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COURT OF APPEALS

STATE OF NEW YORK

PLYMOUTH VENTURE PARTNERS, II, L.P.

Appellant,

-against-

NO. 73

GTR SOURCE, LLC, CAPITAL MERCHANT
SERVICES, LLC

Respondents.

20 Eagle Street
Albany, New York
November 16, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

SHANE R. HESKIN, ESQ.
WHITE AND WILLIAMS LLP
Attorney for Appellant
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103

CHRISTOPHER R. MURRAY, ESQ.
STEIN ADLER DABAH & ZELKOWITZ, LLP
Attorney for Respondent Capital Merchant Services, LLC
1633 Broadway
46th Floor
New York, NY 10019

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ANDREW P. SCHRIEVER
CUDDY AND FEDER LLP
Attorney for Respondent Marshal Biegel
445 Hamilton Avenue
14th Floor
White Plains, New York 10601

RYAN K. CUMMINGS
HODGSON RUSS LLP
Attorney for Respondent GTR Source, LLC
140 Pearl Street
Suite 100
Buffalo, NY 14202

Amanda M. Oliver
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: And the first case on the
2 calendar is Appeal No. 73, Plymouth Venture Partners versus
3 GTR Source and Capital Merchant Services.

4 Counsel?

5 MR. HESKIN: Good afternoon. May it please the
6 Court, Shane Heskin on behalf of plaintiffs-appellants.
7 I'd respectfully request three minutes of rebuttal.

8 CHIEF JUDGE DIFIORE: Three minutes, sir?

9 MR. HESKIN: Three minutes.

10 CHIEF JUDGE DIFIORE: You may have three minutes.

11 MR. HESKIN: Thank you.

12 There are 30,000 reasons why this Court must
13 answer the certified questions yes. That is the number of
14 judgments that the MCAs have amassed in this court system.
15 Unfortunately, that number is only growing through default
16 judgments even today, even after the legislature stopped
17 the confessions of judgment.

18 What happened here is a rogue New York City
19 marshal reached across state lines, in Michigan, froze a
20 bank account, causing an avalanche of adverse effects,
21 missing payroll, defaulting on other lenders, and getting
22 put into a receivership.

23 It cannot be - - -

24 JUDGE GARCIA: So I'm sorry, Counsel - - -
25 Counsel, here. I'm sorry.

1 MR. HESKIN: Sure.

2 JUDGE GARCIA: At that time, when the bank
3 account was frozen, as I recollect, the debtor went into
4 the court and tried to get the judgment reversed, right?
5 Why isn't the proper thing to do then, at the same time, to
6 seek to get this execution undone?

7 MR. HESKIN: So - - -

8 JUDGE GARCIA: Why do we wait all these years
9 and now we have a federal action, and now do we have
10 damages, do we have a marshal involved, when it all could
11 have been taken care of then?

12 MR. HESKIN: Well, it - - - there are a couple
13 reasons. One is there didn't need to be a void to vacate
14 the judgment - - - or the levy at that time.

15 First of all, what they did - - - the first
16 efforts were to try and vacate it on a couple procedural
17 grounds, which was they didn't file it in the county; the
18 second was under BCL 1314, where we're trying to get the
19 judgment vacated altogether. It's very expensive and time
20 consuming to have to file a plenary action, which the court
21 would have required. You have to file a plenary action,
22 you have to litigate it on the merits, and overturn on - -
23 - on the usury. It's a very fact-intensive process.

24 That's expensive. You're talking about - - -

25 JUDGE GARCIA: But why couldn't they come in on

1 an Article 52 and say this is an improper attachment. They
2 had notice. They had the time. Come in and say it's an
3 improper attachment; why not?

4 MR. HESKIN: They could have, but didn't need to
5 so - - -

6 JUDGE GARCIA: Why? Because we'd rather, as a
7 policy matter, have this?

8 MR. HESKIN: Well as a matter of public policy,
9 you shouldn't - - - a debtor in California who had their
10 bank accounts attached - - - attached and seized by a New
11 York City marshal shouldn't have to come to New York to - -
12 -

13 JUDGE GARCIA: But they're subject to
14 jurisdiction. The judgment is in New York, so why
15 shouldn't they have to come to New York?

16 MR. HESKIN: Because the process is void from
17 inception. It's not necessary. It's - - -

18 JUDGE GARCIA: But that seems like a non
19 sequitur. So they have a valid judgment in New York;
20 they're subject to jurisdiction in a New York court. They
21 get notice one of their bank accounts is attached, so they
22 come to New York, and they say you shouldn't have attached
23 this. I mean, they could bring a federal action years
24 later, you know, in district court, but that seems a little
25 less convenient and efficient.

1 MR. HESKIN: It - - - it's not what's required
2 under the statute. And for example, look what happened in
3 Silver Cup, okay? Silver Cup is - - - we did exactly that.
4 And there's a big distinction there because in Silver Cup,
5 the marshal acted within his authority. He served it
6 within - - -

7 JUDGE GARCIA: Silver Cup was an Article 52 case?

8 MR. HESKIN: Silver Cup was an Article 52, yeah.

9 JUDGE GARCIA: All right.

10 MR. HESKIN: So he served it within New York
11 City. So there, he had the jurisdiction, he had the
12 authority to issue it. So that's what brings it within
13 Article 52. Now, it - - - we got that vacated, but we
14 were then required to seek a plenary action to get damages
15 for that.

16 So it's not something that's economically
17 feasible by just going in New York and getting that
18 modified because now, we can bring a plenary action. We
19 don't have to bring it in upstate New York, we can bring it
20 in federal court. It's not required. So it - - - that's
21 the difference - - - that's the distinction between void
22 and voidable. And where the marshal acts within his
23 jurisdiction, then yes, we have to go to - - - Article 52
24 applies. We have to go to that court and get it vacated.
25 And then we seek a plenary action.

1 JUDGE CANNATARO: But Counsel, I mean, that's
2 clearly not the case. The assets were levied upon, the
3 bank released those assets to the judgment creditor. To
4 make a distinction between void and voidable seems somewhat
5 incongruous given the fact that the proceeds actually made
6 it to the judgment creditor. And I think the question here
7 is why wasn't there an effort to void the incumbrance?

8 MR. HESKIN: Because there was an action brought
9 and common law req - - - allows you to bring an action for
10 wrongful execution. It's a void process. We don't have -
11 - - what you have to re - - - understand is that in these
12 confessions of judgment, they authorize judgment to be
13 entered anywhere in New York, in any county in New York.

14 JUDGE GARCIA: I thought it was two counties?

15 MR. HESKIN: No. That was - - - so - - - so
16 maybe today, but prior, they - - - it said it had to be
17 entered in - - -

18 JUDGE GARCIA: So we have a different rule if
19 it's a case like this and it's a - - - it's a judgment
20 creditor that we find particularly offensive, we have a
21 rule. But if it's a different judgment, we have a
22 different rule?

23 MR. HESKIN: No, no, that's not the case at all.

24 JUDGE GARCIA: So what do the facts matter in
25 that sense? Like, what does it matter that this was a

1 confession of judgment or that it was this type of a loan?
2 Because if we make a rule, it's going to apply to every
3 case.

