

## Protective Order May Not Set Aside Sheriff's Sale After Deed Is Delivered

Robert W. Corcoran Jr.

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## ARTICLE 52—ENFORCEMENT OF MONEY JUDGMENTS

*Protective order may not set aside sheriff's sale after deed is delivered*

In order to ensure the fair and equitable enforcement of money judgments under Article 52 of the CPLR,<sup>152</sup> section 5240 empowers a court to alter the nature and extent of any enforcement device employed.<sup>153</sup> Although CPLR 5240 may be invoked prior to completion<sup>154</sup> of a sheriff's sale of real property,<sup>155</sup> it has remained unclear whether this remedial power may be exercised after the property is

<sup>152</sup> *E.g.*, CPLR 5222 (1978) (restraining notice); *id.* 5225 (order to deliver property); *id.* 5226 (installment payment order); *id.* 5227 (payment of debt owed to judgment debtor); *id.* 5231 (income execution); *id.* 5232-5233 (sale of personal property); *id.* 5235-5236 (sale of real property). Article 52 of the CPLR is an exhaustive revision of Article 45 of the former Civil Practice Act. CPA art. 52 (repealed by ch. 308, § 101 [1962] N.Y. Laws 1299). The revision was required to eliminate the abuse of enforcement procedures by debtors and creditors which resulted from the CPA's "illogical distinctions, inconsistencies and pitfalls." THIRD REP. 233-44. *See generally* Donohue, *Enforcement of Judgments Other Than by Execution Under the CPLR*, 9 N.Y.L.F. 300, 300-04 (1963). The legislature, in effecting the revision, segregated provisions concerning the enforcement of money judgments from enforcement procedures for most other types of judgments. *See* SIEGEL § 476, at 637.

<sup>153</sup> CPLR 5240 (1978), in pertinent part, provides:

The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure . . . .

Believing that protection from enforcement abuse would be obtained more effectively by one central provision, the framers of article 52 consolidated scattered regulatory sections of the CPA into CPLR 5240. *See* THIRD REP. 314. The court's powers under CPLR 5240 are stated broadly to ensure their applicability to all article 52 procedures. *See* *Gorea v. Pinsky*, 50 App. Div. 2d 713, 714, 374 N.Y.S.2d 879, 881 (4th Dep't 1975); CPLR 5240, commentary at 451-52 (1978); 6 WK&M ¶ 5240.01. An order under CPLR 5240 may be issued by the court sua sponte or upon the motion of an interested party. SIEGEL § 522, at 713.

<sup>154</sup> *E.g.*, *Hammond v. Econo-Car of the North Shore, Inc.*, 71 Misc. 2d 546, 336 N.Y.S.2d 493 (Sup. Ct. Nassau County 1972) (husband's creditors restrained from executing on his interest in tenancy by the entirety), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 580, 603 (1973); *Holmes v. W.T. Grant, Inc.*, 71 Misc. 2d 486, 336 N.Y.S.2d 601 (Sup. Ct. Nassau County 1972) (execution sale postponed in lieu of \$20 monthly payments); *Gilchrist v. Commercial Credit Corp.*, 66 Misc. 2d 791, 322 N.Y.S.2d 200 (Sup. Ct. Nassau County 1971) (impending sheriff's sale cancelled and creditor ordered to collect through alternate means), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 378 (1971).

<sup>155</sup> CPLR 5236, which provides for the execution sale of real property, requires public advertisement and notice to the debtor and to all creditors having a lien in the property. CPLR 5236(c) (1978). Subject to postponement, it sets a sale date between the 8th and 9th weeks following notice. CPLR 5236(a) (1978). Unlike the former CPA, there is no requirement that the judgment creditor exhaust the personal assets of the debtor before resorting to execution and sale of his residence. *See* CPA § 643. The authors of article 52 felt this prerequisite placed an "unwarranted burden on judgment creditors and [showed a] tenderness for the judgment debtor." THIRD REP. 242; *see* 6 WK&M ¶ 5230.10.

sold.<sup>156</sup> In *Guardian Loan Co. v. Early*,<sup>157</sup> the Court of Appeals recently held that, although some circumstances may warrant equitable relief, the protective power of CPLR 5240 is unavailable once a sheriff's sale of real property is executed in conformity with statute and a deed is delivered to a bona fide purchaser.<sup>158</sup>

