

To be Argued by:
CHRISTOPHER R. MURRAY
(Time Requested: 30 Minutes)

Appeal No. CTQ-2021-00001
Second Circuit Docket Nos. 2020-118 and 2020-580

Court of Appeals
of the
State of New York

Second Circuit Docket No. 2020-118

PLYMOUTH VENTURE PARTNERS, II, L.P.,
PLYMOUTH MANAGEMENT COMPANY in their capacities
as receivers for Futurenet Group, Inc.,

Plaintiffs-Appellants,

– against –

GTR SOURCE, LLC and STEPHEN W. BIEGEL,
in his capacity as New York City Marshal, Badge No. 27,

Defendants-Respondents.

Second Circuit Docket No. 2020-850

PLYMOUTH VENTURE PARTNERS, II, L.P.,
PLYMOUTH MANAGEMENT COMPANY in their capacities
as receivers for Futurenet Group, Inc.,

Plaintiffs-Appellants,

– against –

CAPITAL MERCHANT SERVICES, LLC,

Defendant-Respondent.

**BRIEF FOR DEFENDANT-RESPONDENT
CAPITAL MERCHANT SERVICES, LLC**

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RULE 500.1(f) CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR 500.1(f), Defendant-Appellee, Capital Merchant Services, LLC, states that the following are its corporate parents, subsidiaries and/or affiliates: Boris Capital Holdings LLC, Advance Merchant Services LLC, TVT Cap Fund LLC, Capital Advance Services LLC, Fundzio LLC, Midnight Advance Capital LLC, Fast Cash Advance LLC, Ibex Funding LLC, Business Advance Team LLC, TVT Capital HR LLC, Cash Village Funding LLC, Riverstrong LLC, Merchant Capital Pay LLC, Ocean 1213 LLC, WCM Funding LLC, Mr. Advance Capital LLC, Fundkite LLC, HFH Merchant Services LLC, World Global Capital LLC, and Simply Equities LLC.

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PRELIMINARY STATEMENT

Defendant-Respondent Capital Merchant Services, LLC (“CMS” or “Respondent”) respectfully submits this Respondent’s Brief in opposition to the Appellants’ Brief filed by Plymouth Venture Partners, II, L.P., and Plymouth Management Company (the “Appellants”), assignees of the claims of Plaintiff Basil Simon (“Simon”), in his capacity as Receiver for FutureNet Group, Inc. (“FutureNet”).

The Appellants argue that a post-judgment execution that was alleged to be served improperly on a non-party garnishee is void and, thus, subjects the judgment-creditor to tort liability. In doing so, Appellants ignore the fact that their argument seeks to impose liability on a judgment-creditor for the discretionary acts of a public official (a sheriff or marshal) and the acts of a non-party garnishee, over whom the judgment-creditor has no control. In the case at bar, it is undisputed that: 1) CMS’s judgment against FutureNet was valid and enforceable; 2) the non-party garnishee, Comerica Bank, accepted service of the execution and complied with the execution without objection; 3) FutureNet never served any exemption claim or motion for relief pursuant to CPLR § 5240; 4) no creditor has challenged CMS’s right or priority to the executed funds pursuant to CPLR § 5239; 5) all of the rights and protections to which FutureNet was entitled under Article 52 of the CPLR were met and satisfied; and 6) the funds executed upon were used to partially satisfy CMS’s

judgment against FutureNet. Nevertheless, Appellants ask this Court to hold that FutureNet sustained tort damages and may assert a cognizable tort claim against CMS.

While the Second Circuit's first question is written in general terms, the issue is whether a judgment-debtor suffers cognizable tort damages from a judgment-creditor when a non-party garnishee accepts service of a post-judgment execution from a sheriff without objection, rather than insisting on service that strictly complies with CPLR § 5232(a), and then honors the levy. The second issue is, assuming *arguendo* that a tort claim could be permissible under the foregoing facts, whether the judgment-debtor is required to seek first relief under CPLR § 5240 before it can assert a tort claim against a judgment-creditor?

CMS respectfully submits that FutureNet, the judgment-debtor could not sustain cognizable tort damages based upon the facts alleged. Whether a non-party garnishee has accepted service of process and has consented to the jurisdiction of the New York courts implicates rights and protections exclusive to the non-party garnishee, not the judgment-debtor. The judgment-debtor has no standing to assert objections belonging to the non-party garnishee and cannot plausibly allege an injury is caused by the judgment-creditor if the non-party garnishee waives any objections it might have. Furthermore, basic principles of tort law provide that a debtor cannot recover in tort where its alleged injury is that it was caused to pay a debt that was

undisputedly due and owing. Indeed, it has long been held that a judgment-debtor has no cognizable tort injury even if it is lured into satisfying its debt by trickery or deception. Appellants do not allege trickery or deception by CMS, but rather, they take umbrage with how and where the Rockland County Sheriff served Comerica Bank with an execution in Rockland County, New York. Finally, Appellants cannot claim FutureNet suffered an injury by Comerica Bank accepting and honoring the execution because FutureNet had previously authorized Comerica Bank to honor it regardless of how or where it was served.

