

To be argued by:
Ryan K. Cummings, Esq.
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CTQ No. CTQ-2021-00001
United States Court of Appeal, Second Circuit Docket Nos. 20-118 and 20-850

Court of Appeals
of the
State of New York

PLYMOUTH VENTURE PARTNERS, II, L.P., PLYMOUTH
MANAGEMENT COMPANY IN THEIR CAPACITIES AS
RECEIVERS FOR FUTURENET GROUP, INC.,

Plaintiffs-Appellants,

– against –

GTR SOURCE, LLC, STEPHEN W. BIEGEL, IN HIS CAPACITY
AS NEW YORK CITY MARSHAL, BADGE NO. 27,

Defendants-Respondents.

(for continuation of caption see inside cover)

BRIEF FOR DEFENDANT-RESPONDENT
GTR SOURCE, LLC

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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.

RULE 500.1(f) CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. 500.1(f), Defendant-Appellee GTR Source, LLC, states that it has the following corporate parents, affiliates or subsidiaries: High Score Capital LLC; Drawbridge Investments, LLC; Addy Source, LLC; Influx Capital Group, LLC; Orange ACH, LLC; and RAM Capital Funding, LLC.

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Defendant-Respondent GTR Source LLC (“GTR”). This appeal is not a referendum on the merchant cash advance industry or regulation of that industry—that is a legislative function. This appeal addresses two, straightforward, certified questions 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 execution that does not comply with the procedural requirements of CPLR 5232(a), even though the seized property is applied to a valid money judgment; and if so

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

The answer to both questions, like the United States District Court for the Southern District of New York held, is “no.”

Any other answer would expose legitimate judgment creditors to, effectively, double jeopardy. The judgment creditor would be out the money they are entitled to by way of their judgment, plus be subject to additional damages to the judgment debtor—placing the judgment debtor in a better position vis-à-vis their creditor than before the judgment was entered. The chilling effect such a

ruling would have on creditors and those who effectuate judgment enforcement in New York, cannot be understated.

As a threshold matter, tort liability does not extend to claims predicated on technical noncompliance with CPLR Article 52's judgment enforcement mechanisms. This Court has already held there is no private right of action against banks who fail to provide the judgment debtor with the statutorily required notifications under Article 52. Similarly, appellate courts in New York have not imposed tort liability on creditors, or their counsel, when they "jump the gun" and start judgment enforcement before the judgment has technically been entered. Consistent with those policy determinations, judgment debtors should not be able to sue in tort for a judgment creditor's, or those charged with carrying out judgment enforcement's, technical failure to comply with Article 52 when they are enforcing a valid judgment and there is no evidence of intentional or malicious misconduct on the part of the judgment creditor or enforcement officer.

Even if there were some viable tort claim in this context, it is axiomatic that any common law tort claim requires, among other things, damages proximately caused by the alleged tort. The District Court properly held that

Plaintiff-Appellant Basil Simon’s (“FutureNet’s”)¹ failure to substantiate and prove any damages proximately caused by Defendants-Respondents GTR’s (“GTR’s”) or Marshal Biegel’s allegedly tortious conduct necessitated dismissal of his claims under New York law. Reduced to its essence, the District Court correctly held that, even if FutureNet’s allegations of improper collection by the Marshal constituted a tort, FutureNet still had no damages because the improper collection was used to satisfy a valid judgment. In other words, FutureNet was not harmed by the allegedly tortious conduct—indeed, this case is not about harm to FutureNet, it is being prosecuted by other creditors of FutureNet. Because FutureNet has not, and cannot, demonstrate any damages by the satisfaction of a valid debt obligation, the District Court’s decision was proper and the first certified question should be answered in the negative.

Finally, even if technical non-compliance with CPLR § 5232(a), which results in the satisfaction of an otherwise valid judgment against the debtor, could give rise to tort liability, the well-established precedent in New York is that the debtor, or other creditors who claim to have a superseding interest in the

¹ Basil Simon subsequently assigned his rights in this litigation to two investment companies (Plymouth Venture Partners, II, L.P., and Plymouth Management Company). The investment companies have never asserted a claim on their own behalf.

subject debtor's property, must get the underlying judgment or enforcement device vacated before pursuing any claims based on those judgments or enforcement devices. Here, it is undisputed that FutureNet tried, and failed, twice to get GTR's money judgment vacated. It is also undisputed that FutureNet has never sought to vacate the judgment enforcement devices upon which it now sues, even though those judgment enforcement devices were issued and complied with—resulting in the filing of a Satisfaction of Judgment by GTR—prior to FutureNet's second failed motion to vacate the judgment and prior to its commencement of this action.

The Court's decision in *Cruz v. TD Bank*, 22 N.Y.3d 61 (2013) provides that judgment debtors such as FutureNet are relegated to pursuing remedies pursuant to CPLR Article 52 if they believe a judgment enforcement process is improper. FutureNet decided not to exercise any rights it may have under CPLR Article 52, and it cannot now make an end-run around that requirement. So the second certified question should also be answered in the negative.

