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CPLR 5201: Second Circuit Upholds Constitutionality of "Seider" Attachment

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jury is lost.⁴³ Similarly in a recent appellate division case, *Tanne v. Tanne*,⁴⁴ the court, in a per curiam opinion, held that failure to oppose a motion to consolidate actions arising out of the same transaction amounted to a waiver of the plaintiff's right to trial by jury.

Courts should not presume that a party has waived so substantial a right as trial by jury when confronted with ambiguous conduct. Although inaction is often a prima facie indication of waiver, it would seem questionable to attach such a consequence to the failure to oppose consolidation motions which are favored and frequently granted. Nevertheless, *Tanne* stands upon firm ground and warns of the harsh result which can arise upon failure to oppose defendant's motion for consolidation of legal and equitable causes of action.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201: Second Circuit upholds constitutionality of "Seider" attachment.

In *Minichiello v. Rosenberg*,⁴⁵ the United States Court of Appeals, Second Circuit, by a 2-1 decision, has upheld the constitutionality of a "Seider" attachment.⁴⁶ The action was commenced in the New York supreme court by attaching the foreign defendant's liability insurance policy. The defendant, on the basis of diversity of citizenship, sought and obtained removal to the District Court for the Western District of New York. Once in the district court, a motion was made to dismiss on the ground that the "Seider" procedure is unconstitutional. This motion was denied. However, since the Southern District, in *Podolsky v. DeVinney*,⁴⁷ had previously declared that *Seider* is unconstitutional, a certificate to appeal to the Court of Appeals was issued.

⁴³ *Lavisch v. Schwartz*, 235 App. Div. 18, 256 N.Y.S. 416 (3d Dep't 1932): "where plaintiff consented to have the action at law and the action in equity tried together in effect as one suit, this constituted a waiver of his right to a trial by jury. . . ." Compare Judge Cardozo's defense of the constitutionality of the waiver doctrine in *Di Menna v. Cooper & Evans*, 220 N.Y. 391, 115 N.E. 993 (1917); If plaintiff elects to take advantage of equitable relief "he elects that the whole controversy in all its aspects, may be determined by the court. . . . One cannot be heard to urge as a breach of one's constitutional right the concession of a remedy which one has one's self demanded." *Id.* at 395, 115 N.E. at 994 (emphasis added). The reasoning of *Schwartz* would seem to be a curious extension of *Di Menna*.

⁴⁴ 30 App. Div. 2d 956, 294 N.Y.S.2d 247 (1st Dep't 1968).

⁴⁵ — F.2d — (2d Cir. 1968).

⁴⁶ *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

⁴⁷ 281 F. Supp. 488 (S.D.N.Y. 1968).

Judge Friendly, writing for a less than enthusiastic majority found that *Seider*, as construed by the New York Court of Appeals, is constitutional. While the Court noted the many problems that *Seider* has created, it felt compelled to salvage its constitutionality on the basis of the New York Court of Appeals' per curiam opinion accompanying a denial of a motion to reargue *Simpson v. Loehmann*.⁴⁸ The per curiam opinion undermines the objections of *Podolsky* by stating that New York's jurisdiction is limited to the face value of the attached policy thus in effect, allowing the insured a limited appearance.

In spite of *Minichiello* there may still be some relief for the over-burdened defendant and his insurer in the federal courts. In *Jarvick v. Magic Mountain Corp.*,⁴⁹ another "*Seider*" case removed to the federal district court, a motion was made, under the federal transfer statute, to transfer the action to defendant's venue.⁵⁰ The motion was granted on the condition that the defendant appear generally. If a defendant can show, to a federal court's satisfaction, that venue should be transferred, the problems created for him by *Seider* would be significantly reduced.

While *Seider* has thus far met the constitutional challenges raised against it, a motion for rehearing of the *Minichiello* case has been granted and it will now be reheard, on briefs alone, by the Court of Appeals, Second Circuit en banc. Afterwards, the United States Supreme Court might be called on to determine the constitutionality of attaching the contingent obligations in a liability insurance policy.

CPLR 5201: Sheriff may recover poundage fees upon vacatur of "Seider" attachment.

In *Gazerwitz v. Adrian*,⁵¹ plaintiffs were involved in an out-of-state accident and commenced an action pursuant to the procedure sanctioned in *Seider v. Roth*.⁵² An order of attachment was presented to the sheriff and he levied on the defendant's liability insurance policy.

Plaintiffs proceeded with the action; however, obstacles at every step of the way⁵³ prompted the institution of an in personam action in the United States District Court in New Jersey. The New Jersey action was settled for an amount in excess of the face

⁴⁸ 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).

⁴⁹ 290 F. Supp. 998 (S.D.N.Y. 1968) (plaintiff was injured on a ski lift in Vermont).

⁵⁰ 28 U.S.C. § 1404(a) (1964).

⁵¹ 57 Misc. 2d 748, 293 N.Y.S.2d 441 (Sup. Ct. Kings County 1968).

⁵² 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

⁵³ *Sazerwitz v. Adrian*, 28 App. Div. 2d 556, 280 N.Y.S.2d 233 (2d Dep't 1968). See *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 436, 451 (1968).