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State High Court Decision Exorcises Ghosts of Liens Past

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Secured borrowing and the transfer of money are the bedrock of the global financial system. However, that system finds itself in crisis. Before the current malaise can end, the system must rebuild in a manner that ensures mutual trust between lenders and borrowers. Rapid repair of the economy requires stabilizing laws and judicial interpretations of those laws. A 2009 decision by the Court of Appeals, *Gletzer v. Harris*,1 took an important step in restoring the confidence necessary to releasing the flow of money from lender to consumers and business. *Gletzer,* by explicit design, allows a lender to make a loan, secure in the knowledge that a title search will disclose all judgments or liens that may affect the ability of the lender to conclude a foreclosure in its favor. Gletzer eliminates the ghastly power of ghosts of liens past to be resurrected without notice. Thanks to *Gletzer,* no one need worry about a docketed judgment which is not timely renewed.

In a triumph for the title industry, but an apartment blow for judgment creditors, *Gletzer* held that judgment liens renewed in New York will only obtain junior priority unless the judgment creditor completes the renewal process during the 10th year of the lien's life. The problem with that process is that if it may take more time than the law allows to prevent gaps in the judgment's lien status.

The statute in question is CPLR 5014, a part of the cluster of statutes giving judgment creditors in New York 20 years to collect on their judgments,2 but essentially automatic lien3 status only during the first 10 years.4 To achieve lien status during the second 10 years, the judgment creditor has to sue the judgment debtor anew, both starting and completing the process during the 10th year.5

Mr. Gletzer's Problem

On Oct. 23, 1991, Morris Gletzer secured a default judgment against Amos Harris. Unable to collect earlier, Gletzer commenced an action on Oct. 22, 2001 to renew the initial judgment lien.

The Supreme Court granted Gletzer's renewal judgment on Feb. 8, 2005, more than three years after the initial lien had lapsed. However, the trial term purportedly solved the problem by making the lien of the renewal judgment effective nunc pro tunc to the first day of the 11th year.

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During that same period, Harris had executed mortgages to two unrelated mortgages without notice of Gletzer's procedures. They thereupon brought suit to assert the superiority of their liens over Gletzer's renewal lien. Although Gletzer won at trial term, both the Appellate Division and the Court of Appeals ruled for the mortgages, disallowing the retroactive effective of the lien.

Fairness

Many question the fairness of a judgment creditor being ousted from a position of priority by a newcomer when the creditor has apparently done as much as possible to protect the lien's position in the collections pecking order.

In the main body of the Court of Appeals ruling, however, the court appears focused on the integrity of the recording system and on the necessity for those who are taking interests in land to be able to rely on the completeness of the public record. That body focuses on stability- oft the focus in decisions regarding real estate.6

The court stated, "(W)e thus conclude that those seeking to secure any interest in real property must be able to rely upon a public record to furnish full and complete information of any conveyances, liens or encumbrances affecting such property." The Court wrote that the recent mortgages "should not be penalized for failing to unearth an expired lien or investigating the prospect that it might be subject to a pending renewal request."

However, *Gletzer's* Footnote 5, rather cryptically reads in its entirety:

It is interesting to note that Gletzer may not have been without a remedy after the expiration of the original 10-year lien. He could have filed an execution on his judgment pursuant to CPLR 5203 (b) or a notice to the world of his interest in the property.

Presumably the Court believes that had Mr. Gletzer may not have been without a remedy after the expiration of the original 10-year lien. He could have filed an execution on his judgment pursuant to CPLR 5203 (b) or a notice of levy pursuant to CPLR 5235, as such measures would have provided notice to the world of his interest in the property.

Debtor Delay

The Court of Appeals wrote *Gletzer* to protect the interests of purchasers and mortgagees, and their title insurer. However, debtors are beneficiaries as well, albeit undeservedly.

Whatever the circumstances which led to Mr. Gletzer recovering a judgment from Mr. Harris in the first place, that statute is designed for any money judgment, based on anything from default on a loan to violent assault. There is no reason to hold judgment debtors in any special favor as a class. Yet, from this quirk in the statutory structure, all such debtors enjoy the privilege of pledging their real property as collateral for some monetary benefit even though there is a judgment out there which may reacquire its status as a lien.

While the intended beneficiaries of the *Gletzer* ruling are worthy enough, this unintended beneficiary is not. With this benefit beckoning them, unscrupulous debtors have major motivation to do anything to delay the judgment renewal. Normally, there are only two defenses available to them: that

the original judgment was itself illegally obtained and that the court lacks personal jurisdiction over them to defend the new action- the latter of which Harris successfully used to delay the action for some four years.7

Moving The Case

Gletzer should have begun his renewal action nearly a year earlier. Judgment creditors should be filing the complaint for renewal on the first business day of the 10th year of the original judgment. If the judgment creditor defaults on the new action, the creditor should immediately file for a judgment. Absent a default, whatever the answer contains, the judgment creditor should move by order to show cause to dismiss the defenses or for summary judgment. Even if there is a question of fact, at least the motion will alert the trial term of the tight deadline. Experienced litigators will all agree that telling a court that there is no rush is no way to guarantee soeedy resolution, but silence will almost guarantee slowness.

Other Procedures

Gletzer's footnote 5 focuses on CPLR 5203 (b) and 5235, statuses which are amongst the lease construed sections in the CPLR.

