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Article 29

CPLR 5201: Seider Action Dismissed in Federal Court Because Absence of "Genuine" New York Plaintiff Eliminated a "Debt" Present in New York

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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.[131]

The most recent development in this controversy is *Belcher v. Kesten*,[132] wherein the Supreme Court, Queens County, further clarified its earlier position[133] 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.*,[134] a federal court of appeals availed itself of the opportunity to limit the applicability of *Seider v. Roth*[135] in actions instituted in the United States courts. In *Farrell* the Second Circuit affirmed the district court's order[136] to vacate attachments of defendants' liability insurance policies and dismiss thirteen suits arising out of an airplane crash in North Carolina. The nominal

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

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

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

134 411 F.2d 812 (2d Cir.), *cert. denied*, — U.S. — (1969).

135 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.

136 295 F. Supp. 228 (S.D.N.Y. 1968).

plaintiffs in this action were New York domiciliaries who had been appointed as administrators of the estates of the thirteen decedents, who had resided without the state. Moreover, all those who would stand to benefit from any wrongful death recovery were non-residents. Two defendants, Piedmont Aviation, Inc., and The Boeing Company, were foreign corporations subject to in personam jurisdiction in New York, while two others, Rapidair, Inc., and Lanseair, Inc., were Missouri corporations, not subject to in personam jurisdiction in this state. Federal jurisdiction was based upon the diversity of citizenship between the administrators and the corporate defendants.[137]

The plaintiffs sought to acquire jurisdiction in New York over Lanseair and Rapidair by utilizing the *Seider* doctrine, *i.e.*, by attaching the liability insurance policies issued to these companies by insurance carriers doing business in New York. Although the defendants were subject to in personam jurisdiction in North Carolina, a *Seider* attachment in New York would most likely result in a greater recovery.[138]

Both the district and circuit courts were convinced that litigation such as this, not involving a "true" New York plaintiff, should be dismissed. The federal courts presumably believed that the New York courts would dismiss such an action on the basis of forum non conveniens;[139] and following the guidance of *Erie Railroad v. Tompkins*,[140] the federal court should likewise dismiss. However, the federal courts avoided conveniens principles and relied upon another ground for the dismissal.

The Second Circuit theorized that the New York Court of Appeals, had it been faced with a similar situation, would have held that the obligations to defend and indemnify the insured would not constitute a "debt" present in New York, and, therefore, would not be attachable. The court reasoned:

> In truth the defendants own nothing in New York or at least nothing that they do not "own" to the same extent in every state; their insurers are bound to defend and indemnify them wherever

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137 *See* McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968).

138 Juries in New York are generally recognized to arrive at higher verdicts in personal injury cases than in other areas of the country. *See* Simpson v. Loehmann, 21 N.Y.2d 305, 316, 234 N.E.2d 669, 675, 287 N.Y.S.2d 633, 641 (1967) (concurring opinion of Breitel, J.).

139 The New York view on forum non conveniens is that courts of this state will only accept jurisdiction in a case involving two non-residents where the cause of action arose without the state upon a showing of special circumstances. *Farrell* was devoid of such circumstances. *See, e.g.*, Vaage v. Lewis, 29 App. Div. 2d 315, 288 N.Y.S.2d 521 (2d Dep't 1968); Williams v. Seaboard Air Line R.R., 9 App. Div. 2d 268, 193 N.Y.S.2d 588 (1st Dep't 1959). *See The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 341-42 (1968).

140 304 U.S. 64 (1938).

> they are sued, even in a state where the insurers are not doing business. Under such circumstances, where there are absolutely no New York contacts except for the doing of business by the insurers, we have the gravest difficulty in understanding how New York could constitutionally call upon the insureds to respond or could impair by attachment rights the insurers would otherwise have to settle with other claimants.[141]

The federal courts opined that the New York Court of Appeals would construe a liability insurance policy to be a "debt" only when the plaintiff was a New York resident or was suing upon an accident which occurred in New York.[142] As suggested previously, however, such an interpretation by the New York courts would appear unlikely in light of New York's willingness to apply modified conveniens rules to achieve the same result, *i.e.*, dismissal.

Although the same result would have been achieved in a New York court, it seems that the federal courts acted in a circuitous fashion. Nevertheless, the decision makes it apparent that both the federal and New York courts recognize that *Seider* aims to give a "genuine" New York plaintiff a New York forum instead of permitting cases arising in all parts of the nation to be triable in New York merely because a defendant has the remotest of connections with the state.

CPLR 5231(b): Income execution available against non-resident judgment debtor.

CPLR 5231(b) requires that an income execution be initially delivered to the sheriff of the county in which the judgment debtor resides, or if he is a non-resident, the sheriff in the county in which he works. Since the sheriff must personally serve him with a copy of the income execution,[143] the debtor is thereby given the opportunity to satisfy the outstanding judgment before his employer is served. This subdivision would appear to afford immunity to a debtor who neither resides in nor is physically employed within the state, even though the judgment is rendered, and the garnishee-employer is present, in New York.[144]

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141 411 F.2d at 816.

142 *Id.* at 817:

> A court that could perform the "miracle" on CPLR 320(c) that was effected in the opinion denying reargument in *Simpson v. Loehmann*, 21 N.Y.2d 990, 290 N.Y.S.2d 914 (1968) . . . would scarcely shrink from the easier task of saying that a liability insurance policy was a "debt" only when the plaintiff was a resident or was suing for a New York accident. This would be particularly true if the Court of Appeals considered that such a restrictive construction was needed to save *Seider* from unconstitutionality or even from serious constitutional doubt.

143 CPLR 5231(c).

144 *See, e.g.*, Brown v. Arabian Am. Oil Co., 53 Misc. 2d 182, 278 N.Y.S.2d 256 (Sup.