State of New York
Court of Appeals

OPINION

No. 73
Plymouth Venture Partners, II, L.P. et al.,
Appellants,
v.
GTR Source, LLC et al.,
Respondents.

Plymouth Venture Partners, II, L.P. et al.,
Appellants,
v.
Capital Merchant Services, LLC,
Respondent.

Shane R. Heskin, for appellant.
Ryan K. Cummings, for respondent GTR Source, LLC.
Christopher R. Murray, for respondent Capital Merchant Services, LLC.
Andrew P. Schriever, for respondent Stephen W. Biegel.
New York State Creditors Bar Association, amicus curiae.

GARCIA, J.:

In two cases brought in federal court, a judgment debtor asserted tort claims against its judgment creditors and a New York City marshal based upon violations of the CPLR article 52 service requirements allegedly committed in the execution of valid judgments issued by New York courts. Uncertainty as to the viability of such tort claims, particularly with respect to any "damages" the judgment debtor could show in such circumstances, understandably ensued.

As a result, the Second Circuit Court of Appeals certified the following questions to this Court:

> "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
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> 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."

(*Plymouth Venture Partners, II, LP v GTR Source*, 988 F3d 634, 645 [2d Cir 2021]).

We hold that a judgment debtor's exclusive avenue for relief under these circumstances is to bring an appropriate action pursuant to CPLR article 52. We therefore answer the certified questions accordingly.

I.

FutureNet, a Michigan corporation, borrowed money from defendants. In 2017, the company entered into agreements with GTR Source (GTR) and Capital Merchant Services (CMS), two merchant cash advance (MCA) businesses, for the purchase and sale of future receivables.[1] Pursuant to these agreements, FutureNet received cash at closing and was to arrange for the proceeds of its future receivables to be direct deposited into accounts with Comerica Bank in Michigan, from which GTR and CMS would debit fixed daily payments

[1] FutureNet's agreements with GTR and CMS were nearly identical; "the only difference [between the two transactions] was the magnitude of the deal" (*Plymouth Venture Partners v GTR Source*, 988 F3d 634, 638 [2d Cir 2021]).

over the course of eighteen weeks. By February 2018, FutureNet had defaulted by blocking GTR and CMS from the Comerica accounts, ending the agreed upon method for repayment of the loans. In response, pursuant to affidavits of confession signed by FutureNet's CEO as part of the agreements, two judgments were entered in New York courts, one for $777,957.59 owed to CMS and one for $120,154.42 owed to GTR.

After judgment was entered, GTR began collection efforts by serving a restraining notice on Comerica Bank in Detroit, Michigan. Upon learning of the restraining notice, FutureNet objected in an email to GTR, stating that Comerica had no presence in New York, that the restraining notice was "tortiously interfering with the superior UCC liens of FutureNet's senior lenders," and threatening to file a temporary restraining order. GTR did not withdraw the restraining notice. Instead, days later, GTR issued an Execution with Notice to Garnishee and directed a New York City marshal, Stephen Biegel, to serve Comerica with a Notice and Levy and Demand on Corporate Creations Network, Inc., Comerica's purported agent for service of process, in Nyack, New York, which in turn directed Comerica to turn over any of FutureNet's property in its control.

As collection efforts moved forward, FutureNet took a number of steps to vacate the underlying judgment, first moving to vacate on procedural and jurisdictional grounds for failure to comply with CPLR 3218's single county requirement. This motion was denied in March 2018 (*GTR Source, LLC v FutureNet Group, Inc.*, 58 Misc 3d 1229[A], 2018 NY Slip Op 50311[U], *6 [Sup Ct, Orange County 2018]). The following day the marshal's office faxed an amended levy to a Comerica office in Detroit. Shortly thereafter,

Comerica complied with the levy, issuing a bank check to Biegel for $127,082.29, the amount of the judgment plus the marshal's poundage fee, all debited from FutureNet's account. GTR then filed a satisfaction of judgment.

In April 2018, FutureNet filed a complaint against GTR in Supreme Court, Orange County, again seeking vacatur of the judgment and now also seeking restitution under CPLR 5015, breach of contract, wrongful execution, and fraud. Later that month, other creditors of FutureNet began proceedings in Michigan state court for the appointment of a receiver (the "Receiver"), claiming, among other things, that entering into the two loan agreements at issue here, and allowing the related judgments and restraining orders to be entered, violated the provisions of their loan agreement. The appointment was made and on August 24, 2018, the Receiver voluntarily withdrew the complaint in Supreme Court and, on the same day, moved yet again to vacate the judgment, once more alleging noncompliance with CPLR 3218. This time, the Receiver also claimed that the court lacked subject matter jurisdiction pursuant to Business Corporation Law § 1314, governing proceedings against foreign corporations. Both arguments were rejected and the motion was denied (62 Misc 3d 794, 810 [Sup Ct, Orange County 2018]).

Having now twice been defeated in its efforts to vacate the judgment in Supreme Court—and having voluntarily withdrawn its state court complaint for vacatur of the judgment, wrongful execution, fraud, and breach of contract—the Receiver, acting on behalf of the judgment debtor, filed a tort action in the District Court for the Southern District of New York. The complaint alleged wrongful restraint and execution against

GTR, wrongful execution against Marshal Biegel individually, conversion, and trespass to chattels. Judge Koeltl granted summary judgment to Marshal Biegel and GTR and dismissed the complaint, holding that the Receiver had suffered no harm and so could not recover in tort (*Simon v GTR Source*, 2019 WL 7283279, at *4-5, 2019 US Dist LEXIS 22111, *14-21 [SD NY, Dec. 26, 2019, No. 19 Civ. 1471 (JGK)]). Specifically, Judge Koeltl held, as to the wrongful execution claim, that "there is no dispute that the funds recovered by the Marshal were used to extinguish the debtor's valid debt owed under a valid court judgment [and] [t]herefore, the Receiver, who stood in the shoes of the debtor, suffered no damages" (*id*. at *4). For the same reason, the court held that the Receiver's claims for conversion and trespass to chattels could not survive "because the Receiver has failed to establish that the Receiver sustained any damages" (*id.* at *4-5).