COUNTERSTATEMENT OF FACTS

The factual background for these certified questions is straightforward and largely undisputed.

A. Judgment is Entered in favor of GTR and against FutureNet.

On November 13, 2017, FutureNet sold \$291,800.00 of its future receivables to GTR pursuant to a Purchase and Sale of Future Receivables Agreement (the “Agreement”) for a Purchase Price of \$200,000.00. (A-172 – 182). Pursuant to the Agreement, FutureNet agreed that proceeds of the future receivables it sold to GTR were to be direct deposited into FutureNet’s banking account with Comerica Bank, from where GTR would be able to ACH debit the proceeds of the future receivables it had purchased *via* daily ACH payments. (A-179). FutureNet received the \$200,000 from GTR.

On or about February 8, 2018, FutureNet blocked GTR’s access to the Comerica banking account, preventing GTR from collecting its purchased future receivables despite the fact that FutureNet was still operating and generating receivables. (A-386 – 388). As of February 31, 2018, \$95,849.00 of the future receivables FutureNet sold to GTR had not been delivered. (A-387). Pursuant to CPLR § 3218, and based upon a sworn affidavit of confession of judgment executed by FutureNet and its principal, Parimal D. Mehta, a judgment was entered

in favor of GTR and against FutureNet and its principal, Mehta, on February 14, 2018 in the amount of \$120,154.42. (A-38 – 40).

B. GTR Executes Upon its Judgment.

On February 14, 2018, an information subpoena with restraining notice and accompanying documents were served on non-party garnishee Comerica Bank. (A-27 – 37). Instead of filing a motion challenging the information subpoena with restraining notice under CPLR § 5240, or serving an exemption claim under CPLR § 5222-A, FutureNet’s counsel sent GTR’s counsel a threatening and inflammatory email and letter communications. (A-41 – 52).

On February 26, 2018, the New York City Marshal, Stephen W. Biegel, served a property execution with notice to garnishee upon Comerica Bank, care of Corporate Creations Network Inc. in Nyack, New York, its designated agent for service of process. (A-54). On February 28, 2018, FutureNet moved in the New York State Supreme Court for Orange County to vacate the February 14, 2018 judgment and to strike all enforcement devices that GTR may have issued. *GTR Source, LLC v. FutureNet Grp., Inc.*, 58 Misc.3d 1229(A), 98 N.Y.S.3d 500(Table), at *6 (Sup. Ct. Orange Cty. Mar. 13, 2018). (A-61-71). On March 13, 2018, Judge Catherine Bartlett denied FutureNet’s application, holding that

FutureNet would need to pursue any requested relief by a separate plenary action, and that “Defendant’s remaining contentions [were] without merit.” *Id.*

An additional demand for funds was served by the Marshal upon Comerica Bank on March 14, 2018. (A-61; A-72 – 80). Comerica Bank issued a bank check payable to Marshal Biegel in the amount of \$127,082.29, inclusive of accrued interest and the Marshal’s poundage fees, on or about March 21, 2018 without objection. (A-393, ¶ 16). Accordingly, on March 22, 2018, GTR filed a Satisfaction of Judgment in the Orange County Clerk’s Office. (A-194).

C. Basil Simon is Appointed Receiver of FutureNet and files suit against GTR.

On or about April 27, 2018, Detroit Investment Fund, L.P. and Chase Invest Detroit Fund, LLC moved in the Circuit Court for the State of Michigan, Wayne County, for an emergency appointment of Basil Simon as receiver of FutureNet. (A-217 – 218). Thereafter, on August 24, 2018, Basil Simon, as Receiver for FutureNet, moved to vacate the underlying Judgment and for restitution in the amount of \$127,082.29 (the amount of money lawfully obtained by the Marshal), in the New York State Supreme Court for Orange County. (A-220 – 221). Judge Bartlett again denied FutureNet’s motion on November 26, 2018.

(A-222 – 240); *see also Simon v. GTR Source, LLC*, 62 Misc.3d 794, 89 N.Y.S.3d 528 (Sup. Ct. Orange Cty. Nov. 26, 2018).

Thereafter, on February 15, 2019, FutureNet filed the present action in the United States District Court for the Southern District of New York, asserting three duplicative tort claims for wrongful restraint and execution, conversion, and trespass to chattel. (A-10 – 26). Each of FutureNet’s claims purports to request damages arising in tort from the improper restraint and execution of funds held by Comerica Bank that were applied to satisfy a valid New York State court judgment in favor of GTR and against FutureNet. (A-10 – 26).

