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CASE LAW DEVELOPMENTS

Narrow Majority of Court of Appeals Holds Judgment Debtor's Exclusive Avenue for Relief for Unlawful Restraint Is Through CPLR Article 52

Judgment Debtor Cannot Assert Common Law Tort Claims

In *Plymouth Venture Partners, II, L.P. v. GTR Source, LLC*, 2021 N.Y. Slip Op. 07055 (December 16, 2021), the Court of Appeals was presented with certified questions to address the avenue(s) of relief available to a judgment debtor where the judgment creditor fails to comply with the CPLR article 52 procedural requirements.

In this case, two New York–based creditors sought and obtained money judgments in New York courts against a Michigan corporation. They (improperly) collected the debts by "authorizing" a New York Marshal and Sheriff to execute levies on a Michigan branch of a Michigan bank that had no presence in New York. Because of this lack of presence, the creditors—and the New York courts, Marshal, and Sheriff—lacked jurisdiction to authorize or effectuate a levy on the funds that the bank held. Two separate tort actions were filed in federal court by the receiver on behalf of the judgment debtor alleging, among other things, wrongful restraint and execution. Both actions were dismissed.

After consolidation, the Second Circuit certified the following questions:

1. whether a judgment debtor suffers cognizable damages in tort when its property is seized pursuant to a levy by service of execution that does not comply with the procedural requirements of CPLR 5232(a), even though the seized property is applied to a valid money judgment; and, if so

2. whether the judgment debtor can, under these circumstances, bring a tort claim against either the judgment creditor or the marshal without first seeking relief under CPLR 5240.

The plaintiff-debtor argued that the executions and levies here did not comply with the article 52 requirements (specifically CPLR 5232(a)), "resulting in 'void or irregular process' that reduced the executions and levies to 'legal nullities' and thereby exposed the defendants to tort liability." *Id*. at *8. The plaintiff sought to recover the amount taken from the accounts that was used to satisfy the judgments and "consequential" damages. Defendant-creditors argued that the plaintiff suffered no damage from the statutory violations and, regardless, the debtor's sole remedy was to seek CPLR article 52 relief.

A narrow majority of the Court of Appeals concluded that the debtor's sole remedy was under article 52:

> There is no need to contort traditional tort claims to accommodate a novel theory by a judgment debtor seeking to recover funds used to satisfy a valid judgment based on alleged violations of our civil procedure law. Instead, CPLR article 52, which provides a mechanism for addressing the "innumerable situations [that] can arise that manifest abuse of the enforcement devices" authorized in that statute, is the exclusive avenue for a judgment debtor seeking relief from the use of an enforcement mechanism that does not comply with article 52's requirements.

Id. at *8–9.

The Court emphasized that CPLR article 52, and specifically CPLR 5239 and 5240, set forth provisions permitting an "interested person," which includes a judgment debtor, "to secure remedies for wrongs arising under the statutory scheme." CPLR 5239 governs the process of levy by service of an execution and provides that an interested person can commence a special proceeding "to determine rights in the property or debt." The court can vacate an execution or order, void a levy, "direct the disposition of the property or debt, or direct that damages be awarded."

CPLR 5240 gives

> the courts broad discretionary power to control and regulate the enforcement of a money judgment under article 52 to prevent "unreasonable annoyance,

IN THIS ISSUE

> expense, embarrassment, disadvantage, or other prejudice to any person or the courts." . . . Accordingly, CPLR 5240 provides courts with the ability to craft flexible and equitable responses to claims that arise with respect to enforcement of valid money judgments (citations omitted).

Id. at *11.

The majority looked toward its prior holding in *Cruz v. TD Bank*, 22 N.Y.3d 61 (2013) as providing a "useful framework." There, the Court held that the Exempt Income Protection Act (2008 amendments to article 52) did not create a private right of action for money damages or injunctive relief by a judgment debtor against a bank. In fact, a "significant" portion of the Court's analysis in *Cruz* was that article 52 "provides avenues for relief from unlawful restraint against a judgment creditor." *Plymouth*, 2021 N.Y. Slip Op. 07055 at *13. Moreover, lower courts have interpreted CPLR 5240 "to provide this valuable avenue of relief for judgment debtors, using their equitable power under this provision in myriad ways." *Id*.

The Court maintained that, notwithstanding the debtor's efforts to characterize its claims here as being in tort, the recovery sought was for alleged violations of the article 52 procedural requirements. To permit a judgment debtor to evade the avenues of relief under article 52 provided by the legislature "would be inconsistent with the relevant statutory framework" and would eviscerate article 52's purpose.