In *Guardian Loan*, the plaintiff levied a judgment of approximately \$1,200 on the defendants' residence.<sup>159</sup> Following proper advertisement and notice to the defendants,<sup>160</sup> the sheriff sold the property to a stranger to the original action for approximately \$3,000, an amount far less than the debtors' equity in the property.<sup>161</sup> The proceeds of the sale were then applied to satisfy the

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<sup>156</sup> Compare *Murphy v. Grid Realty Corp.*, 73 Misc. 2d 1071, 1073, 343 N.Y.S.2d 670, 671-72 (Sup. Ct. Nassau County 1973) and *In re Bachner*, 82 Misc. 2d 107, 109, 368 N.Y.S.2d 749, 751 (Sup. Ct. Nassau County 1975) (CPLR 5240 unavailable after judicial sale of real property completed) with *Wandschneider v. Bekeny*, 755 Misc. 2d 32, 39, 346 N.Y.S.2d 925, 932 (Sup. Ct. Westchester County 1973) (CPLR 5240 and the court's power of equity invoked after judicial sale).

Prior to the enactment of the CPLR, a judgment debtor had the right to redeem his property within 1 year following its sale by the sheriff. CPA § 724-727; see THIRD REP. 302-03. With the enactment of the CPLR, the right of redemption after sale was abolished in the hope of bringing higher prices at sheriffs' sales by freeing purchasers from the possibility of losing their purchased property. See generally CPLR 5236, commentary at 430-31 (1978). The 8 week period between notice of sale and the actual sale, see note 155 *supra*, was intended to overcome the anticipated objections to the abolition of redemption by allowing the debtor a redemption period before the sale. Siegel, *The Sale of Real Property Pursuant to an Execution Under the CPLR*, TENTH ANN. REP. N.Y. JUD. CONFERENCE 120, 122-23 (1965). The aim of the abolition of redemption—obtaining higher prices—has not been effectively attained. See, e.g., *Guardian Loan Co. v. Early*, 47 N.Y.2d at 517, 392 N.E.2d at 42, 419 N.Y.S.2d at 58 (equity of \$39,000 lost to \$3,020 bid); *Wandschneider v. Bekeny*, 755 Misc. 2d 32, 36, 346 N.Y.S.2d 925, 929 (Sup. Ct. Westchester County 1973) (\$26,000 equity sold for \$500); *Community Capital Corp. v. Lee*, 58 Misc. 2d 34, 35, 294 N.Y.S.2d 336, 337 (Sup. Ct. Nassau County 1968) (\$18,000 equity sold for \$197). See generally 6 WK&M ¶ 5236.20; Comment, *Enforcement of Money Judgments Against Real Property in New York*, 1 HOFSTRA L. REV. 214 (1973).

It should be noted that the abolition of redemption rights in execution sales of real property has not been extended to mortgaged property unless the possessors of interest in such property are made parties to the foreclosure action. See *Quaremba v. Nassau Suffolk Lumber & Supply Corp.*, 21 Misc. 2d 645, 189 N.Y.S.2d 397 (Sup. Ct. Suffolk County 1959).

<sup>157</sup> 47 N.Y.2d 515, 392 N.E.2d 1240, 419 N.Y.S.2d 56 (1979), *rev'g* 64 App. Div. 2d 689, 407 N.Y.S.2d 571 (2d Dep't 1978).

<sup>158</sup> 47 N.Y.2d at 522, 392 N.E.2d at 1244, 419 N.Y.S.2d at 61.

<sup>159</sup> *Id.* at 517, 392 N.E.2d at 1241-42, 419 N.Y.S.2d at 58.

<sup>160</sup> *Id.*; see note 155 *supra*.

