

## CPLR 5304(b)(6): Case Illustrates Danger of Ignoring Foreign Arbitration

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

the amount subject to income execution.<sup>193</sup> The court found no evidence of legislative intent to depart from the former law in this respect.<sup>194</sup> It reasoned that a contrary conclusion would (1) result in the anomaly of an individual with more dependents (who therefore is subject to less withholding) paying more on income execution than one with less dependents (and correspondingly greater withholding),<sup>195</sup> and (2) encourage judgment debtors to reduce their take-home pay through fraudulent devices.<sup>196</sup> The aforementioned change in terminology, the court concluded, was intended to make it clear that commissions, overtime, bonuses and other irregular income are subject equally with ordinary wages to income execution.<sup>197</sup>

The decision in *County Trust Co. v. Berg* is consistent with the legislative history and with logic.<sup>198</sup> Earnings not subject to income execution perhaps should be increased, but computation should be based on gross income. The gross income standard is simpler and fairer than a net take-home pay basis.

#### ARTICLE 53 — RECOGNITION OF FOREIGN COUNTRY MONEY JUDGMENTS

*CPLR 5304(b)(6): Case illustrates danger of ignoring foreign arbitration.*

Under the rule of comity as it developed in decisional law, New York upheld foreign judgments if the foreign court obtained jurisdiction over the parties and if the judgment was not secured by fraud

<sup>193</sup> *State Tax Comm'n v. Voges*, Sup., 144 N.Y.S.2d 193 196 (Sup. Ct. Queens County 1955); *Coller v. Sheffield Farms Co., Inc.*, 129 Misc. 600, 604, 223 N.Y.S. 305, 311 (St. Lawrence County Ct. 1927).

<sup>194</sup> 65 Misc. 2d 535-36, 318 N.Y.S. 2d at 156-57; see SIXTH REP. 492-93; 6 WK&M ¶ 5231.11.

<sup>195</sup> *Id.* at 535-36, 318 N.Y.S.2d at 156.

Professor Siegel observed that the court's solution to this anomaly further disadvantages all taxpayer debtors:

To prevent the bachelor from getting 'more' than the familyman does, the *Berg* case sanctifies a system which surcharges both of them.

Siegel, *Wage Garnishment in N.Y.: 10 Per Cent of What*, 165 N.Y.L.J. 96, May 19, 1971, at 4, col. 3.

Additionally, Professor Siegel argued that the difference in garnishment under the proposed net income basis reflects the difference in taxes paid by the bachelor and the family man. *Id.*

<sup>196</sup> 65 Misc. 2d at 536, 318 N.Y.S.2d at 157.

<sup>197</sup> *Id.*

<sup>198</sup> For a contrary view see Siegel, *supra* note 7, 165 N.Y.L.J. 95, May 18, 1971, at 1, col. 4; *id.* 96 May 19, 1971, at 1, col. 4. Professor Siegel notes that there was no real distinction between net and gross income when the original statute was enacted, for deductions for Social Security and federal, state and city income taxes did not exist. *Id.* 95, May 18, 1971, at 4, col. 3.

or violative of the state public policy.<sup>199</sup> Recently, comity has been statutorily sanctioned in the Uniform Foreign Court Money Judgments Recognition Act, which is embodied in CPLR 5301 through 5309.<sup>200</sup>

The provisions of the above Act apply "to any foreign court judgment which is final, conclusive and enforceable where rendered."<sup>201</sup> Such a judgment is conclusive between the parties insofar as it grants recovery of a sum of money and enforceable by a motion for summary judgment in lieu of complaint.<sup>202</sup> Under CPLR 5304(b)(6), however, New York need not recognize a foreign judgment if

the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court. . . .

Said provision was construed by the Supreme Court, New York County, in *New Central Jute Mills Co., Ltd. v. City Trade & Industries, Ltd.*<sup>203</sup>

New Central and City Trade had entered into a contract in India which contained a provision for arbitration of disputes arising therefrom in India in accordance with the Indian Arbitration Act.<sup>204</sup> The Court of Appeals had determined that the contract was valid and that the arbitration provision was enforceable.<sup>205</sup> Plaintiff New Central obtained two arbitration awards by default, despite ample notice to defendant City Trade, received judgments upon them in an Indian court, after notice to City Trade, and then moved in New York for summary judgment in lieu of complaint upon said foreign judgments.<sup>206</sup> The parties had entered into a stipulation in another action staying any arbitration proceedings concerning the matters at issue in that action.<sup>207</sup> City Trade challenged the validity of the foreign judgments under CPLR 5304(b)(6), on the ground that the above stipulation also applied to these arbitration proceedings.<sup>208</sup> Section 31 of the Indian Arbitration

<sup>199</sup> *Dunstan v. Higgins*, 138 N.Y. 70, 75, 33 N.E. 729, 730 (1893).