4 MR. HESKIN: Sure. And the key here is that
5 Article 52 simply does not apply; it's not efficient; it's
6 a void process. And the judgment that the victim has the
7 right to go anywhere, any court they want, to get the
8 relief because - - -

9 JUDGE WILSON: So - - -

10 MR. HESKIN: - - - it's void.

11 JUDGE WILSON: - - - we've just - - - will you
12 help me with the record a little bit?

13 MR. HESKIN: Sure.

14 JUDGE WILSON: I thought, at least as to GTR,
15 there was a motion made by you under 5240; is that wrong?

16 MR. HESKIN: That is wrong - - - that is not - -
17 - not correct. We didn't do it under 52 in the state
18 court. We did that in Silver Cup. In Silver Cup, we did a
19 motion for 52. In GTR, we did two things. We sought to
20 vacate it because of the county issue, they filed it in the
21 wrong one of sixty-two counties. And then BCL 1314 - - -

22 JUDGE WILSON: I thought before the receiver
23 became involved, there was actually a motion made in front
24 of Supreme Court on 5240?

25 MR. HESKIN: It - - - it was - - - it was only -

1 - - only to vacate the judgment. And then upon vacating
2 the judgment, it was for restitution, is to turn over the
3 funds. And that motion sub - - - procedurally, was denied.
4 So then after that was procedurally denied, we filed it in
5 federal court on the wrongful execution claim.

6 And - - - that is - - - the difference is that if
7 we had to vacate the judgment up in - - - up in New York
8 first, which we don't have to do because the process was
9 void from inception - - - and that's the key distinction,
10 is that if you - - - once the marshal acts outside of his
11 jurisdiction, he never - - - that - - - that is void.
12 There was never - - - it never happened, and he therefore
13 didn't have authority. Once he - - -

14 JUDGE FAHEY: So - - -

15 MR. HESKIN: - - - serves something in Michigan -
16 - -

17 JUDGE FAHEY: - - - so that - - - so that means
18 that - - - so that's your response to the - - - that there
19 was not a tort here at all. In other words, your void
20 versus voidable argument is the basis for you rejecting
21 GTR's argument that this is a valid money judgment. And
22 even if its service was improper, it's irrelevant since
23 it's a valid money judgment, and you're not entitled to any
24 damages beyond those damages. So there really wasn't a
25 tort at all here to begin with?

1 MR. HESKIN: Well, there is. There's - - -
2 there's definitely a tort. There are - - -

3 JUDGE FAHEY: Well - - -

4 MR. HESKIN: - - - definitely damages.

5 JUDGE FAHEY: - - - all right. All right. It
6 seems to me if the - - - if you have a valid money
7 judgment, then that's the damages that you're entitled to.
8 And for there to be a tort, you would have to show us
9 something beyond that money judgment for damages. There'd
10 have to be established proximate cause and show that there
11 is some other damages beyond this money judgment. And I
12 don't see those in the tort that's pled.

13 MR. HESKIN: Well - - - well, there was money in
14 the account, and now there wasn't money in the account.

15 JUDGE FAHEY: Um-hum.

16 MR. HESKIN: So they took the money in the
17 account. And think about how this would play out in this
18 case.

19 JUDGE FAHEY: Well let's just stay with my tort
20 argument - - -

21 MR. HESKIN: Sure.

22 JUDGE FAHEY: - - - all right? I - - - what I'm
23 interested in is the fundamental question here is, is there
24 a tort? And so we got a duty, a breach of a duty, a
25 negligent action, let's give you all those. I think you -

1 - - I think it's a fair argument. Then we say, what are
2 the damages and is there proximate cause establishing those
3 damages. Well, it would - - - if we apply the but-for
4 principle in proximate cause, it's pretty hard to show that
5 you have anything beyond a money judgment as damages. So
6 therefore, if the money judgment is valid, you have no
7 cognizable damages.

8 MR. HESKIN: We do. It's simply the money that
9 was taken out of the account. And then would - - - then
10 you'd get into the issue - - -

11 JUDGE FAHEY: So in other words - - -

12 MR. HESKIN: - - - of the policy - - -

13 JUDGE FAHEY: - - - the money judge - - - the
14 execution of the money judgment is your damages?

15 MR. HESKIN: The money they took out of the
16 account. I had 30,000 - - -

17 JUDGE FAHEY: But if the judgment is valid to
18 begin with, it doesn't matter because it's the same dollar
19 amount.

20 MR. HESKIN: It - - - well - - -

21 JUDGE FAHEY: There is no tort?

22 MR. HESKIN: Well then you have to apply the
23 concepts of offset. And offsets are equitable. You can't
24 - - - you cannot take your own - - - take money illegally
25 and then apply it to your own judgment. We've cited - - -

1 JUDGE FAHEY: No, I understood your argument. I
2 - - - honestly, I wasn't as impressed by that argument.
3 The one I was struggling with was whether or not there was
4 an actual tort here. And if so, how does this play out if
5 there aren't any ascertainable damages beyond the valid
6 money judgment?

7 MR. HESKIN: So let's just seek - - - play out
8 how this would work if the money was returned.

9 JUDGE FAHEY: Um-hum.

10 MR. HESKIN: If the money was returned back to -
11 - -

12 JUDGE WILSON: Why don't you start that a little
13 differently. If it had never been taken; start it that
14 way.

15 MR. HESKIN: If it had never been taken, my
16 client would have had the money to make payroll. He
17 wouldn't have had - - - he would have been able to use that
18 money to pay senior secured creditors and - - -

19 JUDGE WILSON: So you - - - you had a senior
20 secured that was five million or so; is that right?

21 MR. HESKIN: Exactly. And so the money would
22 have been paid to them. And so what this rule is creating
23 if - - - if you allow this to go on, it's going to infer -
24 - -

25 JUDGE RIVERA: But Counsel - - - Counsel, if I

1 can interrupt you on that, damages. I'm on the screen,
2 excuse me.

3 MR. HESKIN: Sure.

4 JUDGE RIVERA: Doesn't - - - doesn't that go to
5 damages for a different party, not for you? Those are
6 damages to the senior lenders.

7 MR. HESKIN: Well, not necessarily.

8 JUDGE RIVERA: That's what I'm not understanding
9 about - - -

10 MR. HESKIN: Sure.

11 JUDGE RIVERA: I don't disagree with your point
12 that it does sound like someone's jumping the queue on the
13 creditors. I'm not disagreeing with you there. But the
14 question is whether or not that's a tort that your client
15 can pursue.

16 MR. HESKIN: Sure. Well there are a lot of - - -

17 JUDGE RIVERA: Damages for them.

18 MR. HESKIN: There are a lot of consequential
19 damages that occur from that. One is if you take the money
20 by violating the law, and I can't make payroll, I'm going
21 to have payroll damages. And there's going to be fines for
22 that. Then, also, if I had that money and I could have
23 paid my senior secured creditors, I now have - - - it's
24 like a preference payment. I now can use - - - choose how
25 I use that money to pay off. I'd rather pay someone where

1 that's - - - got a senior secured lien on all of my
2 property than pay someone - - -

3 JUDGE RIVERA: So if I - - - if I'm understanding
4 your argument - - - I don't know that this is the way you
5 actually litigated the case, but if I'm understanding your
6 argument, you're saying if - - - if the law had been
7 followed, there are particular payments that you would not
8 have incurred. And those are the ones that you want
9 reimbursed, not necessarily the debt itself.

10 MR. HESKIN: I don't want the debt - - -

11 JUDGE RIVERA: Am I understanding correctly?

12 MR. HESKIN: Correct. I don't - - - I don't want
13 the debt itself to be paid, I want the - - - if they took
14 \$300,000 out of my bank account, the \$300,000 goes back
15 into the bank account, and now we're in a receivership.
16 And it - - - that would get distributed in order of
17 preference. The creditors that didn't break the law would
18 get paid first in order of their preference.

19 JUDGE RIVERA: But - - - but again, you're - - -
20 you're saying that the damages you actually suffered from
21 that had to do with these fines related to payroll.