D. FutureNet and Defendants-Respondents’ move for Summary Judgment.

On May 17, 2019, FutureNet filed its notice for summary judgment on each of its four causes of action. (A-122 – 123). Defendant-Respondents opposed and cross-moved for summary judgment on June 18, 2019. (A-276 – 277). The United States District Court for the Southern District of New York heard oral argument on the parties’ respective motions for summary judgment on December 19, 2019. (A-436 – 485). On December 26, 2019, the Honorable John G. Koeltl, issued an order denying FutureNet’s motion for summary judgment and granting Defendant-Respondents’ motion for summary judgment on the grounds that the

“funds recovered by the Marshal were used to extinguish the debtor’s valid debt owed under the valid court judgment.” (A-497).

E. FutureNet Appeals to the Second Circuit.

FutureNet subsequently appealed to the Second Circuit Court of Appeals, resulting in the certified questions now before the Court.

ARGUMENT

The FutureNet has no viable tort claim. It is undisputed that there was a valid, enforceable New York State money judgment in favor of GTR and against the FutureNet, and that the funds executed upon were wholly used to satisfy FutureNet’s obligation to pay the money judgment. Plaintiffs-Appellants, as the assignees of FutureNet, stand in its shoes and have no greater rights than FutureNet had. Stated another way, Plaintiffs-Appellants cannot rely upon their alleged damages as creditors to FutureNet to establish standing to pursue the alleged tort claims. Accordingly, as was the case at both the New York State Supreme Court (twice) and District Court levels, Plaintiffs-Appellants cannot demonstrate to this Court that FutureNet sustained any damages as a result of the complained of activities.

POINT I.
**THE FIRST CERTIFIED QUESTION SHOULD BE ANSWERED
IN THE NEGATIVE BECAUSE THE JUDGMENT DEBTOR HAS
NO DAMAGES PROXIMATELY CAUSED BY AN ALLEGED TORT**

The first certified question addresses fundamental tort law questions.

Can you have a tort claim when a judgment creditor is seeking to enforce a valid judgment, but fails to comply with the technical requirements of CPLR Article 52, where there is no evidence of intentional or malicious conduct on the part of the creditor? And even if the answer is yes, can you have an actionable tort where the plaintiff suffers no damages? The common law has always required that the alleged tort proximately cause damages in order to be sustained. Here, FutureNet suffered no damages because, even if one were to believe a tort had been committed through technical non-compliance with New York's judgment enforcement statute, the alleged tort resulted in the extinguishment of a legitimate money judgment against FutureNet. There is no split in New York authority on this point.

A. Defendants Have No Tort Liability to FutureNet.

As a threshold matter, even accepting the facts as pleaded by FutureNet, there is no tort liability on the part of GTR or the Marshal. Time and again, New York courts have held that technical errors by a creditor, or those

acting on its behalf, in an effort to collect upon a judgment, or anticipated judgment, are not actionable in tort.

For example, in *Gaines v. Gaines*, 109 A.D.2d 866 (2d Dep't 1985), the plaintiff sued his ex-wife, her lawyer, and the Westchester County Sheriff for malicious execution and issuance of a restraining order. The defendant lawyer had obtained, as part of a divorce decree, an order awarding him attorneys' fees against the plaintiff. The lawyer issued a restraining notice to plaintiff's employer and bank (Marine Midland Bank, N.A.), which in turn levied upon plaintiff's funds, making it impossible for him to pay his other creditors. The lawyer also had the Sheriff serve an execution for those funds, representing that he had a valid judgment against the plaintiff. The truth was, no underlying judgment had been entered because the divorce decree had not been reduced to a money judgment. In affirming the Trial Court's dismissal of the complaint against the defendant attorney, the Second Department held: "While defendant Hersh's attempts at enforcement were far from exemplary, plaintiff has failed to allege facts sufficient to make out tortious or malicious conduct on the part of Hersh." *Id.* at 867.

The *Gaines* court specifically noted that "plaintiff could have moved for a protective order pursuant to CPLR 5240. Plaintiff failed to avail himself of

this remedy and chose instead to commence an action for damages predicated on allegations of malicious falsehood.” *Id.* at 868. The court concluded its decision by holding: “[t]he fact that [defendant’s] attempts at enforcement were legally improper, does not, of itself, justify the commencement of plaintiff’s action.” *Id.*; *see also Lieberman v. Pobiner, Londson, Bashian & Buonamici*, 190 A.D.2d 716 (2d Dep’t 1993) (“There is no question that the defendant law firm employed a legally invalid method to secure the judgment against the plaintiff. It is well settled that counsel fees awarded in a matrimonial action do not become a judgment debt enforceable by execution until the award is first reduced to a judgment. However, while the manner in which counsel attempted to enforce the award of counsel fees contained in the *pendente lite* order was technically improper, it does not necessarily follow that the action to recover damages for abuse of process has merit.”).