The dissents, consisting of one written by Judge Fahey and the other by Judge Wilson, took issue with the majority's analysis. Judge Fahey conceded that CPLR article 52 "is the correct vehicle for resolving claims based on collection efforts that are alleged to violate article 52." *Id*. at *16. He noted, however, that the general rule is "'that when the common law gives a remedy, and another remedy is provided by statute, the latter is cumulative, unless made exclusive by the statute.' . . . Here, CPLR article 52 neither states nor implies that its remedies are exclusive" (citation omitted). *Id*. at *20. Thus, the failure to seek CPLR article 52 relief did not preclude a tort action.

Judge Wilson maintained that nothing in New York law supported the conclusion that the statutory processes supplanted or limited a common law tort claim. He stressed that a judgment creditor has two options when seeking to levy on assets held in a state other than New York by a garnishee over which the issuing court has no jurisdiction: commence a plenary action in the foreign jurisdiction or use the tools of the Uniform Enforcement of Foreign Judgments Act (UEFJA).

Thus, here the judgment creditors acted in a legally unauthorized manner. Judge Wilson opined that theoretically, it is possible "that a judgment debtor could suffer cognizable damages in tort when its property is seized, in violation of CPLR 5232(a), and used to satisfy a valid judgment" (addressing the first certified question "avoided by the majority"). In addition, Judge Wilson asserted that there was no basis to conclude that CPLR article 52 procedures are a prerequisite to filing a tort claim; they do not foreclose or impair the common law tort claim and thus are to be treated as supplementary. Finally, the CPLR article 52 procedures may not always be the most efficient for judgment debtors and the possibility of a tort action might provide a

> powerful incentive for judgment creditors to use the UEFJA process instead of attempting, as here, to instruct a New York Sheriff or Marshal to levy on property over which New York lacks jurisdiction. Third parties claiming a superior right to those of the judgment creditor may benefit from the commencement of enforcement proceedings in the state in which the assets are held and from the period of repose before a levy can occur.

Id. at *43.

Court of Appeals Holds That Special Circumstances Did Not Require That Defendants' Forum Non Conveniens Motion Be Denied

Finds That the Courts Below "Painstakingly" Considered the Relevant Factors and Thus Did Not Abuse Their Discretion

Forum non conveniens, codified in CPLR 327, does not impact subject matter or personal jurisdiction but applies where there are no significant contacts with New York. It is a discretionary determination of the trial court, and the Court of Appeals has articulated certain relevant factors to consider, stressing the "flexibility" of the doctrine "based upon the facts and circumstances of each case." *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984).

> Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. No one factor is controlling (citations omitted).

Id.

Estate of Kainer v. UBS AG, 2021 N.Y. Slip Op. 07056 (December 16, 2021), deals with a lesser known component of a forum non conveniens analysis. That is, "where there are special and unusual circumstances favoring acceptance of a suit between nonresident parties based on an out-of-state [claim], it is error of law for the [courts below] to exclude consideration of such circumstances in deciding whether to exercise [their] discretion in favor of accepting or of rejecting jurisdiction." *Varkonyi v S.A. Empresa De Viacao Airea Rio Grandense [Varig]*, 22 NY2d 333, 338 (1968). The question in *Kainer* was whether there were such special circumstances that required the denial of the forum non conveniens motion.

Kainer involved a dispute over the ownership of the proceeds of sale of an Edgar Degas painting stolen by the Nazi regime from Margaret Kainer in the 1930s. Kainer, a former resident of Germany and a refugee in Switzerland during World War II, relocated to France and died there in 1968. The plaintiffs are Kainer's estate and 11 putative heirs, alleging that the estate passed to them under French intestacy law. The defendant is a foundation (created by the predecessors of the UBS defendants) allegedly provided for in Kainer's father's will, to be established where Kainer died without children or grandchildren (the "Foundation"). The plaintiffs allege that following her death, the defendant's predecessors created the Foundation as a Swiss public entity and improperly obtained Kainer's assets; that certain Swiss localities were determined to be the estate's sole legal heirs based

on false claims; and that a prior German action between the Foundation and the Swiss localities concluded in a settlement dividing the estate among those parties.

In 2000, the Foundation registered the painting as stolen in lost and looted art databases. In 2009, defendant Christie's Inc. arranged for the private sale of the painting in which the Foundation renounced its rights to the painting in exchange for 30% of the proceeds from its sale (ultimately receiving $1.8 million). Days later, Christie's sold the painting for $10.7 million at a New York public auction.

Plaintiffs brought this action seeking damages against the Foundation defendants, the UBS defendants, and Christie's, and asserting claims, including conversion, unjust enrichment, and conspiracy based on the 2009 sale. The defendants moved to dismiss on forum non conveniens grounds and the defendants, except Christie's and UBS's American arm, alternatively sought dismissal on personal jurisdiction grounds. While the motion was pending, Congress enacted the Holocaust Expropriated Art Recovery Act of 2016 (the HEAR Act), which extended state statutes of limitations in civil actions to recover artwork appropriated by the Nazis. The trial court permitted supplemental briefing as to the HEAR Act, but the plaintiffs failed to address or preserve any specific argument as to the Act's applicability to the appropriateness of a forum non conveniens dismissal in an action seeking damages.