22 MR. HESKIN: Well - - -

23 JUDGE RIVERA: Or am I misunderstanding?

24 MR. HESKIN: It - - - it's a combination. I'm
25 saying - - - I'm giving you hypothetical consequences of -

1 - -

2 JUDGE RIVERA: Yes.

3 MR. HESKIN: - - - what the damages could be in
4 any - - - any particular case when you follow this rule.
5 If - - -

6 JUDGE RIVERA: Yeah, well, did - - - are those
7 damages you asserted?

8 MR. HESKIN: Are they - - - yeah, yes, we are - -
9 -

10 JUDGE RIVERA: Okay.

11 MR. HESKIN: - - - asserting consequential
12 damages in these cases. And so we missed payroll, we were
13 put in a receivership, we were not able to make payments to
14 - - -

15 JUDGE RIVERA: So - - - so let me ask this. If
16 they had followed - - - if this had - - - if they had
17 followed the law, or if it had properly been executed, and
18 the bank turns over that money anyway, wouldn't you have
19 been in the same place, unable to meet payroll? I mean,
20 that's the whole point. You don't have the money to pay
21 your debts.

22 MR. HESKIN: Well, if they had followed the law -
23 - -

24 JUDGE RIVERA: Yeah.

25 MR. HESKIN: - - - we would have had notice of

1 it.

2 JUDGE RIVERA: Yeah.

3 MR. HESKIN: They would have had to come to
4 Michigan and - - - and properly - - - and we could have
5 sought - - - sought injunctive relief, and would have been
6 on notice, rather than just having a marshal seize their -
7 - -

8 JUDGE RIVERA: Yeah, but - - - but notice that
9 you owe the money, you haven't paid, and you got to turn it
10 over, and they're taking it from your bank account? Again,
11 I'm not really - - - it'll be the last question I ask along
12 this line. It - - - I'm a little bit confused as to how,
13 at the end, you're put in a worse position. That's - - - I
14 was looking for that part of the damages.

15 MR. HESKIN: Well at the end, if - - - if this
16 did - - - but for the unlawful activity, my client would
17 have had the money, would have been able to make payroll.
18 And it would have been able to put - - - put in - - - pay
19 its senior secured creditors. If they had followed the
20 law, all those things would have happened.

21 But because they did not follow the law, they
22 woke up one morning and found their bank account frozen.
23 They missed their payroll. They weren't - - - they were
24 defaulted on their senior secured creditors. And they - -
25 - there were other - - - were consequences. They - - -

1 JUDGE CANNATARO: Counsel, does the bank bear any
2 responsibility in this tort - - - as you say, it was a
3 judgment void ab initio. That should have been as obvious
4 to the bank as it was to anyone else in this transaction.
5 What's their responsibility for turning the funds over?

6 MR. HESKIN: There are banks that will not honor
7 these. And there are banks that just don't want to get
8 involved. There - - - there's no liability on the banks.
9 They have provisions in the contracts that say, if we're
10 served with a subpoena or a levy, we have the right to
11 honor it whether it's valid or invalid.

12 So they don't want to expend the resources and
13 attorney time to actually have to try and figure that out
14 or litigate that. So they - - - they can turn the money
15 over, and that's typically in anyone's bank account - - -

16 CHIEF JUDGE DIFIORE: Thank you, Counsel.

17 Counsel?

18 MR. CUMMINGS: Thank you. Good afternoon. Ryan
19 Cummings on behalf of GTR Source, LLC, if it please the
20 Court.

21 Your Honors have already touched upon the primary
22 issue in this case, which is there's a valid judgment here.
23 There's - - - it's been litigated twice and it's a valid
24 judgment. So we have a valid judgment. Where we depart
25 from the appellants here is what happens if you go and try

1 to enforce a valid judgment, as opposed to an invalid
2 judgment, and you happen to make a mistake under Article
3 52. What are the consequences - - -

4 JUDGE WILSON: Well, it's a little - - - it may
5 be a little different from that.

6 MR. CUMMINGS: Okay.

7 JUDGE WILSON: Because there is the Uniform
8 Enforcement of Foreign Judgment Act, right? And that's
9 been enacted by - - - adopted by almost every state,
10 including Michigan and New York. And at least my reading
11 of it is what you should have done once you had the valid -
12 - - and I assume the judgment's valid. The Second
13 Circuit's asked us to assume it's valid, so don't have to
14 argue that. If you have a valid judgment here, you have to
15 walk it over to a Michigan court, register it there, and
16 then levy on it there, especially when you're dealing with
17 third-party garnishee, a bank, that has no presence here.

18 So the question really is the last one, I think,
19 that we were dealing with, which is, suppose that's what
20 you had to do, and suppose just - - - and you don't have to
21 concede this - - - just suppose for the purpose of my
22 argument that - - - or my hypothetical, that the marshal
23 had no jurisdiction to attach this property in that way,
24 you have to go through the Uniform Act, and - - - and
25 register in Michigan court, and you didn't do that.

1 The question, though, is what would have been
2 different, right, had you done that? And the thing that I
3 think we may be missing a little bit is we're being asked
4 for a rule from the Second Circuit, and it - - - it's a
5 rule that has to apply whether we're talking about a
6 \$150,000 judgment or a \$5 million judgment, and a secured
7 creditor in a first position who maybe should have notice
8 of this. And procedures that are available such as
9 bankruptcy and restructuring, we don't have - - - you know,
10 this company, for a variety of reasons looks like it was
11 not going anywhere, right? But we have to consider the
12 situation where it might be a company where you could
13 negotiate with the first lien holder, the - - - the first -
14 - - you know, part of the lender in the first security
15 position who might want a going business and might be able
16 to work something out.

17 So the question is, can we be sure on the first
18 question - - - I'm not at the second question yet - - -
19 first question from the Second Circuit, that in all cases,
20 the fact that all you're doing is executing a valid
21 judgment through an improper means - - - and assume it's
22 improper; you can tell me why it's not if you want - - - is
23 that always going to be a case where you can't bring a tort
24 action? That's the question.

25 MR. CUMMINGS: And the answer is, no, you should

1 not be able to bring a tort action in that circumstance,
2 that hypothetical - - -

3 JUDGE WILSON: Ever?

4 MR. CUMMINGS: - - - that you just laid out.
5 Ever. Because, actually, Article 52 provides a mechanism
6 for an expedited resolution of who's entitled to - - -

7 JUDGE WILSON: But that's the second question.
8 So suppose Article 52 didn't exist, you'd have a tort
9 action?

10 MR. CUMMINGS: It - - - you might have a tort
11 action if the improper execution was done maliciously,
12 intentionally, something like that. Where it's a simple
13 mistake, a simple mistake, the courts in New York have
14 said, you know, look - - -

15 JUDGE WILSON: Well - - -

16 MR. CUMMINGS: - - - we're not endorsing this,
17 but you - - - you're not liable in tort. And in this
18 particular circumstance where you have a marshal, it is not
19 as if there is not oversight of - - -

20 JUDGE WILSON: Well, negligence is ordinarily
21 thought of as encompassing simple mistakes, right? I mean,
22 trespass to chattels works whether you're negligent or
23 you're intentional or - - - or venal.

24 MR. CUMMINGS: Actually, trespass to chattels
25 actually does have a bit of a - - - an intent component. I

1 just happened to finish a trial on that very issue. And
2 it's an intentional interference with somebody else's
3 superior possessory interest.

