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CPLR 5015(a): On Motion, Trial Court Uses Inherent Discretionary Power To Vacate Its Own Final Judgment in Light of Posttrial Death of Plaintiff

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personally" certainly seems, as one commentator has suggested, the preferable approach.[158]

Such approach has been favored by the Second Department. In *Moran v. Rynar*[159] the court imposed a $250 penalty upon the neglectful attorney as a condition for vacating the dismissal.[160] In subsequent cases involving both 3404 and 3216 dismissals, the Second Department has consistently imposed similar small penalties upon the recalcitrant attorney as a condition to restoring the case to calendar.[161]

The *Schickler* court, while adopting the Second Department's approach, has nevertheless made an important departure from the rather lenient penalty of $250 generally imposed by that Department.[162] As one commentator wisely noted, the sum of $250 does not constitute a sufficient deterrent to neglectful prosecution.[163] The *Schickler* penalty of $1000 appears more realistic in that it is better designed to discourage attorney neglect and incompetence while the blameless litigant is still allowed his day in court.[164]

ARTICLE 50 — JUDGMENTS GENERALLY

CPLR 5015(a): On motion, trial court uses inherent discretionary

158 7B MCKINNEY'S CPLR 3216, commentary at 919 (1970). In this commentary, Professor David D. Siegel, discussing a decision of the Court of Appeals for the Second Circuit to penalize the attorney rather than dismiss a meritorious cause of action, *see* note 155 *supra*, states that "[t]he New York courts might profitably adopt that approach for the *benefit* of the lawyer" who would otherwise face a malpractice suit and/or a disciplinary proceeding. *Id.* (emphasis in original).

159 39 App. Div. 2d 718, 332 N.Y.S.2d 138 (2d Dep't 1972) (mem.).

160 In vacating the dismissal, the court stated:

> A proper exercise of discretion in cases like this requires a balanced consideration of all relevant factors, including the merit or lack of merit in the action, seriousness of the injury, extent of the delay, excuse for the delay, prejudice or lack of prejudice to the defendant, and intent or lack of intent to deliberately default or abandon the action. Also to be weighed in the balance is our strong public policy that actions be disposed of on the merits.

Id. at 718-19, 332 N.Y.S.2d at 140-41 (citation omitted).

161 *See* Cohen v. Tucker, 44 App. Div. 2d 706, 354 N.Y.S.2d 691 (2d Dep't 1974) (mem.) ($250 penalty); Urban v. Maloney, 40 App. Div. 2d 531, 334 N.Y.S.2d 122 (2d Dep't 1972) (mem.) ($250 penalty); Moran v. Rynar, 39 App. Div. 2d 718, 332 N.Y.S.2d 138 (2d Dep't 1972) (mem.) ($250 penalty); Springer v. Morangio, 38 App. Div. 2d 852, 330 N.Y.S.2d 100 (2d Dep't 1972) (mem.) ($100 penalty).

162 *See* note 161 *supra*.

163 7B MCKINNEY'S CPLR 3216, commentary at 97 (Supp. 1974). Professor Siegel states:

> The sum of $250, or anything near it, does not seem to constitute a deterrent to neglectful prosecution. . . . [T]he irresponsible minority among lawyers who collect cases but do not prosecute them diligently will be favored even beyond the great generosity CPLR 3216 already shows them.

Id.

164 Notwithstanding the apparent logic of the *Schickler* decision, the lower penalty has been adhered to in recent First and Second Department cases. *See, e.g.*, Cichorek v. Cosgrove, 47 App. Div. 2d 883, 367 N.Y.S.2d 7 (1st Dep't 1975) ($350 penalty); Sommer v. Fucci, 47 App. Div. 2d 771, 365 N.Y.S.2d 249 (2d Dep't 1975) ($100 penalty).

power to vacate its own final judgment in light of posttrial death of plaintiff.

In *Miner v. Long Island Lighting Co.*,[165] an action for personal injuries caused by defendants' negligence, the trial judge, upon motion by the third-party defendant, vacated a $2 million judgment which had resulted from a jury verdict in plaintiff's favor.[166] The court concluded that a new trial on the issue of damages was appropriate in light of the plaintiff's death only eleven months after trial.[167]

Plaintiff's premature death sharply contrasted with the 43.8-year life expectancy established for him at trial.[168] Since it appeared that a substantial portion of the jury's general verdict was predicated on future medical expenses projected on the basis of this life expectancy,[169] the court held that "in the interest of justice, this motion must be granted . . . ."[170] Thus, relief from the judgment resulted from a purely posttrial occurrence.

