St. John's Law Review

Volume 42, July 1967, Number 1 Article 39

CPLR 5001: Pre-verdict Interest Not Allowed

St. John's Law Review

ARTICLE 50 — JUDGMENTS GENERALLY

CPLR 5001: Pre-verdict interest not allowed.

The well-established rule in New York is that pre-verdict interest is not allowable on a verdict for personal injuries.[107] The rationale behind this rule is twofold: (1) "the damage award in such a case most often includes compensation for future loss, and therefore to add interest would be duplicatory," [108] and (2) "such damages are rarely measurable by external economic standards," [109] so that having interest computed on an award so inherently arbitrary has been considered inadvisable.

However, a problem arises when an action for personal injuries is grounded upon a breach of contract. CPLR 5001(a), a continuation, with minor modification, of CPA § 480, provides that "interest shall be recovered upon a sum awarded because of a breach of performance of a contract. . . ."

The appellate division, first department, interpreted the CPA section to mean that pre-verdict interest on a personal injury award was allowable if the suit was based upon a breach of contract.[110] Apparently, the first department courts will continue to construe CPLR 5001 in the same fashion.[111]

However, under the CPA, courts in the second department refused to allow pre-verdict interest in a personal injury action whether or not the suit was based upon breach of contract.[112] In a recent decision, *Gillespie v. Great Atl. & Pac. Tea Co.*,[113] there was a verdict for personal injuries based upon a breach of warranty of fitness for use. The court, in refusing to allow pre-

---

[107] 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5001.07 (1966). An exception to this rule is in wrongful death actions. N.Y. DECED. EST. LAW § 132.

[108] DeLong Corp. v. Morrison-Knudsen Co., 20 App. Div. 2d 104, 109, 244 N.Y.S.2d 859, 864 (1st Dep't 1963), *aff'd*, 14 N.Y.2d 346, 200 N.E.2d 557, 251 N.Y.S.2d 657 (1964).

[109] *Ibid.*

[110] Brown v. Godefroy Mfg. Co., 278 App. Div. 242, 104 N.Y.S.2d 444 (1st Dep't 1951). Since the personal injury action had been grounded upon a breach of warranty of fitness for use, pre-verdict interest was awarded. See also Miller v. Foltis Fisher Inc., 152 Misc. 24, 272 N.Y. Supp. 712 (App. T. 1st Dep't 1934).

[111] In Gellman v. Hotel Corp. of America, 46 Misc. 2d 521, 260 N.Y.S.2d 154 (N.Y.C. Civ. Ct. 1965), the court allowed pre-verdict interest in a personal injury action based on breach of warranty.

[112] West v. L. J. F. Corp., 207 N.Y.S.2d 715 (App. T. 2d Dep't 1960). Here, plaintiff alleged a breach of contract as defendant, a common carrier, failed to prevent an assault upon her by another passenger. The court held that the cause of action was basically in tort.

[113] 26 App. Div. 2d 953, 276 N.Y.S.2d 372 (2d Dep't 1966).

verdict interest, expressly rejected first department cases allowing it in similar situations.

Actually, the reasons that have motivated the courts to disallow pre-verdict interest in personal injury actions based upon tort are still applicable when the plaintiff frames his complaint so that it is based upon contract. In any event, it seems that a decision by the Court of Appeals or a legislative re-evaluation is warranted to prevent forum shopping within the state.

ARTICLE 52—ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201: Seider *procedure held constitutional.*

Not unexpectedly, the constitutionality of the holding in *Seider v. Roth*[114] was recently endorsed by the supreme court, Albany County, in a factually similar case. In *Jones v. McNeill*,[115] the accident out of which the cause of action arose occurred in New Mexico. Defendants, residents of California, were personally served there, and an auto liability policy issued to defendants by an insurance company doing business in New York was attached by plaintiff as the jurisdictional basis. The defendants argued that the attachment of the insurer's obligation to defend and indemnify, as a basis for jurisdiction, was violative of due process in contravention of the fifth and fourteenth amendments of the United States Constitution.

The court answered that no deprivation of due process was shown. First, there had been reasonable notice to the defendant and sufficient opportunity for him to be heard. (He was personally served in California, and given the right to appear within thirty days.) Second, the court had jurisdiction over the subject matter of the action. Last, there was a jurisdictional predicate, since property of the defendant within the state was levied upon pursuant to an order of attachment. This property was a *res* within the state, allowing an adjudication as to whether the debt claimed by plaintiff should be satisfied out of it.

CPLR 5201: Rent income held attachable.

The plaintiff in *Glassman v. Hyder*[116] attached a tenant's obligation to the defendants for the payment of rent on a twenty-

---

[114] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). The constitutionality of the procedure set forth in *Seider* was not there questioned or considered. For a discussion of the import of *Seider*, see *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 463, 490 (1967).

[115] 51 Misc. 2d 527, 273 N.Y.S.2d 517 (Sup. Ct. Albany County 1966).

[116] 51 Misc. 2d 535 (N.Y.C. Civ. Ct. 1966).