

IS A “BOOK OF BUSINESS” PROPERTY FOR PURPOSES OF JUDGMENT ENFORCEMENT?

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Where a judgment debtor transfers his or her property to a third party, CPLR § 5225(b) allows a judgment creditor to bring a proceeding directly against that third party for turnover of the judgment debtor’s property. In order to be subject to this and other judgment enforcement mechanisms, however, the property in question must be assignable or transferrable. *See* CPLR § 5201(b).

In *Mitchell v. Garrison Protective Services, Inc.*, No. 13-3599-CV, 2014 WL 4454905 (2d Cir. Sept. 11, 2014), the Second Circuit addressed the question of whether a company’s “book of business” constituted property for purposes of CPLR § 5201(b) and, consequently, CPLR § 5225(b). The *Mitchell* plaintiffs brought a motion under CPLR § 5225(b) to enforce a \$266,590 default judgment that they had won against their employer, security guard company Lyons Professional Services, Inc. (“LPS”), in a sex-discrimination lawsuit. They alleged that LPS had fraudulently transferred its assets to security guard company Garrison Protective Services, Inc. (“Garrison”).

Following a bench trial, the trial court determined that LPS’ sole shareholder had, seven weeks after entry of the default judgment, sold LPS’ “book of business” to Garrison under a “Consulting Agreement,” which provided that the shareholder would attempt to steer LPS accounts and clients to Garrison, in exchange for the shareholder’s receipt of a consulting fee based on the resulting annual revenues.

The trial court also found that the book of business belonged to LPS, not its shareholder, and that LPS therefore had “transferred substantially all of its assets to Garrison despite plaintiffs’ outstanding judgment and that LPS received no consideration for the transfer.” The trial court granted the plaintiffs’ motion and ultimately entered judgment against Garrison and LPS’ shareholder, jointly and severally, in the amount of \$266,590.

Garrison appealed, arguing before the Second Circuit that LPS’ book of business did not qualify as “assignable or transferrable property” and therefore was not subject to enforcement under CPLR § 5225(b), because the LPS contracts were terminable on thirty days’ notice.

In its decision, the Second Circuit reviewed what constitutes “property” for purposes of CPLR § 5201, noting that such property can be “an intangible, future right, but cannot be a property right that is unassignable.” If the debtor does not have the right to assign or transfer property, it does not constitute “property” under CPLR § 5201. The Court also pointed out that “[s]ome type of contingent interests are too speculative, as a matter of law, to constitute ‘property’ under New York law,” such as a prepaid service contract at issue in a recent case, which was terminable at will without prior notice and without penalty.

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The Second Circuit went on to hold that the record in the *Mitchell* case was not sufficient to conclude that LPS' book of business was property for purposes of CPLR § 5201(b). Although "a company's assets may include its book of business" and in some cases "a book of business may be transferred," the Second Circuit held that whether or not any particular book of business is assignable depends at least partially on the language of the pertinent contracts. The LPS contracts, however, were not introduced at trial, and there was no evidence that the book of business was actually assigned. It was also unclear whether the book of business contained other property and whether such property was transferrable. "If the book of business was, in fact, transferred from LPS to Garrison, then it is property for the purposes of § 5201(b)," the Second Circuit held. "If, however, the LPS clients simply took their business elsewhere, it is not."

The Second Circuit vacated the trial court's judgment and remanded for additional proceedings and further clarification.

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Wilk Auslander actively follows nationwide legal developments concerning issues relating to judgment enforcement, and is available to provide a consultation to prospective clients concerning every aspect of judgment enforcement remedies and asset recovery. For more information, or if you have any questions concerning our firm's practice in the area of judgment enforcement litigation, please contact Jay S. Auslander at jauslander@wilkauslander.com or Natalie Shkolnik at nshkolnik@wilkauslander.com.