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CPLR 5231: Employer Estopped by Failure to Promptly Object to Improperly Served Income Execution

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derivative action attaches whenever the corporation, had it been suing in its own right, would be entitled to one. Inasmuch as plaintiff did not request the unique remedies afforded by equity for fraud — *e.g.*, rescission, an accounting or a constructive trust — but, in fact, his interest lay only in securing a money judgment, the court concluded that the action was at law, triable by a jury as a matter of right.

The Supreme Court of the United States recently dealt with the same issue in *Ross v. Bernhard*.[121] In determining that a jury trial was mandated by the seventh amendment, the Court stated that

> legal claims are not magically converted into equitable issues by their presentation to a court of equity in a derivative suit. . . . The heart of the action is the corporate claim. If it presents a legal issue . . . the right to a jury is not forfeited merely because the stockholder's right to sue must first be adjudicated as an equitable issue triable to the court. . . .[122]

Ross and *Fedoryszyn* represent a sharp break with precedent.[123] By postulating a "nature of the claim" criterion, both decisions recognize that the stockholder is standing in the shoes of the corporation and that the mere denomination "derivative action" should not foreclose a party's right to a jury trial when legal relief is sought. It is no longer feasible to maintain to the contrary, *i.e.*, that actions to recover money damages are like chameleons taking their color from surrounding circumstances.[124]

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5231: Employer estopped by failure to promptly object to improperly served income execution.

If a judgment debtor fails to pay installments pursuant to an income execution[125] or if the sheriff is unable to serve him therewith,[126] a copy of the income execution may be served upon the debtor's employer[127] who then has a duty to withhold 10 percent of

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121 396 U.S. 531 (1970).

122 *Id.* at 538-39, *citing* Fleitmann v. Welsbach St. Lighting Co., 240 U.S. 27 (1916).

123 *See, e.g.*, Goetz v. Manufacturers & Traders Trust Co., 154 Misc. 733, 277 N.Y.S. 802 (Sup. Ct. Erie County 1935); *cf.* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). *Compare* 5 J. MOORE, FEDERAL PRACTICE ¶ 38.38 (4) (2d ed. 1969) *with* C. WRIGHT, FEDERAL COURTS 320 (2d ed. 1970).

124 Ross v. Bernhard, 396 U.S. 550 (1970) (dissenting opinion).

125 The machinery in CPLR 5231 was established to avoid harassment of the judgment debtor who is willing to make regular installment payments to satisfy a judgment. 6 WK&M ¶ 5231.02.

126 The failure-of-service provision is not limited to situations wherein the judgment debtor is not a resident of or employed in the proper county for service; it covers any situation in which the judgment debtor cannot be located. *Id.* ¶ 5231.18.

127 CPLR 5231(d).

the debtor's salary or incur personal liability for the amount not withheld during the course of the debtor's employment.[128] In *Vista Sales Corp. v. Briggsford Corp.*[129] a special proceeding was commenced to recover accrued installments which the employer had neglected to withhold. In opposition, the employer asserted that the income execution was ineffective because it was not served in the same manner as a summons.[130] Recognizing the soundness of the objection, the court nonetheless ruled that it was waived by respondent's failure to raise it as an affirmative defense.[131] Moreover, the employer was estopped from objecting to the mode of service because it had lulled the judgment creditor into a sense of security by making some weekly payments.

Vista is not the first case to hold that in certain circumstances the employer may be estopped from contending that service was improper.[132] Thus, the recipient of an income execution should not wait until an enforcement proceeding is commenced to raise the objection. Instead, the employer would be well advised to move for a protective order under CPLR 5240 as soon as possible. But, if, as in *Vista*, the employer does not promptly object, should he be allowed to make some payments, thereby waving the rights of the judgment debtor?[133] At first glance, it would seem that a debtor who has been given an opportunity to satisfy the judgment has no cause to complain. Yet CPLR 5231 embraces a very delicate subject inasmuch as wages are considered a special type of property requiring stricter vigilance.[134] Moreover, despite the fact that the judgment debtor has already been afforded a hearing, there is an indication that post-judgment income execution will be reviewed as cautiously as pre-judgment garnishment.[135] Fore-

128 *See* Royal Business Funds Corp. v. Rooster Plastics, Inc., 53 Misc. 2d 181, 278 N.Y.S.2d 350 (Sup. Ct. N.Y. County 1967).

