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Article 42

CPLR 3403: "Seider" Plaintiff Denied "Attachment" Preference

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and asked for a trial preference on the theory of constructive indigency. Defendant offered to advance payment on all medical expenses, and to contribute $30 to $40 monthly towards living expenses. The appellate division, second department, in spite of plaintiff's extensive injuries,[166] reversed an order granting a trial preference stating only that the facts did not merit a preference.

Large hospital bills alone apparently do not constitute a sufficient ground for a preference,[167] and an offer of financial aid from the defendant is a factor to be considered in opposition to a motion for a preference on the ground of destitution.[168] The defense bar should thus note that, in cases involving potential liability, an offer of financial assistance is one method of blocking a "destitution" preference.[169]

CPLR 3403: "Seider" *plaintiff denied "attachment" preference.*

In *Margulies v. Boverman*,[170] plaintiff obtained in rem jurisdiction by attaching the obligations of the defendants' insurer to defend and indemnify pursuant to the controversial procedure authorized in *Seider v. Roth*.[171] Having obtained jurisdiction, plaintiff moved for a preference on the basis of Rule IX (2) of the Bronx and New York County Supreme Court Rules.[172]

The Supreme Court, New York County, in denying the motion, noted that personal injury plaintiffs may be entitled to a preference where there are injuries resulting in permanent or protracted disability or death; or where the interests of justice require an early trial. Although the plaintiff in the instant case did come within the literal meaning of subdivision 2, that is, "[a]ny action on contract, replevin or in conversion or wherein property is held under an attachment which has not been discharged . . .," the court held that he did not come within the spirit of the rule's meaning when read as a whole. To grant a preference in such a situation would be manifestly unfair to other personal injury

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[166] The dissent, in preface to categorizing plantiff's injures, states "[t]o list all of her injuries in detail would be to give a brief lecture in human anatomy as the injuries cover nearly every part of her body, from her head to limbs." *Id.* at 636, 286 N.Y.S.2d at 196.

[167] Balestrero v. Prudential Ins. Co., 285 App. Div. 835, 137 N.Y.S.2d 134 (2d Dep't 1955) (mem.).

[168] Johnson v. Pennsylvania Greyhound Lines, Inc., 282 App. Div. 709, 122 N.Y.S.2d 44 (2d Dep't 1953) (mem.).

[169] 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3403.13 (1965).

[170] 56 Misc. 2d 507, 288 N.Y.S.2d 732 (Sup. Ct. N.Y. County 1968).

[171] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). *But see* Podolsky v. DeVinney, 281 F. Supp. 488 (S.D.N.Y. 1968).

[172] This rule implements CPLR 3403.

plaintiffs.[173] The court reasoned that subdivision 2 must either apply to commercial actions or to all actions wherein it is the *defendant* who applies for the preference.[174]

The court's decision appears to be especially sound in view of the rationale underlying the grant of a preference in an attachment situation. The preference is for the benefit of the defendant so that his property is not unnecessarily encumbered for long periods of time.

ARTICLE 50 — JUDGMENTS GENERALLY

CPLR 5001(a): Interest from time of accident denied in breach of warranty action for personal injuries.

In *Gillespie v. Great Atlantic & Pacific Tea Co.*,[175] the Court of Appeals ruled on the question of whether or not interest will be allowed from the date of injury in personal injury actions based on breach of warranty. Plaintiff, injured by flying glass when a carton of quinine water exploded, contended that since the action was based on "breach of performance of a contract"[176] interest should be recoverable from the date of the accident.

In a previous warranty action for personal injury, *Gellman v. Hotel Corp. of America*,[177] interest was allowed from the date of the accident. It was reasoned that since the action was grounded in contract, interest should be allowed.[178] *Gillespie*, however, makes it clear that where the action is based on personal injury, no interest will be allowed.

CPLR 5002: Interest allowed from date of arbitration award.

By virtue of CPLR 5002, interest is recoverable upon a sum awarded "from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment." Until recently there has been some confusion as to whether or not interest could be recovered on an arbitration award. Commentators have stated that since it is arguable that arbitration

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[173] 56 Misc. 2d at 509, 288 N.Y.S.2d at 734.
[174] *Id.*
[175] 21 N.Y.2d 823, 235 N.E.2d 911, 288 N.Y.S.2d 907 (1968) (mem.).
[176] *See* CPLR 5001(a).
[177] 46 Misc. 2d 521, 260 N.Y.S.2d 154 (Civ. Ct. Bronx County 1965).
[178] 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5001.07 (1965). *But see* 7B McKINNEY'S CPLR 5001, supp. commentary 84 (1967) (contending that although the action is nominally for breach of warranty, it is in reality basically a tort action).