CMS's collection efforts followed a similar course. In February 2018, in Rockland County, CMS served a restraining notice on Comerica's registered agent in New York (Corporate Creations Network, Inc.), directing Comerica not to transfer any property held on behalf of FutureNet. Upon learning of this restraining notice, FutureNet contacted CMS by letter and email and, as it had with GTR, stated that Comerica had no presence in New York and so was not subject to general jurisdiction in New York, that the restraining notice was "tortiously interfering with the superior UCC liens of FutureNet's senior lenders," and threatening to file a temporary restraining order. CMS did not retract the restraining notice. Several months later, CMS delivered to the Sheriff of Rockland County an Execution with Notice to Garnishee directing the sheriff to levy upon the FutureNet bank accounts

controlled by Comerica by delivering the Execution to Corporate Creations. The sheriff issued a levy and demand to Comerica, delivered to Corporate Creations, demanding Comerica transfer property held for FutureNet to the Sheriff. Comerica complied in April 2018, withdrawing the entirety of FutureNet's Comerica account located in Redford, Michigan, in the amount of $322,592.59, and providing that amount to the Rockland County Sheriff. [2]

The Receiver filed a complaint against CMS in the District Court for the Southern District of New York, alleging claims for wrongful restraint and execution, conversion, and trespass to chattels. Judge Failla granted CMS's motion to dismiss, stating that "the Court would agree with the logic of the *GTR Source* decision and conclude that the Receiver has failed to allege that he or FutureNet suffered legally cognizable damages" (*Simon v Capital Merchant Servs., LLC*, 2020 WL 615091, *11-12, 2020 US Dist LEXIS 22831, *32-36 [SD NY, Feb 7, 2020, 19 Civ. 904 (KPF)]). [3]

[2] Comerica's compliance with the executions and levies was in accord with its account agreement with FutureNet, which stated that Comerica would honor any legal process, including any execution or garnishment, that it believed—correctly or incorrectly—to be valid, and would comply with legal process served by mail or fax "at any of [its] offices, even if the law requires personal delivery at a specific office."

[3] Judge Failla also held that FutureNet was collaterally estopped by Judge Koeltl's opinion in *Simon v GTR Source* from arguing that FutureNet was injured by seizure of the funds and so "necessarily fails to state a plausible claim for relief under the tort doctrines of wrongful restraint and execution, conversion, or trespass to chattels" (2020 WL 615091, *11, 2020 US Dist LEXIS 22831, *31-32, [SD NY Feb 7, 2020, 19 Civ. 904 (KPF)]). On appeal, the Second Circuit held that the district court erred in holding that collateral estoppel applied (988 F3d at 642). That issue is not before this Court.

An entity described as "two of FutureNet's senior creditors . . . who were assigned [the Receiver's] claims and permitted to substitute into the actions as appellants"[4] appealed to the Second Circuit and the cases were consolidated (988 F3d at 640). The Second Circuit determined that the question of whether the Receiver's tort claims failed to establish the necessary element of damages should be certified to this Court (*id.* at 643-644). Noting that "neither party identifies a New York Court of Appeals opinion addressing that precise issue," and that, with respect to the issue of cognizable damages, "two recent New York Supreme Court decisions have reached differing results on the topic" (*id.* at 643, citing *Bam Bam Entertainment LLC v Pagnotta*, 59 Misc 3d 906 [Sup Ct, Kings County 2018] and *Silver Cup Funding LLC v Horizon Health Ctr., Inc.*, 70 Misc 3d 1201[A], 2020 NY Slip Op 51529[U] [Sup Ct, Ontario County 2020]), the Second Circuit "conclude[d] that certification of the question to the New York Court of Appeals is preferable to resolving it ourselves" and certified the foregoing questions (*id.* at 644). This Court accepted the certified questions (36 NY3d 1077 [2021]).

II.

FutureNet argues that "the executions and levies in these cases did not comply with the requirements of Article 52 of the CPLR, specifically CPLR 5232(a)," resulting in

[4] To the extent that any part of these actions seeks to vindicate rights held by FutureNet's senior creditors, such efforts are misplaced. The Receiver, and any party substituted for the Receiver, stands only in the shoes of the judgment debtor and may only vindicate rights held by the judgment debtor in the first instance (*see* 988 F3d at 643 n 7; *GTR Source, LLC v FutureNet Grp, Inc.*, 62 Misc 3d 794, 807-808 [Sup Ct, Orange County 2018]).

"'void or irregular process'" that reduced the executions and levies to "legal nullities" and thereby exposed the defendants to tort liability (988 F3d at 643, quoting *Day v Bach*, 87 NY 56, 60 [1881]). FutureNet seeks to recover the amount taken from the Comerica accounts that was used to satisfy the relevant judgments and "consequential" damages.[5] GTR and CMS counter that FutureNet suffered no damages from the alleged violation of the statute and that, in any event, under these circumstances FutureNet's sole remedy was to seek relief under article 52 (*id*. at 643-644). We agree with the final point. 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 (Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5240:1).

The enactment of CPLR article 52 "effected sweeping changes of both substance and procedure in the law relating to the satisfaction of money judgments" (*Guardian Loan*

[5] Judge Fahey's proposed answer to the first question, that no tort claim can survive because the judgment debtor sought damages limited solely to the value of the seized property (dissenting op at 3), would merely serve to motivate the next plaintiff to specify the "consequential" damages that resulted from the improper attachment in any amount greater than that owed to the judgment creditor. The problem is not one of drafting, causation, or damages. Those issues are merely manifestations of the unsuitability of tort law to these circumstances.

Co. v Early, 47 NY2d 515, 518 [1979]). The statute regulates the methods of enforcement and satisfaction of money judgments by, for example, exempting certain property, establishing liens and priority rules among creditors, imposing technical requirements for enforcement devices, and providing a flexible array of procedures for relief from violations of the statute. Section 5232 (a) governs the process of levy by service of execution, and specifically provides that "service [of a copy of the execution upon the garnishee] shall not be made by delivery to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318," and CPLR 318 in turn sets out the requirements for designation of an agent for service of process.[6]

"[G]eneral provisions that permit 'any interested person'—including a judgment debtor—to secure remedies for wrongs arising under the statutory scheme" are set out in CPLR 5239 and 5240 (*Cruz v TD Bank, N.A.*, 22 NY3d 61, 74 [2013]). CPLR 5239 provides that "[p]rior to the application of property or debt by a sheriff or receiver to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt." In such a proceeding, "[t]he court may vacate the execution or order, void the levy, direct the disposition of the property or debt, or direct that damages

[6] FutureNet has alleged that Corporate Creations does not meet the requirements of CPLR 318, and Judge Wilson opines that, as a result, New York lacked jurisdiction over Comerica despite the in-state service on Corporate Creations. It suffices to observe in response that Comerica willingly complied with the executions and levies in each case—consistent with its account agreement with FutureNet—and never raised any objection to the method of service or the viability of personal jurisdiction in New York.

be awarded" (CPLR 5239; *see* Siegel, NY Prac § 521 at 993 [6th ed 2018] [the court in a CPLR 5239 proceeding can "render judgment . . . for whatever is warranted" and "award damages to any party establishing a legal right to them"]). Section 5240 in turn lays out the court's power to, "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." Intended to "replace myriad provisions of the Civil Practice Act which often led to conflicting results, . . . CPLR 5240 grants the courts broad discretionary power to control and regulate the enforcement of a money judgment under article 52 to prevent 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts'" (*Guardian Loan*, 47 NY2d at 519, quoting 1959 Rep of Advisory Comm on Prac and Pro at 314]). In other words, this provision "center[s] in one place [the] pervasive judicial power to right, on a case by case basis, any wrong in connection with any of the numerous Article 52 procedures" (Siegel, NY Prac § 522 at 993).[7] 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.

