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CPLR 5004: Conflict Over Legal Rate of Interest Continues

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tion has been resolved, courts can focus on interpreting particular aspects of it. A problem recently posed centered on the efficacy of a demand for a note of issue which was served by ordinary mail, rather than by registered or certified mail as required under CPLR 3216.

In *Beermont Corp. v. Yager*,[123] the court found that despite the irregular mode of service plaintiff's attorney had not been prejudiced. Consequently, the court granted a motion to dismiss for lack of prosecution because a note of issue was not served within forty-five days, and the attorney's sole excuse was a busy schedule, which is not considered a justification for a denial of the motion. Moreover, the court took notice of the five-year lapse between defendant's demand for a bill of particulars and the appellant's compliance therewith.

Since the attorney in *Beermont* was not prejudiced by the irregular service, the court was justified in granting the motion to dismiss.[124] For, the demand did, in fact, serve its basic purpose: it apprised the attorney of his situation. And, the irregular service was not, in any event, related to the failure to file a note of issue within forty-five days. Hence, exacting compliance with the service requirements by the defendant was not mandated. Conversely, a slight delay by an attorney while attempting to comply with the demand should also be overlooked.[125]

CPLR 5004: Conflict over legal rate of interest continues.

CPLR 5004 prescribes that "interest shall be paid at the legal rate." This rate, which is set under section 5-501 of the General Obligations Law[126] had traditionally been a flat 6 percent. An amendment to section 5-501,[127] however, authorized the Banking Board to adjust the rate of interest "upon the loan or forbearance of any money, goods, or things in action." Accordingly, during February of 1969, the Board adopted the maximum rate of interest of 7.5 percent.[128]

Without a specific declaration of legislative intent, the courts had to determine the effect, if any, of the Board's action upon the

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123 34 App. Div. 2d 589, 308 N.Y.S.2d 109 (3d Dep't 1970).

124 *See* CPLR 2001.

125 For example, where local court rules have thwarted an otherwise diligent effort to procure a note of issue, an extension should be permitted without requiring the plaintiff to exhibit that his previous delay was justifiable. 7B McKINNEY'S CPLR 3216, commentary 26, at 934 (1970).

126 N.Y. GEN. OBLIGATIONS LAW § 5-501 (McKinney 1964).

127 *Id.* (McKinney supp. 1968).

128 *See* 3 NYCRR 34.1 (1969).

interest rates under sections 5001,[129] 5002,[130] and 5003[131] of the CPLR. This depended on the interpretation given to the restrictive phrase "loan or forbearance of any money" in the context of a statute which might rationally be held to imply that such action by the Board would collaterally change the above interest rates.

Simultaneously, polar conclusions were reached. The Attorney General, relying upon a construction of the phrase "loan or forbearance" as being applicable to purchase money mortgages,[132] announced that the interest rate on money judgments remained at 6 percent.[133] Meanwhile, the Supreme Court, Suffolk County, ruled that the higher interest rate governed when computing interest on a note secured by a mortgage on real estate which was subject to a foreclosure action.[134]

To date, the conflict has been nurtured[135] and, despite frequent requests for legislative action,[136] has gone unresolved. In the latest case, *Rachlin & Co. v. Tra-Mar, Inc.*,[137] the court took cognizance of the current rise in interest rates and concluded that the lower rate of 6 percent might encourage a debtor to delay payment as long as possible. Consequently, the higher rate was adopted.

The difficulties caused by the indecisiveness in this area are by no means minute. The implications for an individual debtor are apparent when it is recalled that interest in many cases runs from the time the cause of action arises to the satisfaction of judgment — often a number of years. For example, in *Beyer v. Murray*,[138] five years elapsed between the entry of judgment and the disposition of a subsequent appeal. Nonetheless, the court ordered that interest accrued from the date of the original verdict.

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129 CPLR 5001 awards interest, in certain actions, from the accrual of a cause of action until verdict, report or decision.