In *Benzemann v. Citibank, N.A.*, 149 A.D.3d 586 (1st Dep’t 2017), the plaintiff sued a judgment creditor and its counsel for negligence, wrongful attachment, and violation of due process for the service of restraining notices that resulted in the restraint of plaintiff’s bank accounts, even though it was his brother who was the judgment debtor. In 2008, the defendants served restraining notices on Citibank that incorrectly included the plaintiff’s social security number,

resulting in the restraint of his bank accounts until it was determined that the wrong social security number had been used. In 2011, the defendants again issued defective restraining notices, and again plaintiff's account was improperly restrained. He then filed suit against the bank, the judgement creditor, and its counsel.

The Trial Court dismissed the claims against the creditors and its counsel. The First Department affirmed the dismissal of the negligence claims because the attorney owed no duty to the plaintiff and the creditor's liability was derivative of that of its counsel. *Id.* at 586. With regard to the "wrongful attachment" claim, the court affirmed its dismissal because it was premised on restraining notices issued pursuant to CPLR § 5222, and such notices do not support an Article 62 claim for wrongful attachment. *Id.* Simply put, New York does not recognize the type of tort claim FutureNet is presenting on this case.²

The case law cited by FutureNet does hold otherwise. For example, in *Paul v. Fargo*, 84 A.D. 9 (4th Dep't 1903), the court was evaluating whether New York recognized a claim for malicious prosecution when a civil suit was "instituted

² Indeed, here is difficult to identify any potentially tortious conduct when Comerica Bank has never objected to the subject enforcement devices and FutureNet contractually agreed that Comerica could honor such devices with impunity. (A-684, Section 3.04).

and prosecuted without probable cause and maliciously, and resulted in damage to the defendant in excess of the costs recovered by him.” *Id.* at 10. The *Paul* court even listed the types of situations that may support such a claim—none of those situations are present here:

It has been repeatedly held by the courts of this and most of the other states of the Union that a civil action may be maintained to recover the damages sustained by the abuse or misuse of the process of the court—as, where a party wrongfully and willfully sues out an execution on a judgment which he knows has been paid and satisfied, and whereby the property of the defendant is taken and sold (*Brown v. Feeter*, 7 Wend. 301); entering up a judgment and suing out execution for a claim already satisfied (*Barnett v. Reed*, 51 Pa. 190, 88 Am. Dec. 574); suing out an attachment for an amount greatly in excess of the debt (*Savage v. Brewer*, 16 Pick. 453, 28 Am. Dec. 255); causing an arrest for more than is due (*Jennings v. Florence*, 2 C. B. 465); levying an execution for an excessive amount (*Sommer v. Wilt*, 4 Serg. & R. 19); causing an arrest when a party cannot procure bail, and keeping him imprisoned until he is compelled to surrender property to which the other is not entitled (*Grainger v. Hill*, 4 Bing. [N. C.] 212); where a person is induced by fraud to come into the jurisdiction of the court, and is then sued, although upon a perfectly valid cause of action (*Slade v. Joseph, 5 Daly*, 187); where service of process is accomplished by unlawfully breaking into a dwelling house, although the party at whose instance the service was made has a good cause of action against the person served (*People v. Hubbard*, 24 Wend. 369, 35 Am. Dec. 628).

Id. at 14. The *Paul* court affirmed dismissal of the malicious prosecution claim. *Id.* at 21.

Silberstein v. Presbyterian Hosp. in New York, 96 A.D.2d 1096 (2d Dep't 1983), was a default judgment case. The defendant hospital had obtained a default judgment against Silberstein for unpaid medical bills. *Id.* at 1096. It then issued an execution on his bank account. *Id.* Subsequently, the default judgment was vacated because the court did not have personal jurisdiction over Silberstein. Silberstein then filed suit against the hospital, alleging that it knew or should have known that the default judgment and execution were void for lack of jurisdiction. The hospital then defaulted in the second lawsuit. Silberstein moved for a default judgment, but the Trial Court denied the motion. He appealed. The Second Department affirmed the Trial Court's decision. Importantly, the court noted that an action for wrongful issuance of execution can "be brought *after* the vacatur in the nature of trespass." *Id.* (emphasis supplied). The vacatur referenced was *both* the judgment and the corresponding execution. That, of course, makes sense because then there was no legal basis to interfere with the debtor's person or property in the first instance as the court did not have jurisdiction over the alleged debtor. Here, there is no dispute that the New York State Supreme Court had

jurisdiction over FutureNet when it entered judgment, and there is no dispute that the GTR judgment is valid.

FutureNet's reliance on *Williams v. Williams*, 23 N.Y.2d 592 (1969) is similarly misplaced. *Williams* involved the evaluation of a complaint alleging abuse of process and defamation by one brother, against another, for filing and then widely distributing a complaint accusing the plaintiff of engaging in theft of trade secrets, among other things, from their jointly owned company. This Court affirmed dismissal of the abuse of process claim because the mere filing of a complaint is not abuse of process.³ In *Williams* there was no claim that the subject complaint was filed in a court that did not have personal jurisdiction over the affected brother, or that a judgment was improperly obtained pursuant to such a facially invalid complaint.

