

NY CLS CPLR R 2223

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New York

Consolidated Laws Service

>

Civil Practice Law And Rules (Arts. 1 — 100)

>

Article 22 Stay, Motions, Orders and Mandates (§§ 2201 — 2223)

R 2223. Duties of officer receiving mandate

An officer to whom a mandate is delivered to be executed shall:

1. execute the mandate according to its command;
2. give without compensation to the person delivering the mandate, if requested, a written receipt describing the mandate and specifying the day and hour of receiving it;
3. deliver without compensation to the person served, if requested, a copy of the mandate; and
4. return the mandate together with his return thereon, by delivering or mailing it to the clerk's office.

History

Add, L 1962, ch 308, § 1, eff Sept 1, 1963.

Annotations

Notes

Prior Law:

Earlier statutes and rules: CPA § 102; RCP 74; CCP §§ 100–103; 2 RS 440 §§ 76, 77; 2 RS 449, part 3, ch 7, tit 6, § 75; 2 RS 551, § 3; L. 1850 ch 225 § 3; Gen Rules Pr 27.

Advisory Committee Notes:

This rule is derived from the first four subparagraphs of CPA § 102, inverting the order of the first and second subparagraphs.

The requirement in the second subparagraph of § 102 that the officer “make return thereon of his proceedings” has been transferred to the fourth subparagraph of the proposed rule, with slight change in language.

The penalty provision of the second subparagraph of § 102 has been transferred to the Public Officers Law, since it establishes a cause of action for damages against a public officer.

The mailing requirements in subparagraph 4 of § 102 have been simplified and delivery to the clerk’s office is substituted for the cumbersome and ambiguous provision concerning the alternative to mailing.

Subparagraph 5 of § 102 has been omitted. There is no reason for treating mandates in a special proceeding differently from other mandates and prescribing an extra fine of twenty-five dollars. In any event, if the officer’s neglect is “wilful,” as subparagraph 5 requires, it may subject him to a contempt prosecution under Judiciary Law § 753(A)(1).

A “mandate” is defined by § 28-a of the General Construction Law as any “writ, process or other written direction” lawfully issued or made by a court, judge or judicial officer and requiring a person or body to do or refrain from doing an act.

The “clerk” referred to is the clerk of the court out of which the mandate issued (or of which the judge who made it is a judge). See CPA § 7(1); new CPLR § 105(e).

Notes to Decisions

I. Under CPLR

1. Generally

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2.Delivery of mandate to officer

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5.False return

6.Failure to file notice of attachment

7.Acts of deputy

8.Remedy against sheriff

I. Under CPLR

1. Generally

Sheriff would be compelled to comply with entered and docketed order of Supreme Court which directed execution upon and sale of certain real property, since execution complied with CLS CPLR § 5230, and judgment was final and binding on parties, where (1) plaintiff obtained money judgment against her former husband, (2) plaintiff obtained judgment setting aside fraudulent conveyance by her former husband of real estate to his new wife on grounds that conveyance took place during pendency of action for money judgment and that judgment became final and binding, (3) plaintiff filed execution with sheriff pursuant to CLS CPLR §§ 5230(b) and 5236, and (4) sheriff refused to execute on property on basis that he could not sell new wife's interest in property; new wife's interest in property was fully litigated in action on fraudulent conveyance, judgment in that action extinguished her rights in property, and thus sheriff was required, as ministerial act, to carry out execution on property. *Liggett v Pichler*, 142 A.D.2d 206, 534 N.Y.S.2d 973, 1988 N.Y. App. Div. LEXIS 12957 (N.Y. App. Div. 1st Dep't 1988), app. denied, 74 N.Y.2d 606, 543 N.Y.S.2d 399, 541 N.E.2d 428, 1989 N.Y. LEXIS 811 (N.Y. 1989).

Interest due and owing on underlying judgment was to be computed by sheriff upon levying income execution on judgment debtor's employer at statutory rate of six percentum per annum, on declining balance due, calculated from and after each periodic payment when received. *Beneficial Discount Co. v Spike*, 91 Misc. 2d 733, 398 N.Y.S.2d 651, 1977 N.Y. Misc. LEXIS 2404 (N.Y. Sup. Ct. 1977).