Even assuming *arguendo* that a tort claim could arise where a judgment-debtor alleges that a non-party garnishee was not properly served, the case law has long held that an order vacating the execution is a pre-condition to a claim for tort damages if the execution was not void, but merely voidable (i.e., subject to a waivable objection). Given that the case law cited by the Appellants holds that the execution served in the CMS case was not void from inception, it is effectively conceded that Appellants were required to first seek relief pursuant CPLR § 5240 before seeking to recover tort damages.

For the reasons set forth herein, CMS respectfully submits that the Court should answer both of the Second Circuit's certified questions with "No."

QUESTIONS CERTIFIED FOR REVIEW

The New York State Court of Appeals accepted the following certified questions (A-747-49) from the United States Court of Appeals for the Second Circuit:

1) Whether a judgment debtor suffers cognizable damages in tort when its property is seized pursuant to a levy by service of an 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.

For the reasons set forth herein, CMS respectfully submits that the answer to both of the certified questions is “No.”

STATEMENT OF FACTS

A. JUDGMENT IS ENTERED IN FAVOR OF CMS AND AGAINST FUTURENET.

On December 27, 2017, FutureNet sold \$780,450.00 of its future receivables to CMS pursuant to a Purchase and Sale of Future Receivables Agreement (the “Agreement”) for an upfront sum of \$550,000.00 from CMS. (A-587-89; A-596). Pursuant to the Agreement, FutureNet would ensure that the proceeds of the future receivables it sold to CMS were directed into a designated account at Comerica Bank from where CMS would be able to ACH debit the proceeds of the receivables it has purchased. (A-596-97).

On or before February 6, 2018, FutureNet blocked CMS’s access to the designated account and prevented CMS from collecting its receivables from the designated account despite the fact that FutureNet was continuing to do business and to generate and collect receivables. (A-592-93). As of February 6, 2018, \$621,750.00 of the future receivables FutureNet sold to CMS had not been delivered. (A-593). Pursuant to CPLR §3218, based upon an affidavit of confession of judgment executed by FutureNet and its principal, Parimal D. Mehta, a judgment was entered in favor of CMS and against FutureNet and Mehta. (A-584- 85).

B. EXECUTION ON THE JUDGMENT.

On or about February 20, 2018, an information subpoena with restraining notice was served on Comerica Bank, a non-party garnishee. (A-541). While

FutureNet's counsel sent an e-mail threatening CMS's counsel, FutureNet decided not to file a motion challenging the information subpoena with restraining notice under CPLR § 5240 or to serve an exemption claim under CPLR §5222-A. (A-550).

On or about April 24, 2018, CMS delivered a writ of execution to the Sheriff of Rockland County. The Sheriff of Rockland County subsequently served Comerica Bank's designated agent for service of process with the execution and a Sheriff's Levy and Demand. (A-556). There is no dispute that FutureNet received exemption notices to garnishees and claim forms. (A562-63). FutureNet did not file a motion challenging any aspect of the execution under CPLR § 5240 or serve an exemption claim arguing that the funds in the account were exempt under CPLR § 5222-A. Comerica Bank subsequently delivered approximately \$322,592.59 from the account to the Rockland County Sheriff without objection. (A-532, ¶34).

Relatedly, but not the subject of dispute in this litigation, on September 11, 2019, the Supreme Court of the State of New York, County of Orange, entered an order in a post-judgment special proceeding that directed Comerica Bank to turnover funds held in a joint account by FutureNet's owner, Mehta, to CMS. (A-685-86). Comerica Bank once again raised no objections to jurisdiction or service in that matter. (*See* A-685-86). CMS recovered just a few thousand dollars more as a result of that turnover order.

Despite the partial recoveries, the majority of the Judgment in favor of CMS and against FutureNet remains unsatisfied. (A-731). Indeed, CMS has recovered substantially less than the purchase price it paid to FutureNet in December 2017, and hundreds of thousands of dollars less than the total amount of receivables it purchased. (See A-584-85; A-532, ¶34). Thus, it remains an undisputable fact of arithmetic that CMS is the only party to have suffered an injury.

C. BASIL SIMON FILED SUIT AS THE ALLEGED RECEIVER FOR FUTURENET.

On or about January 30, 2019, Simon filed an action as the alleged receiver for FutureNet.¹ (A-521). On May 29, 2019, Simon filed an Amended Complaint to address various deficiencies in the Complaint. (A-527; A-522-23, ¶¶10-12). While the Appellants claim that a receivership was instituted in Michigan because of the executions served by CMS and GTR, that contention is inaccurate. Rather, FutureNet’s troubles resulted from its CEO’s bribery of public officials in Michigan, and the resultant investigation, prosecution, and conviction.²

¹The Appellants’ Brief is often vague as to their standing and capacity. Appellants suggest at a few points that they are litigating on behalf of FutureNet’s “senior secured creditors.” See App. Brief, p.3, 11, and 14. However, it was adjudicated in a related proceeding that Simon, the Plaintiff, stood in the shoes of FutureNet. *GTR Source, LLC v. Futurenet Grp., Inc.*, 62 Misc. 3d 794, 809 (Sup. Ct. Orange Cty. 2018). As the Appellants are Simon’s assignees, the Appellants stand in the shoes of FutureNet. Respectfully, the Court should not consider any arguments in which the Appellants purport to stand in the place of any entity other than FutureNet.