129 63 Misc. 2d 196, 311 N.Y.S.2d 85 (N.Y.C. Civ. Ct. N.Y. County 1970).

130 Service in *Vista* was effected by registered mail which is clearly improper. *Cf.* Triangle Publications, Inc. v. Worth Advertising Agency Co., 200 Misc. 671, 103 N.Y.S.2d 714 (N.Y.C. Munic. Ct. 1951) ("presentation" not equivalent to mandate of personal service).

131 CPLR 320(b).

132 *See* Spatz Furniture Corp. v. Lee Letter Serv., Inc., 52 Misc. 2d 291, 276 N.Y.S.2d 219 (N.Y.C. Civ. Ct. N.Y. County 1966).

133 Recognizing, as one must, that the improper service in *Vista* could be easily cured by serving another income execution on the employer, it is nonetheless submitted that no degree of harm to the debtor can be considered *de minimis* in view of the fact that wages are a special type of property and that the implications and utility of wage garnishment have become the subject of critical study. For a collection of cases and articles evidencing an anti-garnishment tenor, see SOCIAL JUSTICE THROUGH LAW 136-70 (H. Semmel ed. 1970).

134 Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), *rev'g* 37 Wis. 2d 163, 154 N.W. 2d 259 (1967).

135 *Compare* Endicott Johnson v. Encyclopedia Press, Inc., 226 U.S. 285 (1924) *with*

seeably, the employer who receives an income execution may soon bear the dual responsibility of protecting the rights of the judgment debtor as well as his own.

ARTICLE 75 — ARBITRATION

CPLR 7502(b): Federal arbitration in the state courts — Prima Paint, Erie & Rederi.

In *Prima Paint v. Flood & Conklin Manufacturing Co.*,[136] the United States Supreme Court held that in a federal court action the Federal Arbitration Act[137] is controlling if the contract in question involves interstate or maritime commerce. Because of the constant reference to the procedure to be followed by the federal courts in *Prima Paint*, there was some question as to whether state courts[138] were also bound to apply the federal arbitration statute in similar circumstances.[139] And, although it had been established that state law governed in the converse situation, *i.e.*, when an action involving an *intrastate* transaction was brought in the federal courts,[140] a definitive statement regarding the scope of *Prima Paint* in New York was lacking until the recent Court of Appeals decision in *Ludwig Mowinckels Rederi v. Dow Chemical Co.*[141]

The contract in *Rederi* contained a broad arbitration clause

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Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) *and* Hanner v. DeMarcus, 390 U.S. 736, 741-42 (1968) (dissenting opinion); *see also* Sweeney, *Abolition of Wage Garnishment*, 38 FORDHAM L. REV. 197 (1969); 162 N.Y.L.J. 7, July 11, 1969, at 1, col. 6.

136 388 U.S. 395 (1967).

137 9 U.S.C. §§ 1-14 (1964).

138 The Federal Arbitration Act is unique in that an independent jurisdictional basis must be established before the federal courts can take cognizance of the dispute. Indeed, section 4 of the Act provides that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate . . . may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28." Moreover, it has been established that the act itself does not afford federal question jurisdiction. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 408 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960); Krauss Bros. Lumber Co. v. Louis Bassert & Sons, Inc., 62 F.2d 1004 (2d Cir. 1933). Significantly, there was no doubt in *Rederi* that the federal courts could have entertained the proceeding since the very transaction which brought the conflict within the ambit of the federal arbitration statute also provided the federal courts with jurisdiction under 28 U.S.C. § 1331 (1964). Nevertheless, there may be numerous instances wherein the contract involves interstate commerce, but the action must be brought in the state court because requisite federal jurisdiction, *e.g.*, failure to meet the $10,000 minimum under 28 U.S.C. § 1332 (1964), is lacking. Accordingly, the law that will be applied in the state courts has enormous practical consequences for the practitioner.

139 *See* Aksen, *Prima Paint v. Flood & Conklin — What Does It Mean?*, 43 ST. JOHN'S L. REV. 1, 22-23 (1968); 7B MCKINNEY'S CPLR 7501, supp. commentary at 99 (1968).

140 Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956).

141 25 N.Y.2d 576, 255 N.E.2d 774, 307 N.Y.S.2d 660, *cert. denied*, — U.S. — (1970).