³ “An abuse of process claim has three elements: 1) regularly issued process, either civil or criminal, 2) an intent to do harm without excuse or justification, and 3) use of the process in a perverted manner to obtain a collateral objective. Process has been defined as “a direction or demand that one person perform or refrain from doing some prescribed act.” The abused process must involve “an unlawful interference with one’s person or property.” Such “interference” may be an arrest, an attachment, or a provisional remedy of similar nature. In addition, the pursuit of a collateral objective must occur after the process is issued; the mere act of issuing process does not give rise to a claim. In New York, wrongful collateral objectives include economic harm, extortion, blackmail, and retribution.” *Nicholas v City of Binghamton, N.Y.*, 2012 WL 3261409, at *18 (N.D.N.Y. Aug. 8, 2012) (citations omitted).

FutureNet's reliance on *Nat'l Bank of N. America v. IBEW, Local No. 3, Pension & Vacation Funds*, 69 A.D.2d 679 (2d Dep't 1979) is particularly odd because it supports Defendants' argument in *infra* Part I. B, that FutureNet has suffered no damages. The case analyzed whether New York's Article 52 judgment enforcement provisions were preempted by ERISA. The court rejected the defendant-fund's argument that the CPLR was preempted, and specifically rejected its asserted concerns that judgment creditors can, or will, run amuck in New York:

A prohibition of attachment, levy, garnishment or other legal process, has a specific meaning and legal implication wholly different from language which merely prohibits assignments and alienations. The differences are highlighted by the phrase "legal process". Unlike an assignment or general alienation, garnishment, levy and other legal processes are remedies which generally arise after an adjudication of liability and the exercise of these remedies is subject to judicial supervision. Whereas assignment and alienation are generally voluntary arrangements between individuals, garnishment and levy are exercises of State power which result in involuntary transfers. Thus, there is little risk that a guileless and innocent pensioner will be defrauded of his benefits by either the actions of those administering the fund or of a third party. Nor is there a risk that the intended beneficiary will not receive the vast majority of the payable benefits. Furthermore, those benefits which pensioners forego by operation of CPLR article 52, nevertheless inure to the employee's benefit by reducing an adjudicated liability. In view of the legislative statement of purposes, it is clear that ERISA's anti-alienation provision is directed at the unsupervised and highly detrimental transfers by which pensioners had been victimized prior to the enactment of

ERISA. No such result would occur by allowing the judicially supervised enforcement of a money judgment.

Id. at 687. In other words, CPLR Article 52 provides safeguards to a debtor because there is judicial oversight to prevent abuse, and moreover, applying funds that are seized to reduce a valid judgment benefits the debtor by reducing that judgment.

In short, where there is a valid underlying money judgment, technical non-compliance with Article 52 by one enforcing that judgment will not give rise to common law tort liability to the judgment debtor.

B. FutureNet Suffered No Damages and, Therefore, it Has No Tort Claims.

Notwithstanding the foregoing, each of FutureNet’s purported causes of action requires a showing of actual damages—something woefully missing from their complaints to the New York State Supreme Court and to the District Court. *See Simon v. GTR Source, LLC*, 2019 WL 7283279, at *4-8 (S.D.N.Y. Dec. 26, 2019). Dismissal of tort claims is appropriate where a complaining party has “incurred no cognizable damages under New York State law.” *Piluso v. Siemens Information and Comm’n Networks, Inc.*, 149 Fed.Appx. 44, 44 (2d Cir. 2005) (affirming district court’s granting of summary judgment dismissing plaintiff’s claims for failure to allege cognizable damages); *Commercial Union Assur. Co.*,

plc v. Milken, 17 F.3d 608, 612 (2d Cir. 1994) (dismissing a “claim lack[ing] that most fundamental of legal elements necessary to support a viable cause of action — any demonstrable damages”). Indeed, where a party has failed to adequately plead cognizable damages to sustain his claims, the problem “is substantive” and “better pleading will not [and cannot] cure it.” *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

A New York Trial Court, under facts virtually identical to those presented in this case, applied this very tort principal. In *Bam Bam Entm’t LLC v. Pagnotta*, 2018 N.Y. Slip. Op. 28109, 59 Misc. 3d 906 (Sup. Ct. Kings Cty. 2018), a New York City Marshal allegedly improperly issued a levy to enforce a valid state court judgment on a New York bank branch that did not hold the subject account. The bank, nonetheless, complied with the levy. The monies received by the Marshal were applied to satisfy the judgment—the court held that the judgment-debtor had sustained no damages due to the Marshal’s technical noncompliance with Article 52 and, therefore, had no viable tort claim.

