

<b>Zomongo.TV USA, Inc. v Biegel</b>
2026 NY Slip Op 31580(U)
April 14, 2026
Supreme Court, New York County
Docket Number: Index No. 154049/2024
Judge: Hasa A. Kingo
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law because actions against a marshal for acts performed by virtue of, or under color of, office are governed by the one-year statute of limitations set forth in CPLR § 215(1).

### **BACKGROUND AND PROCEDURAL HISTORY**

According to the complaint and plaintiff's opposition papers, on May 29, 2018, Capital Advance Services, LLC obtained a judgment by confession against plaintiff in Kings County. Shortly thereafter, an execution was delivered to Marshal Biegel. Plaintiff alleges that, although BMO Harris Bank had no branch in New York City or New York State holding the account at issue, the marshal's office prepared levy papers and transmitted them by fax to BMO Harris's legal department in Illinois, seeking restraint and turnover of funds located in plaintiff's Arizona account. Plaintiff further alleges that the bank removed approximately \$954,454.18, inclusive of poundage and fees, less than twenty-four hours after transmission of the levy papers, and that the judgment was thereafter satisfied.

In 2021, plaintiff moved in related litigation pursuant to CPLR § 5240 to vacate the levy and recover restitution. Plaintiff asserted there, among other things, that the levy violated CPLR § 5232(a), the separate entity rule, and the geographic limits on a city marshal's authority, and that funds were distributed before expiration of the statutory waiting period. Plaintiff alleges that, on May 4, 2022, Justice Wan granted relief, declared the levy void ab initio, and ordered restitution. Plaintiff now maintains that Justice Wan's ruling either authorized or triggered the present damages action. Plaintiff commenced this plenary action against Marshal Biegel on May 1, 2024.

### **ARGUMENTS**

Defendant argues that the complaint must be dismissed because its claims are foreclosed by *Plymouth Venture*. There, the Court of Appeals held that where a judgment debtor seeks relief from the use of an enforcement mechanism that allegedly failed to comply with CPLR article 52 in the course of enforcing a valid judgment, the debtor's exclusive avenue for relief is an appropriate proceeding under CPLR article 52, not a tort action recharacterizing alleged procedural defects as negligence, conversion, or trespass (*Plymouth Venture Partners, II, L.P.*, 37 NY3d at 595, 599-600). Defendant contends that plaintiff's present complaint is precisely the kind of pleading *Plymouth Venture* disallows, because the gravamen of each cause of action is that the levy did not comply with article 52 and related enforcement law.

Defendant further argues that all claims are untimely under CPLR § 215(1), which applies to actions against a sheriff or marshal "upon a liability incurred by him by doing an act in his official capacity or by omission of an official duty." The Appellate Division, Second Department, and Court of Appeals have held that this one-year period applies to New York City marshals and governs common-law claims including negligence, conversion, and trespass when the challenged conduct was undertaken by virtue of, or under color of, office (*Jemison v Crichlow*, 139 AD2d 332, 334-338 [2d Dept 1988], *aff'd* 74 NY2d 726 [1989]; *Kolomensky v Wiener*, , 507 [2d Dept 1987]). Defendant contends that the alleged conduct occurred no later than May 30, 2018, yet this action was not commenced until May 1, 2024. Defendant therefore argues that the complaint is untimely by many years.

Plaintiff responds that *Plymouth Venture* is narrower than defendant suggests. Plaintiff argues that *Plymouth Venture* does not extinguish all tort claims arising from an unlawful levy, but instead requires a two-step sequence: first, a judgment debtor must obtain relief under CPLR § 5240 declaring the levy or execution invalid; second, the debtor may then commence a plenary action to recover damages flowing from that unlawful levy. Plaintiff contends that it complied with that sequence by obtaining Justice Wan's May 4, 2022 order declaring the levy void *ab initio*. Plaintiff also points to language relied upon in related proceedings suggesting that where process is vacated for irregularity or lack of jurisdiction, a later plenary action may lie (*see Siegel v Northern Blvd. & 80th St. Corp.*, 31 AD2d 182, 183 [1st Dept 1968]).