² <https://www.justice.gov/opa/pr/former-ceo-detroit-based-technology-company-sentenced-one-year-prison-bribery>

Instead of utilizing the procedural avenues that regulate judgment enforcement devices under the CPLR, Simon filed a diversity action in federal court asserting duplicative tort claims for wrongful restraint and execution, conversion, and trespass to chattel. (A-527-39). Simon's claims allegedly seek tort damages arising from the restraint and execution of funds held by non-party Comerica Bank that were applied to the judgment in favor of CMS and against FutureNet. (A-581).

In the *GTR Source* litigation, Simon conceded that FutureNet had agreed in its deposit account agreement with Comerica Bank that Comerica Bank was authorized to "comply with any writ of attachment, execution, garnishment, tax levy, restraining order, subpoena, warrant or other legal process which [Comerica Bank] believe[s] (correctly or incorrectly) to be valid. [FutureNet] agree[s] that [Comerica Bank] may honor legal process which is served by mail or facsimile transmission or at any [Comerica Bank] offices, even if the law requires personal delivery at a specific office." (A-684, Section 3.04).

Consequently, Simon's claims seek to recover tort damages from CMS despite the fact that: 1) FutureNet had authorized Comerica Bank to accept and honor the levy and demand; 2) Comerica Bank accepted and honored the levy and demand without objection; and 3) the executed funds were duly applied to partially satisfy the judgment in favor of CMS and against FutureNet.

D. CMS FILED A MOTION TO DISMISS.

On or about June 28, 2019, CMS filed a motion to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1), (6), and (7). (A-568). Simon opposed the motion. CMS filed a reply. (A525). Prior to the Court's decision on the motion, CMS filed a letter advising the Court of a new decision in *Basil Simon, in his capacity as Receiver for FutureNet Group, Inc. v. GTR Source, LLC, et al.* (A687-88). CMS' letter stated:

In Basil Simon, in his capacity as Receiver for FutureNet Group, Inc. v. GTR Source, LLC, et al, S.D.N.Y., Docket No.: 19-cv-1471 (JGK), the Plaintiff in this action filed nearly identical claims against another judgment creditor and a New York City Marshal, for executing on the same bank accounts at Comerica Bank that were executed upon in this case. In Plaintiff's action against GTR Source, LLC, the Court dismissed Plaintiff's action against the Defendants because Plaintiff does not have a valid claim against the judgment-creditor for claims for wrongful execution, conversion, and trespass to chattels because Plaintiff did not have any recoverable damages. A true, correct, and complete copy of the Court's Decision and Order in that action is attached hereto as Exhibit A.

The Court firmly ruled against Plaintiff's claims for one of the reasons that were raised in CMS's motion to dismiss this action (e.g., Plaintiff's lack of recoverable damages). The substantive issue about executing on New York judgments on Futurenet's accounts at Comerica Bank were identical. Exhibit A, pp.4-5. The same claims (wrongful execution, conversion, and trespass to chattels) were alleged against the judgment-creditors in each action. Exhibit A, p.1. Plaintiff had a full and fair opportunity to litigate its issues in dueling summary judgment motions against GTR Source, LLC. Exhibit A, p.1. The absence of damages was a dispositive issue raised in Plaintiff's case against GTR Source and in CMS's motion to dismiss in this action. *See* Exhibit A. Consequently, the Court should hold that Plaintiff is collaterally estopped from arguing that it sustained damages arising from the same

allegations it alleged against GTR Source against CMS. *See Azzawi v. Int'l Ctr. for Dispute Resolution*, 2016 U.S. Dist. LEXIS 157712, *15 (S.D.N.Y. Nov. 14, 2016). Indeed, it would be inefficient and create unnecessary uncertainty if Plaintiff were permitted to continue to advance the same arguments despite the Court's dismissal of same in a nearly identical action against another judgment-creditor.

(A687-88).

On January 2, 2020, the trial court issued an Order giving Simon time to serve supplemental opposition in light of the *GTR Source* decision and CMS's letter. (A-691). On January 10, 2020, Plaintiff's counsel filed his supplemental opposition brief. (A-525).

E. THE TRIAL COURT GRANTED CMS'S MOTION TO DISMISS.

On February 7, 2020, the trial court issued an order granting CMS's motion based upon FutureNet's lack of recoverable tort damages. (A-694-722).

