

## CPLR 5201: Fund Beyond Judgment Creditor's Execution

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*CPLR 5201: Fund beyond judgment creditor's execution.*

In *Valerio v. College Point Sav. Bank*,<sup>160</sup> the judgment creditor sought to levy on a fund composed of monthly payments made by the judgment debtor as mortgagor to the mortgagee bank. These payments, under the mortgage contract, were to be held in trust by the bank to insure satisfaction of monthly tax and insurance obligations. Under this contract, the judgment debtor had no right to any of the money paid while any part of the principal or interest was owing to the bank. The court, in a rationale similar to that used in construing the CPA counterparts of CPLR 5225(b) and 5227, held that the judgment creditor's rights in the fund could be no greater than that of the judgment debtor.<sup>161</sup> Thus, the judgment creditor, when he seeks to levy on the property of the judgment debtor in the hands of a third party, can only do so subject to the terms of the contract. To be more precise, the judgment creditor may execute on the property of the judgment debtor in the possession of a third party by commencing a special proceeding in which the judgment debtor has an interest,<sup>162</sup> or where the third party is a "person who . . . is or will become indebted to the judgment debtor. . . ." <sup>163</sup>

Prior commentary had noted the difficulty of drawing any distinction between these two categories of third-party possessors. Indeed, attorneys were advised to avoid the difficulty by proceeding against third parties under both sections simultaneously.<sup>164</sup> The *Valerio* decision does not attempt to clarify this problem. This is an area of considerable importance to judgment creditors since, under CPLR 5227, the court may require that payment be made directly to the judgment creditor, whereas under CPLR 5225(b), payment or delivery is to be made through a sheriff. Whenever a sheriff must be employed as an intermediary, his fees will diminish the recovery and his procedures will cause a certain delay. It is important to note that the judgment creditor in *Valerio* followed the advice of the commentary and employed both these sections. Until a distinction is made between the two, the practitioner is similarly advised to employ both 5225(b) and 5227 in this type of proceeding.

<sup>160</sup> 48 Misc. 2d 91, 264 N.Y.S.2d 343 (Sup. Ct. Suffolk County 1965).

<sup>161</sup> Compare *id.* at 92, 264 N.Y.S.2d at 344, with *Slaff v. Slaff*, 9 App. Div. 2d 80, 83, 191 N.Y.S.2d 636, 639 (1st Dep't 1959) and *Central Suffolk Hosp. Ass'n v. Downs*, 213 N.Y.S.2d 192, 194 (Sup. Ct. Kings County 1961). CPA §§ 794, 796 were formerly applicable.

<sup>162</sup> CPLR 5225(b).

<sup>163</sup> CPLR 5227.

<sup>164</sup> See 7B MCKINNEY'S CPLR 5225, *supp. commentary* 26 (1965).