The ability of a court to vacate its judgment is firmly established in New York law. On motion, CPLR 5015(a) authorizes a court render-

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165 172 N.Y.L.J. 27, Aug. 7, 1974, at 13, col. 1 (Sup. Ct. Kings County) (Kelly, J.), *rev'd on other grounds*, 47 App. Div. 2d 842, 365 N.Y.S.2d 873 (2d Dep't 1975) (mem.).

166 172 N.Y.L.J. 27, at 13, col. 2. The trial court also vacated a $175,000 judgment in favor of plaintiff's wife for loss of her husband's services and society. *Id.*, cols. 2-3. *See* note 170 *infra.*

The Appellate Division, Second Department, dismissed as academic plaintiff's appeal from the order to vacate when the majority found LILCO not negligent as a matter of law. 47 App. Div. 2d at 843, 365 N.Y.S.2d at 875, *criticized in* Broder, *Trial Tactics and Techniques, Codified Negligence*, 173 N.Y.L.J. 72, Apr. 15, 1975, at 1, col. 1.

167 172 N.Y.L.J. 27, at 13, col. 2.

168 At the time of trial plaintiff was 27 years old. His life expectancy was calculated according to mortality tables prepared by the Department of Health, Education, and Welfare. *Id.*

169 At trial plaintiff's attorney had argued that medical and nursing expenses for plaintiff's expected life would amount to over $1.9 million. The court speculated that this was a very influential factor in the jury's $2 million judgment. *Id.*

It is well settled that an injured party may recover both for permanent injury and for those losses that are reasonably certain to occur at some time in the future. Accordingly, the amount of recovery substantially depends on the injured party's life expectancy. *See generally* 3 PERSONAL INJURY §§ 3.03, 3.04[2][c], 3.04[3][f], 3.04[5], 3.04[7], 8.08, 8.12[6] (L. Frumer, R. Benoit, & M. Friedman eds. 1965). *See also* Miner v. LILCO, 47 App. Div. 2d 842, 844, 365 N.Y.S.2d 873, 877 (2d Dep't 1975) (mem.) (Hopkins, J., dissenting).

170 172 N.Y.L.J. 27, at 13, col. 2. The court applied the same rationale to the issue of plaintiff-wife's damages. It stated:

> A new trial must also be had on the cause of action alleged by the plaintiff-wife for loss of her husband's services and society. The verdict rendered in her favor . . . was also predicated, in large part, on the 43.8 years of plaintiff's life expectancy. Here, too, when actual fact is substituted for opinion and conjecture the loss of her husband's services and society would be limited to about four and one-quarter year. For the loss she sustained for that period, the verdict . . . would be clearly excessive.

Id., cols. 2-3.

ing a judgment to relieve a party from its terms for reasons including newly discovered evidence,[171] fraud, or lack of jurisdiction.[172] These grounds, however, are not exclusive. While the statute represents a legislative attempt to codify decisional law,[173] it was intended that prior case law be preserved.[174] As a result, the court retains the inherent discretionary power it had at common law to "vacate, amend or modify its judgments"[175] in the interests of substantial justice.[176] Thus, absent other considerations, the power of the *Miner* court to vacate its own judgment was clearly present.

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171 The *Miner* court was well aware that plaintiff's early demise could not be categorized as newly discovered evidence. It quoted an early decision to this effect as follows:

> "After-developments, refuting an opinion as to future probable results (required to be testified to only with reasonable certainty), cannot be classified as newly-discovered evidence which may be defined as the existence of material facts unknown to the moving party at the time of the trial, and which reasonable diligence could not have discovered."

172 N.Y.L.J. 27, at 13, col. 3, *quoting* Fogel v. Interborough Rapid Transit Co., 53 Misc. 32, 34, 103 N.Y.S. 977, 978 (Sup. Ct. N.Y. County 1907).

172 CPLR 5015 states:

> (a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
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> 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or
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> 2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; or
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> 3. fraud, misrepresentation, or other misconduct of an adverse party; or
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> 4. lack of jurisdiction to render the judgment or order; or
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> 5. reversal, modification or vacatur of a prior judgment or order upon which it is based.
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> (b) On stipulation. The clerk of the court may vacate a default judgment entered pursuant to section 3215 upon the filing with him of a stipulation of consent of such vacatur by the parties personally or by their attorneys.
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> (c) Restitution. Where a judgment or order is set aside or vacated, the court may direct and enforce restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal.

