

**APPELLATE DIVISION FASHIONS EQUITABLE REMEDY
IN CASE ARISING FROM POST-JUDGMENT
RESTRAINT OF BANK ACCOUNT**

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By: Natalie Shkolnik
Jessica Taran

Distressed Holdings, LLC v. Ehrler, 2013 WL 6246247 (2d Dep't, Dec 4, 2013)

Restraint of a judgment debtor's bank account without notice or opportunity to claim that certain funds were exempt from debt collection violated the judgment debtor's due process rights, the Appellate Division, Second Department (the "Court") held in a decision dated December 4, 2013. The Court nevertheless declined to vacate the restraining notice, instead fashioning an equitable remedy that took into account that the notice failure was not the fault of the judgment creditor, which had served a restraining notice, exemption notice, and exemption claim form on the bank holding the judgment debtor's account: it was the non-party bank that had failed to forward the documents to the judgment debtor. In its decision, the Court directed the judgment creditor to immediately provide the judgment debtor with the exemption notice and exemption claim forms, in order to afford the judgment debtor the opportunity to claim that certain funds were exempt from debt collection.

The case has its origins in a foreclosure action against the judgment debtor commenced in Florida. Distressed Holdings, LLC ("Plaintiff") purchased the foreclosed property and obtained a deficiency money judgment against Rhonda Ehrler ("Defendant") in the amount of \$188,867. Plaintiff then domesticated the deficiency judgment in Nassau County Supreme Court and commenced enforcement proceedings by serving Defendant's bank, Bank of America, with an information subpoena and restraining notice.

Plaintiff complied with the strict provisions of New York Civil Practice Law & Rules ("CPLR") § 5222-a, which require that, upon serving a judgment debtor's banking institution with a restraining notice, the judgment creditor must also serve an exemption notice and two copies of exemption claim forms, which the banking institution must, in turn, serve on the judgment debtor within two days of receipt. Through no fault of Plaintiff's, the bank failed to notify Defendant of the restraint on her account and failed to serve her with the documents it had received from Plaintiff. Thus, Defendant did not learn of the restraint on her account until she attempted a banking transaction. Plaintiff subsequently issued an Execution with Notice to Garnishee ("Execution") to a New York City marshal, directing him to levy Defendant's bank account.

Defendant sought to vacate the restraining notice, arguing that it was invalid given Plaintiff's failure to demonstrate compliance with CPLR § 5222-a, whose purpose is to protect judgment debtors from the collection of exempt funds. Plaintiff argued in response that vacating the restraint due to the failure by Defendant's bank, over which Plaintiff had no control, would be unfair and unjust. Plaintiff also argued, albeit unsuccessfully, that the issue of compliance with CPLR § 5222-a was academic because it had served the Execution, directing the New York City marshal to levy against Defendant's bank account; Plaintiff

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contended that a restraining notice pursuant to CPLR 5222 and a levy of personal property pursuant to CPLR 5232 were separate and distinct methods of judgment enforcement and that a judgment creditor could use either or both methods.

The Court agreed with the judgment debtor that she was deprived of due process when the bank restrained her account without providing her with notice or an opportunity to claim any of the funds in the account as exempt. The Court also rejected Plaintiff's argument that the failure to provide notice was mooted by the levy executed against Defendant's bank account, expressly holding that "as evidenced by the plain text of CPLR 5222-a, the Legislature intended for the banking institution to provide the requisite notice to the judgment debtor regardless of whether a restraining notice or levy is employed to enforce a judgment." And yet, the Court did not vacate the restraining notice.

In fashioning a remedy, the Court invoked its equitable powers pursuant to CPLR § 5240, which provides it with authority to issue any order "denying, limiting, regulating, extending, or modifying the use of any enforcement procedure." In doing so, the Court weighed the following against each other: (i) on the one hand, Plaintiff's compliance with its obligations under CPLR 5222-a, its lack of control over the bank's noncompliance, and its strong interest in the satisfaction of the judgment; and (ii) on the other hand, Defendant's strong interest in retaining those funds in her account that are exempt. On balance, the Court found that it would be inequitable to terminate the restraint but directed that Defendant be afforded an opportunity to claim exemptions, consistent with the procedure set forth in CPLR § 5222-a, before any of her funds were turned over to Plaintiff.

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