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CPLR 5231(b): Income Execution Available Against Non-Resident Judgment Debtor

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> 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.

Oysterman's Bank & Trust Co. v. Manning[145] departs somewhat from prior authority in holding that the income execution is available against a non-resident judgment debtor who is not employed in New York. Judgment in that case had been rendered against a defendant over whom in personam jurisdiction had been acquired. At the time income execution was sought, however, the judgment debtor was living in California while his employer, General Motors, had corporate presence in New York. In holding that the income execution procedure was nevertheless available, the *Manning* court declared that the subdivision could be complied with by having the enforcement officer of the sister state serve a copy of the order upon the judgment debtor to "remind" him of his obligation.[146] The court, noting that the basic intention behind the enactment of the statute was "to facilitate and improve the enforcement of judgments . . .,"[147] reasoned that the enforcement of judgments would not be thwarted by too literal an interpretation of this preliminary procedural step.

The result achieved in the instant case appears reasonable and just in that a judgment debtor who leaves the state is no longer able to escape the judgment enforcement procedure. Moreover, he is provided with an opportunity to make voluntary payments since he is given the requisite notice. However, it is not quite clear whether the laws of the foreign jurisdiction will be amenable to the new procedure. Specifically, it is not known if the sheriff of a sister state will feel obligated to serve the judgment debtor in the absence of an order from the courts of that state. In this regard, CPLR 5231(d) provides for a levy upon the remuneration the judgment debtor receives from his employer if he cannot be served or if he fails to pay after proper service. However, this subsection contemplates a good faith effort on the sheriff's part to serve the judgment debtor,[148] and one questions whether the New York courts can be secure in the knowledge a foreign sheriff is making such an effort.

Ct. Suffolk County 1967); Kaplan v. Supak & Sons Mfg. Co., 46 Misc. 2d 574, 260 N.Y.S.2d 374 (Civ. Ct. N.Y. County 1965). It should be noted, however, that prior to the CPLR, there was no problem in executing against a non-resident judgment debtor. Under CPA 684, an order ran directly against the garnishee (employer) and the sheriff could seek him out without regard to considerations of the debtor's residence or place of employment. 7B McKINNEY'S CPLR 5231, commentary (1963). *See, e.g.*, Morris Plan Indus. Bank v. Gunning, 295 N.Y. 324, 67 N.E.2d 510 (1946); Feinman v. Marks, 294 N.Y. 367, 62 N.E.2d 606 (1946).

145 59 Misc. 2d 144, 298 N.Y.S.2d 355 (Sup. Ct. N.Y. County 1969).

146 The court thereby adopted the suggestion in 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5231.17, supp. 35-36 (1968).

147 59 Misc. 2d at 146, 298 N.Y.S.2d at 357.

148 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5231.18 (1968).

It is thus apparent that the efficacy of this new procedure will rest largely upon the still untested reaction of the foreign courts. If the procedure proves impractical, the New York courts may be compelled to devise yet another means of providing the requisite notice.

ARTICLE 56 — APPEALS TO THE COURT OF APPEALS

CPLR 5602: Warning by Court of Appeals with regard to observance of Court rules.

Failure to comply with the mandates of article 56 of the CPLR and the various court rules relating to appeals may result in dismissal of a litigant's motion for appeal or reargument.

In *In re Estate of Hart*[149] a motion for leave to appeal was filed from an order of the appellate division, and in *Blistein v. Kassner*[150] a motion was filed for reargument of a decision of the Court of Appeals. In both cases the motions were dismissed by the Court of Appeals since they failed to substantially comply with the Court rules.[151] It should be noted that the dismissals were without prejudice and the motions could therefore be renewed upon filing the proper papers within thirty days. However, the Court warned the appellants that "[t]he new rules, simplifying practice in this court and conforming it to modern procedure, specify requirements for papers on motions, as well as on appeals, and the court will enforce compliance with these requirements."[152]

In light of this warning by the Court, it is incumbent upon the practitioner to be familiar with the rules and comply with them; the Court may very well dismiss future nonconforming motions with prejudice.

ARTICLE 65 — NOTICE OF PENDENCY

CPLR 6515: Court utilizes discretionary power in cancellation of notice of pendency upon substitution of surety bond for property.

Under the common law doctrine of *lis pendens*, after the plaintiff had filed his bill or petition and the defendant had been served, any purchaser or encumbrancer of real property involved in the

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149 24 N.Y.2d 158, 247 N.E.2d 148, 299 N.Y.S.2d 182 (1969).

150 *Id.*

151 22 NYCRR 500.1-500.9 (1969) contains the rules governing appeals. Among other requirements, 20 copies of the moving papers and brief must be filed with the Court, and the brief must show that the Court has jurisdiction of the motion and appeal. In addition, the questions of law presented must be identified and shall show why they merit review. In a motion for reargument of a prior decision, the points alleged to have been overlooked must be referred to.

152 24 N.Y.2d at 160, 247 N.E.2d at 149, 299 N.Y.S.2d at 184.