

State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at 518-455-7711 or gspencer@nycourts.gov.

To be argued Tuesday, November 16, 2021

**No. 73 Plymouth Venture Partners, II, L.P. v GTR Source, LLC
Plymouth Venture Partners, II, L.P. v Capital Merchant Services, LLC**

FutureNet Group, a Michigan corporation, borrowed money in 2017 from two merchant cash advance companies, taking a \$200,000 advance from GTR Source in exchange for \$291,000 of FutureNet's future accounts receivable and taking \$550,000 from Capital Merchant Services (CMS) in exchange for \$780,000 in accounts receivable. Both loan agreements allowed GTR and CMS to receive daily debit payments from FutureNet's account at Comerica Bank in Detroit. In February 2018, when FutureNet could no longer meet its daily payment obligations, GTR and CMS declared defaults, filed affidavits of confession of judgment in New York State court, and each received a valid court judgment. GTR and CMS served restraining notices on Comerica directing it to freeze FutureNet's funds at its Detroit branch. GTR then issued an "execution with notice to garnishee" to a New York City Marshal and directed him to serve it on Comerica through Corporate Creations Network in Rockland County, the bank's designated agent in New York. The Marshal served the execution on Corporate Creations by certified mail and later faxed an amended execution to Comerica's Detroit branch. The bank issued a \$127,000 check to the Marshal, who remitted it to GTR, and GTR then filed a satisfaction of judgment in the state court action. CMS took a similar approach, issuing an "execution with notice to garnishee" to the Rockland County sheriff and directing him to levy on FutureNet's Comerica account by serving it on Corporate Creations, which he did. Comerica then issued a \$322,000 check to the sheriff and he gave it to CMS, covering less than half of CMS's money judgment against FutureNet.

Meanwhile, FutureNet's secured creditors commenced a state court action in Michigan for appointment of a receiver to oversee FutureNet's assets. The receiver, among other things, commenced these federal actions in U.S. District Court for the Southern District of New York, naming GTR and the City Marshal as defendants in one suit and CMS in the other. The receiver did not seek to invalidate the defendants' judgments, but instead contended they were liable for tort damages because their execution and levy were invalid. He argued GTR's execution and levy were invalid because the Marshal served the execution on Corporate Creations in Rockland County, outside his New York City jurisdiction; and CMS's execution and levy were invalid because Corporate Creations was not a proper agent for service under CPLR 5232(a). Thus, he argued, the defendants took FutureNet's property without legal authority.

District Court dismissed the suits in separate proceedings, ruling FutureNet suffered no damages, whether or not the execution and levy were valid, because the alleged conversion resulted in the property being used to satisfy a valid money judgment. The decisions were appealed by two of FutureNet's senior creditors – Plymouth Venture Partners, II and Plymouth Management Company – who were assigned the receiver's claims and substituted as plaintiffs.

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issues by answering two certified questions: "(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."

For appellant Plymouth: Shane R. Heskin, Manhattan (212) 244-9500
For respondent CMS: Christopher R. Murray, Manhattan (212) 867-5620
For respondent Marshal: Andrew P. Schriever, White Plains (914) 761-1300
For respondent GTR: Ryan K. Cummings, Buffalo (716) 856-4000

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No. 74 Matter of Hallock

No. 75 Matter of Malerba

Larry Hallock and Mary Malerba, name partners in the Suffolk County law firm Hallock & Malerba, are appealing orders of the Appellate Division, Second Department, which suspended them from the practice of law as reciprocal discipline based on misconduct in a federal court action in 2015 that resulted in the censure, upon consent, of both attorneys. They contend they were denied due process in the state disciplinary proceeding.

The law firm was representing Sheri Luscier in a personal injury action in the Southern District of New York when Oleg Smolyar, who was of counsel to the firm, filed an affidavit (the “Luscier Affidavit”) on behalf of the client in U.S. District Court. After Luscier denied on the stand that she had ever seen or signed the affidavit, the court directed Hallock and Malerba to file a declaration explaining the circumstances surrounding the preparation and execution of the Luscier Affidavit, which it later called “a sham filing of no evidentiary worth.” Hallock filed an “Attorney’s Affidavit” signed by Smolyar, which falsely stated that Smolyar had read the Luscier Affidavit to Luscier, that she commented on it, and that her requested changes were incorporated into the final version. Smolyar ultimately recanted the Attorney’s Affidavit, saying it falsely described the circumstances surrounding the Luscier Affidavit. Smolyar testified the Attorney’s Affidavit was drafted by Hallock, who directed him to “just cut, paste and sign.” The District Court imposed a \$9,000 sanction on Smolyar and the law firm, and after further proceedings censured Hallock and Malerba.

In the New York disciplinary proceedings, the Grievance Committee for the Tenth Judicial District asked the Appellate Division to impose reciprocal discipline “based upon the findings of professional misconduct” underlying the federal court censures. The court suspended Hallock for one year, saying, “While [Hallock] admits that he failed to supervise Smolyar, we find that [his] misconduct extended beyond a mere failure to supervise. The District Court sanctioned [Hallock] and his firm, finding that [he] was a ‘direct participant in the preparation and filing of the ‘Attorney’s Affidavit,’” which was designed to cover up the initial wrongdoing. Failure by attorneys to adhere to basic standards of honesty in their representations to the courts seriously compromises the ability of the courts to render the appropriate disposition in matters brought before them.” The court suspended Malerba for six months, saying, “Not only did [Malerba] assist in the submission of the Luscier Affidavit, but she subsequently assisted in the submission of a second filing to cover up the fraudulent filing. Although less culpable than her law partner..., we find that [her] dishonest conduct merits a suspension from the practice of law.”

Hallock and Malerba argue the Appellate Division denied them due process by relying on evidence adduced in its disciplinary proceeding against Smolyar without giving them notice and an opportunity to impeach the evidence. Contending the U.S. District Court “confined its findings to failure to supervise,” they argue the imposition of reciprocal discipline violated due process because the Appellate Division “expanded its findings sua sponte to include intentional dishonesty and imposed a harsher sanction” than the District Court without giving them notice and an opportunity to be heard.

For appellants Hallock and Malerba: Deborah A. Scalise, Scarsdale (914) 725-2801

For respondent Grievance Committee: Rona I. Kugler, Hauppauge (631) 231-3775