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CPLR 5513(a): Time to Appeal Begins to Run When Service of Judgment with Notice of Entry Is Made

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ball Club, Inc., the supreme court, special term, entered an order directing the defendant to pay ten percent of the monies held by it to Avis and the balance to Sample. On appeal by Girard Trust Bank, the Appellate Division, First Department,[100] held that a bonus paid to a professional football player for maintaining a positive attitude for the best interest of the team and professional football was to be considered wages earned for services rendered over the *entire* season, for the purpose of determining what portion was subject to the 90 percent exemption of earnings of the judgment debtor for personal services rendered within 60 days prior to the delivery of execution to the sheriff under CPLR 5205(e)(2). Determination of whether any portion of an additional bonus for participating in 50 percent of the offensive or defensive plays fell within the exemption depended upon whether the last play occurred before or after the 60 day period.

Had the money been sought two months after the close of the season, the judgment creditor could have avoided the 90 percent exemption. However, the advantages apparent in acting so late are offset by many disadvantages. A multitude of judgment creditors may serve income executions at an earlier date or, if other judgment creditors are planning a similar course of action, the sixty-first day may herald a race to the sheriff's office. Additionally, there is always the possibility that neither the judgment debtor nor his money could be located at such a late date.

ARTICLE 55 — APPEALS GENERALLY

CPLR 5513(a): Time to appeal begins to run when service of judgment with notice of entry is made.

Appeals as of right have to be taken within thirty days following service upon the appellant of a copy of the judgment or order appealed from. However, when *the appellant* has entered the judgment or order, or served notice of its entry, his appeal must be taken within thirty days after doing either.[101]

In an Article 78 proceeding, special term, after rendering its decision, directed that an order be settled. The respondents had submitted a proposed judgment, and the appellant had filed a proposed counter judgment. The special term judge signed the appellant's proposed counter judgment on May 29, 1968, and on June 13, 1968, at

100 31 App. Div. 2d 142, 295 N.Y.S.2d 741 (1st Dep't 1968).

101 Previously, the time limit was 60 days. 7B MCKINNEY'S CPLR 5513(a), supp. commentary 297 (1967). *See* 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5513.03 (1968).

respondent's request, it was filed in the county clerk's office. Appellant was served with a copy of the judgment and notice of entry on July 17, 1968. Subsequently, appellant served a notice of appeal on the appellate division, which then granted respondent's motion to dismiss the appeal since more than thirty days had elapsed since the judgment had been entered. The Court of Appeals reversed,[102] holding that where a proposed counter judgment submitted by an appellant requires a party to request that it be entered, as opposed to being automatically entered, and respondent makes the request, appellant's time to appeal begins to run at the time service of judgment with notice of entry is made upon him by the respondent and not when entry of the order is submitted.[103]

It is incumbent upon the practitioner to be familiar with local practice; however, it is suggested that one should always serve his opponent with notice of entry regardless of whose judgment was entered.

ARTICLE 75—ARBITRATION

CPLR 7503(c): Ten day period within which a party may apply to stay arbitration construed as statute of limitations by first department.

In *Jonathan Logan, Inc. v. Stillwater Worsted Mills*,[104] the petitioner, upon being served with a demand for arbitration and within the ten day period of limitation prescribed by CPLR 7503(c), procured a signed order to show cause why the arbitration should not be stayed. However, the order permitted service upon the respondent within a period six days longer than the ten day limitation.

The first department, by a 3-2 decision, affirmed the lower court's dismissal of petitioner's application for the stay on the grounds it was "time-barred." Justice Eager's majority opinion recognized that a special proceeding was necessary for the court to have jurisdiction over an application for a stay of arbitration[105] and that a special proceeding may be commenced by service of an order to show cause.[106] Furthermore, the court acknowledged that the order to show cause was signed by a judge within the ten day period. However, the decisive fact in the court's view was that the petitioner failed to serve respondent within that period. The court held that "the mere signing of the

102 *In re* Stuart & Stuart, Inc. v. New York State Liquor Authority, 23 N.Y.2d 493, 245 N.E.2d 225, 297 N.Y.S.2d 576 (1969).

103 *Id.* at 496, 245 N.E.2d at 226, 297 N.Y.S.2d at 578.

104 31 App. Div. 2d 208, 295 N.Y.S.2d 853 (1st Dep't 1969).

105 CPLR 7502(a): "A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy. . . ."

106 CPLR 304.