Section 5203(b) allows for the original assertion of personal jurisdiction whereby the judgment was obtained in the first place to act as a sufficient predicate to order an extension of the lien beyond 10 years by way of motion. Not specifying a time for making the motion, it calls for the extension to be temporary and only long enough to get the property on the auction block. Creditors who do not want the property to be sold will wait to make this motion as late as possible in the 10th year of the original judgment to maximize its effect, but early enough in that year for the extension to be in place by the time the original ten years have expired. As in *Gletzer,* the judgment creditor cannt date his lien extension from the time of the making of the motion, but only from the time of the granting of its order.

Why would a judgment creditor hold off on sending the property to the block? Because if the property is worth less than the judgment, especially if there are superior liens themselves greater in value than the judgment, the judgment creditor is better off with the coercive effect of the lien on the property than the incomplete or even zero funding of the judgment that happens if the property is sold.

Section 5235 is simply a notice statute. It is an exact analogy to the notice of pendency.8 Like a notice of pendency, it merely asserts that there is a clod on the title to the property and that the enforcment officer can be putting the property on the block. Thus, while not directly asserting or being a lien, it has the effect of blocking later conveyances, subjecting them to the earlier judgment's enforcement.

While some may regard 5235 as lacking teeth, the real problem with it is not that it fails to be a direct lien, but rather the timing mechanism the wording of the statute suggests. The statute states that its filing must take place "after the expiration of 10 years after the filing of the judgment-roll." If the 5235 filing takes place on precisely the first day of the 11th year, then there should theoretically be no gap in the judgment creditor's coverage. However, only the sheriff, a public official who may or may not see the urgency in filing, has authority to make a 5235 filing. No matter how much the judgment creditor may try, there is no procedure to compel promptness.

The answer to this would seem to lie with getting the paperwork to the sheriff before the end of the 10th year so that the sheriff's filing takes place slightly before the expiration of the original lien. However, *Community Capital Corp. v. Lee,*8 a trial term decision, holds this improper, rendering the premature Section 5235 filing ineffective.

The court wrote, "Gletzer may not have been without a remedy after the expiration of the original 10-year lien." The court did not write, "Gletzer had a remedy." The use of the word "may" which makes one wonder whether the Court of Appeals agrees with *Lee. Gletzer* does not tell us enough to answer that question.

The Script

The first day of the 10th year, the judgment creditor should commence the action to renew the lien. This must be followed with an order to show cause for accelerated judgment, either by motion to dismiss defenses or by summary judgment on the complaint, at the earliest possible date. If, at around the six-month mark it appears that there will be a delay in that suit, the judgment creditor should move under 5203 (b) for an extension of the lien and should also request the court to grant a preliminary conference in order to alert the court of the looming deadline. That extension should comfortable take the lien past the end of the 10th year. While under that extension, the judgment the judgment creditor should have the sheriff file under 5235. By following this script, the judgment creditor suffers no gap in lieven coverage and, it should be noted, no hazard for the title industry or junior mortgagees.

Possible Statutory Changes

While the suggested script is effective, it is undoubtedly cumbersome and discriminatory against all but institutional debt collectors. Requiring it simply serves no discernible public policy. The statuses require amendment.

The Appellate Division decision in *Gletzer*10 suggests as solutions: temporary lien extension, allowing more than a year for the renewal, or obviously, making the lien 20 years in the first place.

The existing renewal process wastefully calls for a fresh assertion of personal jurisdiction over someone who was already under New York's jurisdiction for the first judgment. Even were there merit to making the judgment creditor reassert his status, a statutory amendment could replace the bringing of a second action with registration, like foreign judment registration under CPLR 5402 (b). Let the judgment debtor have the burden of mounting the challenge.

The current statute is a waste of private and public money. Having read every case construing these statutes, we find no reason for having the current statutory scheme.

The most sensible solution is to make the lien of a judgment 20 years in the first place.

Barring that, a simple procedure of re-registering the judgment with a simple form a layman can fill out without attorney assistance is the next best step to fairness and equity.

Passing Judgment on 'Gletzer'

Gletzer appears to be a good ruling about a bad set of laws. It secures stability in land titles and reliability in transactions. It casts the duty for diligence in protecting rights on those who best know the rights they have. The laws in question, although able to secure those rights, are ridiculously arcane and cumbersome and cry out for modernization.

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Endnotes

1. 12 N.Y. 3d 468 (2009).

2. CPLR § 211(b).

3. In order for a judgment to attach to real property as a lien, the judgment or a transcript of it must be filed with the Clerk of the County where the land is situated.

4. CPLR § 5203(a).

5. CPLR § 5014(c).

6. See *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.,* 87 NY2d 130 (1995).

7. As recently as 1997, the property itself would have been a sufficient predicate for the exertion of jurisdiction. But the United States Supreme Court struck down so called "quasi in rem jurisdiction" in *Shafer v. Heitner,* 433 U.S. 186 (1977). However, before *Shafer,* commentators had already questioned the constitutionality of using property as a jurisdictional predicate in an action unrelated to the property itself. See, Zammit, "Quasi In-Rem Jurisdiction: Outmoded and Unconstitutional?", 49 St. John's L.Rev. 668, 670 (1975).

8. Most commonly called a "lis pendens." See CPLR 6501.

9. 58 Misc. 2d 34, 294 N.Y.S.2d 336 (Sup. Ct., Nassau County, 1968).

10. 51 A.D.3d 196.