Plaintiff further argues that the one-year statute of limitations does not apply because Marshal Biegel allegedly acted not within the lawful scope of his office, but only under color of office. Plaintiff maintains that because the levy was declared void *ab initio* and allegedly exceeded the marshal's territorial and statutory authority, the conduct should not be treated as an act in official capacity protected by CPLR § 215(1). On plaintiff's view, the three-year limitations period applicable to injury to property governs (*see CPLR § 214[4]*). Plaintiff also contends that its claims did not accrue until May 4, 2022, when Justice Wan declared the levy void and plaintiff's right to sue for damages matured. Finally, plaintiff argues that, accepting the pleaded facts as true and affording plaintiff every favorable inference, the complaint adequately states causes of action for negligence, trespass, and conversion.

## DISCUSSION

On a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether those facts fit within any cognizable legal theory (*Leon v Martinez*, 84 N.Y.2d 83, 87-88 [1994]). On a motion to dismiss pursuant to CPLR § 3211(a)(5), however, dismissal is warranted where the documentary record and the pleaded dates establish that the action is time-barred as a matter of law (*see Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]). Even under the liberal pleading standard applicable to CPLR § 3211(a)(7), a plaintiff must plead a viable theory recognized by law, and where the Court of Appeals has held that the statutory remedy is exclusive under the circumstances presented, a plenary tort complaint cannot stand (*Plymouth Venture*, 37 NY3d at 595, 599-600).

The court first addresses the viability of the pleaded tort claims in light of *Plymouth Venture*. There, the Court of Appeals considered certified questions arising from claims brought by a judgment debtor against judgment creditors and a New York City marshal based upon alleged noncompliance with CPLR article 52 in the execution of valid New York judgments. The Court held that, under those circumstances, "a judgment debtor's exclusive avenue for relief" is "an appropriate action pursuant to CPLR article 52" (*Plymouth Venture*, 37 NY3d at 595). The Court explained that there is "no need to contort traditional tort claims" to accommodate a judgment debtor's attempt to recover funds applied to a valid judgment based on alleged violations of New York's civil procedure law, and further stated that where the plaintiff "attempts to characterize its causes of action as tort claims," but in substance seeks recovery for "violations of the procedural requirements of article 52," permitting such an action outside article 52 would be inconsistent with the statutory framework (*id.* at 599-600).

That reasoning squarely applies here. However plaintiff labels its claims, the complaint's gravamen is that defendant employed an improper judgment-enforcement mechanism: plaintiff alleges that the marshal faxed levy papers to an out-of-state bank office, attempted to reach out-of-state funds, violated CPLR § 5232(a), violated the separate entity rule, exceeded the territorial limits of his authority, and caused premature transfer of funds before expiration of the article 52 waiting period. Those are, at bottom, asserted defects in the use of article 52 enforcement devices. The complaint does not identify an independent duty extrinsic to the judgment-enforcement framework; rather, it seeks damages because the levy allegedly failed to comply with that framework. Under *Plymouth Venture*, such claims belong within article 52 and may not be repackaged as negligence, trespass, and conversion claims in a plenary action against the marshal (*Plymouth Venture*, 37 NY3d at 599-600).

Plaintiff's effort to read *Plymouth Venture* as establishing a mandatory two-step regime culminating in a later tort action is unpersuasive. The majority did not hold that a party may sue in tort after first prevailing under CPLR § 5240. To the contrary, it held that article 52 is the exclusive avenue for relief "under these circumstances" (*id.* at 595). Although the dissent criticized that approach and argued that article 52 should not displace common-law tort remedies, the dissent is not controlling (*see id.* at 605-616 [Wilson, J., dissenting]). This court is bound by the majority's holding, not the dissent's reservations about it. Nor does the passing observation in other cases that a plenary action may sometimes follow vacatur for irregular process override the later and more specific guidance supplied by the Court of Appeals in *Plymouth Venture* regarding claims by a judgment debtor complaining of article 52 defects in the enforcement of a valid judgment (*see Siegel*, 31 AD2d at 183; *Plymouth Venture*, 37 NY3d at 599-600).

Even if the court were to assume, solely for the sake of argument, that plaintiff could maintain some form of plenary claim after obtaining article 52 relief, the complaint would still have to be dismissed as untimely. CPLR § 215(1) requires that an action against a sheriff, coroner, or constable "upon a liability incurred by him by doing an act in his official capacity or by omission of an official duty" be commenced within one year. That provision applies as well to city marshals (*Kolomensky*, 135 AD2d at 507; *Jemison*, 139 AD2d at 334; *Jemison*, 74 NY2d at 726). The Appellate Division, Second Department, in *Jemison* specifically applied CPLR § 215(1) to claims against a city marshal sounding in negligence, trespass, and conversion, and rejected attempts to avoid the one-year statute by characterizing the marshal's conduct as intentional or malevolent (*Jemison*, 139 AD2d at 337-338). The focus is not whether the act was later alleged to have been wrongful, but whether it was undertaken by virtue of, or under color of, the marshal's office (*id.*).

