St. John's Law Review

Volume 40, May 1966, Number 2 Article 46

CPLR 5227: Payments of Debts Owed to Judgment Debtor--Priority

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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-

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[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).

mined solely from levy of execution or filing of an order and not from the use of other enforcement devices. This variance, however, would not affect the result in the instant case since the ranking of Neilson's judgment was not involved.

The practitioner should note with interest the fact that among all the outstanding liens attached to the fund, the attorney's fee had priority. Neilson, in fact, conceded that the attorney was to be paid before all the other claimants. It appears that the rationale for this approach lies in the fact that it was the attorney's efforts which brought the MVAIC fund into existence. The situation is analogous to the priority given to a mechanic's lien.[211]

Finally, in regard to the assignments of the *proceeds* of the personal injury action, the court noted that they did not violate the prohibition against the assignment of a personal injury cause of action.[212] The priority among the assignments was determined by the date of making, the earlier one having priority. Thus, by virtue of these statutory liens and assignments, the debtor had effectively and completely disassociated himself from the MVAIC fund, leaving no debt available to Neilson.

The decision is illustrative of the broad plenary powers given the court in a CPLR 5227 special proceeding.[213]

CPLR 5231: Form over substance—or substance over form?

Recently, the courts of this state were presented with the following situation. In essence, the petitioner recovered a judgment in the New York City Civil Court against defendants who lived within the city but were employed beyond its limits. An income execution was delivered to the enforcing officer but was returned unsatisfied. Thereafter, a transcript of the judgment was issued out of the civil court and filed with a county clerk. An income execution was then served on the employer by the sheriff in a county beyond New York City.

In *Schleimer v. Gross*,[214] the court refused to order the sheriff to accept and serve an income execution upon the employer. In so doing, the court noted that under Section 701(a) of the New York City Civil Court Act, the authority of the enforcing officer to serve an income execution is limited to the city of New York. In addition, under section 702 of the same act once the judgment or transcript is issued out of the civil court and filed with the county clerk, *only* a sheriff can enforce it (as though it were rendered by the supreme court). As a consequence of these provisions, the

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211 N.Y. LIEN LAW § 3.

212 N.Y. GEN. OBLIG. LAW § 13-101; Grossman v. Schlosser, 19 App. Div. 2d 893, 244 N.Y.S.2d 749 (2d Dep't 1963).

213 Ruvolo v. Long Island R.R., *supra* note 203.

214 46 Misc. 2d 931, 261 N.Y.S.2d 670 (Sup. Ct. Nassau County 1965).