4 JUDGE WILSON: You'd have to know that it's their
5 property, yeah.

6 MR. CUMMINGS: Yes. Yes. So those circumstances
7 are slightly different than what we're talking about here,
8 which is technical noncompliance with an enforcement
9 statute. And there is an avenue; Article 52 does exist.
10 There is an avenue for a judgment - - - somebody who
11 believes there is - - - has a superior interest in that
12 property to come to court expeditiously, within seven days,
13 and get a determination as to whose got priority over those
14 dollars or that property. So we do have a mechanism here.

15 And Counsel has touched upon, you know, is it
16 void versus voidable. And the question was asked, well,
17 what does Comerica Bank do in this circumstance? Because
18 Comerica's actually the one who receives the execution and
19 is in a position to say, wait a second, we're not subject
20 to personal jurisdiction for some reason in New York or
21 this isn't properly issued to us. That was a right that
22 Comerica had.

23 JUDGE FAHEY: Well, but - - - wouldn't the
24 damages be limited to the value of the property that was
25 the subject of the money judgment only? And in that

1 circumstance, you wouldn't have a valid tort. But there
2 can be circumstances where you may have a valid tort if
3 there were different damages?

4 MR. CUMMINGS: There may be a hypothetical
5 situation.

6 JUDGE FAHEY: So I mean, one thing I've learned
7 in my grind through the legal system is the variety of
8 damages is pretty much limitless, all right? I think we'd
9 all acknowledge that.

10 So that being the case, they may not be in this
11 circumstance because your damages here may be limited to a
12 valid money judgment, but any rule that we make may need to
13 be limited to the value of the property that was the
14 subject of the valid money judgment only because anything
15 beyond that would create a rule that - - - that would
16 restrict tort rights that they may or may not have. And it
17 may be that fraud - - - you may - - - you may be into a
18 fraud territory; you may be in ordinary negligence. But
19 it's irrelevant for us to even reach that if we limit it to
20 the damages that are subject to a valid judgment.

21 MR. CUMMINGS: I agree with you, Your Honor.
22 That - - - that rule seems to be narrowly tailored to the
23 circumstances that are before the Court in this
24 circumstance.

25 JUDGE FAHEY: So would you be advocating a

1 limitation like that in any response that we gave to the
2 Second Circuit?

3 MR. CUMMINGS: I think that's the issue before
4 this Court, and that would make sense to limit the response
5 in that circumstance to that - - - this issue that has been
6 litigated before both the Second Circuit and here.

7 JUDGE FAHEY: Thank you.

8 CHIEF JUDGE DIFIORE: Thank you, Counsel.

9 MR. CUMMINGS: Thank you.

10 CHIEF JUDGE DIFIORE: Counsel?

11 MR. MURRAY: May it please the Court, Christopher
12 Murray, Stein Adler Dabah & Zelkowitz, for the respondent,
13 Capital Merchant Services.

14 Your Honors, there's kind of a key factor here.
15 Counsel has argued repeatedly that the way this case is
16 distinguishable from Silver Cup is whether or not it - - -
17 the service actually took place in the jurisdiction where
18 the officer had - - - it's their county, their locale.

19 In Capital Merchant Services case, the service
20 took place in Rockland County by the Rockland County
21 Sheriff's Office. He's arguing that - - - the Comerica
22 Bank was simply served incorrectly, but it raised no
23 objections. That's relevant for a lot of reasons. One is
24 that the objection would belong to Comerica Bank, and
25 Comerica Bank has never raised that objection. It has

1 never objected to jurisdiction or service.

2 And in that regard, this is a lot like Koehler v.
3 Bank of Bermuda, where if you have jurisdiction over the
4 garnishee, because the garnishee is not objecting, and you
5 have jurisdiction over the judgment debtor, because you
6 have a judgment against them, there's really no issue. It
7 doesn't matter where the property is because you have
8 jurisdiction over whoever it is that you need. It is based
9 on an in personam jurisdiction, not based upon in - - - in
10 rem. It doesn't matter where the accounts allegedly are.
11 So that's a key factor.

12 Additionally, the duty that they allege was
13 breached is not a duty that is owed to the judgment debtor.
14 It is a duty that is - - - belongs to the bank. We didn't
15 breach any duty to the judgment debtor. The judgment
16 debtor is entitled to no protection based upon whether or
17 not the bank is properly served. They suffer no injury at
18 that - - -

19 JUDGE WILSON: Why isn't the - - - why isn't the
20 - - - over here. Why isn't the judgment debtor entitled to
21 protections of Michigan's enactment of the Uniform Law?

22 MR. MURRAY: Respectfully, Your Honor, it's
23 because the judgment debtor is subject to New York
24 jurisdiction as a judgment debtor. They consented to
25 jurisdiction here. They are subject to our jurisdiction -

1 - -

2 JUDGE WILSON: But isn't it clear, though, that
3 if their assets are not located in the state, you have to
4 go through the Uniform Act, and you have to register in
5 Michigan?

6 MR. MURRAY: Absolutely not, Your Honor.

7 JUDGE WILSON: Um-hum.

8 MR. MURRAY: That is - - - that is not the law.
9 The law in Koehler v. Bank of Bermuda, and in the vast
10 majority of cases in New York, is that if you have
11 jurisdiction over the judgment debtor, you can go ahead and
12 get your relief from the judgment debtor here. Now, if
13 there was real property, that is actually an exception to
14 that rule. However, in this instance, we absolutely can go
15 after their assets because they are subject to jurisdiction
16 here. The judgments are enforceable. That's the key fact.

17 The case law that Counsel cites where there is a
18 void versus voidable distinction all arise from the alleged
19 judgment being in someway defective. There's a lack of
20 subject matter jurisdiction from the judgment. The
21 judgment had already been satisfied. The judgment had
22 already been vacated. The underlying debt had already been
23 satisfied.

24 None of that is applicable here. The judgment
25 was enforceable. Thus, the issuance of process, the

1 execution, was valid. Counsel's objection is not to the
2 issuance of process. That, I think is - - - is settled
3 law, that the process itself is proper. His objection
4 truly is narrowly tailored to the execution of any service.
5 He's saying that service of process thereby renders the
6 issuance, initial issuance, of an execution improper.

7 Respectfully, that is not the law. And we cite
8 case law to this effect within our brief, that essentially
9 it all hinges upon the objections belonging - - - I'm
10 sorry, that it all hinges upon this, that - - -

11 JUDGE CANNATARO: So I'm - - - just so I'm clear,
12 are you saying that the only issue to be decided is whether
13 or not there's a valid judgment, and the means of
14 enforcement, whether you domesticate a foreign judgment, or
15 where you serve it, or who serves it, are beside the point?

16 MR. MURRAY: Your Honor, I would say they're
17 beside the point as long as the issue that is allegedly
18 technically defective that they're arguing is a - - - is a
19 protection to the nonparty garnishee. If the bank had
20 objected in this case, they would say they have no damages
21 because nothing would have happened. Their argument is
22 that the bank consented to jurisdiction and, therefore,
23 they have damages. That can't possibly be the basis of a
24 bright line rule, that if the bank consents to New York
25 jurisdiction, now they have a tort claim against us.

1 Respectfully, that's not reasonable.

2 Now, the reason Counsel is bringing this as a
3 tort claim - - - he makes that clear in his reply papers -
4 - - he wants it to be tort claim because he wants to sue
5 attorneys, collection attorneys. He wants them to be
6 alleged joint tortfeasors. That's - - - that's the reality
7 here. That's why - - -

8 JUDGE CANNATARO: Can I just ask you as a point
9 of personal confusion. Is this enforcement tort a
10 negligence-based tort or an intentional tort, as far as it
11 exists out there in the world?