An overwhelming majority of the Court of Appeals held that the trial court did not abuse its discretion in dismissing the action against the Foundation and UBS defendants. The Court acknowledged that there were special circumstances here:

> [T]he origins of plaintiffs' claims lie in "[t]he unique and horrific circumstances of World War II and the Holocaust." As explained in the Congressional findings accompanying the HEAR Act, "[i]t is estimated that the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups." It has long been the public policy of the United States that "steps should be taken expeditiously to achieve a just and fair solution to claims involving such art that has not been restituted if the owners or their heirs can be identified." In addition, as plaintiffs point out, New York has a compelling interest in protecting the integrity of its art market and preventing the illicit trafficking of stolen art in the State (citations omitted).

Kainer, 2021 N.Y. Slip Op. 07056 at *8.

However, the Court held that the record reflected that the courts below "painstakingly considered the relevant factors, including the public policies at issue, and determined that the balance of factors militated in favor of dismissal." *Id*. at *8–9. The Court stressed that special circumstances that impact compelling state interests do not require the denial of the motion where there are only tenuous connections to New York; the availability of a suitable alternative is a "most important factor" but not a "precondition to dismissal"; and the lower courts did not abuse their discretion.

In a dissent, Judge Fahey pointed to the language of CPLR 327, which permits the Court to dismiss on forum non conveniens grounds "[w]hen the Court finds that in the interest of substantial justice the action should be heard in another forum . . . on any conditions that may be just." Thus, Judge Fahey insisted that justice is the prevailing consideration in a forum non conveniens analysis and that the general factors alluded to above "are simply inadequate when we are in the realm of the devastating aftermath of one of the greatest crimes in human history." *Id*. at *11.

He disagreed with the majority that special circumstances did not warrant the conclusion that the lower courts abused their discretion, in this "unique circumstance for which our precedent does not adequately account." *Id*. He pointed to the established New York public policy to "protect the true owners of stolen artwork and to reject legal doctrines or policies that 'encourage illicit trafficking in stolen art.'" *Id*. at *16. The dissent also asserted that the HEAR Act of 2016 was further proof of the public policy concerns and that the claims here be determined on the merits.

Court Need Not Resolve Personal Jurisdiction Issues Before Addressing Forum Non Conveniens Motion

A subsidiary issue in *Kainer* was the plaintiffs' argument that the trial court erred in not first resolving the defendants' personal jurisdiction issues. The Court of Appeals asserted that the plaintiffs' erroneous position was predicated on their misreading of the language in a prior Court decision that "the doctrine [of forum non conveniens] has no application unless the Court has obtained in personam jurisdiction of the parties." *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 579 (1980).

The *Kainer* Court noted that the argument the plaintiffs advanced was not presented to the Appellate Division or Court of Appeals in *Ehrlich-Bober*. In fact,

> [t]he statement on which plaintiffs rely appears in the procedural history portion of our decision and was simply a description of the Appellate Division decision—in concluding that a forum non conveniens dismissal was not warranted and dismissing on an unrelated ground, the Appellate Division implicitly disagreed with the conclusion of Supreme Court that personal jurisdiction was lacking. We did not hold in *Ehrlich-Bober* that a court invariably must resolve any outstanding personal jurisdiction issue prior to addressing forum non conveniens, decline to adopt such a rule in this case, and conclude that the court here did not abuse its discretion in that regard (citation omitted).

Kainer, 2021 N.Y. Slip Op. 07056 at *5–6.

When Opposing Forum Non Conveniens Motion, Consider Alternatively Asking Court to Set Conditions if the Motion Is Granted

In *Kainer*, the dissent noted that the plaintiffs failed to ask the trial court to condition the grant of a forum non conveniens dismissal on defendants' waiver of procedural defenses in a Swiss proceeding in which the plaintiffs were litigating against the Foundation.

The dissent questioned whether such a specific request is necessary "when the primary obligation of the courts in assessing a forum non conveniens dismissal is to consider the 'interest of substantial justice.'" *Id*. at *21. However, good practice would be generally to include such a request as an alternative to a denial of the motion, where appropriate.

Workers' Compensation Law §25-a(1-a) Forecloses Transfer of Liability to Special Fund for Death Benefits Claim Submitted After Cutoff Date

Majority Holds That Liability for Death Benefits Could Not Have Been Transferred Together With Prior Timely Submission of Disability Claim

Verneau v. Consol Edison Co. of N.Y., 2021 N.Y. Slip Op. 06531 (November 23, 2021) deals with The Special Fund for Reopened Cases ("The Special Fund") in connection with workers' compensation claims. The Special Fund was created in 1933 to provide benefits for injured workers in the event of an insurer's insolvency, an employer's inability to pay, or "the reopening of a long-closed matter." The liability for a claim could be transferred to the Special Fund (from an employer or insurer) if certain statutory criteria were met (Workers' Compensation Law § 25-a(1)). Once a claim was transferred, the insurer had no further involvement.

