

CPLR 8012(b)(2): Sheriff Must Commence Plenary Action Against Attorney in Order To Fix Liability for Poundage Fees

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opinion vis-à-vis reviewability in place of the legislature's interpretation.

ARTICLE 80 — FEES

CPLR 8012(b)(2): Sheriff must commence plenary action against attorney in order to fix liability for poundage fees.

CPLR 8012(b)(2) prescribes that "where an execution is vacated or set aside¹¹² the sheriff may move for an order fixing his poundage fee and¹¹³ to pay the same to the sheriff." Unlike poundage fees based on attachment,¹¹⁴ poundage fees based on a levy of execution are collectible against an attorney as well as the party whom he represents.¹¹⁵ Nevertheless, it was held in *Jewelry Realty Corp. v. Newport, Associates, Inc.*¹¹⁶ that although the attorney may be included under this subsection a plenary action must be commenced in order to fix his liability.¹¹⁷

The plaintiff's attorney issued to the sheriff an execution which was subsequently vacated upon application by the defendant. The sheriff thereupon moved for an order fixing his poundage fees. Said relief was granted against the plaintiff. But, noting that the remedy described in CPLR 8012(b) is to be strictly limited¹¹⁸ and fearing that the procedure employed in the instant case might cause constitutional problems regarding due process, the court refused to grant similar relief against the attorney unless an independent action was commenced.

NEW YORK CITY CIVIL COURT ACT

CCA 202: Civil court reduces verdict in excess of jurisdictional limitation upon plaintiff's consent.

The jurisdiction of the New York City Civil Court is restricted to

¹¹² Under CPLR 8012(b)(1), the sheriff must actually collect the money before he is entitled to poundage fees. Two exceptions to this rule are contained in subparagraphs two and three: where the parties settle the claim after the execution is issued or where the execution is vacated or set aside. An additional exception is where the sheriff is prevented from collecting the money due to active interference by the party who issued the execution. 8 WK&M ¶ 8012.04.

¹¹³ The courts are in disagreement regarding whether an attorney is included in the phrase "party liable therefor" under this subsection. *Compare* *Myers v. Grove*, 242 App. Div. 637, 272 N.Y.S. 162 (2d Dep't 1934) *with* *Gadski Tauscher v. Graff*, 44 Misc. 418, 89 N.Y.S. 1019 (Sup. Ct. N.Y. County 1904) *and* *Manni v. Shirtcraft Co.*, 6 Misc. 2d 925, 161 N.Y.S.2d 791 (Sup. Ct. Kings County 1957).

¹¹⁴ *See* CPLR 6212(b).

¹¹⁵ *Adams v. Hopkins*, 5 Johns. 252 (N.Y. 1810). *See also* *Osterhout v. Day*, 9 Johns. 114 (N.Y. 1812).

¹¹⁶ 64 Misc. 2d 409, 314 N.Y.S.2d 787 (N.Y.C. Civ. Ct. N.Y. County 1970).

¹¹⁷ *Personeni v. Aguino*, 6 N.Y.2d 35, 38, 159 N.E.2d 559, 187 N.Y.S.2d 764, 767 (1959). (dissenting opinion).

¹¹⁸ *Judson v. Gray*, 11 N.Y. 408 (1854).