FutureNet asserts that it was not required to seek relief under CPLR 5240 and that it may, instead, seek to recover for defendants' alleged failure to strictly follow the procedures of CPLR 5232 through a tort action. Our holding in *Cruz* that a later-enacted

[7] Venue provisions for such proceedings are set out in section 5221, which establishes where "special proceeding[s] authorized by this article shall be commenced."

provision of article 52—the Exempt Income Protection Act of 2008—does not provide an independent vehicle through which judgment debtors may seek damages for violations of that provision provides a useful framework for addressing this issue (*Cruz*, 22 NY3d at 74-78). Indeed, in *Cruz*, we described the provisions in CPLR article 52 as "permitting the commencement of special proceedings whereby creditors, debtors and 'any interested person' can adjudicate disputes over the ownership of income or property (CPLR 5239, 5221)" and empowering the court to "'make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure' (CPLR 5240)" (*id.* at 68). We reasoned that "[t]he fact that significant enforcement mechanisms are built into CPLR article 52—and in fact, predated the EIPA—militates against recognition through implication of a new type of claim . . . falling outside the statutory scheme" and we deemed those existing enforcement mechanisms exclusive (*id.* at 75, 78). We also rejected any claim of a preexisting right to bring a plenary action, noting that "plaintiffs have not cited any persuasive pre-EIPA precedent in which a New York court recognized an account holder's right to sue a depository bank for a violation of CPLR article 52 outside the special proceedings" provided for in that statute, and that "[p]ermitting a party to seek relief for violation of the statute in a plenary action in some other court would essentially read the venue provisions out of the statute" (*id*. at 74, 77).[8]

[8] In *Cruz*, plaintiffs' "common law claims arising out of [defendant's] alleged failure to comply with the EIPA" were dismissed because the district courts determined that plaintiffs' complaint did not allege the necessary elements of these common law torts—yet another demonstration of the inapplicability of common law tort principles to allegations of flawed enforcement of valid money judgments (*Cruz v TD Bank, N.A.*, 855

That article 52 provides avenues for relief from unlawful restraint against a judgment creditor formed a significant part of our analysis (*id.* at 75-76). Moreover, in *Cruz* we acknowledged that relief under CPLR 5240 is available "even after the assets have been transferred to the judgment creditor," and "the court could reverse the transfer by issuing an order 'denying' the execution and directing restitution by the judgment creditor" (*id.* at 75-76). As we established in *Cruz*, "[p]rovided relief is sought in the appropriate forum in a timely manner,[9] the judgment creditor is not entitled to retain . . . funds secured in error" (*id.* at 76). This, of course, holds true beyond the application of the EIPA requirements—CPLR 5240 provides a venue in which judgment debtors can seek redress for violations of article 52, even after assets have been turned over to the judgment creditor.

Our lower courts understand CPLR 5240 to provide this valuable avenue of relief for judgment debtors, using their equitable power under this provision in myriad ways (*see e.g. Kantrowitz Goldhamer & Graifman, P.C. v Spivack*, 170 AD3d 821, 910 [2d Dept 2019] [after noting that section 5240 "grants the courts broad discretionary power to alter the use of procedures set forth in CPLR article 52," finding Supreme Court properly applied its equitable powers under CPLR 5240 in denying plaintiff's motion to compel defendant's employer to pay outstanding balance due on judgment, where "defendant was making consistent biweekly payments to satisfy the judgment as well as effecting substantial court-

F Supp 2d 157, 174-179 [SD NY 2012]; *Martinez v Capital One, N.A.*, 863 F Supp 2d 256, 267-268 [SD NY 2012]).

[9] There is "no concrete temporal limitation on initiation of a CPLR 5240 proceeding" but "such relief should be pursued within a reasonable time after the injury is incurred" (*Cruz*, 22 NY3d at 76 n 4).

ordered maintenance and child support payments to his ex-wife"]); *Matter of Sirotkin v Jordan, LLC*, 141 AD3d 670, 671 [2d Dept 2016] [limiting extent of judgment creditor's enforcement against judgment debtor pursuant to court's equitable powers under CPLR 5240]; *Paz v Long Is. R.R.*, 241 AD2d 486, 487 [2d Dept 1997] [judgment debtor "authorized to utilize CPLR 5240 as a procedural vehicle to stay enforcement of the judgment so as to secure satisfaction of its liens"]; *Viggiano v Viggiano*, 136 AD2d 630, 631 [2d Dept 1988] [granting motion to set aside execution and holding judgment creditor responsible for all fees and poundage due to the sheriff]; *Moskin v Midland Bank & Trust Co.*, 96 Misc 2d 600, 602 [Sup Ct, NY County 1978] [noting that "the exercise of the discretionary power granted by CPLR 5240 requires harmonizing the judgment debtor's interest in avoiding irreparable . . . harm . . . with the legitimate interest of a creditor in securing payment of a valid debt"]). In *Silver Cup*, a case on which FutureNet heavily relies, the court, pursuant to a CPLR 5240 motion, vacated an execution and levy and granted restitution to a judgment debtor (2020 NY Slip Op 51529[U]).

While FutureNet attempts to characterize its causes of action as tort claims, at bottom, FutureNet seeks to recover for alleged violations of the procedural requirements of article 52 and, as we determined in *Cruz*, permitting an action based solely on the violation of requirements established by article 52 to proceed outside the mechanisms provided by article 52 would be inconsistent with the relevant statutory framework. FutureNet justifies removal of this case from the reach of article 52 by making a largely irrelevant distinction between void and voidable process, relying primarily on nineteenth-century cases from this Court. But as with the plaintiffs in *Cruz*, FutureNet fails to provide

any persuasive authority for its claim of a preexisting right to bring a tort action in these circumstances. *Day v Bach*, decided in 1881, predates enactment of the CPLR by 81 years—of course, as a result, it is silent as to the appropriate forum or methods of redress for violations of article 52 (87 NY 56). Nor does *Day*, or indeed any other case cited by FutureNet, involve freestanding tort claims brought in a different court than that issuing the relevant judgment. *Day* concerns an effort to overturn an attachment (*id.*); both *Tausend v Handlear* (33 Misc 587 [App Term 1901]) and *V. Loewer's Gambrinus Brewing Co v Lithauer* (36 Misc 539 [App Term 1901]) involve efforts to overturn judgments; and *Fischer v Langbein* (103 NY 84, 89-90 [1886]) involves an allegation of wrongful imprisonment. Indeed, the novelty of FutureNet's claims explains the uncertainty in the federal courts that led to certification. Rather than engage in a "void" versus "voidable" debate here, we hold that an article 52 proceeding is the correct vehicle for resolving claims based on collection efforts that are alleged to violate article 52—a determination we have made with respect to other statutes with internal enforcement provisions (*see Cruz*, 22 NY3d at 79, *cf. Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 [2009] [prohibiting independent common-law tort claim on the basis of violations of the Martin Act beyond the Martin Act's enforcement provisions]).[10]

[10] To be sure, that does not mean that no claim can ever be premised upon tortious conduct that occurs during the execution and levy process (*see Cla-Mil E. Holding Corp. v Medallion Funding Corp.*, 6 NY3d 375, 379 [2006]; CCA 1605). But where such claim is grounded in a violation of CPLR 5232 procedures, article 52 provides the appropriate forum for relief.