Rule compelling an officer to whom a mandate is delivered for execution to execute mandate according to its command covers situation presented when a sheriff seeks to enforce provisions of an income execution. *Beneficial Discount Co. v Spike*, 91 Misc. 2d 733, 398 N.Y.S.2d 651, 1977 N.Y. Misc. LEXIS 2404 (N.Y. Sup. Ct. 1977).

Mandamus was proper remedy to compel sheriff to fulfill his statutory duty to compute and collect interest on judgment recovered and entered by judgment creditor from and after date of issuance of income execution against judgment debtor's employer. *Beneficial Discount Co. v Spike*, 91 Misc. 2d 733, 398 N.Y.S.2d 651, 1977 N.Y. Misc. LEXIS 2404 (N.Y. Sup. Ct. 1977).

Sheriff failed to fulfill his statutory duty when he did not compute and collect interest on judgment recovered and entered by judgment creditor from and after date of issuance of income execution against judgment debtor's employer. *Beneficial Discount Co. v Spike*, 91 Misc. 2d 733, 398 N.Y.S.2d 651, 1977 N.Y. Misc. LEXIS 2404 (N.Y. Sup. Ct. 1977).

An employer would not be required to bear the loss for a sheriff's failure to compute the amount of interest, fees and expenses due and owing on a judgment, since, pursuant to CPLR § 5231, the sheriff to whom the income execution was delivered for enforcement, and not the employer upon whom it was served, is ultimately responsible for the computation of interest from the date of entry to the date of satisfaction, and since CPLR § 2223, which compels an officer to whom a mandate is delivered for execution to execute such mandate according to its command, applies to the sheriff enforcing the provisions of the income execution. *National Surety Corp. v R. H. Macy & Co.*, 116 Misc. 2d 780, 455 N.Y.S.2d 1007, 1982 N.Y. Misc. LEXIS 3957 (N.Y. Sup. Ct. 1982).

Plaintiff had basis to sue deputy sheriff for damages resulting from deputy sheriff's alleged failure to execute mandate to satisfy prior judgment entered in favor of plaintiff since plaintiff's allegations, if true, showed lack of concern of public officer towards fulfilling his duties on behalf of public, and such dereliction should not be condoned. *Ange Wang v Bartel*, 163 Misc. 2d 600, 624 N.Y.S.2d 735, 1994 N.Y. Misc. LEXIS 665 (N.Y. App. Term 1994).

II. Under Former Civil Practice Laws

2. Delivery of mandate to officer

Delivery of an execution to a deputy sheriff is in contemplation of law a delivery to the sheriff; but leaving it at the place of business of the deputy sheriff is not a delivery to the sheriff. *Burrell v Hollands*, 29 N.Y.S. 515, 78 Hun 583 (1894).

3. Care of property levied on

If a sheriff does not do his duty after levying upon personal property, under an execution issued to him; if he does not keep the property, and take legal remedies to obtain the same, so that it may be sold to apply on the execution, he is liable to the plaintiff in the execution. *Steffin v Steffin*.

4. Extending time for return of execution

A sheriff cannot deal with an execution without the direction of the party in whose interest it is issued and where he extends the time to return an execution, he is liable for any damages sustained by the judgment creditor. *McGuire v Bausher*, 52 A.D. 276, 65 N.Y.S. 382, 1900 N.Y. App. Div. LEXIS 1580 (N.Y. App. Div. 1900).

5. False return

The return by a sheriff to an execution against the person, of “not found,” subjects the bail of the defendant to an action upon his undertaking and is conclusive upon him. If the return be false, the bail has a right of action against the sheriff for damage sustained by reason thereof. *Cozine v Walter*, 55 N.Y. 304, 55 N.Y. (N.Y.S.) 304, 1873 N.Y. LEXIS 167 (N.Y. 1873).

6. Failure to file notice of attachment

Where a sheriff agreed with an attorney that he would file the notice required by CPA § 917 (§§ 6203, 6214, 6215, 6216 herein) and failed or neglected to do so, he was liable for damages sustained by the attaching creditor by reason of such neglect. The filing of such notice was part of the sheriff’s official duty. It was no defense to an action for such damages that the deed given by the debtor before the notice was filed was invalid. *Lewis v Douglass*, 6 N.Y.S. 888, 53 Hun 587, 1889 N.Y. Misc. LEXIS 830 (N.Y. Sup. Ct. 1889).