130 CPLR 5002 awards interest, in any action, from verdict, report or decision to judgment.

131 CPLR 5003 provides that every money judgment shall bear interest from the date of entry.

132 Mandelino v. Fribourg, 23 N.Y.2d 145, 242 N.E.2d 823, 295 N.Y.S.2d 654 (1968).

133 OP. ATT'Y GEN. OF N.Y. (informal and unofficial), appearing in 161 N.Y.L.J. 11, Jan. 16, 1969, at 1, col. 1.

134 Dime Savings Bank v. Carlozzo, 58 Misc. 2d 821, 296 N.Y.S.2d 805 (Sup. Ct. Suffolk County 1969).

135 *Compare* Belcher v. Keston, 162 N.Y.L.J. 20, July 29, 1969, at 11, col. 7 (Sup. Ct. Queens County) *and* Kay Lew Enterprises v. Lewis Marshall, 161 N.Y.L.J. 102, May 26, 1969, at 17, col. 1 (Sup. Ct. N.Y. County) *with* Gelco Builders v. Simpson Factors Corp., 161 N.Y.L.J. 121, June 23, 1969, at 14, col. 1 (Sup. Ct. N.Y. County). *See also The Quarterly Survey*, 44 ST. JOHN'S L. REV. 340-42 (1969).

136 *See, e.g.*, 7B MCKINNEY'S CPLR 5004, supp. commentary at 132-35 (1969).

137 33 App. Div. 2d 370, 308 N.Y.S.2d 153 (1st Dep't 1970).

138 33 App. Div. 2d 246, 306 N.Y.S.2d 619 (4th Dep't 1970).

Collectively, millions of dollars are at stake.[139] Moreover, whenever a choice of venue is possible, a conflict arises between the creditor, seeking a 7.5 percent forum and parity with existing interest rates, and the debtor, already beset with financial burdens, adamantly resisting said forum via a motion for a change of venue.[140]

Rachlin represents the first appellate pronouncement on whether the interest rate under article 50 has been increased by the action of the Banking Board. Based on the soundness of the decisions thus far, it is improbable that any one approach can be considered the correct one.[141] Hence, it is conceivable that without prompt legislative action, the conflict will merely be transposed onto the appellate level rather than resolved.

CPLR 5015: Default judgments vacated sua sponte.

CPLR 5015 provides that the "court which rendered a judgment . . . may relieve a party . . . upon such terms as may be just, on motion of an interested person." Does the phrase "interested person" allow for a motion by the court itself? In *All-State Credit v. Riess*[142] this question was answered in the affirmative. There, the appellate term affirmed a Nassau County District Court's sua sponte vacatur of default judgments and the underlying complaints in 669 actions which had been consolidated.

The actions were based on various retail installment contracts. None of the defendants were residents of Nassau County, nor were they served with process there. Instead, jurisdiction was predicated upon the long-arm provision of the UDCA.[143] Since personal service had not been effected, and the plaintiff failed to include the requisite allegation concerning the basis for jurisdiction, the court concluded that it lacked personal jurisdiction over the defendants.[144]

Although the *All-State* decision ostensibly exceeds a court's express power under CPLR 5015, it is justifiable in view of a court's inherent authority to vacate judgments.[145] Indeed, it would be an ab-

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139 *See* 7B McKINNEY's CPLR, commentary at 132-34 (1969).

140 CPLR 511(a).

141 *See* 7B McKINNEY's CPLR 5004, commentary at 132-34 (1969).

142 61 Misc. 2d 677, 306 N.Y.S.2d 596 (App. T. 2d Dep't 1970).

143 UDCA § 404(a)(1) & (b).

144 *Cf.* Coffman v. National Union Fire Ins. Co., 60 Misc. 2d 81, 302 N.Y.S.2d 480 (Dist. Ct. Nassau County 1969).

145 CPLR 5015 contains five grounds for relief: (1) excusable default; (2) newly discovered evidence; (3) fraud, misrepresentation or other misconduct of an adversary; (4) lack of jurisdiction, and (5) reversal, modification or vacatur of a prior judgment or order. Nevertheless, courts have consistently opined that these grounds are not exclusive. Rather, the court's power is inherent. Ladd v. Stevenson, 112 N.Y. 325, 19 N.E. 842 (1889). *See also*