Policy considerations also counsel this outcome. Our legislature "provided the avenues for relief it deemed warranted" in article 52 (*Cruz*, 22 NY3d at 71), and empowering a judgment debtor to evade these proceedings, which are, at bottom, designed to protect debtors from improper collection efforts (*see Midlantic Natl. Bank/N. v Reif*, 732 F Supp 354, 356 [ED NY 1990] [describing section 5240 as "designed to prevent the brutal use of legal procedures against a judgment debtor"]), would eviscerate the purpose of article 52. An article 52 proceeding, brought as it must be within a reasonable time, also serves to limit the injury that might be inflicted by improper use of the enforcement process, for example by making funds available for payroll that might otherwise be seized. Indeed, here FutureNet was aware of the restraining notices and the intent to levy the funds, and although the company objected to the restraint in communications with the judgment creditors, it brought an action solely aimed at overturning the judgment and did not independently challenge the levy at a time when any claimed errors in the executions could potentially have been remedied by the court. FutureNet could also have pursued relief under CPLR 5240 following the execution—our holding in *Cruz* made clear that such an action is permitted even after assets have been transferred to a creditor. FutureNet chose instead to pursue challenges to the validity of the underlying judgments[11] and then, after those challenges failed, endeavored to convert its claims into common law torts.

[11] While Judge Wilson asserts that FutureNet "did, in fact, move the court for relief pursuant to CPLR 5240, seeking to vacate 'any and all enforcement devices issued by GTR" (dissenting op at 6 n 5), this request was tied to FutureNet's challenge to the judgment itself, and even to that extent, such relief was not pursued. Indeed, counsel for FutureNet stated at oral argument that it was "wrong" to characterize its motion as a

While FutureNet argues that a tort action should be permitted here to curtail abusive practices by MCA businesses, this case is not, of course, a referendum on the MCA industry—how the judgment creditor came to obtain what is undisputedly a valid judgment against the debtor is irrelevant in assessing the proper method for adjudicating claims that the judgment was improperly collected. [12] And any rule we articulate here applies to all cases, not solely to the MCA industry. Furthermore, the use of special proceedings specifically endowing courts with broad equitable powers to fashion protective resolutions is at least as valuable to a potentially insolvent debtor as the blunt tool of a later-instituted tort claim for damages.

To hold otherwise—to permit allegations of noncompliance with article 52 in the course of enforcing valid judgments to be recast into common law tort claims—is not workable (*see e.g. Greene v People's Neighborhood Bank*, 190 AD3d 1205, 1207-1208 [3d Dept 2021] [dismissing suit brought by judgment debtor against judgment creditor asserting over 400 causes of action sounding in tort after the judgment creditor served a restraining notice on plaintiff's bank account pursuant to CPLR 5222 (b)]), *lv denied* ___

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motion to vacate the enforcement devices under section 5240, and that "it was only . . . to vacate the judgment. And then upon vacating the judgment, it was for restitution."

[12] Nor does this case pose the question Judge Wilson answers: "how a judgment creditor holding a New York judgment may levy on assets of the judgment debtor held in another state by an out-of-state garnishee" (dissenting op. at 7). Any questions concerning the applicability of the Uniform Enforcement of Foreign Judgments Act (UEFJA) or our case law concerning statutory enforcement mechanisms provided by other CPLR provisions are not properly before us. None of the parties have litigated or raised issues regarding the UEFJA, CPLR 5225, or CPLR article 62; neither district judge was presented with, or ruled on, these questions; and the Second Circuit did not consider or certify these issues to this court.

NY ___ [2021]). Instead, the better course, and the one we follow today, is to require that such claims be brought pursuant to article 52.

Accordingly, the certified questions should be answered in accordance with this opinion.

FAHEY, J. (dissenting):

I would answer the first certified question in the negative and would decline to answer the second certified question. I dissent because I disagree with the majority's answer to the second question.

I.

According to the majority, a judgment debtor may not bring a tort claim against a judgment creditor or marshal, asserting that its property was seized pursuant to a levy by service of execution that does not comply with CPLR 5232 (a), without first seeking relief under CPLR 5240. Indeed, the majority goes so far as to describe CPLR article 52 as "a judgment debtor's exclusive avenue for relief under these circumstances" (majority op at 2). While I agree that CPLR article 52 "is the correct vehicle for resolving claims based on collection efforts that are alleged to violate article 52" (*id.* at 14), I cannot join an opinion making it a prerequisite for bringing a common law tort action.

The majority conflates two questions: (i) whether CPLR article 52 gives rise to an implied *statutory* private right of action in favor of a person who has been harmed as a result of a violation of CPLR 5232 (a) and (ii) whether a person with such a loss may in principle recover under traditional *common law* tort principles (*see id.* at 11-12). We have carefully distinguished those questions in past precedents (*see e.g. Sheehy v Big Flats Community Day*, 73 NY2d 629, 631 [1989]), and we should continue to separate them. The majority relies on *Cruz v TD Bank, N.A.* (22 NY3d 61 [2013]), but that decision expressly noted that "common-law tort claims . . . [we]re beyond the scope of the questions certified to this Court" (*Cruz*, 22 NY3d at 69).

"The general rule is and long has been 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" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 324 [1983] [internal quotation marks and citations omitted]). Moreover, "it is a general rule of

statutory construction that a clear and specific legislative intent is required to override the common law" (*Hechter v NY Life Ins. Co.*, 46 NY2d 34, 39 [1978]). Here, CPLR article 52 neither states nor implies that its remedies are exclusive. There is no legal basis for concluding that the failure to seek relief under CPLR article 52 precludes a tort action.

II.

Of course, this does not mean that a tort action will be successful. In the present case, I would answer the first certified question, as reformulated, in the negative. I would hold that a judgment debtor whose property was seized pursuant to a levy by service of execution that does not comply with CPLR 5232 (a) does not state a claim in tort if the seized property is applied to a valid money judgment, *when the damages sought are limited solely to the value of that seized property*. As a matter of law, any defects in the process of seizing the funds would not be a legal cause of an injury, because the funds constituted a debt pursuant to a valid judgment.

I would decline to answer the second question. The Second Circuit Court of Appeals asks us to answer that question only if we have answered the first question in the affirmative (*see Plymouth Venture Partners, II, L.P. v GTR Source, LLC*, 988 F3d 634, 645 [2d Cir 2021]). While this Court, as always, "is not limited to the questions stated," and "may modify the certified questions as it sees fit" (*id.*), the first certified question in this case allows for a straightforward and dispositive answer, removing the need to answer the second question.

