

CPLR 5222: Restraining Notices--Income Execution

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1965) "CPLR 5222: Restraining Notices--Income Execution," *St. John's Law Review*: Vol. 40 : No. 1 , Article 64.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol40/iss1/64>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

definite for attachment purposes. Applying this to the conditional sales contract situation, the debtor-purchaser had a right to possess the aircraft even though the vendor had legal title. It was this possessory right for which a monetary value could be determined and thus it was attachable.

In *Seider*, the court was not presented with the problem of determining the worth of the insurer's contractual obligation to defend and indemnify the insured. It has been suggested, however, that the premium reflects a minimum value to be accorded to this obligation.²⁴⁹ This suggestion fails to consider that the premium purchases coverage, similar to any consumer item, and does not reflect in any aspect the actual value of the obligation to indemnify and defend. In essence, it appears that Judge Ughetta's objection to *Seider* is the practical difficulty in fixing pecuniary value to this obligation. His objection appears to be well-founded and may find voice in future decisions.

CPLR 5222: Restraining notices—income execution.

A good illustration of the interaction of sections 5222(b) (effect of restraint), 5205(e) (income exemptions) and 5231(d) (levy upon default of debtor) is present in the case of *Power v. Loonam*.²⁵⁰ In this decision the debtor moved to vacate a restraining notice served on his employer. Under CPLR 5205(e), ninety per cent of the debtor's income is exempt except as to such part the court determines to be unnecessary for reasonable requirements of the judgment debtor and his dependents.²⁵¹ This in effect is an exception to CPLR 5222(b) which prohibits, once a restraining notice is served, the transfer of all property or debts in which the judgment debtor has an interest. If this order were effective against the employer it would tie up all of the earnings of the judgment debtor. In addition, the court noted that CPLR 5231(d) authorizes service of the restraining notice on the employer only after the debtor defaults in payment or where the debtor is unavailable to accept service. This affords the debtor an opportunity to satisfy the judgment before the employer learns about it.²⁵² In the instant case, the judgment debtor had not defaulted and was available for service. On these grounds, the court vacated the restraining notice against the employer. The practitioner

²⁴⁹ *Matter of Riggle*, 11 App. Div. 2d 51, 56, 205 N.Y.S.2d 19, 25 (2d Dep't 1960), *aff'd*, 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

²⁵⁰ 45 Misc. 2d 818, 258 N.Y.S.2d 136 (Sup. Ct. Nassau County 1965).

²⁵¹ See *Widder v. Kaffee*, 19 App. Div. 2d 817, 818, 243 N.Y.S.2d 601, 603 (1st Dep't 1963).

²⁵² 7B MCKINNEY'S CPLR 5231, *supp. commentary* 38 (1965).

should be alert to this interaction. Where the debtor is making the prescribed payments, the employer cannot be served.

CPLR 5225: Special proceedings involving substantial disputes.

Under prior law, a summary disposition of ownership of property for enforcement purposes could only be made when there was no substantial dispute as to the judgment creditors' rights in the property.²⁵³ Today, the CPLR provides for a special proceeding for the adjudication of the rights of adverse parties without resort to the plenary action. This procedure is governed generally by Article 4 and specifically by Article 52.²⁵⁴

The new plenary nature of the special proceeding in the enforcement area is illustrated by several recent decisions. In *Ruvolo v. Long Island R.R.*,²⁵⁵ the judgment creditor, the divorced wife of the judgment debtor, commenced a special proceeding against the defendant who was stakeholder of a fund which was in settlement of the husband's personal injury action against defendant. The creditor, pursuant to CPLR 5225(b) and 5227 sought to have her rights determined under the judgment and have distributed out of the fund that part to which she was entitled. The defendant stakeholder sought by cross-motion a protective order against other creditors before making the disbursement. In denying defendant's motion, the court recognized that proceedings under CPLR 5225(b) and 5227 are plenary in nature and that interested third parties may intervene formally to have their claims determined although there is no requirement that notice be given to such claimants or that they be joined as parties. The court suggested, however, that in cases of doubt as to the other claimants' rights the defendant could interplead such claimants if they failed to intervene and thus, in a single proceeding obtain a determination of all claims.

In a subsequent decision,²⁵⁶ the special proceeding was again utilized but, in this instance, to determine the issue of ownership. The judgment creditor contended that although the judgment debtor's daughter was the record holder of certain stock, the judgment debtor was in fact the actual owner and thus the stock was subject to levy. The court noted that resort to a plenary action was no longer necessary where, as here, there arose a substantial dispute as to the judgment creditor's rights and that adjudication

²⁵³ CPA § 796; *Matter of Delaney*, 256 N.Y. 315, 176 N.E. 407 (1931); see generally 6 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 216, ¶ 5225.14.

²⁵⁴ See, *e.g.*, CPLR 5225, 5227 and 5239.

²⁵⁵ 45 Misc. 2d 136, 256 N.Y.S.2d 279 (Sup. Ct. Queens County 1965).

²⁵⁶ *First Small Business Inv. Corp. v. Zaretsky*, 46 Misc. 2d 328, 259 N.Y.S.2d 700 (Sup. Ct. Queens County 1965).