

## CPLR 5004: Conflict Over Legal Rate of Interest

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verdict, however, the jury finds the facts, while the court, by applying the law to the facts, determines which party is entitled to judgment. The need for detailed instructions to the jury is thus obviated.<sup>117</sup> A jury may also return a general verdict accompanied by answers to written interrogatories based on specific questions posed by the court. The use of special verdicts or general verdicts with answers to interrogatories is a matter entirely within the discretion of the court and, hence, is reviewable only when the exercise of discretion is abused.<sup>118</sup>

*Corbett v. Brown*<sup>119</sup> is a recent case demonstrating the utility of the special verdict. The plaintiff, an employee of a contractor who was constructing a retaining wall on defendants' property, was injured when he was struck by a large piece of concrete. His complaint alleged both general negligence and negligence based upon failure to provide a safe place to work. The defendants brought a third-party action against the contractor, who in turn brought a fourth-party action against the supplier of equipment. After concluding that the trial court was in error when it held that contributory negligence was not available as a defense to plaintiff's second cause of action, the court advised that:

Upon the new trial, if different theories of negligence should again be invoked, the trial court would be well advised to make use of the procedure available under the statute (CPLR 4111), which permits the rendition of a special verdict or a general verdict accompanied by written answers to written interrogatories. Thus, if the defendants are again held liable for their negligence, the basis of the jury's determination would be ascertained.

The determination of liability in the third-party and fourth-party actions will depend upon the finding of negligence on the defendants' part, if any, and, therefore, the dismissal of the third-party and fourth-party complaints should be reversed.<sup>120</sup>

#### ARTICLE 50 — JUDGMENTS GENERALLY

##### *CPLR 5004: Conflict over legal rate of interest.*

CPLR 5004 declares that the interest rate on judgments shall be at the "legal rate" unless otherwise provided by statute. The "legal" interest rate has traditionally been found in the so-called "usury statute" in the General Obligations Law.<sup>121</sup> In 1968, the law was amended to

816 (1948); Sunderland, *Verdicts General and Special*, 29 YALE L.J. 253, 261 (1920). *But see* 5 MOORE'S FEDERAL PRACTICE ¶ 49.05 (2d ed. 1968).

<sup>117</sup> 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 4111.03.

<sup>118</sup> *Id.*

<sup>119</sup> 32 App. Div. 2d 27, 299 N.Y.S.2d 219 (3d Dep't 1969).

<sup>120</sup> *Id.* at 32-33, 299 N.Y.S.2d at 224.

<sup>121</sup> N.Y. GEN. OBLIGATIONS LAW § 5-501 (McKinney 1964).

provide that the legal rate of interest should be the rate prescribed by the Banking Board pursuant to section 14a of the Banking Law.<sup>122</sup> However, if no rate is set by the Board, the statute provides for a legal rate of 6 percent. The Banking Law states that the Banking Board has the authority to prescribe rates of interest at not less than 5 percent nor more than 7.5 percent. Accordingly, on July 1, 1968, the Board adopted a resolution declaring that the maximum rate of interest would be 7.25 percent. The resolution was amended in February, 1969, thereby raising the rate to 7.5 percent.<sup>123</sup>

A principal source of conflict arises from the language in the General Obligations Law which speaks of interest for a "loan or forbearance."<sup>124</sup> On November 21, 1968, the Attorney General rendered an opinion<sup>125</sup> in which he stated that the interest rate on money judgments was 6 percent, notwithstanding the amendments to the General Obligations Law and the Banking Law. This conclusion was arrived at through reliance upon the language of a case decided prior to the amendments construing the phrase "loan or forbearance" as being inapplicable to purchase money mortgages.<sup>126</sup> However, the Supreme Court, Suffolk County, almost simultaneously held in *Dime Savings Bank of Brooklyn v. Carozzo*<sup>127</sup> that the higher rate of interest was applicable in computing interest on a note secured by a mortgage on real estate which was subject to a foreclosure action.<sup>128</sup>

This conflict was further nurtured when the Special Term, New York County, followed the Attorney General's opinion in holding that the 6 percent rate was applicable to a money judgment since, once entered, it was not a "loan or forbearance" even though it may have been based upon one.<sup>129</sup> Subsequently, in *Gelco Builders v. Simpson Factors Corp.*,<sup>130</sup> the supreme court in the same county held the higher rate to be applicable to an action for inducing breach of contract. The

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<sup>122</sup> *Id.*:

1. The rate of interest, as computed pursuant to this title, upon the loan or forbearance of any money, goods, or things in action, except as otherwise provided by law, shall be the rate prescribed by the banking board pursuant to section fourteen-a of the banking law, or if no rate has been so prescribed, six per centum per annum.

