

## CPLR 5239: Prior Perfected U.C.C. Security Interest Superior to Judgment Lien

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*CPLR 5239: Prior perfected U.C.C. security interest superior to judgment lien.*

CPLR 5239 provides that an interested person may bring a special proceeding to determine his rights in property which has been levied upon prior to its disposition by the sheriff. In such a proceeding the court may vacate the levy, or, if there appear to be disputed issues of fact, the court will order a separate trial and indicate who is to have possession of the property in question pending a decision.<sup>120</sup>

Petitioner in *William Iselin & Co. v. Burgess & Leigh Ltd.*<sup>121</sup> held a perfected security interest in the debtor's present and after-acquired inventory and accounts receivable. The financing agreement gave petitioner the right to foreclose upon default or non-payment. Subsequently, one of the respondents obtained a judgment against the debtor, execution was issued to the sheriff and the debtor's inventory was levied upon. Petitioner thereafter demanded payments due under the financing agreement and the debtor defaulted.

Petitioner brought a special proceeding, pursuant to CPLR 5239, to have respondent's levy vacated. The respondent contended that petitioner's agreement with the debtor, whereby petitioner refrained from declaring the debtor in default so he might continue to operate the business and deplete his inventory, created a material issue of fact as to right of possession, and sought a continuance or a denial of petitioner's motion, pending discovery proceedings pursuant to CPLR 3212(f).<sup>122</sup> In vacating the levy, the court held that the petitioner had the right to take possession of the inventory by virtue of the express provision of the financing agreement and Uniform Commercial Code Section 9-503.<sup>123</sup> The court reasoned that, upon filing,<sup>124</sup> petitioner's security interest took priority over all unfiled and unperfected interests<sup>125</sup> including respondent's since a judgment creditor's lien, pursuant to CPLR 5202(a), is perfected only by the issuance of execution. Petitioner's prior right, gained by duly filing the

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<sup>120</sup> See 7B MCKINNEY'S CPLR 5239, commentary 201 (1963).

<sup>121</sup> 52 Misc. 2d 821, 276 N.Y.S.2d 659 (Sup. Ct. N.Y. County 1967).

<sup>122</sup> CPLR 3212(f) provides that where it appears "from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

<sup>123</sup> Uniform Commercial Code § 9-503 provides that on default, a secured party, unless otherwise agreed, has the right to possession of the collateral and may take possession without judicial process if that can be done without a breach of the peace.

<sup>124</sup> N.Y. U.C.C. § 9-302.

<sup>125</sup> N.Y. U.C.C. §§ 9-301, 9-312.

financing statement, was a matter of public record and discovery proceedings were, therefore, unnecessary. Since the right of possession was in the petitioner, and not in the debtor, the levy by respondent was ineffective to transfer the right of possession.<sup>126</sup>

The decision in *Iselin* illustrates with clarity the all-pervasive character of U.C.C. liens and, to a certain extent, establishes not only the priorities that will result when conflict with the rights of a judgment creditor arises, but also that CPLR 5239 is the medium through which such priority disputes are to be resolved.<sup>127</sup>

#### ARTICLE 63 — INJUNCTION

*CPLR 6301: Injunction may be granted in special proceeding.*

In *City Commission on Human Rights v. Regal Gardens, Inc.*,<sup>128</sup> by order to show cause, petitioner, alleging discrimination, sought a preliminary<sup>129</sup> injunction pursuant to CPLR 6301 to restrain respondents from renting or otherwise disposing of a certain apartment.

Before addressing itself to the merits of the complaint, the court had to remove one technical hurdle argued by the respondents, viz., that the court could not entertain the application since it was not made in a pending action.<sup>130</sup> In answering this contention, the court pointed out that Section B1-8.0(4) of the Administrative Code of the City of New York authorizes the use of a show cause order under the facts of the present case as a "prosecution in the form of a special proceeding."<sup>131</sup> The court also cited CPLR 103(c) which directs that, when the parties are before the court, it should not dismiss solely because the proceeding "is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution." However, the injunction was denied because the Commission had no knowledge of the merits of the complaint and the only basis of the charge of discrimination was a hearsay statement by the complainant.

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<sup>126</sup> *William Iselin & Co. v. Burgess & Leigh Ltd.*, 52 Misc. 2d 821, 276 N.Y.S.2d 659 (Sup. Ct. N.Y. County 1967).

<sup>127</sup> See 7B MCKINNEY'S CPLR 5239, *supp. commentary* 86 (1967).

<sup>128</sup> 53 Misc. 2d 318, 278 N.Y.S.2d 739 (Sup. Ct. Queens County 1967).

<sup>129</sup> 7B MCKINNEY'S CPLR 6301, *commentary* 127 (1963). Note the difference between preliminary injunction (with notice) and temporary restraining order (without notice).

<sup>130</sup> CPLR 6301 makes the remedy of preliminary injunction available "in any action . . ."

<sup>131</sup> CPLR 103(b) provides that "[a]ll civil judicial proceedings shall be prosecuted in the form of an action, *except where prosecution in the form of a special proceeding is authorized*" (emphasis added).