

CPLR 5222: Restraining Notices

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guaranty made effective. In addition, the debts owed to the bank from the sale of the drafts would also be attachable. The court's holding that these drafts were not a property within the meaning of CPLR 5201 and thus not subject to attachment appears justifiable.

CPLR 5208: Enforcement after death of judgment debtor; leave of court.

In *In re Casey's Estate*,²⁰⁰ the administratrix of an estate commenced a proceeding in the surrogate's court to vacate a restraining notice issued pursuant to CPLR 5222 to enforce a judgment obtained against the debtor's representative. The creditor's contention, that the surrogate's court lacked the authority to grant such relief, was rejected and the notice vacated. In so doing, the court noted that CPLR 5208 prohibits the enforcement of a money judgment after the death of the debtor without leave of the surrogate's court which granted letters of administration upon the estate. The court noted that, without the surrogate's leave, Article 52 enforcement procedures are not effective against the property of the deceased when the judgment was obtained prior to his death but where execution was delayed until after death. The court reasoned, therefore, that no greater relief should be afforded a creditor whose judgment was obtained initially against the deceased's representative.

CPLR 5222: Restraining Notices.

In *Sumitomo Shoji v. Chemical Bank N.Y. Trust Co.*,²⁰¹ the court was presented with the issue of determining the effectiveness of a restraining notice served upon a bank. The restraining notice specified several accounts, two of which were corporate checking accounts not in the judgment debtor's name. Subsequently, the bank honored checks signed and made payable to "cash" by the debtor which closed out these corporate checking accounts. The bank contended that since there had been no adjudication as to the judgment debtor's interest in these accounts, it was obligated to honor the checks or suffer liability for wrongful dishonor.²⁰² The court held that by disregarding the restraining notice, the bank assumed the risk of liability if the creditor could establish that the corporate accounts constituted property of the debtor. The court then directed that this issue be set for trial.

The creditor subsequently moved to reargue the question of the bank's liability, setting up a summary judgment obtained pursuant

²⁰⁰ 46 Misc. 2d 776, 260 N.Y.S.2d 816 (Surr. Ct. Rensselaer County 1965).

²⁰¹ 47 Misc. 2d 741, 263 N.Y.S.2d 354 (Sup. Ct. N.Y. County 1965).

²⁰² N.Y. U.C.C. §§ 4-302, 4-402.

to CPLR 3213 against the corporations whose accounts were involved. This judgment held that the judgment debtor treated the corporate monies exclusively as his own. The court denied the motion to reargue on the ground that the bank was not bound by this determination since it was not a party to the action in which summary judgment was granted.

The bank also moved for reargument contending first, that the issue of ownership could not be resolved in a special proceeding, and secondly, that the restraining notice was ineffective as of the time of its service.

The court, in denying the bank's motion, held that the special proceeding had been properly brought. CPLR 5225 and 5227 changed prior law which required a plenary action to determine rights.²⁰³

In accordance with CPLR 5222,²⁰⁴ the court held the restraining notice effective as of the date of issue. In so doing, the court extensively investigated the legislative history of CPLR 5222 and concluded that the creditor's specification of a debt or property in a restraining notice is *binding* on the person served to prohibit alienation except upon direction of the sheriff or pursuant to court order.

In regard to the issue of possible liability of the bank for wrongful dishonor, the court observed that since the bank is restrained pursuant to a statute subsequent to the one creating liability, the dishonor cannot be classified as wrongful. In addition, CPLR 5222(b) expressly provides that the creditor who served the restraining notice shall be liable to the true owner of the property (if other than the judgment debtor) for any damages sustained because of the restraint.

Upon motion for reconsideration, the bank contended that under Section 134(5) of the Banking Law, notice of an adverse claim to an account was not effective unless the claimant followed certain procedures including posting a bond. The purpose of the statute is to protect banks against double liability.²⁰⁵ The court stated that the instant case did not constitute an adverse claim since the bank was not requested to make any type of disbursement. It was only prohibited from transferring the funds without court approval.

²⁰³ *Ruvolo v. Long Island R.R.*, 45 Misc. 2d 136, 256 N.Y.S.2d 279 (Sup. Ct. Queens County 1965); SIXTH REP. 486; 7B MCKINNEY'S CPLR 5225, supp. commentary 26 (1965).

²⁰⁴ CPLR 5222(b) provides in part: "A restraining notice served upon a person other than the judgment debtor is effective only if, at the time of service . . . the judgment creditor has stated in the notice that a specified debt is owed by the person served to the judgment debtor. . . ."

²⁰⁵ *Leeds v. Guaranty Trust Co.*, 193 Misc. 681, 682, 85 N.Y.S.2d 70, 71 (Sup. Ct. N.Y. County 1948).

The instant case provides an excellent illustration of the usefulness of the restraining notice as an enforcement device. CPLR 5222(a) provides that a restraining notice may be issued by the clerk of the court or by the attorney of the judgment creditor as an officer of the court. The practitioner should note, however, that under *City of New York v. Panzirer*,²⁰⁶ mere service of the restraining notice does not effectuate a priority for the judgment.

CPLR 5227: Payments of debts owed to judgment debtor—priority.

In the case of *Neilson Realty Corp. v. MVAIC*,²⁰⁷ the petitioner commenced a special proceeding pursuant to CPLR 5227 to satisfy its judgment against the debtor out of a recovery which the debtor obtained against MVAIC. A cross application under CPLR 5240 was made by an interested party for an order directing that the fund involved be distributed in accordance with the following priority: first, to satisfy the attorney's fee and disbursements involved in the litigation against MVAIC; secondly, to satisfy the liens of the insurance company which provided workmen's compensation payments to the debtor pursuant to Section 227(1) of the Workmen's Compensation Law; thirdly, to satisfy the lien of the hospital pursuant to Section 189(1) of the Lien Law, which provided medical services to the debtor; fourthly, to two physicians; and lastly, to the Department of Welfare, all of whom claimed rights via the debtor's assignment of the *proceeds* of the personal injury cause of action. The court followed this proposed order of priority. By so doing, the fund was exhausted, thus leaving Neilson, the party who *commenced* the special proceeding, with nothing.

In its opinion, the court noted that the debtor's claim for personal injuries did not become a debt within the meaning of CPLR 5201 until the damages were fixed.²⁰⁸ Thus, when Neilson served a restraining notice (CPLR 5222(b)) and subpoena on MVAIC approximately one month after the fixing of damages, it affected only that amount of the debt which belonged to the debtor. The court stated, however, that such activities made Neilson a judgment lienor.²⁰⁹ This statement is not in accord with CPLR 5234 or with a recent case construing this section.²¹⁰ These authorities hold that priority among judgment creditors is deter-

²⁰⁶ 23 App. Div. 2d 158, 259 N.Y.S.2d 284 (1st Dep't 1965).

²⁰⁷ 47 Misc. 2d 260, 262 N.Y.S.2d 652 (Sup. Ct. Queens County 1965).

²⁰⁸ *Wallace v. Ford*, 44 Misc. 2d 313, 253 N.Y.S.2d 608 (Sup. Ct. Erie County 1964).

²⁰⁹ *Neilson Realty Corp. v. MVAIC*, 47 Misc. 2d 260, 263, 262 N.Y.S.2d 652, 657 (Sup. Ct. Queens County 1965).

²¹⁰ *City of New York v. Panzirer*, 23 App. Div. 2d 158, 259 N.Y.S.2d 284 (1st Dep't 1965).