In addition, CPLR 5019 provides statutory authority for a court to correct technical deficiencies in a judgment. *See also* N.Y. JUDICIARY LAW § 217(a) (McKinney Supp. 1974) (vacating of default judgments), *discussed in* 7B MCKINNEY'S CPLR 5015, commentary at 212-15 (Supp. 1974). *Cf.* CPLR 4404 (providing for posttrial motion for judgment or new trial).

173 *See* 5 WK&M ¶ 5015.01.

174 7B MCKINNEY'S CPLR 5015, commentary at 578 (1963).

175 Miner v. LILCO, 172 N.Y.L.J. 27, Aug. 7, 1974, at 13, col. 2 (Sup. Ct. Kings County).

176 *See* 7B MCKINNEY'S CPLR 5015, commentary at 578-82 (1963). This concept was clearly enunciated by the Court of Appeals in Ladd v. Stevenson, 112 N.Y. 325, 19 N.E. 842 (1889), wherein the Court, discussing § 724 of the Code of Civil Procedure (a predecessor of CPLR 5015), held:

> The whole power of the court to relieve from judgments taken through "mistake, inadvertence, surprise or excusable neglect," is not limited by section 724; but in the exercise of its control over its judgments it may open them upon the application of anyone for sufficient reason, in the furtherance of justice.

Use of this broad discretionary power was sanctioned in an early Court of Appeals' decision, *Fogel v. Interborough Rapid Transit Co.*,[177] wherein the passage of time had uncontrovertedly established as erroneous expert opinion testimony concerning the consequences of plaintiff's injuries. Although the record revealed no basis in law for reversing plaintiff's judgment, the Court indicated in dictum that the defendant could still properly move for a new trial.[178] The Court noted that "it should be practicable to substitute for opinion and theory actual facts . . . ."[179] The *Miner* court, relying upon this reasoning, vacated its earlier judgment to permit a new trial wherein the damages could be recalculated according to plaintiff's actual lifespan.[180]

The attitude of the New York courts towards granting relief from inequitable judgments has been characterized as "extremely permissive."[181] Arguably, the *Miner* court was faced with a situation where events wholly subsequent to the trial had rendered its earlier judgment an inadequate representation of the equities between the parties. This alone, however, does not appear to justify the court's exercise of its inherent discretionary power. *Fogel* and *Miner* excepted, the New York courts have not considered *post*trial developments as providing an adequate basis for revision of a prior judgment.[182] Presumably, upholding a

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Its power to do so does not depend upon any statute, but is inherent, and it would be quite unfortunate if it did not possess it to the fullest extent.

Id. at 332, 19 N.E. at 844.

The power of the courts in this regard is well established and has frequently been invoked by the New York courts. *See, e.g.*, Michaud v. Loblaws, Inc., 36 App. Div. 2d 1013, 321 N.Y.S.2d 626 (4th Dep't 1971); Jacobowitz v. Herson, 243 App. Div. 274, 276 N.Y.S. 816 (1st Dep't), *rev'd*, 268 N.Y. 130, 197 N.E. 169 (1935); Maloney v. McMillan Book Co., 52 Misc. 2d 1006, 277 N.Y.S.2d 499 (Syracuse City Ct. 1967).

177 185 N.Y. 562, 77 N.E. 1022 (1906).

178 *Id.* at 562-63, 77 N.E. at 1023. The defendant did, in fact, follow the Court's suggestion. The trial court, faced with the Court of Appeals' pronouncement, *see* text accompanying note 179 *infra*, reluctantly granted the motion to vacate. Fogel v. Interborough Rapid Transit Co., 53 Misc. 32, 103 N.Y.S. 977 (Sup. Ct. N.Y. County 1907).

179 185 N.Y. at 562, 77 N.E. at 1023.

180 172 N.Y.L.J. 27, at 13, col. 3.

181 5 WK&M ¶ 5015.02.