In analyzing whether Simon had pled and could plead a cause of action, the trial court noted that "[e]ach of [FutureNet's] causes of action has as an essential element that claim suffered damages as a result of the alleged wrongdoing." (A-708). The trial court went on to conduct an analysis of whether Simon had alleged legally cognizable damages upon which to state a claim. (A-719-22). The trial court ultimately found that by analyzing the basic principles of tort law, a judgment-debtor has no damages arising from an allegedly defective restraint and execution where the executed funds undisputedly were used to pay money that the judgment-debtor owed to the judgment-creditor pursuant to a judgment. (A-719-22).

The court also found that Simon was collaterally estopped from claiming he had legally cognizable damages by a straightforward application of defensive non-mutual collateral estoppel based upon Simon's loss of the exact same issue based on essentially the same facts in the *GTR Source* litigation. (A-713-19).

F. THE APPEAL TO THE SECOND CIRCUIT.

On March 10, 2020, Simon's counsel filed a Notice of Appeal on behalf of the Plymouth Appellants, but not on behalf of Simon. (A-724). On January 14, 2021, the Second Circuit granted the Plymouth Appellants leave to substitute Simon. Thereafter, on February 23, 2021, the Second Circuit issued its Decision and Certified Question. (A-729).

ARGUMENT

I. FUTURENET DID NOT SUFFER COGNIZABLE TORT DAMAGES.

The Appellants argue that the service of a levy by the Rockland County Sheriff on a non-party bank in a manner that did not comply with the provisions of CPLR § 5232(a) governing service on a non-party garnishee gives rise to a cause of action in tort by a judgment-debtor against the judgment-creditor. Despite the adamance with which the Appellants argue, their contentions are fundamentally flawed.

First, whether a non-party bank has accepted service of process and/or has consented to the jurisdiction of the New York courts implicates rights that belong to the non-party bank, not the judgment-debtor. The judgment-debtor has no standing to assert objections that the non-party bank has decided not to raise. If the bank has accepted service and consented to the court's jurisdiction, as Comerica did in this case, how can the judgment debtor, FutureNet, claim to have been injured? Quite simply, the judgment-debtor suffers no injury regardless of how or where the levy and demand is served on a non-party garnishee.

Second, Appellants' argument is conspicuously silent on the fact that FutureNet had authorized Comerica Bank to accept and honor the levy and demand in its deposit account agreement with Comerica Bank. How can FutureNet assert a claim for tort damages when it authorized the very conduct alleged to have occurred?

Even assuming *arguendo* that an alleged failure to serve a non-party garnishee in the manner provided in CPLR § 5232(a) could give rise to a claim by a judgment-debtor against a judgment-creditor – and to be sure it cannot – FutureNet’s agreement that Comerica Bank could forego strict compliance should be fatal to its tort theory.

Third, the District Court correctly adduced those basic principles of tort law provide that a debtor cannot recover in tort where its alleged injury is that it was caused to pay a debt that was undisputedly due and owing. FutureNet could not have been injured by CMS’s levy and demand because the funds in question were used to partially satisfy a valid judgment debt.

Finally, Appellants’ argument for tort liability is unreasonable because it would hold judgment-creditors liable for the acts of a sheriff, despite the fact that a judgment-creditor has no control or authority over how and where a sheriff serves an execution. Moreover, Appellants’ theory is even less reasonable when one considers that the difference between a harmless error in service by the sheriff, and an alleged tort would be whether or not the non-party garnishee bank decides to raise an objection or waive any objection.

A. Any Service of Process and Personal Jurisdiction Objections Belonged To Comerica And Appellants Lacked Standing To Raise Such Objections.

Appellants’ theory against CMS is that the service of the levy by the Rockland County Sheriff on Comerica Bank’s agent in Rockland County should be deemed

null and void because: a) service of the levy on the bank was allegedly deficient under CPLR § 5232(a); and b) Appellants contend that the court lacked personal jurisdiction over the bank. However, unlike their arguments against the respondents in the *GTR Source* case, there is no argument that CMS or the Rockland County Sheriff violated some other restriction on judicial power.³

Appellants' argument that the CMS levy served on Comerica Bank was null and void is wrong. As explained below, Appellants' reliance on *Day v. Bach*, 87 N.Y. 56 (1881) is misplaced because the levy in this case is not and cannot be deemed null and void from inception. In the analytical framework of *Day*, the levy and demand were, at most, voidable. *See Day*, 87 N.Y. at 61. Indeed, the distinction is apparent because the levy could be voidable only if it had been objected to by Comerica Bank.