Where, as here, a judgment-creditor’s execution on a judgment is alleged to have been improper or voidable, the judgment-debtor will not, and cannot, have a claim for tort damages if the funds collected are applied to the

judgment-debtor's balance due and owing under a valid state court judgment. *Id.* at 808-11. Notably, FutureNet moved to have GTR's judgment vacated two times. (A-190; A-285). Both times, the Honorable Catherine Bartlett, Supreme Court Justice for the State of New York, Orange County, denied FutureNet's motions. (A-259; A-288). FutureNet did not appeal those decisions. Hence, there is no dispute that GTR's judgment against FutureNet is valid and enforceable. Indeed, as the District Court held, it is undisputed that the underlying judgment is valid: "In this case, the state court twice refused to vacate the judgment, and the Receiver does not point to any damages because the debt FutureNet owed to GTR was valid and the funds that were seized satisfied that valid debt." *Simon v GTR Source, LLC*, 19CV1471 (JGK), 2019 WL 7283279, at *8 (SDNY Dec. 26, 2019).

The District Court understood that FutureNet's tactics were without merit under New York law. Applying *Pagnotta*, the District Court opined that "a judgment debtor could not maintain a suit against a New York City Marshal for out-of-city execution absent a showing of actual damages to the judgment debtor and negligence on the part of the Marshal." (A-2 citing *Pagnotta*, 59 Misc. 3d at 912-13). Critically, holding a Marshal liable to evaluate the underlying judgment that he seeks to enforce "would be to create an expensive and unmanageable burden not intended or otherwise codified by the legislature and one not

recognized in over 170 years of established jurisprudence.” *Id.* Moreover, to connect the dots, in a case in which damages could not be established because there is ‘simply no dispute that the Judgment Debtor [] owe[s] the money that was levied upon,’ holding the Marshal liable would not be appropriate because it would amount to “having the Marshal pay the Plaintiff’s debt.” *Id.* Indeed, “[t]o hold otherwise would result in a windfall for the judgment debtor at the expense of the public official.” *Id.*

The District Court was spot on. Undeniably, there are “no cases that hold that a private entity can be liable for causing a bank account to be levied when the judgment is valid and there are no damages alleged.” (A-2 at p. 20). Moreover, “[i]n this case, the state court twice refused to vacate the judgment, and the Receiver does not point to any damages because the debt FutureNet owed to GTR was valid and the funds that were seized satisfied the valid debt.” *Id.*; *see also United States v. Marshall*, 339 F.3d 990 (9th Cir. 2003) (claims for wrongful seizure or forfeiture of property fail for lack of damages where, as here, the money received is used to pay a valid debt).

The District Court, and the Trial Court in *Pagnotta*, properly summarized New York tort law. There is no cognizable tort claim against a

judgment creditor, or one who is charged with executing on the underlying judgment, where they are liable to the judgment debtor or the judgment debtor's other creditors, for executing upon a proper and valid money judgment.

Indeed, it is well established that a complaining party suffers no damages, even if fraudulently induced to perform in accordance with his or her legal obligations (*i.e.*, paying an outstanding debt). *See Marc Dev. v. Wolin*, 904 F. Supp. 777, 793 (N.D. Ill. 1995) (“[Plaintiffs] claim that they were defrauded into making the March 28 payment by defendants’ failure to disclose Cosmopolitan’s planned application. But ‘one suffers no damage where he is fraudulently induced to do something which he is under legal obligation to do, such as pay a just debt....’ This rule applies even where the plaintiff might have benefitted by nonperformance. . . [Plaintiffs] cannot escape the fact that it was under a legal obligation to repay the Utah loan. . . . By remitting \$858,000 to Cosmopolitan on that date, [Plaintiff] was doing only what it was required to do under the Utah loan agreement. . . . There *is* no claim when the plaintiff is induced to do something it was already obligated to do.”) (citations omitted); *Williams v. Seterus, Inc.*, 2020 WL 362874, * 3 (N.D. Ala. Jan. 22, 2020) (“Alabama law states that ‘one suffers no damage where he is fraudulently induced to do something which he is under legal obligation to do, such as pay a just debt, ... or perform a valid contract.’ . . . In

the absence of any actual injury resulting from Ms. Williams’s reliance on Seterus’s alleged misrepresentation, Ms. Williams cannot establish a prima facie case of negligent misrepresentation.”) (citations omitted).

Similarly, anchored in well-settled law, an unauthorized check paid by a banking institution will not cause the account holder to be damaged where the check was used to discharge a debt owed by the account holder. *Indus. Sav. Bank v. People’s Funeral Serv. Corp.*, 296 F. 1006, 1007 (D.C. Cir. 1924) (“By paying the check a debt of the corporation was discharged; therefore it sustained no damage by the act of the bank in paying it. To support an action based on negligence there must be, not only the negligent act, but a consequential injury, which is the gravamen of the charge”). In other words, tort damages are unavailable where, as here, the money is used to pay an existing obligation. *See Salkey v. State Farm Life Ins. Co.*, 2019 N.Y. Slip. Op. 31240(U), at *6 (Sup. Ct. Broome Cty. 2019) (“The complaint also fails to allege cognizable damages. Salkey does not contend that child support arrears or weekly payments are inaccurate or invalid. Instead, she argues that the Family Court Order should not have been granted because it covered more than 3 years of child support payments. However, if the child support obligation existed and the installment payments were used to satisfy those weekly obligations (even if for a greater period than

authorized by statute), Salkey has not suffered any damages. That settlement money has simply been used to pay the amounts due and owing for child support- a debt or obligation that she does not dispute.”).