In 2013, the legislature closed the fund to new claims, amending WCL § 25-a with the addition of subsection (1-a), establishing a cutoff of January 1, 2014 for new claims, but allowing that "the board may make a finding after such date pursuant to section twenty-three of this article upon a timely application for review."

The question in *Verneau* was whether WCL § 25-a(1-a) foreclosed the transfer of liability to the Special Fund for a *death benefits claim* submitted after the cutoff date, even though there was a prior timely transfer of liability for a worker's *disability claim* arising out of the same injury. A divided Court of Appeals responded in the affirmative.

Two appeals were involved here. In each, the claimant's *disability* claim was transferred to the Special Fund, one in 2011 and the other in 1997. Both claimants died and family members applied for death benefits after the cutoff date in WCL § 25-a(1-a). Ultimately, the Appellate Division held in both cases that since the Special Fund had been liable for the disability claim, it would be liable for the death claim.

A majority of the Court of Appeals reversed. Looking to the "plain meaning" of the statutory text, the Court focused on the use of the term "a claim" to conclude that the "legislature's choice of the singular indefinite article—'a' claim—means the liability to be transferred is for a *single claim at the time of application*. Thus, the statute prohibits the transfer of liability for any claim that has accrued on or after the cut-off date." *Id* at *6. The Court stressed that the relevant statute did not "suggest that a death benefits claim is merely an associated cost of a disability claim. Rather, a death benefits claim is a separate and distinct legal proceeding (citation omitted)." *Id* at *6, n.1.

To support its position, the Court referred to its early decision in *Zechmann v. Canisteo Volunteer Fire Dep't*, 85 N.Y.2d 747 (1995), decided nearly 20 years prior to the enactment of WCL § 25-a (1-a). There, the Court concluded that a death benefits claim was "separate and distinct" and accrues at the date of a death: "We assume the legislature acts with knowledge of this Court's decisions." *Verneau*, 2021 N.Y. Slip Op. 06531 at *7.

Liability for the death benefits claim could not have been transferred together with the earlier liability for the disability claim because (i) the cause of action for death benefits does not accrue before death, (ii) the statutory structure treats death benefits as separate and distinct from disability benefits, and (iii) death benefits liability does not proceed automatically upon a finding of liability for disability benefits. In fact, many times the casual relationship between the work-related injury and the death benefits claim is contested.

The Court maintained that its interpretation of WCL § 25-a(1-a) furthered the legislature's goal in amending WCL § 25-a. The Special Fund was originally intended to give carriers relief "in a small number of cases where liability unexpectedly arises in long-closed cases." However, ultimately insurers reaped windfalls collecting premiums for claims paid out not by the carriers but by the Special Fund. The Special Fund was closed to prevent such windfalls. Thus, foreclosing the transfer of liability for death benefits where the death occurred after the cutoff would further the objective of preventing windfalls.

In dissent, Judge Garcia saw a distinction between the "transfer of *a claim*" and the language of the statute, which refers to the "transfer of *liability of a claim*." He would affirm the Appellate Division, finding that "liability for costs associated with the original claim, including the cost of a related death benefits claim, transferred with the original disability claim." *Id*. at *15.

He asserted that the sole issue in the Court's decision in *Zechmann* was the timeliness of the claim. It did not address the issue here. While he agreed with the majority that the legislature is presumed to be knowledgeable of the law in effect when a statute is enacted, Judge Garcia pointed to the 2011 *Third Department* decision in *Matter of Fitzgerald v Berkshire Farm Center & Services for Youth*, 87 A.D.3d 353 (3d Dep't 2011), "holding that once the requirements for transfer of a 'stale claim' had been satisfied, the Special Fund stepped into the shoes of the carrier and was liable for a subsequent causally related claim for death benefits whenever it accrued." *Verneau*, 2021 N.Y. Slip Op. 06531 at *17. In fact, Third Department decisions following the WCL 2013 amendment applied *Fitzgerald*. Judge Garcia stressed the significance of the fact that that an appeal from a WCB decision must be taken to the Appellate Division, Third Department, hereby making that Department's precedent crucial in any analysis:

> "The rationale behind this provision is to create a court with a specific expertise to deal with the complexity of the appeals that are generated in this area." So, while it is true the Third Department is not the final "arbiter" of New York law [as the majority asserted], it plays a unique role in developing the law of workers' compensation. And, as discussed, no appeal to this Court was taken from the Third Department's decision in either *Fitzgerald* or *Misquitta* (citation omitted).
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> *Id*. at *19.

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