182 Posttrial developments do not constitute a ground for relief from a prior judgment under the explicit provisions of CPLR 5015. *See* note 172 *supra*. New York case law closely parallels the statute. *See, e.g.*, Bouxsein v. Bialo, 35 App. Div. 2d 523, 313 N.Y.S.2d 426 (2d Dep't 1970) (excusable default); Clove Corp. v. Avalanche Mt., Inc., 27 App. Div. 2d 870, 277 N.Y.S.2d 739 (3d Dep't 1967) (excusable default); Cornwell v. Safeco Ins. Co., 42 App. Div. 2d 127, 346 N.Y.S.2d 59 (4th Dep't 1973) (newly discovered evidence); McCarthy v. Port of N.Y. Auth., 21 App. Div. 2d 125, 248 N.Y.S.2d 713 (1st Dep't 1964) (newly discovered evidence); *In re* Polsky, 19 App. Div. 2d 413, 244 N.Y.S.2d 22 (1st Dep't 1963) (fraud, misrepresentation, or misconduct); Mills v. Nedza, 222 App. Div. 615, 227 N.Y.S. 156 (2d Dep't 1928) (fraud, misrepresentation, or misconduct); National Commercial Bank & Trust Co. v. Ross, 40 App. Div. 2d 1046, 338 N.Y.S.2d 758 (3d Dep't 1972) (lack of jurisdiction); Malone v. Citarella, 7 App. Div. 2d 871, 182 N.Y.S.2d 200 (2d Dep't 1959) (lack of jurisdiction); Feldberg v. Howard Fulton St., Inc., 44 Misc. 2d 218, 253

judgment on the merits as the final determination of each party's rights[183] is deemed paramount to reevaluating the fairness of a decision in light of unanticipated posttrial developments.[184]

While the circumstances in *Miner* arouse sympathy for the defendants' plight, the decision seriously imperils the finality of judgments in actions where damages are based on future contingencies. The ramifications of general adoption by the courts of this practice are staggering; they include a constant relitigation of previously tried causes as the passage of time reveals the actual, as opposed to projected, consequences of each dispute.[185]

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5222(b): Service of restraining order gives judgment creditor rights superior to general creditors who subsequently take assignment without consideration.

CPLR 5222(b) prohibits a judgment debtor served with a restraining notice from transferring any of his property until the judgment is satisfied or vacated.[186] Any person violating this section subjects himself to a fine in contempt of court.[187] Moreover, as a result of the decision of

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N.Y.S.2d 291 (Sup. Ct. Kings County 1964), *aff'd without opinion*, 24 App. Div. 2d 704, 261 N.Y.S.2d 1012 (2d Dep't 1965) (reversal of prior judgment).

Even in *Miner*, the one Appellate Division Justice who considered the appropriateness of the vacatur, *see* note 166 *supra*, noted that:

> Usually, a new trial because of facts discovered after trial relevant to the recovery of damages is directed only where fraud or deceit was practiced at the trial . . . .

47 App. Div. 2d at 846, 368 N.Y.S.2d at 880 (Hopkins, J., dissenting) (citations omitted). Although he agreed that the verdict was excessive, Justice Hopkins concluded that the trial court's order granting a new trial because of a posttrial development should have been reversed. *Id.* at 847, 365 N.Y.S.2d at 881.

183 *See generally* 5 WK&M ¶¶ 5011.01, .03, .10-.13.

184 Nonetheless, "finality of judgments" is not an absolute rule to be followed blindly by the courts. For example, in Bardach v. Mayfair-Flushing Corp., 49 Misc. 2d 380, 267 N.Y.S.2d 609 (Sup. Ct. Queens County), *aff'd mem.*, 26 App. Div. 2d 620, 272 N.Y.S.2d 969 (2d Dep't 1966), the court, in its original judgment, had granted an easement. When the original purposes for the easement later became impossible to accomplish, and continued enforcement would only serve to impose a substantial hardship on the owner of the premises, the court refused to enforce the judgment. While the court relied in part on established property law doctrines, it also recognized its inherent discretionary power to properly vacate the judgment. 49 Misc. 2d at 383, 267 N.Y.S.2d at 612.

185 Carrying the *Miner* logic to its fullest extent would allow a plaintiff who outlived the life expectancy determined at trial to properly move to vacate the earlier judgment and seek a new trial as to his actual damages. Theoretically, such a motion could be made periodically until actual death.

186 CPLR 5222(b). The purpose of this section is to eliminate both the time and expense of an enforcement proceeding. *See* 9 CARMODY-WAIT 2d § 64:2, at 331 (1966).

187 CPLR 5251 states in pertinent part: "Refusal or willful neglect of any person to obey a . . . restraining notice . . . shall . . . be punishable as a contempt of court."