to the statutory requisites is ordinarily essential to the effectuation of a valid lien. For a full discussion see 9 CARMODY—WAIT 2D CYCLOPEDIA OF NEW YORK PRACTICE § 63:114 (1966).

⁶⁷ See CPA § 1459.

⁶⁸ 21 App. Div. 2d 762, 250 N.Y.S.2d 493 (1st Dep't 1964).

⁶⁹ See also 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶7502.04-.05 (1968), espousing the view that under CPLR 7502 the statutory basis has been removed and therefore the courts must either find a new rationale or abandon the practice of consolidating arbitrations.

⁷⁰ 21 App. Div. 2d at 763, 250 N.Y.S.2d at 495 (dissenting opinion) (citing CPLR 7502(a)),