<sup>161</sup> 47 N.Y.2d at 517-18, 392 N.E.2d at 1241-42, 419 N.Y.S.2d at 58. The judgment debtors' residence had a fair market value of \$48,000 but was subject to a mortgage of \$9,000 and unsatisfied liens amounting to approximately \$11,000. *Id.* This reduced its net value to approximately \$28,000. The property was sold at execution for \$3,020. *Id.* As the Court noted, execution sales of a judgment debtors' home usually result in a purchase price far below the fair market value of the residence. *Id.*; see, e.g., *Levine v. Berlin*, 46 App. Div. 2d 902, 903,

judgment creditors and the property was deeded to the third-party purchaser.<sup>162</sup> The debtors subsequently moved to vacate the sale and void the deed, buttressing their claim for relief on circumstances which prevented them from paying the judgment.<sup>163</sup> The Supreme Court, Suffolk County, granted the motion and a divided Appellate Division, Second Department, affirmed on the ground that the inadequate purchase price, coupled with the debtors' good faith efforts to pay the judgment, supported the lower court's application of CPLR 5240.<sup>164</sup>

In an opinion written by Chief Judge Cooke, the Court of Appeals reversed,<sup>165</sup> observing that notwithstanding their good faith efforts, the debtors, even on the day of the sale, lacked the funds to satisfy the judgment.<sup>166</sup> Acknowledging that courts are given "broad discretionary powers" to regulate the enforcement of money judgments under CPLR 5240, Chief Judge Cooke reasoned that since the section "relates to the use of an enforcement device," it is inapplicable where enforcement is complete.<sup>167</sup> Permitting a lawful

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362 N.Y.S.2d 186, 189 (2d Dep't 1974); *Concord Landscapers, Inc. v. Pincus*, 41 App. Div. 2d 759, 760, 341 N.Y.S.2d 538, 540 (2d Dep't 1973); *In re Bachner*, 82 Misc. 2d 107, 108, 368 N.Y.S.2d 749, 750 (Sup. Ct. Nassau County 1975); *Wandschneider v. Bekeny*, 75 Misc. 2d 32, 33, 346 N.Y.S.2d 925, 927 (Sup. Ct. Westchester County 1973). Such sales often inflict extreme hardship upon the judgment debtor. *See Seyfarth v. Bi-County Elec. Corp.*, 73 Misc. 2d 363, 364-65, 341 N.Y.S.2d 533, 534-35 (Sup. Ct. Nassau County 1973); *Hammond v. Econo-Car of the North Shore, Inc.*, 71 Misc.2d 546, 546-47, 336 N.Y.S.2d 493, 494-95 (Sup. Ct. Nassau County 1972), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 580, 603 (1973); *Gilchrist v. Commercial Credit Corp.*, 66 Misc. 2d 791, 792-93, 322 N.Y.S.2d 200, 202 (Sup. Ct. Nassau County 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 378 (1971).

<sup>162</sup> 47 N.Y.2d at 517, 392 N.E.2d at 1241, 419 N.Y.S.2d at 58.

<sup>163</sup> *Id.* at 517-18, 392 N.E.2d at 1242, 419 N.Y.S.2d at 58. The debtors claimed that on the day of the sale a flat tire on their car prevented them from getting to the sale with \$1,100 in cash to satisfy most of the debt. *Id.*

<sup>164</sup> 64 App. Div. 2d 689, 407 N.Y.S.2d 571 (2d Dep't 1978), *rev'd*, 47 N.Y.2d 515, 392 N.E.2d 1240, 419 N.Y.S.2d 56 (1979). In a dissenting opinion, Justice Gulotta argued that the interest of the innocent purchaser at a valid judicial sale must be paramount to that of the judgment debtor in order to preserve the stability of titles. 64 App. Div. 2d at 689-90, 407 N.Y.S.2d at 572.

<sup>165</sup> 47 N.Y.2d at 518, 392 N.E.2d at 1242, 419 N.Y.S.2d at 58. All the judges concurred except Judge Fuchsberg, who took no part in the decision.

<sup>166</sup> *Id.* at 521, 392 N.E.2d at 1244, 419 N.Y.S.2d at 60.