A foreign default judgment was equally recognizable. *Riehle v. Margolies*, 279 U.S. 218, 225 (1929).

<sup>200</sup> L. 1970, ch. 981, eff. Sept. 1, 1970. See Kulzer, *The Uniform Foreign Money-Judgments Recognition Act*, THIRTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK 194-247 (1968); Kulzer, *The Uniform Enforcement of Foreign Judgments Act*, *id.* 248-99.

<sup>201</sup> CPLR 5302.

<sup>202</sup> CPLR 5303.

<sup>203</sup> 65 Misc. 2d 653, 318 N.Y.S.2d 980 (Sup. Ct. N.Y. County 1971).

<sup>204</sup> *Id.* at 654, 318 N.Y.S.2d at 982.

<sup>205</sup> *City Trade & Industries, Ltd. v. New Central Jute Mills Co., Ltd.*, 25 N.Y.2d 49, 250 N.E.2d 52, 302 N.Y.S.2d 557 (1969), *aff'g* 30 App. Div. 2d 513, 290 N.Y.S.2d 108 (1st Dep't 1968).

<sup>206</sup> 65 Misc. 2d at 654-55, 318 N.Y.S.2d at 981-83.

<sup>207</sup> *Id.* at 655, 318 N.Y.S.2d at 983.

<sup>208</sup> *Id.*

Act provided that the only place in which an arbitration award or agreement can be questioned is in the court in which said award was filed or is fileable.<sup>209</sup> The New York court concluded that the existence and effect of the stipulation upon which City Trade based its defense were issues solely for the determination of the Indian court.<sup>210</sup>

[O]nce parties have agreed to submit their controversy to a foreign arbitrator, and to be bound by foreign law, they cannot relitigate their claims or defenses in domestic litigation.<sup>211</sup>

Not viewing the stipulation as an agreement for settlement in other than the Indian court,<sup>212</sup> the New York court granted summary judgment to New Central.<sup>213</sup>

The disposition of this case is just both in fact and in law: City Trade deliberately determined not to participate in any of the proceedings in India, and the stipulation upon which it depended was not an agreement to resolve the controversy otherwise than in the Indian court.

#### ARTICLE 65 — NOTICE OF PENDENCY

*CPLR 6501: Second filing of notice of pendency authorized to permit action to foreclose real property mortgage.*

In any action in which the judgment would affect title, possession, use, or enjoyment of real property, a notice of pendency may be filed pursuant to CPLR article 65.<sup>214</sup> This serves as constructive notice from the time of filing to purchasers from or incumbrancers against the defendant.<sup>215</sup> The life span of an unextended notice of pendency is three years,<sup>216</sup> the granting of a motion to cancel such a notice being obligatory upon the court.<sup>217</sup> Only one notice of pendency predicated upon a particular cause of action may be filed under CPLR 6501.<sup>218</sup>

<sup>209</sup> *Id.* at 656-57, 318 N.Y.S.2d at 984.

<sup>210</sup> *Id.* at 657, 318 N.Y.S.2d at 985-86.

<sup>211</sup> *Id.* at 655-56, 318 N.Y.S.2d at 983, citing *Engelbrechten v. Galvanconi & Nevy Bros., Inc.*, 59 Misc. 2d 721, 300 N.Y.S.2d 239 (N.Y.C. Civ. Ct. N.Y. County 1969); *Plugmay, Ltd. v. National Dynamics Corp.*, 48 Misc. 2d 913, 266 N.Y.S.2d 240 (N.Y.C. Civ. Ct. N.Y. County 1966).

<sup>212</sup> *Id.* at 657, 318 N.Y.S.2d at 985.

<sup>213</sup> *Id.* at 658, 318 N.Y.S.2d at 986.

<sup>214</sup> CPLR 6501-6515 outlines procedures for obtaining, filing, and cancelling notice of pendency.

<sup>215</sup> CPLR 6501.

<sup>216</sup> CPLR 6513 is self-executing: failure to obtain an extension results in the death of the notice.

<sup>217</sup> *Robbins v. Goldstein*, 32 App. Div. 2d 1047, 303 N.Y.S.2d 822 (2d Dep't 1969) found this mandate inherent in the language of CPLR 6514. See *McLaughlin, New York Practice*, 22 SYRACUSE L. REV. 55, 81 (1971); 7B MCKINNEY'S CPLR 6514, *supp. commentary* at 74 (1970). See also *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 532, 578-79 (1970).