7. Acts of deputy

A deputy’s authority ceases when he receives a written revocation of appointment. *Edmunds v Barton*, 31 N.Y. 495, 31 N.Y. (N.Y.S.) 495, 1865 N.Y. LEXIS 66 (N.Y. 1865).

In sheriff’s action against deputy and his sureties for deputy’s false return to an execution, plaintiff must prove that the return was made by deputy, unless the fact is admitted in the pleadings. *Conner v Keese*, 105 N.Y. 643, 11 N.E. 516, 105 N.Y. (N.Y.S.) 643, 7 N.Y. St. 200, 1887 N.Y. LEXIS 800 (N.Y. 1887).

8. Remedy against sheriff

A sheriff who fails to serve an order directing him to arrest and detain a defendant who has defaulted in payment of alimony and counsel fees in a matrimonial action, is punishable for contempt of court, and the fact that the sheriff was awaiting the approval of the papers by his counsel does not purge him of the contempt so long as the papers on their face are not void.

Fiorini v Fiorini, 203 N.Y.S. 785, 122 Misc. 325, 1924 N.Y. Misc. LEXIS 755 (N.Y. Sup. Ct. 1924).

If a sheriff returns an execution satisfied, he may be proceeded against by action or attachment. Hatfield v Hatfield, 15 N.Y. St. 788.

Opinion Notes

Agency Opinions

I. Under CPLR

1. Generally

A sheriff must continue to return unsatisfied executions to the clerk of the court of issuance, even though the clerk is no longer required to file or enter such return. 1972 NY Ops Atty Gen June 13 (informal).

A warrant of eviction which directs a sheriff to give only seventy-two hours' notice to mobile-home tenants is facially invalid and in excess of the court's jurisdiction. A sheriff may ignore the unauthorized time limit in the warrant. If he executes the warrant within the unauthorized time limit, he may be liable to persons who are evicted sooner than permitted by law. 1980 NY Ops Atty Gen Dec. 30 (informal).

Research References & Practice Aids

Cross References:

"Mandate" defined, CLS Gen Const § 28-a.

Jurisprudences:

54 NY Jur 2d Enforcement and Execution of Judgments §§ 71., 145., 147. .

85 NY Jur 2d Police Sheriffs, and Related Officers § 115. .

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 2223, Duties of Officer Receiving Mandate.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 15.06. Conversion of motions and applications.

CPLR Manual § 27.12. Execution and levy against personal property other than income.

Annotations:

Civil liability of one making false or fraudulent return of process. 31 ALR3d 1393.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 2223:1.

LexisNexis Forms FORM 75-CPLR 2223:1.—Receipt for Mandate Delivered to Officer.

1 Medina's Bostwick Practice Manual (Matthew Bender), Forms 11:101 et seq .(stays, motions, orders and mandates).

Hierarchy Notes:

NY CLS CPLR, Art. 22

Forms

Forms

Form 1

Receipt for Mandate Delivered to Sheriff or Other Officer

Received on this _____ day of _____, 20_____,
at _____ o'clock in the _____ noon of that day, an execution
against the property of _____, issued under a judgment of the
_____ Court, County of _____, in an action entitled
_____, Plaintiff, against _____, Defendant, entered in
the office of the clerk of the County of _____ on the _____ day of
_____, 20_____ [or otherwise described mandate for which receipt is
issued].

[Print signer's name below signature]

Sheriff, _____ County

Form 2

Complaint in Action Against Sheriff for Failure to Levy Under Execution

[Caption and introductory paragraph]

1. The defendant is and at all times hereinafter mentioned has been the sheriff of the County of _____, State of New York.

2. On or about the _____ day of _____, 20_____, in an action
then pending in the Supreme Court of the State of New York, County of
_____, between _____, the plaintiffs herein, as
plaintiff and _____, as defendant, the said plaintiffs duly recovered a
judgment against the said defendant for the sum of _____ Dollars, damages and
costs, which was, on the _____ day of _____, 20_____, duly
entered and docketed in the office of the clerk of the County of _____.

