

CPLR 5222: Action for Damages Arising from Negligent Violation of Restraining Notice Allowed

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ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5222: *Action for damages arising from negligent violation of restraining notice allowed.*

CPLR 5222 states what must be contained in a restraining notice, the form such notice may take, on whom it may be served, how it may be served, its effect and duration. In addition, CPLR 5222(a) states that a restraining notice must "state that disobedience is punishable as a contempt of court."¹⁴³ The restraining notice is an independent remedy under the CPLR.¹⁴⁴ Its purpose is to make a creditor's specification of a debt, in which he claims the debtor has an interest, effective to prevent a payment or transfer until an order is issued or determination made by a court.¹⁴⁵ The effect of a restraining notice is not merely to give notice, but also to give injunctive relief.¹⁴⁶ Not only the debtor, but any person, *e.g.*, a garnishee, may be punished for contempt after disobeying a restraining notice.¹⁴⁷

Although it had been suggested that a contempt proceeding was not the only remedy for violation of a restraining notice under the CPLR,¹⁴⁸ no court had previously addressed itself to the specific issue. A similar question was raised, however, in regard to civil contempt proceedings under Section 773 of the Judiciary Law. In *Reidel Glass Works, Inc. v. Francis Kurtz and Co.*,¹⁴⁹ it was stated that section 773 was an express recognition that contempt proceedings under section 753 were only a concurrent remedy and did not bar an action for damages. Furthermore, in *S. Lipkin and Son, Inc. v. Baumann*,¹⁵⁰ it was recognized that while an adjudication of contempt may not be warranted by the facts, a party may be liable on the same facts in a separate proceeding for violation of an injunction.

In the recent decision of *Mazzuka v. Bank of North America*,¹⁵¹ the New York City Civil Court, Queens County, allowed

¹⁴³ CPLR 5251 provides that disobedience of a restraining order is punishable as contempt of court.

¹⁴⁴ 7B MCKINNEY'S CPLR 5222, commentary 79 (1963).

¹⁴⁵ *Sumitomo Shoji v. Chemical Bank N.Y. Trust Co.*, 47 Misc. 2d 741, 263 N.Y.S.2d 354 (Sup. Ct. N.Y. County 1965), *aff'd*, 25 App. Div. 2d 499, 267 N.Y.S.2d 477 (1st Dep't 1966).

¹⁴⁶ *Id.*

¹⁴⁷ 7B MCKINNEY'S CPLR 5251, commentary 207 (1963).

¹⁴⁸ *Sumitomo Shoji v. Chemical Bank N.Y. Trust Co.*, 47 Misc. 2d 741, 263 N.Y.S.2d 354, 358 (Sup. Ct. N.Y. County 1965).

¹⁴⁹ 260 App. Div. 163, 20 N.Y.S.2d 938 (1st Dep't 1940), *reargument denied*, 260 App. Div. 859, 23 N.Y.S.2d 479, *aff'd and appeal dismissed*, 287 N.Y. 636, 39 N.E.2d 270 (1941).

¹⁵⁰ 100 N.Y.S.2d 270 (App. T. 1st Dep't 1950).

¹⁵¹ 53 Misc. 2d 1053, 280 N.Y.S.2d 495 (N.Y.C. Civ. Ct. 1967).

an action for damages for the negligent violation of a restraining notice. The court analogized Section 773 of the Judiciary Law to CPLR 5222 and 5251, concluding that a contempt proceeding under the CPLR for violation of a restraining notice was a concurrent remedy which did not bar an action for damages. While CPLR 5251 called for "refusal or willful neglect"¹⁵² for a contempt proceeding to be successful, the facts in *Mazzuca*, as noted, showed the disobedience of the restraining notice to be caused by a mistake and in no way willful.¹⁵³

ARTICLE 55 — APPEALS GENERALLY

CPLR 5511: Defendant may obtain limited review of a final determination when based only in part on his default.

CPLR 5511 provides that "[a]n aggrieved party . . . may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party." This provision carries forward the provision found in CPA 557 and is based on the rationale that where a party defaults, he has acquiesced in the judgment against him, abandoning his legal position, and therefore there can be no error of the lower court which may be the subject of an appeal. However, in those cases where the defendant did contest all or some of the issues against him, he is afforded a limited right to appeal. Thus, if a defendant defaults only in part, he may seek review of those issues which were the subject of a contest in the lower court.¹⁵⁴

James v. Powell,¹⁵⁵ is an illustration of this proposition. There, the appellants contested the trial court's judgment awarding

¹⁵² Prior to 1965, CPLR 5251 required only "failure" to obey in order to punish for contempt. In 1965 "refusal and willful neglect" were substituted for "failure." N.Y. Sess. Laws 1965, ch. 773, § 14.

¹⁵³ Even without the change in statutory language of CPLR 5251, it would be impossible to definitively state that contempt requires or does not require the element of intent. Compare *People v. McCloskey*, 6 N.Y.2d 390, 160 N.E.2d 647, 188 N.Y.S.2d 904 (1959), and *Ditomaso v. Loverno*, 242 App. Div. 190, 273 N.Y.S.2d 76 (2d Dep't 1934) (two civil contempt cases where willfulness was assumed to be an element of civil contempt), with *People ex rel. Negas v. Dwyer*, 90 N.Y. 402 (1882), and *Faulisi v. Board of Police Comm'rs*, 7 Misc. 2d 704, 162 N.Y.S.2d 687 (Sup. Ct. Steuben County 1957) (two criminal contempt cases wherein it was stated that willfulness is not necessary for a civil contempt proceeding).

¹⁵⁴ See 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE §§ 5511.10, 5511.11 (1964). See also *People v. Connelly*, 217 N.Y. 570, 573, 112 N.E. 579, 580 (1916); *Sirianni v. Sirianni*, 14 App. Div. 2d 432, 22 N.Y.S.2d 693 (2d Dep't 1961); *Sauerbrunn v. Hartford Life Ins. Co.*, 165 App. Div. 506, 150 N.Y.S. 1039 (1st Dep't 1914), *aff'd*, 220 N.Y. 363, 115 N.E. 1001 (1917).

¹⁵⁵ 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S.2d 10 (1967). One of the appeals was from the affirmance of the order striking defendant's answers