<sup>167</sup> *Id.* at 519-20, 392 N.E.2d at 1243, 419 N.Y.S.2d at 59. The Court observed that its ruling did not leave the judgment debtor completely remediless since CPLR 2003 permits a court to set aside a defective sale within 1 year after the sale for a failure to comply with the CPLR as to the notice, time, or manner of such sale, "if a substantial right of a party was prejudiced by the defect." CPLR 2003 (1978). 47 N.Y.2d at 520, 392 N.E.2d at 1243, 419 N.Y.S.2d at 60; *accord*, *Levine v. Berlin*, 46 App. Div. 2d 902, 903, 362 N.Y.S.2d 186, 189 (2d Dep't 1974); *see Criterion Capital Corp. v. Valven Holding Corp.*, 23 App. Div. 2d 878,

sale to be set aside after title has been transferred to a purchaser, according to the Court, would discourage third parties from participating at judicial sales, since title may be invalidated at any later time.<sup>168</sup> Moreover, the Court determined that a different holding would constitute a judicial restoration of the equity of redemption, a remedy abolished by the Legislature when enacting the CPLR.<sup>169</sup> Nevertheless, it was found that fraud, mistake, or overreaching would justify the invocation of a court's traditional equity powers, even after a sale.<sup>170</sup> As in *Guardian Loan*, however, the Court found that a sale may not be vacated merely because the purchase price was inadequate.<sup>171</sup>

Grounded in a concern for preserving the viability of judicial sales and protecting the rights of bona fide purchasers, the *Guardian Loan* holding appears to be in accord with prior decisions denying relief under CPLR 5240 where the debtor merely has complained of an inadequate purchase price.<sup>172</sup> In addition to effecting

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878, 259 N.Y.S.2d 946, 947 (2d Dep't 1965) (failure to post notice will not invoke CPLR 2003 if party not prejudiced). See also *Gegerson v. Northern Operating Corp.*, 41 App. Div. 2d 837, 838, 342 N.Y.S.2d 424, 427 (2d Dep't 1973); *First Fed. Sav. & Loan Ass'n v. McKee*, 61 Misc. 2d 693, 696, 305 N.Y.S.2d 589, 592 (Sup. Ct. Nassau County 1969).

<sup>168</sup> 47 N.Y.2d at 520, 392 N.E.2d at 1243, 419 N.Y.S.2d at 59.

<sup>169</sup> *Id.* at 520, 392 N.E.2d at 1243, 419 N.Y.S.2d at 59-60; see note 156 *supra*.

<sup>170</sup> *Id.* at 520-21, 392 N.E.2d at 1243-44, 419 N.Y.S.2d at 60. Chief Judge Cooke acknowledged that the Court possesses "equitable power over a sale made pursuant to its judgment or decree to ensure that it is not made the instrument of injustice." *Id.* The Chief Judge continued that "[w]here the judgment debtor can show not merely disparity in price, but in addition one of the categories integral to the invocation of equity, such as fraud, mistake or exploitive overreaching, a court of equity may grant relief." *Id.* at 521, 392 N.E.2d at 1244, 419 N.Y.S.2d at 60; accord, *Murphy v. Grid Realty Corp.*, 73 Misc. 2d 1071, 1072, 343 N.Y.S.2d 670, 671 (Sup. Ct. Nassau County 1973); *Dime Sav. Bank v. Thomas*, 24 Misc. 2d 850, 851-52, 209 N.Y.S.2d 160, 161 (Sup. Ct. Nassau County 1960). But see *Holness v. McGillian*, N.Y.L.J., Jan. 9, 1969, at 19, col. 6 (Sup. Ct. Westchester County) (despite absence of fraud court may use equity powers to set aside sale which produced very low purchase price).

<sup>171</sup> 47 N.Y.2d at 521-22, 392 N.E.2d at 1244, 419 N.Y.S.2d at 60-61. The Court suggested that anticipation of an inadequate price should have prompted resort to CPLR 5240 by the debtors between delivery of the execution to the sheriff and the sale of the property. 47 N.Y. 2d at 522, 392 N.E.2d at 1244, 419 N.Y.S.2d at 61.