Here, the conduct challenged by plaintiff was plainly undertaken under color of the marshal's office. The levy papers, levy instructions, demand, and poundage were all issued in defendant's capacity as a New York City marshal executing upon a judgment delivered to him for enforcement. Plaintiff's theory is not that defendant engaged in some purely private appropriation of property unrelated to his office; it is that he misused official enforcement mechanisms by employing them in an unauthorized manner. That distinction matters. A marshal does not forfeit the protection of CPLR § 215(1) merely because the plaintiff alleges that the official act was procedurally defective, jurisdictionally overreaching, or even void. To hold otherwise would permit virtually every challenge to an execution or levy to evade the statute simply by

recharacterizing the asserted official overreach as conduct wholly outside office. The reasoning of *Jemison* does not permit that result (*Jemison*, 139 AD2d at 337-338; *Helm v Marchisotto*, 2022 N.Y. Slip Op. 32149(U), \*1-2 [Sup Ct, N.Y. County 2022]).

Nor can plaintiff avoid dismissal by invoking CPLR § 214(4). Even assuming *arguendo* that the three-year period governing injury to property applied, the action would remain untimely. The wrongful acts alleged occurred on May 29 and 30, 2018, when the levy was transmitted and funds were removed from plaintiff's account. Plaintiff's injury, if any, occurred when its funds were restrained, removed, and turned over, not when a court later declared the levy void. A later judicial determination confirming that the levy was improper does not postpone accrual; it merely adjudicates the legality of conduct and the existence of a remedy. The loss of dominion over the property is what triggered any tort claim for conversion or trespass to chattel, and any negligence claim based on the allegedly improper levy likewise accrued when the levy was executed and the property taken (*see Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44-45 [1995][conversion claim accrues at time of wrongful taking]; *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993][tort claim accrues when injury is sustained]).

Plaintiff's position that its causes of action accrued only upon Justice Wan's May 4, 2022 order cannot be reconciled with settled accrual principles. The fact that plaintiff may have first obtained a judicial declaration of invalidity in 2022 does not mean plaintiff first sustained injury in 2022. The complaint itself is predicated on the allegation that plaintiff's bank account was unlawfully levied in 2018 and that approximately \$954,454 was taken at that time. That was the claimed economic injury. By plaintiff's own allegations, the harm had already occurred years before this action was commenced. Because the action was filed on May 1, 2024, it is untimely under CPLR § 215(1), and untimely as well even under the more generous three-year period plaintiff invokes.

The court therefore need not reach every subsidiary dispute raised by the parties, including whether CPLR § 103(c) conversion principles could ever salvage a miscast pleading in this posture, whether prior Kings County rulings have preclusive effect, or whether plaintiff's allegations otherwise suffice to plead the elements of negligence, trespass, and conversion. The complaint fails as a matter of law for two independent reasons: first, *Plymouth Venture* forecloses the plenary tort theory pleaded here because the complaint seeks damages for alleged article 52 enforcement defects; and second, even if a plenary action were theoretically available, this action was commenced years after expiration of the applicable limitations period.

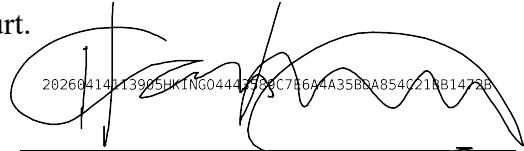
Accordingly, it is hereby

ORDERED that Defendant New York City Marshal Stephen W. Biegel's motion (Motion Seq. 001) to dismiss the complaint is granted pursuant to CPLR § 3211(a)(7) because plaintiff's tort causes of action, premised on the allegedly improper use of CPLR article 52 enforcement devices, may not be maintained in a plenary action in light of the exclusive remedial scheme recognized in *Plymouth Venture Partners, II, L.P. v GTR Source, LLC*, 37 NY3d 591 (2021); and it is further

ORDERED that, independently, defendant's motion is granted pursuant to CPLR § 3211(a)(5) because the action is time-barred under CPLR § 215(1) and *Jemison v Crichlow*, 74 NY2d 726 (1989); and it is further

ORDERED that the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.



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HASA A. KINGO, J.S.C.

4/14/2026

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE