St. John's Law Review

Volume 43
Number 1 *Volume 43, July 1968, Number 1*

Article 32

December 2012

CPLR 5701: Issue of Liability Appealable Prior to Assessment of Damages

St. John's Law Review

appellate division within ten days, his appeal to the Court of Appeals would not be dismissed.

While the express language of 5601(d) does not limit dual appeals, cases interpreting CPA 590 did find such a limitation.[142] Since no change of this nature was intended by the recodification, dual review should not be permitted under the CPLR. Moreover, the Legislative Studies and Reports indicate that if review of the subsequent lower court proceedings is desired, the appeal must first be made to the appellate division and then, after their decision, to the Court of Appeals.[143] If dual appeals were allowed, they would be time consuming, result in a duplication of effort, and offend against the requirement of finality. Therefore, in the absence of any unusual circumstances, it appears justified to limit the use of this procedural device.

ARTICLE 57 — APPEALS TO THE APPELLATE DIVISION

CPLR 5701: Issue of liability appealable prior to assessment of damages.

In *Fortgang v. Chase Manhattan Bank*,[144] a negligence action, the issues of liability were tried separately before a jury and a verdict was found for the plaintiffs. Subsequently, an interlocutory judgment was entered and the case was set down for an assessment of damages. On motion to stay trial on the issue of damages pending an appeal from the interlocutory judgment, the appellate division, second department, relying on CPLR 5701, granted the stay, and held the decision appealable.[145]

Prior to *Fortgang*, the second department, in *Bliss v. Londner*,[146] had held that subsequent to a non-jury trial exclusively on the issue of liability, the defendant must await the determination of damages before an appeal may be instituted.

Two years after the *Bliss* decision, the appellate division, first department, in *Hacker v. City of New York*,[147] was confronted with a similar question. In *Hacker*, the court held that an appeal *would* lie after trial on the issues of liability irrespective of the fact that the case would be later scheduled for a determination of

---

142 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶5601.26 (1964).

143 18 N.Y.2d 797, 221 N.E.2d 914, 275 N.Y.S.2d 384 (1966).

144 29 App. Div. 2d 41, 285 N.Y.S.2d 110 (2d Dep't 1967).

145 CPLR 5701 provides in part that: "An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or county court:

1. from any final or interlocutory judgment. . . ."

146 20 App. Div. 2d 640, 246 N.Y.S.2d 296 (2d Dep't 1964).

147 25 App. Div. 2d 35, 266 N.Y.S.2d 194 (1st Dep't 1966).

damages. The court distinguished cases not allowing appeals in single trials, *i.e.*, where "the issue of liability is first determined by triers who promptly go on to hear the issue of damages," [148] emphasizing that the decision was limited to split trials.

Thus, in the interests of uniformity in appellate practice and in the administration of justice, the appellate division, second department, reinforces the position taken by the first department. In the second department, an appeal will now lie as of right regardless of whether the determination was made by a court or a jury or whether the appeal is made from an interlocutory judgment or an order.

ARTICLE 62 — ATTACHMENT

CPLR 6214(d): Special proceeding may be commenced against defendant as well as garnishee to compel payment to sheriff.

CPLR 6214(d) provides that where an order of attachment has been levied upon property or debts a special proceeding may be commenced against the *garnishee* by the plaintiff to compel the payment of the debt to the sheriff.

In *Hom-De-Lite Realty Corp. v. Trimboli*,[149] plaintiff initiated a proceeding to compel the *defendant*, as distinguished from the garnishee, to pay a sum of money to the sheriff, upon which money a levy had been previously made by an order of attachment. The court held that, although CPLR 6214(d) does not expressly provide that the plaintiff has such a remedy against the defendant in the action, other related statutory provisions clearly imply that the remedy is available against the defendant.[150]

It appears that this construction of the statute is in accordance with the legislature's intent in enacting CPLR 6214(d).[151] Since related sections such as CPLR 6202 provide that where the term "judgment debtor" is referred to in certain sections of the CPLR, it should be construed to mean "defendant." It is a reasonable inference that "garnishee" should also be construed to mean "defendant." This is especially true when the literal construction of the terms results in unnecessary hardship.[152]

---

[148] *Id.* at 37, 266 N.Y.S.2d at 196.

[149] 28 App. Div. 2d 1127, 284 N.Y.S.2d 141 (2d Dep't 1967).

[150] *See* CPLR 5225, 6202.

[151] *See* McKINNEY'S STATUTES, Bk. 1, § 111 at 180, in which it is stated that remedial statutes should receive a liberal construction: "[I]t is particularly proper to extend their operation to cases within the intent of the lawmakers though not covered by the exact meaning of their language."

[152] *Id.*