<sup>172</sup> See *In re Bachner*, 82 Misc. 2d 107, 368 N.Y.S.2d 749 (Sup. Ct. Nassau County 1975); *Murphy v. Grid Realty Corp.*, 73 Misc. 2d 1071, 343 N.Y.S.2d 670 (Sup. Ct. Nassau County 1973). The Court's holding is consistent with past treatment of inadequate prices at other types of judicial sales, such as the sale of a debtor's residence resulting from a judicial order at a foreclosure or bankruptcy proceeding. In *Hammerman v. Ferguson*, 50 App. Div. 2d 853, 376 N.Y.S.2d 606 (2d Dep't 1975), for example, the court reversed the set-aside sheriff's sale, stating that "mere inadequacy of price, without allegations of other mitigating circumstances, will not sustain a motion to set aside a foreclosure sale." *Id.* at 854, 376 N.Y.S.2d at 608 (citations omitted); see *Mauer v. Butler*, 55 App. Div. 2d 784, 784, 389 N.Y.S.2d 483, 484 (3d Dep't 1976). But cf. *Central Trust Co. v. Alcon Developers, Inc.*, 93

the legislative abolition of the right of redemption,<sup>173</sup> the Court's holding supports the continued use of execution sales as an effective enforcement device.<sup>174</sup> Having focused on the unavailability of the section once the rights of innocent third parties are implicated,<sup>175</sup> however, the Court's decision should not preclude equitable relief after delivery of the deed to a purchaser who is not a stranger to the underlying judgment. If the purchaser is connected to the judgment creditor, and the purchase price of real or personal property is inadequate, it would appear that a court could invoke its equitable powers to set aside the sale.<sup>176</sup>

Although *Guardian Loan* clearly indicated that the use of CPLR 5240 is impermissible once an enforcement device is complete,<sup>177</sup> the Court encouraged the use of CPLR 5240 by the debtor to suggest alternatives to, or modifications of, the proposed sher-

Misc. 2d 686, 687-88, 403 N.Y.S.2d 396, 396-97 (Sup. Ct. Wayne County 1978) (price of \$1 received on property to satisfy \$1,894,109 judgment so "grossly inadequate as to shock the conscience of the Court"). See also *State Realty & Mortgage Co. v. Villaume*, 121 App. Div. 793, 795, 106 N.Y.S. 698, 699 (1st Dep't 1907); *Housman v. Wright*, 50 App. Div. 606, 608-09, 64 N.Y.S. 71, 72-73 (2d Dep't 1900).

<sup>173</sup> See note 156 *supra*.

<sup>174</sup> As Chief Judge Cooke noted, allowing the debtor's motion "would discourage participation by third parties at judicial sales, for the title acquired at the sale would never be free from the spectre of judicial invalidation." 47 N.Y.2d at 520, 392 N.E.2d at 1243, 419 N.Y.S.2d at 59; *accord*, *Murphy v. Grid Realty Corp.*, 73 Misc. 2d 1071, 1073, 343 N.Y.S.2d 670, 671-72 (Sup. Ct. Nassau County 1973); *cf.* *Housman v. Wright*, 50 App. Div. 606, 609, 64 N.Y.S. 71, 73 (2d Dep't 1900) (court must ensure confidence of purchasers at judicial sale).

<sup>175</sup> 47 N.Y.2d at 520, 392 N.E.2d at 1243, 419 N.Y.S.2d at 59.

<sup>176</sup> Although the *Guardian Loan* decision seems to suggest that CPLR 5240 may be available to void a completed sale where the purchaser is the judgment creditor, it is submitted that the clear language of CPLR 5240, which allows its invocation only during the use of an enforcement device, bars such a result. The section draws no distinction between a third-party purchaser and a creditor-purchaser. Nevertheless, an inadequate purchase price, if paid by the purchaser-creditor, should be sufficient ground for a court to grant equitable relief. The use of equity in this situation would be consistent with the *Guardian Loan* Court's repeated intimations that a different result would have obtained if the purchaser was not "bona fide." Moreover, it would not conflict with the Court's statement that equitable relief is available when there is evidence of fraud, mistake, or overreaching.