3 Thereafter and on or about the _____ day of _____, 20_____, an execution in due form of law was duly issued upon the said judgment to the defendant herein, against the property of the said _____, judgment debtor, and said execution was delivered to the defendant on or about the _____ day of _____, 20_____.

4. On information and belief, the said _____, the judgment debtor, at and after the time of the delivery of the said execution to the defendant herein had in his open and visible possession within the said County of _____, certain goods, chattels and property belonging to himself, which said goods, chattels and property were liable to be taken and sold on execution out of which the said defendant could and ought to have levied execution.

5. The defendant, in disregard of his duty, did not collect the goods, chattels and property of the said _____, judgment debtor and neglected to levy or collect the same.

6. Notwithstanding that more than 60 days and more than sufficient time therefor has elapsed, the said defendant has not returned said execution as he was commanded and directed to do therein and as was his duty to do.

7. As a result of the premises, the plaintiff sustained damages in the amount of _____ Dollars with interest thereon from the _____ day of _____, 20_____, less the sum paid by the said _____, the judgment debtor as hereinafter stated.

8. On or about the _____ day of _____, 20_____, the said _____ paid upon or to apply upon the aforesaid judgment the sum of _____ Dollars and the balance or remainder of said judgment, to wit, the sum of _____ Dollars, is still unpaid.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of _____ Dollars with interest thereon from the _____ day of _____, 20_____, together with the costs of this action.

[Indorsement, address, telephone number, and verification.]

Attorney for Plaintiff

Office and P. O. Address

Telephone No.

Form 3

Complaint in Action Against Sheriff for Failure to Return Execution Against Property Levied on Under Warrant of Attachment

[Caption and introductory paragraph]

1. The defendant, at all times hereinafter mentioned has been and still is the sheriff of the County of _____, State of New York.

2. On or about the _____ day of _____, 20_____, in an action wherein the plaintiff herein was plaintiff and one _____ was defendant, which action was then pending or about to be commenced in the Supreme Court, County of _____, a warrant of attachment was duly granted on the _____ day of _____, 20_____ by a judge of the said court which warrant was directed to the defendant herein, whereby the said defendant was commanded and directed to attach and safely keep so much of the property within his county which the said _____, had or might have at any time before final judgment in the said action as would satisfy the plaintiff's demand of _____ Dollars with interest from the _____ day of _____, 20_____, together with the costs and expenses of the action. The defendant was further directed by the said warrant of attachment to

proceed thereon in the manner required by law and to make his return within the time prescribed by law.

3. The said warrant of attachment was duly issued and delivered to the defendant on or about the _____ day of _____, 20_____ and, on the same day, the defendant duly levied on sufficient personal property of the said _____ to satisfy plaintiff's demand against the said _____.

4. Thereafter, and on or about the _____ day of _____, 20_____, the plaintiff duly recovered a judgment in the aforesaid action against _____, in the Supreme Court, _____ County for the sum of _____ Dollars and the judgment roll in said action was duly filed and docketed on the said _____ day of _____, 20_____ in the office of the Clerk of the County of _____.

5. The said warrant of attachment and the said judgment have been in full force and effect since the _____ day of _____, 20_____ and still are in full force and effect.

6. On the _____ day of _____, 20_____, an execution upon said judgment was duly issued to and received by the defendant, as sheriff of the said County of _____, against the property of the said _____, commanding the defendant to satisfy the said judgment out of the personal property attached in said action and if that was insufficient, out of other personal property of the judgment debtor and if both were insufficient, out of the real property attached and to return the said execution to the Clerk of the Supreme Court, County of _____ within 60 days after the receipt thereof.

7. Although sufficient time has elapsed therefor the said defendant has not returned the said execution as commanded and directed nor has he returned the said warrant of attachment.

8. 8. By reason of the neglect of the defendant as aforesaid, the plaintiff has sustained damage in the amount of _____ Dollars with interest thereon from the _____ day of _____, 20_____.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of _____ Dollars with interest from the _____ day of _____, 20_____ together with the costs of this action.

[Indorsement, address, telephone number, and verification.]

Attorney for Plaintiff

Office and P. O. Address

Telephone No.

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