Specifically, the Appellants' theory against CMS is flawed because objections to personal jurisdiction and service are "a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 (U.S. 1982). Thus, the person or entity

³ This is a key point of distinction between the two cases. Appellants allege that CMS sent its execution to the Rockland County Sheriff and the Rockland County Sheriff served a levy on Comerica Bank's agent, Corporate Creations, inside Rockland County. Appellants' objections against CMS pertain only to whether there was personal jurisdiction over Comerica Bank and whether Comerica Bank was properly served. By contrast, Appellants allege that GTR Source and the Marshal faxed an execution outside the City and State of New York in violation of CCA §§ 1609(1)(a)-(b).

over whom jurisdiction is asserted is vested with the power to waive such objections. *Id.* at 703. Indeed, “[i]nsufficiency of process and lack of personal jurisdiction are personal defenses which, therefore, may not be raised on behalf of another.” *O’Connell v. Three Park Ave. Bldg. Co., L.P. (In re Blutrigh Herman & Miller)*, 227 B.R. 53, 58 (Bankr. S.D.N.Y. 1998). A party lacks standing to object to the exercise of personal jurisdiction over another. *Sayles v. Pac. Eng’rs & Constructors, Ltd.*, 2009 U.S. Dist. LEXIS 124819, *18 (W.D.N.Y. Jan. 16, 2009); *Duttle v. Bandler & Kass*, 1992 U.S. Dist. LEXIS 8894, *15-16 (S.D.N.Y. June 23, 1992); *Levine v. Brown*, 2020 U.S. Dist. LEXIS 19473, *2-3 (S.D.N.Y. Feb. 4, 2020); *Madu, Edozie & Madu, P.C. v. SocketWorks Ltd. Nig.*, 265 F.R.D. 106, 114 (S.D.N.Y. 2010) (noting that a party cannot raise service and jurisdiction objections on behalf of another).

As the Appellants’ theory against CMS does not render the CMS execution and levy void from inception, but at most provided Comerica Bank with grounds to object, the claims fail against CMS. For the foregoing reasons, the Court should hold that a judgment-debtor does not suffer cognizable damages in tort as a result of alleged non-compliance with the provisions of CPLR § 5232(a) for service on a non-party garnishee.

B. Comerica Bank Waived Any Objections To Service And Personal Jurisdiction.

Appellants contend that service of the levy and demand on Comerica Bank by the Rockland County Sheriff was not strictly compliant with CPLR § 5232(a), and thus the Court lacked personal jurisdiction over Comerica Bank. However, leaving aside the fact that the objection belongs to Comerica Bank, Appellants fail to recognize that personal jurisdiction and service may be acquired by consent, thereby rendering inapplicable the ordinary rules governing service and personal jurisdiction for a given matter. *Gilbert v. Burnstine*, 255 N.Y. 348, 355 (1931).

There is no authority cited by Appellants that holds that jurisdiction and service could not be effectuated on Comerica Bank by Comerica Bank's consent. Moreover, nothing in CPLR § 5232(a) or § 318 prohibit a garnishee from accepting service or otherwise consenting to the exercise of personal jurisdiction over them in New York.

It is axiomatic that persons and entities may consent to personal jurisdiction and waive any objections to service. *Alfred E. Mann Living Tr. v. ETIRC Aviation S.A.R.L.*, 78 A.D.3d 137 (1st Dept. 2010). Once process has been complied with, the time to raise any objections to the validity of service of process and jurisdiction has been waived. *Brunswick Hosp. Ctr., Inc. v. Hynes*, 52 N.Y.2d 333, 339-40 (1981) ("Quite simply, having complied with the process, the subpoenaed party no longer possesses the option of challenging its validity or the jurisdiction of its issuer.

Any other rule would open the door to never-ending challenges to the validity of subpoenas, perhaps even years after initial issuance and compliance.”). Any objection to defective service is waived if the person receiving process complies without raising an objection. *Matter of Sessa v. Bd. of Assessors of Town of N. Elba*, 46 A.D.3d 1163, 1164 (3d Dept. 2007). Comerica Bank’s compliance with the information subpoena with restraining notice and the execution, and levy without raising objections constituted consent to service and personal jurisdiction. *Cherfas v. Wolf*, 20 Misc. 3d 1118(A) (Sup. Ct. Kings. Cty. July 14, 2008).

In fact, this Court’s decision in *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533 (2009) is instructive on the effect of the garnishee’s consent to New York jurisdiction. In *Koehler*, post-judgment enforcement devices were served on Bank of Bermuda, a bank whose sole connection to New York was a subsidiary’s location New York. *Id.* at 534. The key takeaway from *Koehler* is that if a New York Court has personal jurisdiction over a garnishee – even if personal jurisdiction is purely the result of the garnishee’s consent – then property held by the garnishee can be levied regardless of where the property is located. *Id.* at 541.

There is no dispute that Comerica Bank complied without objection in this case. By its compliance, Comerica Bank accepted service and waived any objections to personal jurisdiction or service. For the foregoing reasons, the Court should hold that a judgment-debtor does not suffer cognizable damages in tort where the non-

party garnishee accepted service of the levy and demand and otherwise consented to the court's personal jurisdiction.

C. FutureNet Did Not Sustain Any Recoverable Tort Damages.

On each of Simon's claims (e.g., wrongful execution and restraint, conversion, and trespass to chattel), a showing of actual damages was a necessary element. *Simon v. GTR Source, LLC*, 2019 U.S. Dist. LEXIS 221111. Dismissal is warranted where a "claim lacks that most fundamental of legal elements necessary to support a viable cause of action – any demonstrable damages." *Commercial Union Assurance Co. PLC v. Milken*, 17 F.3d 608, 612 (2d Cir. 1994).