By not distinguishing between a third-party purchaser and a creditor-purchaser, *Guardian Loan* impliedly rejected the use of CPLR 5240 in *Wandschneider v. Bekeny*, 75 Misc. 2d 32, 346 N.Y.S.2d 925 (Sup. Ct. Westchester County 1973), where the court analogized the position of the judgment creditor-purchaser to that of a mortgagee in a foreclosure sale and used both its equitable powers and CPLR 5240 to invoke the foreclosure procedure of crediting the judgment with the market value of the purchased property. *Id.* at 36, 346 N.Y.S.2d at 929; see RPAPL § 1371(2) (1979). It is suggested that if the facts in *Wandschneider* were before the Court of Appeals today, the use of equity, but not CPLR 5240, would be consistent with the *Guardian Loan* decision.

<sup>177</sup> 47 N.Y.2d at 520, 392 N.E.2d at 1243, 419 N.Y.S.2d at 60.

iff's sale.<sup>178</sup> In illustrating and emphasizing the availability of CPLR 5240 before the sale, the Court approvingly cited lower court orders that directed creditors to satisfy judgments by "less intrusive means" than the sale of residences<sup>179</sup> and that varied the terms of sales of real property to improve the chances of obtaining representative prices.<sup>180</sup> It appears, therefore, that the CPLR 5240 remedies available during an enforcement proceeding are limited, in large measure, only by the imagination and inventiveness of the debtor's attorney and the court.<sup>181</sup> It is hoped that the courts will continue to implement CPLR 5240 where appropriate to protect debtors from the harsh consequences often associated with the enforcement of money judgments.

*Robert W. Corcoran, Jr.*

#### CRIMINAL PROCEDURE LAW

*CPL 470.05: Defendant's failure to assert double jeopardy defense at trial held no bar to review on appeal*

In a criminal proceeding, the Court of Appeals generally may

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<sup>178</sup> *Id.* at 519, 392 N.E.2d at 1243, 419 N.Y.S.2d at 59. Unfortunately, as noted by various courts, the typical judgment debtor is unaccustomed to the legal intricacies of enforcement procedures and often does not resort to an attorney until the sale is completed. *Concord Landscapers, Inc. v. Pincus*, 41 App. Div. 2d 759, 760, 341 N.Y.S.2d 538, 541 (2d Dep't 1973). As one court characterized it, a debtor is "beset by apathy, indifference and fear until confronted with the unyielding legality of the sale of his personal residence." *Lee v. Community Capital Corp.*, 67 Misc. 2d 699, 702, 324 N.Y.S.2d 583, 586 (Sup. Ct. Nassau County 1971).

<sup>179</sup> 47 N.Y.2d at 519, 392 N.E.2d at 1243, 419 N.Y.S.2d at 59.

<sup>180</sup> *Id.* CPLR 5240 is designed to protect "any person, whether or not a party, who is in danger of suffering pecuniary loss or of being subjected to harassment through use of an enforcement procedure." 6 WK&M ¶ 5240.02. CPLR 5240 has been invoked to protect against various abuses accompanying the sale, or threatened sale, of a judgment debtor's property. *See, e.g.*, *Abby Financial Corp. v. Angelis*, 45 App. Div. 2d 968, 359 N.Y.S.2d 585 (2d Dep't 1974) (sale of guarantor's home vacated due to false statements in the execution); *Seyfarth v. Bi-County Elec. Corp.*, 73 Misc. 2d 363, 341 N.Y.S.2d 533 (Sup. Ct. Nassau County 1973) (sale of husband's interest in tenancy by the entirety postponed); *Hammond v. Econo-Car of the North Shore, Inc.*, 71 Misc. 2d 546, 336 N.Y.S.2d 493 (Sup. Ct. Nassau County 1972) (creditor ordered to wait until husband's interest in tenancy by entirety destroyed by death, divorce, or sale of house); *Holmes v. W. T. Grant, Inc.*, 71 Misc. 2d 486, 336 N.Y.S.2d 601 (Sup. Ct. Nassau County 1972) (creditor ordered to accept \$20 per week in lieu of execution upon welfare recipient's home); *Gilchrist v. Commercial Credit Corp.* 66 Misc. 2d 791, 322 N.Y.S.2d 200 (Sup. Ct. Nassau County 1971) (interest of children paramount to that of creditor), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 378 (1971).

<sup>181</sup> *See* note 180 *supra*. *See also* CPLR 5228, commentary at 309-10 (appoint receiver for private sale); CPLR 5236, commentary at 425 (motion for extension of time to pay).