The foregoing clearly resonated with the District Court, which applied *Pagnotta* in clear terms:

[T]he reasoning of *Pagnotta* rested on the principle that a plaintiff has not suffered any tort damages, which is a necessary element of a tort suit, when the plaintiff is a judgment debtor and the alleged converted funds were seized to satisfy a valid judgment against that judgment debtor. For the same reasons, the Receiver suffered no damages in this case because the funds seized were used to satisfy a valid judgment resulting from a valid debt. This conclusion . . . results from a straightforward application of the usual principles of tort damages.

(A-2 at fn. 2). As the District Court held, *Pagnotta* is on all “all fours” with this case and sets the stage for why, in fact, GTR is entitled to keep the funds restrained and delivered by the Marshal, exclusive of the Marshal’s poundage fees. Again, FutureNet cites to no cases pertaining to whether a judgment-debtor has suffered tort damages under the same fact pattern as the present case.

FutureNet attempts to argue around this dispositive issue by suggesting that a claim for wrongful execution or conversion is established when the ‘process’ [defined as attachment, execution, garnishment] is irregular or unauthorized, citing *Day v. Bach*, 87 N.Y. 56, 61 (1881). Remarkably, FutureNet

does not address the key analysis in *Day*—that the judgment must be invalid in order for the process to be irregular or unauthorized and, therefore, exposing the judgment creditor to damages for allegedly improperly collecting on it: “[I]f the process was regularly issued” pursuant to a valid judgment “in a case where the Court had jurisdiction, the party may justify what has been done under it” and thus not held liable. *Day*, 87 N.Y. at 61. Critically, “process” is irregular or unauthorized only if it is applied for and obtained by way of a void judgment. *Id.* In other words, absent a void judgment, there can be no irregularity. *Id.* at 62. Thus, a judgment-debtor such as FutureNet is left with one option — moving to vacate the levy obtained by way of a regularly issued “process.”

In fact, in *Day*, the Court specifically rejected a claim by the judgment debtor against the judgment creditor, or the sheriff, for trespass or conversion damages arising out of the attachment of the debtor’s property, even though the attachment was later vacated on the merits. The Court noted in *dicta* that “if the attachment was procured by fraud and falsehood, an action in the nature of an action for malicious prosecution may perhaps lie.” *Id.* There was no malicious prosecution claim in *Day*, and there is no such claim here.⁴

⁴ As discussed in Defendant-Respondent Capital Merchant Services, LLC’s Brief, at most the levy’s at issue are voidable under the *Day* analysis, meaning that until they are

As discussed above, it is undisputed that GTR possessed a valid judgment against FutureNet—it has been upheld twice by the New York State Supreme Court and is not attacked directly in this action. Furthermore, the record is clear that FutureNet, though made aware of the numerous procedural vehicles in New York State Court for vacating the judgment enforcement mechanisms initiated by GTR, never proceeded to make such an application. Instead, FutureNet filed duplicative actions in the Supreme Court for the State of New York, Orange County — both of which were denied. Again, rather than filing the proper state court motion seeking to vacate the enforcement device, FutureNet proceeded to file this action, which is duplicative to those already denied in the New York State Supreme Court.

Appellant’s reliance on *Tausend v. Handlear*, 33 Misc. 170 (Sup. Ct. App. Term 1901) suffers from the same defect. In *Tausend*, the judgment debtor moved to vacate an order of attachment that directed “[a]ny Marshal of the City of New York to Whom the Annexed Summons is Delivered” to seize the goods and chattel of the debtor. *Id.* at 588. That instruction exceed the authority of the

vacated by the Court, no action lies against Defendants-Respondents. And, only Comerica could raise objections to jurisdiction and service to invalidate those judgment enforcement devices and it has not done so. *See* Defendant-Respondent Capital Merchant Services, LLC’s Brief, pp. 15-19.

municipal court of the City of New York. *Id.* The trial court initially declined to vacate the order of attachment. On appeal, the judgment debtor did not appear, and the court held that the order of attachment had to be vacated and a new trial conducted. *Id.* at 591. The fundamental principal in *Tausend*, however, is that the court had no jurisdiction to render the judgment being enforced by the subject attachment. The same circumstance was found in *V. Loewer's Gambrinus Brewing Co. v. Lithauer*, 36 Misc. 587 (Sup. Ct. App. Term 1901).⁵ Importantly, in neither case was the judgment debtor found to have a tort claim against the judgment creditor, or those retained to execute on the attachment. These cases stand for the unremarkable proposition that a judgment which is issued by a court that had no jurisdiction over the judgment debtor, is subject to vacatur.