WILSON, J. (dissenting):

From time immemorial, people have refused to pay debts. One function of a legal system is to replace armed self-help debt collection with something more civilized. The fundamentals of New York's legal system for debt collection are typical: first, get a money

judgment from a court; second, ask the judgment debtor to pay it; third, if the judgment debtor refuses, request the appropriate Sheriff or Marshal to seize assets of the judgment debtor sufficient to pay off the debt—preferably cash, but other marketable property if necessary. That third step does not work, however, when the assets of the judgment debtor you wish to seize are held outside of New York by a third party over whom New York lacks jurisdiction. Then what? Even if you possess a valid judgment against a debtor, the civilized rules of debt collection do not allow you to rob the debtor's bank to satisfy the judgment.

In this case, two New York based creditors obtained monetary judgments from New York courts against a Michigan-based corporation. They collected the debts by purportedly 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 the bank had no presence in New York, the creditors—and New York courts, Sheriffs and Marshals—lacked jurisdiction to authorize or effectuate a levy on the funds the bank held. Instead, the only way to use the legal system to satisfy the New York judgments by seizing the assets in the Michigan bank was to employ a Michigan court to direct the seizure. By circumventing Michigan's processes, the New York creditors deprived the Michigan-based corporation (the judgment debtor) certain protections the law affords it. Circumvention of a foreign jurisdiction's process in that manner might proximately cause injury to the judgment debtor, even if the judgments were perfectly valid—for example, if the time allowed by the

foreign process would have allowed the judgment debtor to avoid the seizure through reorganization in bankruptcy.

The Second Circuit certified two questions of law for this Court to resolve, sparked by the Michigan-based corporation's tort claims against the allegedly improper judgment execution:

> "(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
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> (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" (*Plymouth Venture Partners, II, LP v GTR Source*, 988 F3d 634, 645 [2d Cir 2021]).

Contrary to the majority's opinion, nothing in New York law indicates that our statutory processes for obtaining, enforcing, and challenging judgments for debt—detailed in CPLR article 52—supplants or limits the ability of a person or entity to raise a common law tort claim against an allegedly improper judgment execution. We should answer the second certified question in the affirmative. Further, when creditors seize property without complying with the procedural requirements in the CPLR—requirements that are meant to apply to entities over which New York has jurisdiction—a debtor might suffer cognizable damages in tort. The answer to the first certified question should be "possibly."

Because the majority ignores the first certified question entirely and neglects to answer the key issue in the second question—instead stating that an article 52 proceeding

is the correct vehicle for resolving claims based on collection efforts that are alleged to violate article 52—I dissent.

I

FutureNet was a corporation based in Michigan that provided infrastructure services to government and commercial customers. FutureNet maintained its bank accounts at a branch of Comerica Bank in Michigan. In July 2017, FutureNet entered into a $5.1 million secured lending facility with Invest Detroit, a $225 million development fund focused on revitalizing Detroit's blighted areas. Some months later, FutureNet entered into the agreements that ultimately gave rise to this case: an agreement with GTR Source (GTR) by which GTR purchased $291,800 of FutureNet's future revenue stream for $200,000 to be paid in daily withdrawals of $3,999 from FutureNet's account at Comerica Bank in Detroit[1], and a similar agreement with Capital Merchant Services (CMS) by which CMS purchased $780,450 of FutureNet's future revenue stream for $550,000, to be paid for by daily withdrawals of $8,672 from that same account.[2]

[1] The daily withdrawals would continue until the amount paid to GTR totaled $291,800.

[2] Although the GTR and CMS agreements are described as "factoring" agreements, they do not bear several of the hallmarks of traditional factoring arrangements, in that FutureNet did not sell any identifiable receivable to GTR or CMS; GTR and CMS did not collect any receivables; GTR and CMS received fixed daily withdrawals from FutureNet's bank account regardless of whether or how much FutureNet collected from or billed to its clients; and GTR and CMS did not bear the risk of nonpayment by any specific customer of FutureNet. The arrangements FutureNet entered with GTR and CMS appear less like factoring agreements and more like high-interest loans that might trigger usury concerns (*see Adar Bays, LLC v GeneSYS ID*, — NE3d —, 2021 NY Slip Op 05616 [2021]). Nevertheless, for the purpose of these certified questions, we are asked to assume the judgments rendered on those agreements are valid.

When FutureNet ceased making the daily payment obligations to GTR and CMS in February 2018, both companies declared defaults and obtained New York judgments against FutureNet by filing confessions of judgment that FutureNet had executed in conjunction with the entry of the agreements. Both GTR and CMS then served a restraining notice against FutureNet's funds: GTR on a Detroit branch of Comerica Bank and CMS on Corporate Creations Network, Inc., which is based in Rockland County, New York and is Comerica's designated agent for service under Business Corporation Law § 305.[3] Both restraining notices averred, incorrectly, that Comerica was subject to jurisdiction in New York and warned that Comerica could be sued if it failed to comply.

After serving the restraining notices, GTR directed a New York City Marshal to serve a Notice and Levy and Demand on Comerica through Corporate Creations. The Marshal levied on FutureNet's property by serving the execution on Corporate Creations by certified mail. After FutureNet unsuccessfully moved to vacate GTR's judgment

[3] Business Corporation Law (BCL) § 305 allows every domestic corporation or authorized foreign corporation to designate a registered agent in New York upon whom process against that corporation may be served. As we recently held in *Aybar v Aybar*, registration under BCL 305 does not confer personal jurisdiction over the registrant (— NE3d —, 2021 NY Slip Op 05393 [2021]).

pursuant to CPLR 5015 (a) (3) and 3218 (b)[4] and also sought relief under CPLR 5240,[5] the Marshal's office faxed an amended execution to the Comerica branch in Detroit where FutureNet's account was held. Comerica then issued a bank check to the Marshal satisfying its judgment against FutureNet and the Marshal's five percent poundage fee (*see* CPLR 8012 [b] [1]).[6]

CMS, in turn, delivered an "Execution with Notice to Garnishee" to the Sheriff of Rockland County, directing him to levy upon FutureNet's Comerica bank account by serving the execution on Corporate Creations. Comerica withdrew all the remaining funds held in FutureNet's account, $322,592.59, and issued a bank check to the Sheriff, which the Sheriff then remitted to CMS.

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[4] CPLR 5015 (a) (3) provides that a court "may relieve a party" from a judgment "on motion of any interested person with such notice as the court may direct, upon the ground of[ ] fraud, misrepresentation, or other misconduct of an adverse party[.]" CPLR 3218 (b) provides that—at any time within three years after an affidavit is executed by a defendant for a judgment by confession—"it may be filed, but only with the clerk of the county where the defendant's affidavit stated that the defendant resided when it was executed or where the defendant resided at the time of filing."

[5] CPLR 5240 provides that a 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." The majority incorrectly describes FutureNet as not having pursued relief under CPLR 5240 ("FutureNet could also have pursued relief under CPLR 5240 following the execution . . . . FutureNet chose instead to pursue challenges to the validity of the underlying judgments and then, after those challenges failed, endeavored to convert its claims into common law torts" [majority op at 15]). The record shows that FutureNet did, in fact, move the court for relief pursuant to CPLR 5240, seeking to vacate "any and all enforcement devices issued by GTR"; the court on February 26, 2018 signed an Order to Show Cause for GTR to show why such relief should not be granted.