12 MR. MURRAY: It - - - Your Honor, I understand it
13 to be he's arguing that it's something of an intentional
14 tort.

15 JUDGE CANNATARO: Okay. I'm sorry. It's just -
16 - - it's not clear. We talk about duties, breach,
17 causation, negligence, reasonable people. And I begin to
18 think that it's negligence sometimes.

19 MR. MURRAY: Understandable.

20 There is one last thing I did want to say.
21 Counsel has argued about there being a senior secured
22 creditor. There's never been any adjudication about any
23 senior secured creditors at all. This transfer of the
24 claim took place in the Second Circuit after the
25 adjudication had taken place in the trial court. To that

1 end, the idea that there is a - - - some sort of a
2 difference in standing that he's arguing or that he's
3 allowed to assert an injury to the senior secured creditor,
4 it - - - it's not correct.

5 And - - - and more importantly, the reason why
6 the senior secured creditors has not brought any claim is
7 that they're not actually senior or secured as to money in
8 a bank account. Money in a bank account is not secured by
9 the filing of a UCC 1. It's secured by control over the
10 bank account. And those creditors never had control over
11 the bank account. And that's why they haven't actually
12 challenged it because as far as the money is concerned,
13 they are wholly unsecured. They are in fact beneath us in
14 terms of the order of priority.

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 Counsel?

17 MR. SCHRIEVER: Thank you, Your Honor. I'll try
18 to be as brief as possible because I know we're all on the
19 same side here. Andrew Schriever from Cuddy and Feder, on
20 behalf of Marshal Biegel.

21 I do want to sort of bring us back to the
22 beginning of the issue that was presented by the Second
23 Circuit. The key phrase was whether or not the judgment
24 debtor suffers cognizable damages. Cognizable. I looked
25 it up in the dictionary yesterday. Not part of the record,

1 but common sense: that means capable of being known,
2 right. What is the injury? We talked about it a little
3 bit; I heard it from the bench. There is no injury here.

4 And to the question as to whether or not, even
5 without Article 52, this would sound in tort, the answer is
6 no for a very, very, very basic reason. Under New York
7 law, and pretty much every other state that I know of, you
8 need to prove each element of your claim in order to stay
9 in court, right.

10 Here, let's assume for the same of discussion, as
11 Your Honor had pointed out, that there was liability or
12 possibly liability on the first prong. Without proximate
13 cause and an actual injury to the person who's bringing the
14 claim, you don't have a case.

15 JUDGE WILSON: Right. But we were just, I think
16 - - - and correct me if you think I'm wrong. The Second
17 Circuit is just asking us about the damages element.
18 They're asking us to assume the rest - - -

19 MR. SCHRIEVER: Yeah.

20 JUDGE WILSON: - - - and they're saying, is the
21 fact that you took the money and used it to satisfy a valid
22 debt - - -

23 MR. SCHRIEVER: Right.

24 JUDGE WILSON: - - - is there any circumstance
25 where that might cause damages recoverable in tort?

1 MR. SCHRIEVER: Okay. And so the - - -

2 JUDGE WILSON: And I understand why it might not
3 in this - - -

4 MR. SCHRIEVER: Yeah.

5 JUDGE WILSON: - - - and I certainly appreciate
6 in this case, if I were the plaintiff's lawyer, I would
7 have a tremendously difficult time proving what those
8 damages were. My question is, is that always going to be
9 the case?

10 MR. SCHRIEVER: I think the - - -

11 JUDGE WILSON: It's always going to be not
12 cognizable?

13 MR. SCHRIEVER: The answer to that, Your Honor, I
14 think is, yes, it will always be the case for one reason.
15 If it's subject to a valid judgment and the debtor is the
16 one who's bringing the claim, the - - - the theory that was
17 advanced by counsel was, well, it was the debtor's money,
18 it would have been in the account, we could have made
19 payroll with it. But as a matter of judgment enforcement
20 policy, once there's a judgment against you, the only
21 assets that you have that are protected are those that are
22 protected by statute, exempt under the law. Other than
23 that, what's sitting in your account is subject to reach by
24 any creditor. It's whoever gets there first with a validly
25 issued levy.

1 So the - - - the concept that I was injured
2 because I couldn't make payroll, that injury was not
3 because the marshal executed a levy. We all know that but
4 for the procedural objection - - -

5 JUDGE WILSON: So had - - -

6 MR. SCHRIEVER: - - - any marshal could have done
7 it correctly.

8 JUDGE WILSON: Right.

9 MR. SCHRIEVER: But just to finish the point,
10 Your Honor - - -

11 JUDGE WILSON: So had - - -

12 MR. SCHRIEVER: Yeah, go ahead, please.

13 JUDGE WILSON: - - - they gone to domesticate it
14 - - -

15 MR. SCHRIEVER: You see where I was going.

16 JUDGE WILSON: Had - - - had they gone to
17 Michigan - - -

18 MR. SCHRIEVER: Um-hum.

19 JUDGE WILSON: - - - right, and domesticated the
20 judgment, and then there's a twenty-one day notice period -
21 - -

22 MR. SCHRIEVER: Sure.

23 JUDGE WILSON: - - - presumably, Invest Detroit
24 could have put them into receivership?

25 MR. SCHRIEVER: It could have happened. There -

1 - - there - - - there could have been a - - -

2 JUDGE WILSON: Right?

3 MR. SCHRIEVER: - - - bunch of, and different
4 types of remedies. And of which - - -

5 JUDGE WILSON: And then - - -

6 MR. SCHRIEVER: - - - would have been the
7 equivalent of what you could have done under Article CP - -
8 - CPLR 5240, right. But that's the - - - the absurdity of
9 this all. The theory of their case, as alleged in the
10 complaint, is somehow the marshal should be liable for a
11 judgment. And as you said, this is for \$127,000 case; it
12 could be for a \$10 million case. And if we start getting
13 into whether it was intentional or not, not only are we
14 stepping on the toes of the Appellate Division authority
15 pursuant to the Civil Court Act, Section 1610 and 1612 - -
16 -

17 JUDGE WILSON: Well the marshal may have other -
18 - - other defenses that are not at issue here, no?

19 MR. SCHRIEVER: Including - - - yes, including -
20 - -

21 JUDGE WILSON: Yeah.

22 MR. CUMMINGS: - - - quasi - - - quasi immunity
23 as a public official, which we didn't get into, but it was
24 just raised, so I want to point that out before we start,
25 you know, pointing - - - pointing in the direction of that.

1 But the - - - the biggest problem that the debtor
2 faces in these situations is absent any other actual
3 damage, there is no damage and therefore no claim.

4 I'll give you a perfect example. There is a case
5 cited, I don't have it in my memory right now, but I was
6 reading it last night again. And there was a case where
7 the court had said, well, the marshal in executing a valid
8 levy was removing things from, like, a - - - a washing
9 machine, a laundromat. And in that situation, the marshal
10 damaged property, right? And even there, the court said,
11 well, okay, maybe there's something for damages there,
12 right, not anything like our situation. But then the court
13 said, but that's why there's a statutory remedy for where
14 there's a bond required for the marshal because you can
15 make an application against the bond.

16 In other words, every direction we turn in this
17 case, at least insofar as my client is concerned, there's a
18 statutory remedy, and there's officially sanctioned and
19 statutorily prescribed oversight by the Department of
20 Investigation, which, in this case, was contacted, did take
21 a measure by issuing a memorandum warning, and we know,
22 under 1610 and 1612, that both the Appellate Division and
23 the Department of Investigations have a nondelegable
24 discretionary power to say, we're going to suspend you,
25 we're going to remove you, and in - - - in certain

1 circumstances, we're going to take away your badge.