Where a judgment-creditor's execution on a judgment is alleged to have been improper, the judgment-debtor will not have a claim for tort damages if the funds collected are applied to the judgment-debtor's balance due under the judgment. *Bam Bam Entm't LLC v. Pagnotta*, 59 Misc. 3d 906, 75 N.Y.S.3d 804 (Sup. Ct. Kings Cty. 2018); *Simon v. GTR Source, LLC*, 2019 U.S. Dist. LEXIS 221111. Indeed, a party suffers no recoverable damages if he is fraudulently induced to do something that he is already under a legal obligation to do, such as pay a debt. *Marc Dev. v. Wolin*, 904 F. Supp. 777, 793 (N.D. Ill. 1995); *Williams v. Seterus, Inc.*, 2020 U.S. Dist. LEXIS 10408, *8 (N.D. Ala. Jan. 22, 2020); *Salkey v. State Farm Life Ins. Co.*, 2019 NY Slip Op 31240(U), *9 (Sup. Ct. Broome Cty. 2019); *M. B. Kahn Constr. Co. v. S.C. Nat'l Bank*, 275 S.C. 381, 384 (S.C. 1980); *Indus. Sav. Bank v. People's*

Funeral Serv. Corp., 296 F. 1006, 1007 (D.C. Cir. 1924). Thus, the payment of a valid debt owed by a judgment-debtor to a judgment-creditor, even if payment is procured by allegedly deceptive or deficient means, does not create a basis to recover in tort from the judgment-creditor. The inability of a judgment-debtor to recover in tort where its sole alleged injury was the payment of money that it undisputedly owed to the judgment-creditor is rooted in basic concepts of tort law, rather than the doctrine of offsets. (A720-22).

Ultimately, the Appellants do not claim they suffered any cognizable injuries. Instead, their entire theory is that the levy and demand caused FutureNet to partially satisfy its lawful obligation to pay CMS pursuant to a valid New York judgment. Neither the judgment nor the levy and demand have ever been vacated. Moreover, even including the funds collected post-judgment, CMS has recovered far less than it paid to FutureNet in 2017. As a consequence, CMS continues to be the only party with an actual injury.

Finally, Appellants offer no explanation for how FutureNet could have suffered a tort injury when FutureNet authorized Comerica Bank to comply with any post-judgment enforcement devices, Comerica Bank complied with the levy without objection, and the funds were used to partially satisfy a valid New York judgment. There is no dispute that all of the rights, obligations, and protections afforded to FutureNet under Article 52 of the CPLR were properly carried out.

For the foregoing reasons, the Court should hold that a judgment-debtor does not suffer cognizable damages in tort where the sole allegation is that the non-party garnishee accepted service of the levy and demand and consented to the court's personal jurisdiction.

D. A Judgment-Creditor Should Not Be Liable In Tort For The Acts Of A Sheriff And A Non-Party Garnishee.

In Addition to the specific issues raised in this case, the Court should answer the first certified question "no" because the Appellants ask this Court to hold that a judgment-creditor can be liable for the acts of a sheriff and the acts of a non-party garnishee.

It would be unjust and unreasonable if tort liability against a judgment-creditor could arise from allegations that: 1) a sheriff served an execution on a non-party garnishee improperly; and 2) a non-party garnishee bank accepted the execution without objection. Judgment-creditors have no control on how or where a sheriff serves an execution. Furthermore, judgment-creditors have no control over whether a bank will object to an execution.

The language of an execution sent to a sheriff contains no direction as to where or how it should be served. In fact, the execution contains standard language acknowledging that the sheriff may not be able to serve the execution, and instructions for returning the execution when the sheriff was unable to effect service on the garnishee. (A-558). CPLR § 5230(c) explicitly contemplates that the sheriff

may be unable to serve the execution and mandates that the sheriff return the execution within sixty days unless he or she receives an extension of time. CPLR § 5230(c). The only information provided by CMS to the sheriff in the execution papers was the location where a copy of the Notice to Garnishee might be sent to Comerica Bank, not where or how service of the execution should be effectuated. (A-559). It would be unjust and unreasonable if judgment-creditors could be held liable in tort for the discretionary acts of a public official over whom the judgment-creditor has no control.

Appellants' theory is all the more unreasonable when considered in context. According to the Appellants, the act that distinguishes a harmless error in serving the execution as opposed to an actionable tort is the non-party garnishee bank's response. If the bank responds by objecting to service or jurisdiction, Appellants concede there would be no harm because nothing will have happened. However, if the bank waives its objections to jurisdiction or service, Appellants contend they have suffered a cognizable tort injury at the hands of the judgment-creditor. Appellants' theory is unreasonable because the judgment-creditor has no control over the bank or its decision-making process.

