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CPLR 5231(h): Section Does Not Apply to Two Different Employers

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judgment creditor commenced a special proceeding against it under CPLR 5227. Under this section, notice of the proceedings would be sent to the judgment debtor and any adverse claimant would be permitted to intervene to protect his rights.[134] Moreover, the bank would have an opportunity to assert its reason for refusing to give the property to the sheriff.[135] In this manner, all of the rights of the parties could be adjudicated and the bank could confidently pay out any money due the judgment creditor.

CPLR 5231(h): Section does not apply to two different employers.

Once an attempt to secure payment from a judgment debtor proves futile,[136] a judgment creditor may direct the sheriff to serve an income execution on the debtor's employer.[137] Under CPLR 5231(h), where two or more income executions, each specifying the same employer, are issued against a judgment debtor, they are to be satisfied, one at a time,[138] in the order of delivery to the sheriff.[139] Even if a judgment creditor is the first to deliver his income execution to a sheriff, however, a recent case, *Lischer v. Halsey-Reid Equipment, Inc.*,[140] posits that the priority will be lost by the failure to renew the income execution each time the debtor changes employers.

In *Lischer* the Marine Midland Trust Company (Marine) obtained a judgment against one Spencer. Subsequently, Lischer also procured a judgment against Spencer. In May of 1968, Marine caused an income execution to be served on Spencer's employer. In August of the same year, Spencer terminated his employment with that employer and began working for respondent, who ultimately was served with an income execution in the name of Lischer. When the employer failed to withhold a portion of Spencer's salary, a special proceeding was commenced to recover the amount. Petitioner's motion for summary judgment was granted: the fact that a prior judgment creditor had served the sheriff

134 CPLR 1013.

135 7B McKINNEY'S CPLR 5238, commentary at 199 (1963).

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

137 CPLR 5231(d). The employer so served has a duty to withhold ten percent of the judgment debtor's salary or be personally liable for any amount not withheld. *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).

138 *See* 6 WK&M ¶ 5231.29.

139 The same rule applies to an income execution delivered to a sheriff prior to the filing of a wage assignment. *See* Beneficial Fin. Co. v. Baker, 43 Misc. 2d 546, 251 N.Y.S.2d 556 (Sup. Ct. Monroe County 1964); *see also* 6 WK&M ¶ 5231.29.

140 63 Misc. 2d 637, 313 N.Y.S.2d 136 (Sup. Ct. Erie County 1970).

first was no defense inasmuch as the income executions specified two different employers.

ARTICLE 75 — ARBITRATION

CPLR 7502(b): Court refers time-limitations objection to arbitrator.

In *City of Auburn v. Nash*[141] the Appellate Division, Fourth Department, was called upon to determine whether it is the arbitrator or the court who should decide an objection addressed to the timeliness of a demand for arbitration. The case arose under a collective bargaining agreement involving city employees. Special term found that although the employee had fully complied with the prescribed grievance procedures, a substantial issue was presented regarding the timeliness of the employee's demand for arbitration. Accordingly, an order was entered which permanently stayed the arbitration.

The appellate division reversed on the ground that questions of "procedural arbitrability" are properly decided by the arbitrator. The court compared the contract before it with one wherein compliance with time limitations is made a condition precedent to arbitration and concluded that, in the latter instance, the issue of timeliness is for the courts;[142] whereas in the former circumstance the issue is for the arbitrators.[143] As support for this proposition the court pointed to the presumption of arbitrability in labor arbitration cases,[144] particularly when no language evidencing a contrary intent is discernible.

In reaching this conclusion no mention was made of CPLR 7502 (b).[145] This section concerns statutes of limitations and reasonable time limitations which are created by contracting parties.[146] In either instance, the issue of compliance with a time limitation is deemed a "threshold" question[147] to be decided by the court. As such, the petitioner who makes a timely application for a stay of arbitration is entitled to judicial review. Moreover, a preliminary determination regarding the proper forum in which to decide the issue is of critical importance inasmuch as a court's determination that the arbitration is

141 34 App. Div. 2d 345, 312 N.Y.S.2d 700 (4th Dep't 1970).

142 *Id.* at 347, 312 N.Y.S.2d at 702, *citing* Matter of Bd. of Educ. (Heckler Elec. Co.), 7 N.Y.2d 476, 166 N.E.2d 666, 199 N.Y.S.2d 649 (1960).

143 34 App. Div. 2d at 347, 312 N.Y.S.2d at 702, *citing* Long Island Lumber Co. v. Martin, 15 N.Y.2d 380, 207 N.E.2d 190, 259 N.Y.S.2d 142 (1965).

144 *See* 7B McKINNEY's CPLR 7503, supp. commentary at 136 (1966).

145 CPLR 7502(b) provides: "If . . . the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation . . . to the court . . . ."

146 CPLR 201; *see* River Brand Rice Mills, Inc. v. Latrobe Brewing Co., 305 N.Y. 36, 110 N.E.2d 545 (1953).

147 7B McKINNEY's CPLR 7503, commentary at 488 (1963).