St. John's Law Review

Volume 45
Number 3 *Volume 45, March 1971, Number 3*

Article 47

CCA 202: Civil Court Reduces Verdict in Excess of Jurisdictional Limitation Upon Plaintiff's Consent

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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 aside[112] the sheriff may move for an order fixing his poundage fee and[113] 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 limited[118] 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).

actions and proceedings wherein the amount sought to be recovered does not exceed $10,000.[119] In *Abbey Rent-a-Car v. Moore*[120] the Appellate Division, First Department ruled that the trial court is powerless to reduce a verdict in excess of its jurisdictional limitation; instead, the case must be resubmitted to the jury for further deliberation.[121] Recently, in *Izzi v. Dolgin*[122] the New York City Civil Court, Kings County, refusing to equate the principle of stare decisis with petrifying rigidity,[123] adopted a contrary approach.[124]

The plaintiff in *Izzi* had originally commenced an action in the supreme court. Subsequently, the case was transferred to the civil court by stipulation after a general preference was denied. The jury returned a verdict for the plaintiff in the amount of $35,000 and the trial court reduced the verdict to $10,000 with the plaintiff's consent. Defendant there upon moved for a new trial, contending that the court's action was improper.

In denying this motion, the court cited a number of sound and practical considerations. First, there was no prejudice to the defendant inasmuch as it would be unreasonable to expect that the jury would reduce its unanimous verdict of $35,000 to less than $10,000. Moreover, the court reasoned that plaintiff would be justified in seeking to transfer the action back to the supreme court with a view toward securing a higher measure of recovery rather than to relitigate the matter in the civil court. Finally, the court noted that since the civil court in New York City potentially has the power to entertain negligence actions in excess of its jurisdictional limits[125] it certainly possesses the inherent authority to reduce a verdict in excess of its jurisdiction, particularly in light of the court's overcrowded calendar.

FORUM NON CONVENIENS

Forum non conveniens: Case illustrates arbitrariness of doctrine.

When one nonresident brings an action against another nonresident on a cause of action arising outside the state, New York courts

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120 30 App. Div. 2d 952, 294 N.Y.S.2d 229 (1st Dep't 1968).

121 *Accord,* Daigneault v. Hough, 162 N.Y.L.J. 13, July 18, 1969, at 9, col 8 (App. T. 2d Dep't).

122 Izzi v. Dolgin, 315 N.Y.S.2d 1005 (N.Y.C. Civ. Ct. Kings County 1970).

123 *Cf.* Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

124 *Accord,* Abood v. Hospital Ambulance Serv., 161 N.Y.L.J. 66 April 4, 1969, at 17, col. 3 (Sup. Ct. Kings County).

125 *See* CPLR 325(d). To date, this expansive jurisdictional proviso has not been adopted in either the first or second departments. Apparently, the appellate divisions therein are cautious because of the calendar congestion already existent in the lower courts. *See* 7B McKINNEY'S CPLR 325, supp. commentary at 266, 268 (1970).