Once an execution has been delivered to a sheriff, a judgment-creditor has no control beyond deciding whether to grant the sheriff a sixty-day extension of time to continue his or her efforts to serve the execution. *See* CPLR § 5230(c). All of the

discretion, judgment, oversight, and decision-making relating to service of the execution is outside the control of judgment-creditor.

For the foregoing reasons, the Court should answer the first certified question with “no.”

II. A JUDGMENT DEBTOR CANNOT RECOVER IN TORT WITHOUT FIRST OBTAINING AN ORDER VACATING THE EXECUTION, LEVY, AND DEMAND PURSUANT TO CPLR § 5240.

Even assuming *arguendo* that a tort claim might arise where a judgment-debtor alleges that a non-party garnishee accepted service of the levy, rather than pursuant to the service provisions of CPLR § 5232(a), an order vacating the execution would be a condition precedent to commencing an action.

Appellants argue that *Day v. Bach*, 87 N.Y. 56 (1881) is controlling and permits a cause of action in tort if the levy was void from inception, rather than merely voidable. However, as addressed above, well-settled principles relating to personal jurisdiction and service of process establish that, at most, the levy and demand could be deemed voidable if Comerica Bank had objected, rather than void from inception. Consequently, under the *Day* analytical framework, an order from the Supreme Court that vacating the execution is a pre-requisite to asserting a tort claim. *Id.* at 61. (holding that if a writ or process is not absolutely void from inception, then “no action lies until it has been set aside.”)

Examples of void writs are few and far between in the case law, but they tend to arise from judgments that are subsequently vacated, judgments entered against the judgment-debtor without jurisdiction, or executions served despite the underlying debt or judgment being satisfied. *See, e.g., Silberstein v. Presbyterian Hosp. in N.Y.*, 96 A.D.2d 1096, 1096 (2d Dept. 1983) (judgment was vacated); *ERA Realty Co. v. RBS Props.*, 185 A.D.2d 871, 873 (2d Dept. 1992) (underlying judgment was void for lack of subject matter jurisdiction). In the case at bar, the judgment was undisputedly valid, enforceable, and unsatisfied.

Moreover, contrary to Appellants' contention, there is nothing inherently void about a judgment-debtor attempting to execute on property that may or may not be outside the state of New York. *Koehler*, 12 N.Y.3d at 539-40 (although pre-judgment attachments are subject to territorial limitations, "the Legislature intended CPLR article 52 to have extraterritorial reach.") Indeed, post-judgment enforcement devices under CPLR article 52 are enforceable regardless of the location of the *res*, and will be enforced as long the Court can acquire personal jurisdiction over the garnishee. *Id.* at 540. Thus, it cannot be said that the execution itself was void from inception.

Indeed, Appellants' own brief seems to concede that a motion under CPLR § 5240 to vacate the execution was a prerequisite in the CMS case. *See App. Brief*, pp.40-41. Appellants argue that an unsettled trial court decision, *Silver Cup*

Funding, LLC v. Horizon Health Ctr. Inc., 2020 NY Slip Op. 515219(U) (Sup. Ct. Ont. Cty. 2019), “is instructive” in distinguishing void process from allegedly voidable process and, thus, determining when an order vacating an execution is a pre-requisite. *See* App. Brief, p.40. According to the Appellants, the distinction is whether the execution was served inside the sheriff’s correct county in New York. *See* App. Brief, p.40. Appellants argue a motion pursuant to CPLR § 5240 was required in *Silver Cup Funding* because the execution in that case was served on TD Bank in New York, but they argue that there were technical defects in service and jurisdiction over TD Bank in violation of the separate entity rule. As those allegations are largely indistinguishable from their theory against CMS in this case, Appellants seem to concede that the claim against CMS was properly dismissed for failure to obtain an order vacating the execution prior to commencing an action. *See* App. Brief, pp.40-41.

Nothing in Article 52 of the CPLR suggests that the legislature intended to allow claims, whether in tort or otherwise, against a judgment-creditor based upon allegations that a post-judgment enforcement device was not properly served on a non-party garnishee or was served on a garnishee over whom the court lacks personal jurisdiction. Similar to the Court’s conclusion in *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 78 (2013), a claim against a judgment-creditor cannot be implied from Article 52 for alleged non-compliance with a service provision against a garnishee.

The exclusive procedural vehicles, including any remedies, would have been found in a motion pursuant to CPLR § 5240 or service of an exemption claim pursuant to CPLR § 5222-A. New York law permits a motion by “any interested person” to request “an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure.” Similarly, CPLR § 5222-A provides that a judgment-debtor may claim that funds that were executed upon were exempt for any number of reasons and creates an expedited procedure to adjudicate whether the funds should be applied to the judgment.

