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CPLR 5522: Intervening Decision of United States Supreme Court Will Not Upset a "Final" Decision

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ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS *

CPLR 5201: Future rents not subject to attachment.

CPLR 5201 provides in part that a money judgment can be enforced against a debt when the debt is certain to become due.

In *Glassman v. Hyder*,[127] plaintiff attached the future rents payable to defendant under a long-term lease. The appellate division, first department, reversing appellate term,[128] held that rents not yet due are contingent and, therefore, are not attachable as debts to become due "certainly or upon demand."

It is apparent that whether the landlord will receive the rent from a tenant is contingent; dependent upon both parties' abiding by the terms of the contract of lease. If the landlord breaches the contract, the tenant may be released from paying rent. If the entire amount of the rent receipts could be attached, the probability that the landlord will breach the contract is increased, *i.e.*, he will have less money to fulfill his contractual obligations of making repairs, supplying heat, etc.

Thus the instant case appears to be a logical interpretation of CPLR 5201 and is in conformity with prior law.[129]

ARTICLE 55 — APPEALS GENERALLY

CPLR 5522: Intervening decision of United States Supreme Court will not upset a "final" decision.

In *In re Huie*,[130] claimant made a motion for reargument of an earlier decided motion for which the statutory time for appeal had expired. The trial court nevertheless granted the motion because a decision of the United States Supreme Court,[131] in the interim, indicated that claimant's prior motion was erroneously dismissed. The Court of Appeals, in affirming the appellate division's reversal of the lower court's order, held that in the absence of the special circumstances enumerated in CPLR 5015, *e.g.*, the discovery of new evidence, fraud, or lack of jurisdiction, a determination which is not appealed should remain undisturbed.

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* For a discussion of the latest developments on the *"Seider"* front see the student note in this issue.

[127] 28 App. Div. 2d 974, 283 N.Y.S.2d 419 (1st Dep't 1967).

[128] For a discussion and criticism of the appellate term's decision see *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 128, 157 (1967).

[129] *In re* Ryan, 294 N.Y. 85, 60 N.E.2d 817 (1945). *But cf.* Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

[130] 20 N.Y.2d 568, 232 N.E.2d 642, 285 N.Y.S.2d 610 (1967).

[131] The intervening case which precipitated this confusion was Schroeder v. City of New York, 371 U.S. 208 (1962).

The ratio decidendi underlying the decision is clear. If the Court were to allow an appeal or reargument after the time for appeal had expired, every decision would be left uncertain. Moreover, there would never be a "final" decision from which the claimant could institute an appeal to the Court of Appeals. Rather than create such uncertainty, then, the Court, in *Huie*, follows its past policy of denying appeals when the statutory time limit has run.[132]

ARTICLE 56 — APPEALS TO THE COURT OF APPEALS

CPLR 5601(a): Dismissal of affirmative defense is a "final order" and appealable as such.

CPLR 5601(a) provides that an appeal may be taken as of right to the Court of Appeals "from an order of the appellate division which finally determines the action." In *Sirlin Plumbing Co. v. Maple Hill Homes, Inc.*,[133] the defendant interposed an affirmative defense and counterclaim. The appellate division, second department, granted plaintiff's motion to dismiss the affirmative defense and counterclaim and the defendant appealed to the Court of Appeals. Plaintiff sought dismissal of the appeal on the basis that the order of the appellate division was not final. The Court of Appeals reversed and denied the motion to dismiss, holding that the determination of the issue by the appellate division "impliedly severed it from the action," and to that extent it was final.[134]

Early cases have suggested that where the claim dismissed by the appellate division was closely related to the claim still pending the decision was not final.[135] In recent decisions though, the Court of Appeals has taken a different position and has considered as final, orders of the appellate division which have dismissed a claim or cause of action although claims arising out of the same transaction remain undecided.[136]

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[132] *E.g.*, Deeves v. Fabric Fire Hose Co., 14 N.Y.2d 633, 198 N.E.2d 595, 249 N.Y.S.2d 423 (1964). *Cf.* People *ex rel.* Bankers Trust Co. v. Graves, 270 N.Y. 316, 1 N.E.2d 114 (1936); Joannes Bros. Co. v. Lamborn, 237 N.Y. 207, 142 N.E. 587 (1923).

[133] 20 N.Y.2d 401, 232 N.E.2d 394, 283 N.Y.S.2d 489 (1967).

[134] It is clear that there need not be any express direction for severance in the appellate division's order as long as the claim was actually severed. *See In re* Gellatly, 283 N.Y. 125, 27 N.E.2d 809 (1940).

[135] *See, e.g.*, Davis v. Cohn, 286 N.Y. 622, 36 N.E.2d 458 (1941); Cage v. Rosenberg, 271 N.Y. 509, 2 N.E.2d 670 (1936).

[136] *E.g.*, Janos v. Peck, 15 N.Y.2d 509, 202 N.E.2d 560, 254 N.Y.S.2d 115 (1964); Denker v. Twentieth Century-Fox Film Corp., 10 N.Y.2d 339, 179 N.E.2d 336, 223 N.Y.S.2d 193 (1961); Ingraham v. Anderson, 2 N.Y.2d 820, 140 N.E.2d 747, 159 N.Y.S.2d 835 (1957).