[6] Under New York law, a Sheriff or Marshal is entitled to a "poundage fee," a set percentage of the money the Sheriff or Marshal recovers through collection efforts.

On May 7, 2018, the two partners in Invest Detroit obtained an order from a Michigan state court appointing a Receiver for FutureNet. Ultimately, the Receiver brought the present action in the United States District Court for the Southern District of New York against GTR and the Marshal, asserting causes of action for wrongful restraint and execution of the Comerica funds, conversion, and trespass to chattels. The Receiver later sued CMS in federal district court, contending that CMS's execution and levy were invalid under CPLR 5232 (a), which requires that levies upon personal property held by garnishees be completed in the same manner as summonses, except if service is made by delivery to someone other than the garnishee, that person must be authorized to receive service specifically through CPLR 318. After the Receiver was unsuccessful in both cases and appealed, the United States Court of Appeals for the Second Circuit consolidated the appeals and certified the two questions before us now.

II

The certified questions ask us to assume that two judgment creditors (GTR and CMS) sought to satisfy valid money judgments from a judgment debtor (FutureNet) by levying execution on a third-party garnishee that held the debtor's money (Comerica Bank). The third-party garnishee was located completely outside of New York state and was not subject to personal jurisdiction in New York. The issue underlying the two certified questions is how a judgment creditor holding a New York judgment may levy on assets of the judgment debtor held in another state by an out-of-state garnishee (in FutureNet's case, Michigan). Thus, before turning to the two certified questions from the Second Circuit, it

is important to answer the question I first posed: how are money judgments enforced across state lines?

The U.S. Constitution requires each State to give full faith and credit to the judicial decisions of every other State. Traditionally, "[a] judgment recovered in one state . . . 'does not carry with it, into another state, the efficiency of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there; and can only be executed in the latter as its laws may permit'" (*Anglo-American Provision Co. v. Davis Provision Co.*, 169 NY 506 [1902], quoting *M'Elmoyle v Cohen*, 13 Pet. 312, 325 [1839]). A half century later, Congress revised the judicial code to provide a simplified system for execution of judgments of federal courts by federal courts (Report of the Administrative Board of the Judicial Conference of the State of New York for the Judicial Year July 1, 1966 through June 30, 1967 [hereinafter Report of the Administrative Board], Legislative Document 1968 at 255-56). However, as to judgments issued or enforced by state courts, Congress did not take measures under its Full Faith and Credit Clause power to "prescribe the Manner in which such . . . Proceedings shall be proved, and the Effect thereof" (US Const, art IV, § 1).

To simplify the cumbersome process of commencing a plenary action in a foreign state where a judgment debtor's assets were held, in 1948 the National Conference of Commissioners on Uniform State Laws finalized the first version of the Uniform Enforcement of Foreign Judgments Act, noting that "[t]he mobility, today, of both persons and property is such that existing procedure for the enforcement of judgments in those

cases where the judgment debtor has removed himself and his property from the state in which the judgment was rendered, is inadequate" (Uniform Enforcement of Foreign Judgments Act, Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in its Fifty-Seventh Year, 1948 at 156). At the time, the method to enforce an out-of-state judgment against a third-party garnishee was the "same [process] employed among the Colonies before the Revolution"—requiring a new action in the foreign state, in which the validity of the judgment against the judgment debtor would have to be proved (Robert A. Leflar, Act 34 The New Uniform Foreign Judgments Act, 3 Ark L Rev 351, 403-04 [1949]). The Conference's objective was to provide a somewhat simplified method that complied with the requirements of due process. Although the change to the federal judicial code, as well as procedures used in Britain, Canada, and Australia, dispensed entirely with the requirement of filing a new plenary action (*id.* at 404), the 1948 Conference of Commissioners worried that state legislators would balk at a uniform statute modeled on the new federal registration statute (Report of the Administrative Board at 255-56). To avoid the risk of limited adoption by the states, the Commissioners promulgated a Uniform Act that retained the need to commence a plenary action but allowed for a quick summary judgment proceeding (*id.* at 256). New York's CPLR already contained processes that were somewhat similar (*id.* at 256, 269-71), and New York did not adopt the 1948 Uniform Act.

Indeed, the 1948 Uniform Act was not widely adopted. Subsequently, however, the "years of experience with the federal registration statute seem[ed] to have laid to rest any

lingering fears as to the constitutionality or feasibility of a registration procedure" for the states (*id.*). Therefore, still attempting to address the variability and inefficiency in enforcing foreign judgments, the Conference of Commissioners promulgated a new Uniform Enforcement of Foreign Judgments Act ("UEFJA") in 1962. Unlike its predecessor, nearly all 50 states—including Michigan and New York—have adopted the 1962 Act.

The Act provides a template for states. Section Two of the Act provides a process for states to enforce foreign judgments. No longer would a judgment creditor be required to commence a plenary action in a foreign state. Instead, the judgment creditor may file a properly authenticated foreign judgment in a court of a state where assets of the judgment debtor are located. The receiving Clerk must then "treat the foreign judgment in the same manner as a judgment" of a court of the enacting state. Under the UEJFA, "[a] judgment so filed has the same effect and [becomes] subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment" of a court of the enacting state "and [can] be enforced or satisfied in like manner" (*id.* at 281). Section Three of the Act contains a notice of filing provision; upon filing of the foreign judgment and an affidavit from the judgment creditor, the Clerk is required to mail notice of the filing to the judgment debtor (*id.* at 284-85). Section Three also provides an optional subsection that states "[n]o execution or other process for enforcement of a foreign judgment filed hereunder shall issue until [_____] days after the date the judgment is filed"; each state was free to determine the number of days of repose before a registered foreign judgment could

be levied on (*id.* at 285, 287). That period of repose was meant to "protect[ ] the judgment debtor during the interval between filing and receipt of notice" (*id.* at 287).

Under the UEFJA, as adopted in both Michigan and New York, a judgment creditor holding a New York judgment and seeking to levy on assets held by an out-of-state third-party garnishee in Michigan must file the judgment in Michigan. No execution of the judgment could take place until 21 days from the mailing of notice to the judgment debtor (New York's implementation requires 30 days after filing of proof of service on the judgment debtor) (Michigan Compiled Laws § 691.1174; CPLR 5403). In the instant case, because the funds GTR and CMS sought to levy on were held by a Michigan bank, GTR and CMS would have had to file the New York judgment with the clerk of the appropriate Michigan court (Michigan Compiled Laws § 691.1173) along with an affidavit setting forth the name and address of the judgment debtor (FutureNet) and the judgment creditor (*id.* at § 691.1174), and the court would then mail notice to FutureNet. After at least 21 days from mailing of the notice, the Michigan court could enter an order authorizing the turnover of the funds (*id.* at § 691.1174).