In summary, New York common law does not recognize tort liability for a judgment-creditor, or those who execute judgment enforcement on their behalf, for technical noncompliance with Article 52 of the CPLR, provided the

⁵ Of course, today a debtor has a statutory remedy if a creditor improperly obtains an order of attachment, and they have a bond to collect against for such an action. *See* CPLR § 6212(e) (“The plaintiff shall be liable to the defendant for all costs and damages, including reasonable attorney’s fees, which may be sustained by reason of the attachment if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant’s property. Plaintiff’s liability shall not be limited by the amount of the undertaking.”). There is no such corresponding statutory right to damages for issuing restraining notices or levies, or a corresponding obligation for a creditor to file a bond before exercising such rights.

judgment being enforced is valid and the noncompliance was not done intentionally or maliciously such that a claim for abuse of process or malicious prosecution could apply. Further, even if there could be a valid tort claim for violation of Article 52, a judgment debtor still must suffer cognizable damages to maintain such a claim, and they do not suffer such damages when a valid debt is extinguished by the complained of enforcement activities. The first certified question should be answered in the negative.

POINT II.
**THE SECOND CERTIFIED QUESTION SHOULD BE
ANSWERED IN THE NEGATIVE BECAUSE THE JUDGMENT
DEBTOR HAS TO INVALIDATE THE UNDERLYING MONEY
JUDGMENT BEFORE BRINGING A TORT CLAIM**

Even if New York law generally recognized a tort claim based on a marshal's technical non-compliance with the procedural requirements of CPLR § 5232(a) when collecting on an otherwise valid and enforceable money judgment, the proper procedural mechanisms found in CPLR §§ 5240 (upon motion of any interested person, the court can deny, limit, condition, regulate, extend, or modify any enforcement procedure) and 5222-a (detailing the process for a claim of exemption), must be utilized—successfully—before a tort claim could lie. Neither FutureNet, nor anyone on its behalf, ever attempted to utilize either procedural mechanism afforded by the CPLR—even though two of its three suits were filed

after GTR’s judgment was entered and collected upon. Rather, FutureNet sought to upend the entire merchant cash advance industry by attacking the validity of the underlying contracts, first in the New York State Supreme Court (twice) and then with the District Court. Neither court, however, accepted FutureNet’s invitation to do so. This Court should reject those ill-founded efforts as well.

Indeed, the case law cited by FutureNet and the Second Circuit require vacatur of the judgment or subject process before any action may lie. As discussed above, in *Silberstein*, which was decided in the context of a motion for default judgment, the court held that the debtor had stated a cause of action in his complaint for wrongful issuance of execution in the nature of trespass *after* the underlying judgment had been vacated: “If process is vacated because of irregularity, e.g., lack of jurisdiction, an action may be brought after the vacatur in the nature of trespass.” 95 A.D.2d at 774.

In *Silver Cup Funding LLC v. Horizon Health Ctr. Inc.*, 2020 NY Slip Op 51529(U), 70 Misc.3d 1201(A) (Sup. Ct. Ontario Cty. Dec. 18, 2020), the merchant moved pursuant to CPLR § 5240 to vacate the judgment enforcement mechanism—an execution and levy—and only after vacatur was granted did the

court opine that the merchant *may* be entitled to damages in a separate plenary action. *Id.* at * 4.

The *Silver Cup* court cited with approval the *Gaines* decision discussed *supra* Point I.A. The *Gaines* court specifically noted that “plaintiff could have moved for a protective order pursuant to CPLR 5240. Plaintiff failed to avail himself of this remedy and chose instead to commence an action for damages predicated on allegations of malicious falsehood.” *Gaines*, 109 A.D.2d at 868. The court concluded its decision by holding: “[t]he fact that [defendant’s] attempts at enforcement were legally improper, does not, of itself, justify the commencement of plaintiff’s action.” *Id.*

Finally, this Court’s decision in *Cruz* requires, at the very least, that the judgment debtor exercise its rights under Article 52 before any further action could be pursued. CPLR Article 52 provides debtors with exclusive remedies for addressing alleged violations of New York’s judgment enforcement laws. As this Court said in *Cruz*, CPLR article 52 “does not give rise to a private right of action,” and therefore “the only relief available is that provided in CPLR article 52.” *Cruz*, 22 N.Y.3d at 79. Accordingly, at the very least, FutureNet must pursue the procedures of CPLR Article 52 before it could prosecute some other tort claim.

The second certified question should also be answered in the negative.

CONCLUSION

For the foregoing reasons, Defendant-Respondent GTR respectfully submits that both certified questions should be answered in the negative.

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