2 And where we get into the Cruz case that this
3 Court decided on similar facts when it was certified by the
4 Second Circuit, this Court properly said, why are we going
5 there when there's already a statutory remedy under Article
6 52, and there's no clear evidence of legislative intent to
7 create a private cause of action.

8 And in this particular circumstance, we know that
9 that was not legislative intent because the statute
10 specifically allows for a procedure whereby the actual - -
11 -

12 JUDGE WILSON: But - - - but there, I think
13 you're missing something because we're being asked to
14 assume that there is a tort action. The Second Circuit's
15 asked us to assume that. They're not asking us to create a
16 private right of action.

17 MR. SCHRIEVER: Um-hum.

18 JUDGE WILSON: So we're not in that world. We're
19 not in the - - - in the create a private - - - right of
20 action world.

21 MR. SCHRIEVER: Yeah.

22 JUDGE WILSON: We're really asking whether the
23 CPLR has supplanted - - - this is the second question - - -

24 MR. SCHRIEVER: Yeah.

25 JUDGE WILSON: - - - supplanted a tort remedy

1 that might otherwise exist.

2 MR. SCHRIEVER: And I think the answer to that
3 clearly is yes, Your Honor.

4 JUDGE WILSON: Why?

5 MR. SCHRIEVER: For - - - for - - - for one basic
6 reason. Because you're dealing with a legislative scheme.
7 It - - - I believe that it's the policy of the court in
8 this state, and most courts in most states, is that where
9 the legislature has - - - and you - - - you've talked about
10 this at length in Cruz, you said the most important factor
11 as to whether or not a private right of action could
12 coexist - - -

13 JUDGE WILSON: But that's - - - but that's
14 implying a private right. We're talking about something
15 different. We're now - - - assume the answer to the first
16 question is yes.

17 MR. SCHRIEVER: Okay.

18 JUDGE WILSON: Just for a second - - - just,
19 right, that you - - - that - - - imagine that's yes. It
20 may well be no, but imagine it's yes, right? If there is a
21 tort action, then we're asking a different question. We're
22 not asking about whether the legislature intended to create
23 one. We're asking whether the legislature in the CPLR
24 intended to eliminate the common law. And that's a very
25 different question under our jurisprudence.

1 MR. SCHRIEVER: So Your Honor, I don't believe
2 that the - - - that it did intend to eliminate the common
3 law. And the reason I can say that with some degree of
4 confidence is because there is recognition in the Silver
5 Cup case, by way of example, where after vacating - - -
6 after the thing they're complaining about, right - - - if
7 they had gone under Article 52, vacated, set aside the
8 levy, reset the clock so to speak, I still don't think the
9 debtor would get the money; it just means some other
10 creditor would get it. But that's step one.

11 JUDGE FAHEY: Can I - - - can I -

12 MR. SCHRIEVER: Yeah.

13 JUDGE FAHEY: - - - ask this because this is an
14 important point that the judge asks.

15 The way I understand the question that's being
16 put to us is was there a tort violated here, which is the
17 same thing, like, as saying was there a tort at all - - -

18 MR. SCHRIEVER: Right.

19 JUDGE FAHEY: - - - right. And in the absence of
20 damages, how can there be a tort; that's your argument,
21 right?

22 MR. SCHRIEVER: Precisely.

23 JUDGE FAHEY: So we'll get to the second question
24 then. But the question that Judge Wilson, if I understand
25 it correctly, is that that may be true in this

1 circumstance, but it can't be true in every conceivable
2 circumstance, right?

3 MR. SCHRIEVER: So it's conceivable, and - - -
4 and this goes to the colloquy I think you were having with
5 my colleague - - -

6 JUDGE FAHEY: How?

7 MR. SCHRIEVER: - - - a bit. It is conceivable -
8 - - and I suppose this is why I go back to the case where,
9 for example, the marshal damages the washer, right?

10 JUDGE FAHEY: Um-hum.

11 MR. SCHRIEVER: In that situation, that was
12 sloppy; that was negligent; there was property damage. It
13 was not within the scope of the marshal's duties to do
14 that.

15 JUDGE FAHEY: I understand that there may be
16 statutory remedies that supplant the common law remedies.

17 MR. SCHRIEVER: Right.

18 JUDGE FAHEY: But there still may be
19 circumstances that we have not conceived of - - -

20 MR. SCHRIEVER: Yes.

21 JUDGE FAHEY: - - - where damages could arise in
22 - - - in a tort like this?

23 MR. SCHRIEVER: So I would suggest that the Court
24 tread very carefully when it comes to the marshal because
25 there is such a - - - a widespread - - -

1 JUDGE FAHEY: So what - - - so - - -

2 MR. SCHRIEVER: - - - statutory regime - - -

3 JUDGE FAHEY: - - - so - - -

4 MR. CUMMINGS: If we're talking general - - -
5 generally about judgment creditors, if - - - if, during the
6 course of any judgment enforcement, rights beyond those
7 rights that a judgment creditor would have get - - - get
8 violated and - - -

9 JUDGE FAHEY: Um-hum.

10 MR. SCHRIEVER: - - - and the judgment debtor can
11 show something other than, well, this money that I owed
12 pursuant to a judgment - - -

13 JUDGE FAHEY: Right.

14 MR. SCHRIEVER: - - - it - - - it - - -

15 JUDGE FAHEY: Sure.

16 MR. SCHRIEVER: - - - that's not the damage. But
17 if they say, and in addition to that, I - - -

18 JUDGE FAHEY: Well - - -

19 MR. SCHRIEVER: - - - lost X, Y, and Z - - -

20 JUDGE FAHEY: I don't think courts have to answer
21 these questions if they aren't necessarily informative. We
22 just have to make sure that we don't answer this one in
23 such a way that it precludes the possibility of the next
24 one.

25 MR. SCHRIEVER: I suppose, Your Honor, that if -

1 - - you know, careful jurisprudence would - - - would
2 warrant the Court suggesting that this case may not be all
3 inclusive. But certain - - - but I certainly would be
4 careful about language that might encourage others to try
5 the same thing. You know, I think that - - -

6 JUDGE FAHEY: Right.

7 MR. SCHRIEVER: - - - the case you're looking for
8 simply has to wind its way up on those facts. And I agree
9 with Your Honor. It is conceivable - - -

10 JUDGE FAHEY: Um-hum.

11 MR. SCHRIEVER: - - - but this case is not the
12 poster child for making a change in law.

13 JUDGE FAHEY: I see.

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.

15 JUDGE FAHEY: Thank you.

16 MR. SCHRIEVER: Thank you.

17 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

18 MR. HESKIN: Thank you.

19 First, real quick, on the issue of damages,
20 there's clear damages on the poundage fees. The marshal
21 charged poundage fees in addition. So at a minimum, there
22 are damages there for the poundage fees. And he charged
23 poundage fees by exceeding his authority, by levying
24 outside of his jurisdiction. So - - -

25 JUDGE CANNATARO: I'm sorry - - -

1 MR. HESKIN: - - - you absolutely - - -

2 JUDGE CANNATARO: - - - weren't the poundage fees
3 payable by the judgment creditor?

4 MR. HESKIN: No. They were taken out of the - -
5 - out of the account. We were responsible for those
6 damages.

7 JUDGE CANNATARO: In excess of the judgment - - -

8 MR. HESKIN: Yes. Yes. Absolutely. So at a
9 minimum, there are damages at a minimum for the poundage
10 fees. We had to pay for those.