III

Thus, a judgment creditor desiring to levy on assets held in a foreign state by a garnishee over which the court issuing the judgment lacks jurisdiction has two avenues: commence a plenary action in the foreign jurisdiction, or use the simplified process of the UEFJA. Both our decisional law and numerous provisions in the CPLR reinforce the conclusion that a New York court cannot authorize a New York Sheriff or Marshal to levy

on property of a garnishee over whom New York lacks personal jurisdiction. Instead, the judgment creditor must employ the process of a court with jurisdiction over the garnishee.

A. CPLR 5225 (b)

CPLR 5225, which governs "payment or delivery of property of [a] judgment debtor," distinguishes between property held by the judgment debtor and property belonging to the judgment debtor but held by a third party. Subsection (b) controls monies held by a third party, and monies held on account in a bank fall within subsection (b) (CPLR 5225 [b]; *see also* Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C5225:1).

In *Koehler v Bank of Bermuda Ltd.* (12 NY3d 533 [2009]), on a certified question from the Second Circuit, we explained that an order of garnishment cannot be effective against garnishees over whom New York lacks personal jurisdiction. We stated, "It is well established that, where personal jurisdiction is lacking, a New York court cannot attach property not within its jurisdiction." In *Koehler*, we carefully discussed CPLR 5225. After noting that CPLR 5225 authorizes courts to issue orders requiring the turnover of personal property to a judgment creditor, we explained the fundamental difference between subsections (a) and (b):

> "CPLR 5225(a) applies when the property sought is in the possession of the judgment debtor himself. CPLR 5225(b) applies when the property is not in the judgment debtor's possession. The most significant difference between the subdivisions is that CPLR 5525(a) is invoked by a *motion* made by the judgment creditor, whereas CPLR 5525(b)

> requires a *special proceeding* brought by the judgment creditor against the garnishee. The reason for this procedural distinction is that the garnishee, not being a party to the main action, has to be independently subjected to the court's jurisdiction" (*id.* at 540-41 [emphasis in original]).

Two important points follow from that discussion. First, to proceed against any third-party garnishee, a judgment creditor must commence a special separate proceeding naming the garnishee as respondent, pursuant to CPLR 5225 (b). Second, and more importantly, the ability to commence a special separate proceeding against a garnishee necessarily requires that New York have personal jurisdiction over the garnishee. We repeatedly emphasized that point in *Koehler*, saying, for example, "It is well established that, where personal jurisdiction is lacking, a New York court cannot attach property not within its jurisdiction," or "the key to the reach of the turnover order is personal jurisdiction over a particular defendant" (*id.* at 538, 540). In *Koehler*, we held that the Bank of Bermuda could be the subject of a turnover order under CPLR 5225 (b) because it had "consented to the personal jurisdiction of the court as of the time [the judgment creditor] had commenced the proceeding" (*id.* at 536).

We reemphasized the basic proposition that personal jurisdiction over a party is necessary for New York courts to compel observance of their decrees for judgments and their execution in *Commonwealth of the Northern Mariana Islands v Canadian Imperial Bank of Commerce* (21 NY3d 55 [2013]). We wrote that "many cases have held that a turnover order is given effect through a court's exercise of personal jurisdiction over a party," and that "[t]hus, '[h]aving acquired jurisdiction of the person, the court [ ] can compel observance of its decrees by proceedings *in personam* against the owner within the

jurisdiction' (*Koehler*, 12 NY3d at 539)" (*id.* at 64). *Northern Mariana Islands* was also before this Court on a certified question, asking whether a turnover order served on a bank was effective against its wholly-owned foreign subsidiary; we held it was not. We explained that "[n]o case supports the . . . attempt to broadly construe *Koehler* and require that a garnishee be compelled to direct another entity, which is not subject to this state's personal jurisdiction, to deliver assets held in a foreign jurisdiction" (*id.* at 64). *Northern Mariana Islands* thus underscores that entities that are not under New York's jurisdiction cannot be directed to turn over assets of the judgment debtor held out-of-state (*see generally* Reilly, Practice Commentaries at C5225:5 ["when the person who has possession or control of the money or property is not the judgment debtor, . . . the application takes the form of a special proceeding instead of a motion. This recognizes that jurisdiction has yet to be obtained over the third person"], C5201:13, C5201:14).

The recognition in the CPLR and our caselaw that a New York court cannot authorize the levy on property held in a sister state by a person or entity over whom New York lacks jurisdiction is the necessary complement to the traditional practice of commencing a plenary action in the sister state or, as simplified in the UEFJA, registering the New York judgment in that state.

B. CPLR 318

Likewise, CLPR 5232 (a) and CPLR 318 reflect the inability of New York courts to authorize a New York Sheriff or Marshal to levy on property held out of state by a garnishee over whom New York lacks personal jurisdiction. CPLR 5232 (a) provides that

levies on a garnishee "shall not be made by delivery to a person authorized to receive service solely by a designation filed pursuant to a provision of law other than [CPLR] 318." CPLR 318, in turn, provides that a natural person, corporation or partnership may designate an agent for service and that such designation must be filed with the clerk of the county in which the principal resides or has its principal place of business. By definition, an out-of-state garnishee cannot reside or have its principal place of business in *any* New York county. Because CPLR 5232 (a) does not allow levies to be made when personal jurisdiction is authorized pursuant to any law other than CPLR 318, CPLR 5232 (a) by its terms does not permit a levy to be made on an out-of-state garnishee, because an out-of-state garnishee cannot register under CPLR 318. The levying procedure of CPLR 5232 (a) is structured to apply to persons over whom New York has personal jurisdiction, which is consistent with and compelled by the longstanding understanding that a state cannot compel actors beyond its jurisdiction.

These provisions in the CPLR show that GTR and CMS proceeded in a legally unauthorized manner as they sought to obtain money for their judgment against FutureNet; the CPLR provisions apply to instances where New York has jurisdiction over the garnishee. Instead of improperly instructing a New York Marshal or Sheriff to levy on a garnishee over which New York lacks jurisdiction, judgment creditors must resort either to the simplified registration process of the UEFJA or the less wieldy process of commencing a plenary action—either way, invoking the process of the foreign court to authorize the appropriate officer of that state to execute the levy.

IV

The proper process for levying against third-party garnishees out of state—as evident in the UEFJA and the CPLR—provides important context for the two certified questions, to which I now turn.