<sup>123</sup> For the current provision see § NYCRR 34.1 (1969).

<sup>124</sup> N.Y. GEN. OBLIGATIONS LAW § 5-501(1) (McKinney 1964). See note 122 *supra*.

<sup>125</sup> OP. ATT'Y GEN. OF N.Y. (informal and unofficial), appearing in 161 N.Y.L.J. 11, Jan. 16, 1969, at 1, col. 1.

<sup>126</sup> *Mandelino v. Fribourg*, 23 N.Y.2d 145, 242 N.E.2d 823, 295 N.Y.S.2d 654 (1968).

<sup>127</sup> 58 Misc. 2d 821, 296 N.Y.S.2d 805 (Sup. Ct. Suffolk County 1969).

<sup>128</sup> *Accord*, *Jamaica Sav. Bank v. Giacomantonio*, 59 Misc. 2d 704, 300 N.Y.S.2d 218 (Sup. Ct. Queens County 1969).

<sup>129</sup> *Kay Lewis Enterprises v. Lewis Marshall*, 161 N.Y.L.J. 102, May 26, 1969, at 17, col. 1 (Spec. T. N.Y. County).

<sup>130</sup> 161 N.Y.L.J. 121, June 23, 1969, at 14, col. 1 (Sup. Ct. N.Y. County).

*Gelco* court cited, as additional authority, an old Court of Appeals decision which held that in an action for breach of a contract to borrow money and repay at a specified rate of interest, the contract rate governs until either the principal is paid or the contract is merged into a judgment; thereafter, the "legal rate" would control.<sup>131</sup>

The most recent development in this controversy is *Belcher v. Kesten*,<sup>132</sup> wherein the Supreme Court, Queens County, further clarified its earlier position<sup>133</sup> in holding that 6 percent is the legal rate of interest to be applied to a *negligence* judgment resulting from wrongful death. Justice Clark ruled that the Banking Board's actions, and hence the higher rate, were only applicable to *commercial* transactions.

The deleterious effects of this unsettled state of the law will continue to be felt until some affirmative legislative steps are taken. Where a choice of venue is possible, "forum shopping" will be encouraged as litigants seek out "7.5 percent forums." It is hoped that the legislature will act as soon as possible to declare a uniform interest rate on money judgments or, as suggested in *Belcher*, to set one standard for judgments arising out of tortious acts and another for those arising out of commercial transactions, in an attempt to achieve parity with commercial interest rates. But if legislative action is not forthcoming, it is submitted that the appellate courts should seize upon the first opportunity and set the controlling interest themselves.

#### ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

*CPLR 5201: Seider action dismissed in federal court because absence of "genuine" New York plaintiff eliminated a "debt" present in New York.*

In *Farrell v. Piedmont Aviation, Inc.*,<sup>134</sup> a federal court of appeals availed itself of the opportunity to limit the applicability of *Seider v. Roth*<sup>135</sup> in actions instituted in the United States courts. In *Farrell* the Second Circuit affirmed the district court's order<sup>136</sup> to vacate attachments of defendants' liability insurance policies and dismiss thirteen suits arising out of an airplane crash in North Carolina. The nominal

<sup>131</sup> O'Brien v. Young, 95 N.Y. 428 (1884). See also Ferris v. Hard, 135 N.Y. 354, 32 N.E. 129 (1892).

<sup>132</sup> 162 N.Y.L.J. 20, July 29, 1969, at 11, col. 7 (Sup. Ct. Queens County).

<sup>133</sup> See *Jamaica Sav. Bank v. Giacomantonio*, 59 Misc. 2d 704, 300 N.Y.S.2d 218 (Sup. Ct. Queens County 1969).

<sup>134</sup> 411 F.2d 812 (2d Cir.), cert. denied, — U.S. — (1969).

<sup>135</sup> 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). See generally 7B MCKINNEY'S CPLR 5201, supp. commentaries 15-53 (1964-68). See also Note, *Seider v. Roth: The Constitutional Phase*, 43 ST. JOHN'S L. REV. 58 (1968) for a discussion of the *Seider v. Roth* doctrine and some of the problems it evokes.

<sup>136</sup> 295 F. Supp. 228 (S.D.N.Y. 1968).