11 So - - -

12 JUDGE RIVERA: I'm a little confused, I'm sorry.
13 I've got to follow up on the poundage. I'm on the screen.

14 I thought, at least in one of your cases, there's
15 actual satisfaction of the debts, so you - - - you're not
16 being charged for the poundage fees, or did I misunderstand
17 the record?

18 MR. HESKIN: The poundage fees are added to the
19 levy, yes. The - - - if you look at the levy that's in the
20 record, it actually has the poundage fees that are charged,
21 and they're deducted from the account. So those poundage
22 fees are absolutely damages. At a minimum, those are
23 damages that have to be addressed by this Court.

24 But think of the rule that this Court would send
25 as a matter of public policy. You heard it right here:

1 whoever gets there first. Whoever gets there first; that's
2 the rule they want you to create, whether lawfully or
3 unlawfully, reward whoever - - -

4 JUDGE GARCIA: By why couldn't the - - -

5 MR. HESKIN: - - - gets there first.

6 JUDGE GARCIA: - - - rules we create be - - -
7 stop them from getting there first, so going in an Article
8 52, which is your exclusive remedy here? Why wouldn't - -
9 - why isn't that a bad rule? And then we don't need to
10 answer the first question.

11 MR. HESKIN: Well, because Article 52 is not
12 exclusive. It's been the common law - - -

13 JUDGE GARCIA: But what - - - but - - - it's not
14 exclusive may be an open question right now, but it could
15 be depending on the answer we give the question, too, so
16 why would that be a bad rule?

17 MR. HESKIN: Because it would require multiple
18 steps, Your Honor. For example, just look at what happened
19 in Silver Cup. We - - -

20 JUDGE GARCIA: But you were in there, you were in
21 court, you took the step to challenge the judgment at a
22 time when this was, as I understand it, being executed, and
23 you had notice of that. So what is the extra step? What's
24 so - - - how - - - this is an extra step. To bring a
25 federal case against all these people and lined up here is

1 - - - is a lot of extra steps. What is the policy reason
2 that we wouldn't want judgment debtors with a valid
3 judgment to go in under Article 52 rather than do this?

4 MR. HESKIN: Because it's the comp - - - first of
5 all, Article 52 did not abrogate the common law of wrongful
6 execution - - -

7 JUDGE GARCIA: No, but that's not my question.

8 MR. HESKIN: And - - - and - - -

9 JUDGE GARCIA: We will decide that.

10 MR. HESKIN: Sure.

11 JUDGE GARCIA: But why - - - what is the policy
12 reason for not doing that?

13 MR. HESKIN: Because a judgment debtor should be
14 able to go into the court of its choosing and pick its
15 forum.

16 JUDGE GARCIA: Not if there's a judgment against
17 it in a court in New York. I mean, that's kind of been
18 answered already. And you have a valid judgment here. So
19 I'm still trying hard to understand why, as a policy
20 matter, we would want this, when, if Article 52 is
21 exclusive, and you had notice here, and you could have gone
22 in, you would have avoided this if you were right.

23 MR. HESKIN: Why can't - - - why - - - why would
24 my client - - - let's say he's in California or Texas or
25 wherever, and if they violated - - - they committed a tort

1 in New York, it's wrongful execution, and they caused their
2 damages, why should I have to come to New York to travel
3 and file an action - - -

4 JUDGE GARCIA: Because you've conceded to
5 jurisdiction in New York by your confession of judgment.
6 And you have a valid judgment here. It's not like they're
7 hauling you in here, and you - - - you said something
8 before: they woke up one morning and the money was gone.
9 Not really. I mean, they had notice it was attached.

10 MR. HESKIN: I understand - - - well, actually,
11 the confessions of judgment don't give you notice. They
12 file - - - this is how it happened, or at least this is how
13 it did happen in the past, is they would file a confession
14 of judgment, and within minutes, they would give it to the
15 marshal and your bank account would be frozen. So you
16 would have absolutely no - - -

17 JUDGE GARCIA: But you have notice - - -

18 MR. HESKIN: - - - notice whatsoever.

19 JUDGE GARCIA: - - - that the bank account is
20 frozen. You had it here. And you had the opportunity to
21 go in and, in fact, went in. You just challenged the
22 judgment and not the execution.

23 So why wouldn't a good rule be if you're going to
24 do that, and you're coming into New York anyway to do that,
25 why wouldn't the rule be that the exclusive remedy here,

1 rather than try to prove 140-year-old possible tort, is to
2 go in there and say, the attachment's not valid. And then
3 that court can order it released. No poundage fees; no
4 payroll issues.

5 MR. HESKIN: It's because the - - - if I'm in
6 California, I can do it in California. It's more
7 convenient for me. If my rights have been violated in
8 California - - - and you've got to remember that these are
9 predatory loans, high-interest loans - - -

10 JUDGE GARCIA: But this rule is for everyone.

11 JUDGE WILSON: May I try a little different
12 version than Judge Garcia's question and that is actually
13 the Second Circuit hasn't asked whether you can't bring a
14 tort action. They've asked whether you have to go under
15 5240 first, right? So why - - - I think that makes Judge
16 Garcia's position a little stronger if you think of it that
17 way. That is, suppose you do have a tort action, but the
18 rule is going to be the first thing you have to do is try
19 under 5240. Failing that, it'll be for another day whether
20 you can proceed under tort. Why is that a bad policy?

21 MR. HESKIN: Okay. Well, first of all, 52 - - -
22 Article 52 would have to apply and it would only apply if
23 their - - - if the judge - - - there was jurisdiction to
24 issue the levy in the first place. So in this - - - in the
25 circumstance where - - -

1 JUDGE WILSON: But you were going - - - wouldn't
2 you go under 52 and say there's no jurisdiction to issue
3 the levy; vacate it?

4 MR. HESKIN: You - - - you could. But the
5 marshal - - - you don't have to if it's void. It's as
6 though it never happened. If the marshal exceeds his
7 authority - - -

8 JUDGE RIVERA: No, but - - - but Counsel, I'm
9 sorry to interrupt you. If I'm understanding this line of
10 questioning, the point is your - - - you have to go into a
11 court to get a judge to say that.

12 MR. HESKIN: Correct.

13 JUDGE RIVERA: And the question is why not use
14 what is already available to you. Judge Garcia is saying,
15 look, you - - - you already went part of the way, used part
16 of Article 52, why not go all the way. And Judge Wilson is
17 saying, well, there's a question as to why not start there.
18 And if there's a deficiency in that process, perhaps you've
19 got a tort action.

20 And may I just mention, you keep talking about
21 California. In this case, you actually did come to New
22 York. I mean, you're in the District Court of New York, so
23 I'm not really sure I'm understanding fully that argument.

24 MR. HESKIN: Well, let me just - - -

25 JUDGE RIVERA: I mean, some judge has got to

1 decide what you claim you want decided, that it's void
2 versus voidable, right? Some judge, some court has got to
3 make that decision - - -

4 MR. HESKIN: Correct.

5 JUDGE RIVERA: - - - so you're going to have to
6 subject yourself to the jurisdiction of the court for that.

7 MR. HESKIN: Correct. And under the law, we're
8 entitled to choose that forum, whether it's California,
9 whether it's the Southern District of New York, whether we
10 want to go to Broome County, or Orange County, or wherever.
11 We have that option. We shouldn't be forced into going to
12 a court that is chosen by the happenstance of the judgment
13 creditor.

14 And that's what's happened here, is they - - - we
15 had the opportunity - - - for example, in Silver Cup, we -
16 - - we're - - - it's in Ontario. But my client is in New
17 Jersey. Why would I have to go all the way up into Ontario
18 County to litigate it when my client is in New Jersey? It
19 would be much more convenient to litigate this in the
20 Southern District of New York, or to litigate it in New
21 Jersey. But because of the way these jurisdictional
22 disputes - - - and they can be in anywhere, any county in -
23 - - in New York, and it's picked by the - - - by the
24 judgment creditor.