A. Certified Question 1

The first certified question—avoided by the majority—asks us whether 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. Because the UEFJA process (or the slower and more elaborate traditional process) provides a delay in enforcement and limited opportunities for either the judgment debtor or other interested parties to intervene and object, there may be instances where a judgment debtor could allege and prove damages proximately caused by the loss of those opportunities. When a question is certified to us, we are answering an abstract question of law, without regard to the facts of the particular case. Considering the certified question in that way, one can imagine situations in which bypassing the procedures set out in the UEFJA through an accelerated and procedurally improper process could proximately cause consequential damages. In Michigan, a foreign judgment filed pursuant to the UEFJA may not be enforced until 21 days after the filing of the foreign judgment is mailed to the judgment debtor (Michigan Compiled Laws § 691.1174). The UEJFA itself provides a set of defenses that can be raised in the foreign court. Further, during that waiting period, a judgment debtor could seek reorganization in bankruptcy, the feasibility of which could be impaired

by the dissipation of assets that otherwise would have remained available in a reorganization. Thus, the answer to the first certified question is "possibly."[7] A judgment debtor is not foreclosed as a matter of law from pleading a tort claim simply because the seized assets were used to satisfy a valid judgment.[8]

B. Certified Question 2

The second certified question asks us whether—if we were to assume all elements of a tort claim have been properly stated—a plaintiff may commence that tort claim without first seeking relief under CPLR 5240. The majority does not answer that question, nor does it reformulate it. Instead, the majority asserts that "[t]here is no need to contort traditional

[7] The majority complains that, by discussing the UEFJA and CPLR 5225, I have answered questions that the Second Circuit did not certify (majority op at 16 n 12). Perhaps I should not have taken the Second Circuit at its word when it instructed: "The Court of Appeals is not limited to the questions stated. Rather, the Court of Appeals may modify the certified questions as it sees fit and may direct the parties to address other issues that it deems relevant to the circumstances presented in this appeal" (*Plymouth Venture Partners*, 988 F3d at 644). I note, also, that the majority answered a question not posed by the Second Circuit (whether CPLR 5420 displaces tort claims) instead of the question that Court asked ("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" [*id.*]).

[8] Although Judge Fahey, who dissents separately, would answer the first certified question "no," he does so with a qualification that suggests he and I are generally in agreement. Judge Fahey would hold "that a judgment debtor whose property was seized pursuant to a levy by service of execution that does not comply with CPLR 5232 (a) does not state a claim in tort if the seized property is applied to a valid money judgment, *when the damages sought are limited solely to the value of that seized property*" (dissenting op at 3 [emphasis in original]). Absent a claim for consequential damages proximately caused by a judgment creditor's use of an invalid procedure, I agree that no claim in tort would lie. The language Judge Fahey emphasizes, however, appears to allow for a tort action in exactly the circumstance in which I would allow one. Whether a plaintiff has satisfactorily pleaded such damages in a federal lawsuit is the province of the federal courts.

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" and that "CPLR article 52 . . . 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" (majority op at 8). Regardless, there is no basis in the CPLR or our decisional law to suggest that the procedures available under CPLR article 52 were meant to constitute a prerequisite to filing a tort action, let alone displace a tort action entirely. Therefore, the answer to the second certified question should be "yes"—a plaintiff may assert the tort claim before seeking relief through CPLR 5240.

Although CPLR article 52 includes procedures by which a judgment debtor could seek to vacate orders enforcing a judgment, a statute—even one with several enforcement mechanisms—does not foreclose or impair a common law claim (as in tort) unless the statute very explicitly says so. We have stated our rule as follows:

> "[W]here a remedy existed at common law for the wrong or injury against which a remedial statute is directed, if such statute provides a more enlarged or a summary or more efficient remedy for the party aggrieved, but does not in terms or by necessary implication deprive him of the remedy which existed at common law, the statutory remedy is considered as merely cumulative, and the party injured may resort to either at his election" (*Fumarelli v Marsam Development, Inc.*, 92 NY2d 298 [1998], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 34).

In many cases, CPLR article 52 may well provide a more efficient remedy than a common law tort action for debtors, creditors, and other parties who claim there was a defect in how judgments were created or executed. But it does not purport to displace any common-law

tort claim, which means that we must treat it as supplementary. In a similar vein, we have often recognized a "canon disfavoring interpreting statutes so as to overrule the common law" (*O'Donnell v Erie County,* 35 NY3d 14, 21 [2020]), as well as a principle that "statute[s] in derogation of the common law must be strictly construed" (*see Rust v Reyer*, 91 NY2d 355 [1998]; *Matter of Adoption of Robert Paul P.*, 63 NY2d 233 [1984]). Under those well-settled rules, CPLR article 52 co-exists with a remedy in common law tort.

The majority relies heavily on *Cruz v TD Bank, N.A.* (22 NY3d 61 [2013]) for its determination that CPLR 5240 is the exclusive remedy for debtors like FutureNet (majority op at 10-12).[9] However, *Cruz* did not address whether common law tort claims were preempted or limited by CPLR article 52. Instead, *Cruz* focused on whether plaintiffs can bring plenary actions against banks seeking money damages for certain violations of the CPLR, as amended by the Exempt Income Protection Act (EIPA). In fact, in *Cruz* we explicitly stated that the common-law tort claims pursued by the plaintiffs were "beyond the scope of the questions certified to this Court" (*Cruz*, 22 NY3d at 65-66, 69). It is important not to conflate *Cruz*'s holding that "a plenary action for injunctive relief and money damages cannot be implied" from certain amendments to the CPLR and that "the

[9] Although Judge Fahey would avoid the second question by answering the first question in the negative, I agree with his observations about the second certified question: "[t]he majority conflates two questions: (i) whether CPLR article 52 gives rise to an implied *statutory* private right of action in favor of a person who has been harmed as a result of a violation of CPLR 5232 (a) and (ii) whether a person with such a loss may in principle recover under traditional *common law* tort principles" (dissenting op at 2).

statutory mechanisms for relief are exclusive" with any holding about *common law* claims, which requires a separate inquiry altogether (*id.* at 78-79).

It is also worth pointing out that it is not clear that the CPLR article 52 procedure will always be the most efficient for judgment debtors. Among other things, 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.

Because CPLR article 52 cannot be construed to supplant or constrain the common law remedy, the answer to the second certified question should be in the affirmative: a judgment debtor need not seek relief under CPLR 5240 as a prerequisite to bringing a tort claim.

V

The certified questions and the cases giving rise to them highlight an important issue: New York creditors (and New York courts) cannot levy judgments for debt against out-of-state garnishees over whom they lack jurisdiction, unless they initiate separate actions in the foreign state or comply with the requirements of the UEFJA. That jurisdictional issue is key. Creditors must respect the laws and jurisdiction of sister states. When creditors holding New York judgments bypass the lawful procedures for satisfying

those judgments, judgment debtors—and perhaps third parties as well—may lose protections the foreign state or the UEFJA afford them, which loss may give rise to cognizable tort damages. If the procedures used here by GTR and CMS were valid, there would have been no need for the UEFJA, the comparable, earlier-enacted federal provision contained in 28 USC 1963 or the two centuries of jurisprudence requiring the institution of a plenary action when assets are held by a garnishee in a foreign state.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant to section 500.27 of this Court's Rules of Practice, and after hearing argument by counsel for the parties and consideration of the briefs and record submitted, certified questions answered in accordance with the opinion herein. Opinion by Judge Garcia. Chief Judge DiFiore and Judges Singas and Cannataro concur. Judge Fahey dissents in an opinion, in which Judge Rivera concurs. Judge Wilson dissents in a separate dissenting opinion.

Decided December 16, 2021