If FutureNet or Simon believed the execution was improper or the funds could not be properly executed upon, they had straightforward procedural vehicles available. If the court held that the execution was improper, or that some or all of the funds should have been exempt from the execution for any reason, it would have been in the court’s power to direct the disposition of the funds. Both procedures are expeditious and substantially less cumbersome than filing a tort action in federal court. Furthermore, if there was a legitimate issue with the execution, both procedures could have been utilized before any money was actually paid over to the Rockland County Sheriff by Comerica Bank. Moreover, even after funds had been transferred to the Sheriff, CPLR § 5240 could have been used to direct the return of any funds that should not have been executed upon and, thus, obviated any claim for injuries arising from the funds having been seized.

For the foregoing reasons, the Court should hold that a judgment-debtor's exclusive remedy for alleged technical errors relating to judgment enforcement should be found in CPLR Article 52, rather than in tort. However, assuming *arguendo* that the Court holds that a claim for tort damages may lie, the Court should hold that an order granting vacatur of an execution pursuant to CPLR § 5240 is a necessary prerequisite to commencing an action in tort.

III. THE APPELLANTS' RELIANCE ON THE SEPARATE ENTITY RULE IS MISPLACED.

By their reliance on the *Silver Cup Funding* decision, Appellants seem to argue that the executions should be deemed voidable based upon the separate entity rule. Respectfully, the Court should hold that Appellants' reliance on the separate entity rule is misplaced in this case.

The separate entity rule is not a statutory requirement or a law arising from any substantive right, but a judicially crafted doctrine dating from approximately a century ago. *Motorola v. Standard Bank*, 24 N.Y.3d 149, 165 (2014) (dissent). The first purpose of the separate entity rule was to protect international banks from being subjected to competing claims in foreign jurisdictions and avoid conflicts among competing legal systems. *Id.* at 162. Moreover, the separate entity rule is intended to apply "as a limiting principle in the context of international banking, particularly in situations involving attempts to restrain assets held in a garnishee bank's foreign branches." *Id.* at 161. The second purpose of the separate entity rule was to treat

each bank branch as a separate entity so as to alleviate the compliance burden on the bank, which would have to notify every branch simultaneously. *Cronan v. Schilling*, 100 N.Y.S.2d 474, 476 (Sup. Ct. N.Y. Cty. 1950). Thus, “[t]he separate entity rule was historically justified on the basis of both the impracticability of requiring constant transmission of reports on the status of accounts in one branch to all other branches, and on the recognition that any banking operation in a foreign country is necessarily subject to the foreign sovereign's own laws and regulations.” *Matter of Int'l Legal Consulting Ltd. v. Malabu Oil & Gas Ltd.*, 2012 NY 35 Misc. 3d 1203(A) (Sup. Ct. N.Y. Cty. 2012). The justifications for the separate entity rule exist for the convenience and protection of garnishee banks, not to act as a shield for recalcitrant judgment-debtors.

The separate entity rule is not self-executing and a restraint or execution allegedly served in violation of the separate entity rule does not render the execution void *ab initio*. *Tronic Sys. v. Fleet Bank*, 2004 NYLJ LEXIS 2638, *3-4 (Sup. Ct. Nassau Cty. 2004). Rather, it allows a bank to object to service or personal jurisdiction where it has been served at a branch other than where an account was opened and the bank's failure to raise an objection based upon the separate entity rule constitutes a waiver of the objection. *Id.* at *5. Indeed, in *Motorola*, the Court distinguished its earlier decision in *Koehler*, by noting that the Bank of Bermuda's failure to raise a separate entity rule objection in *Koehler* was effectively a waiver

of the objection that deprived the Court of an occasion to examine it. *Motorola*, 24 N.Y.3d at 161.

CMS respectfully contends that the Court should decline to apply the separate entity rule in this case because: 1) objections relating to the separate entity rule belong to the garnishee bank, Comerica Bank, not the judgment-debtor, and only Comerica Bank may raise them; and 2) separate entity rule objections are waiveable and, as Comerica Bank did not raise such an objection, the Court should hold the objection was waived. Neither of these points were before the Court in the *Silver Cup Funding* case and, as such, that trial court did not consider them in that case. Additionally, counsel for CMS was unable to locate a decision by this Court in which a separate entity rule objection was sustained without it being raised by a bank. Finally, none of the concerns relating to international banking that justify the application of the separate entity rule are implicated in this case.

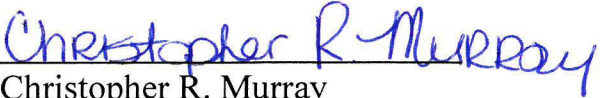
For the foregoing reasons, CMS respectfully submits that the Court should answer both certified questions with “no.”

CONCLUSION

For the foregoing reasons, this Court should answer both certified questions with “no.”

WHEREFORE, CMS respectfully requests that this Honorable Court issue an Order: 1) answering both certified questions with “no;” and 2) awarding CMS such other and further relief as the Court deems just and proper.

Dated: July 9, 2021



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NEW YORK STATE COURT OF APPEALS
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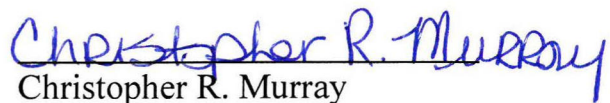
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