25 And so we should have the opportunity to say,

1 listen, I don't want to have to go all the way up to Eerie
2 County to fight this. I don't want to have to go to Broome
3 County. I can pick my battle in the Southern District of
4 New York. That option is - - -

5 JUDGE CANNATARO: Counsel, is there anything - -
6 -

7 MR. HESKIN: - - - always available.

8 JUDGE CANNATARO: - - - is there anything in the
9 certified question or in the argument that you're making
10 that limits this tort to foreign judgment debtors only?
11 And the question I'm asking is, what's to stop a domestic
12 judgment debtor from bringing the same tort action for
13 wrongful enforcement of the judgment? I know you - - -
14 your client has a particular hardship, but is there
15 anything about this that limits it just to foreign
16 judgments?

17 MR. HESKIN: No. It could be a domestic one,
18 too, if, for example, the city marshal were to execute on a
19 bank account or issue a levy in Eerie County. Then they'd
20 be able - - - they would be able to bring the same thing.

21 JUDGE CANNATARO: So any judgment debtor who's
22 unhappy with the way the judgment was enforced conceivably
23 has the right to bring this action for improper
24 enforcement?

25 MR. HESKIN: Yes. If they broke the law. Think

1 of the rule that if - - - if Your Honors answer no to this
2 question, either one of these questions, Marshal Biegel and
3 all the other New York City marshals can go out there and
4 issue levies anywhere in the country without consequence.
5 Without consequence. Why wouldn't they do that? They can
6 get their poundage fees. They can just issue their levies,
7 and - - -

8 JUDGE RIVERA: Well, no, no, Counsel - - -

9 MR. HESKIN: - - - no one can - - -

10 JUDGE RIVERA: - - - that - - - that - - - no,
11 Counsel, there are consequences. It's just you want a
12 particular judicial forum.

13 MR. HESKIN: What - - - what - - -

14 JUDGE RIVERA: The question is, which is the
15 proper forum, whether or not there's a particular kind of
16 cause of action. It's not that there are no consequences
17 potentially. That - - - I don't think is a fair framing of
18 the issue.

19 But let me ask you something else. I know your
20 time is short. Should we make a distinction - - - and I
21 know this is in the Second Circuit mentioned it in passing,
22 it's a little bit in the briefing, at least from the
23 amicus. Should we be making a distinction between let's
24 call it for the moment wrongful conduct to enforce a debt
25 versus wrongful conduct to enforce a valid judgment; is

1 that perhaps a better framing of the question as posed?

2 MR. HESKIN: Well - - - well, I'll say in the
3 case of the marshal where you knowingly and willfully
4 execute and exceed your authority, that's a distinction
5 where - - - versus - - - and that's why the sheriff is not
6 in here. The sheriff is not in this case because he
7 executed - - - he served it within his authority.

8 Now, what's the liability on that, it's under - -
9 - it's under CPLR 318. The - - - the merch - - - the - - -
10 the creditor had the obligation to show, to properly serve
11 that levy. There's only two ways you can serve a levy
12 under the CPLR. You have to serve it on an officer of the
13 company, or you have to do it under a designated agent
14 under 318.

15 Now, Comerica doesn't have a - - - it doesn't
16 have a principal place of business in New York. Their
17 principal place of business is in Texas, so they don't have
18 a designated agent under 318. It wasn't served on an
19 officer of the company because they're not here. And
20 therefore, this isn't a technical defect. It's a fatal
21 defect because they couldn't possibly serve Comerica with a
22 levy in New York because they have no designated agent
23 under 318. They have no officers in here. So it couldn't
24 be done whatsoever.

25 So that is - - - that's why it's up to the - - -

1 that's why the creditor, the - - - CMS, the - - - the merch
2 - - - the MCA that directed - - -

3 JUDGE RIVERA: And - - -

4 MR. HESKIN: - - - the sheriff - - -

5 JUDGE RIVERA: - - - and - - - and let me - - -
6 let me just ask you. Let - - - given the way you've set
7 out the wrongful conduct, it - - - does Article 52 not
8 provide - - - I understand your point that you - - - that
9 this is about choice, the - - - and you should be able to
10 choose how you wish to proceed given the wrongful conduct.
11 But just to be clear, you're not taking the position that
12 Article 52 doesn't provide a remedy for the wrongful
13 conduct as you have described it; is that correct?

14 MR. HESKIN: Well, all I can say is what happened
15 in Silver Cup. Like, so Article 52 can modify a judgment,
16 but - - - modify a levy. It can do that, it can order
17 restitution, which they did. But you have to bring a
18 plenary action. So Article 52 in and of itself is not
19 enough. You can't seek attorneys' fees for the damages.
20 You can't seek consequential damages under Article 52. You
21 need an underlying tort action, which is the wrongful
22 execution.

23 So Article 52 in and of itself doesn't do it
24 alone. So you need to go back to the common law, and - - -
25 and rely - - - rest on the common law remedies, which are

1 needed by a plenary action. And in Silver Cup, that's
2 exactly what they said. It's not meant to modify - - -

3 JUDGE RIVERA: You - - - you mean - - - you mean
4 if the execution, the wrongful execution has occurred, as
5 opposed to if you're able to preempt the wrongful
6 execution?

7 MR. HESKIN: Correct. If - - - if the - - -

8 JUDGE RIVERA: Correct?

9 MR. HESKIN: Correct.

10 JUDGE RIVERA: So you're talking about that
11 smaller class of - - - of wrongful conduct?

12 MR. HESKIN: Correct. And - - - and - - - and
13 here, I can't say enough that it's - - - the damages here
14 are clear. There was, for - - - let's just use round
15 numbers - - - \$300,000 in the bank account, and then
16 there's 300 - - - then - - - then there's not. It's zero.
17 Those are the damages.

18 Now, if they want to say, well, we want - - -
19 there - - - there aren't really cognizable damages because
20 there was a valid judgment and we're going to use that to
21 collect information, that's where you have to get into
22 the offset in equities and that's where you don't get - - -
23 get to - - - to apply that. A wrongdoer, someone who
24 breaks the law, cannot go and break into someone's house,
25 take that, and say, hey, well that was mine anyway, and now

1 I get to keep it. No. It has to go back - - - we have to
2 go back and obtain those lawfully.

3 So if that money went back, then they would - - -
4 it would be back in the bank account and then they would
5 have to use lawful means to obtain it. And then when they
6 use the lawful means to obtain it, then there was all sorts
7 of the protections that they could get. They could have -
8 - - you know, the receivership could have stepped in
9 Michigan. There are all sorts of protections that were
10 evaded.

11 And - - - and I know I'm running out of time.
12 And I thank you so much for your patience. This is an
13 incredibly important issue. But the law of the state
14 cannot be that you can break the law, collect upon a
15 judgment, and then just say it doesn't matter because there
16 was a lawful judgment.

17 CHIEF JUDGE DIFIORE: Thank you, Counsel.

18 MR. HESKIN: That can't be the law.

19 CHIEF JUDGE DIFIORE: Thank you.

20 MR. HESKIN: Thank you.

21 CHIEF JUDGE DIFIORE: We'll take a break now to
22 execute our cleaning protocol.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of Plymouth Venture Partners, II, L.P. v. GTR Source, LLC; Capital Merchant Services, LLC, No. 73 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Amanda M. Oliver

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: November 19, 2021