

CPLR 5231: Procedure for Withholding of Installments

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action for personal injuries was forbidden,¹²⁴ an assignment of the proceeds of a personal injuries action was not.¹²⁵ Being assignable, or transferable, the future proceeds came within the purview of CPLR 5201, and, consequently, their transfer might be restrained under CPLR 5222.

5201(a) allows a money judgment to be enforced against "any debt past due or . . . to become due certainly or upon demand of the judgment debtor. . . ." It is often recited that if the right to payment rests upon an unfulfilled condition the debt is not one within the meaning of 5201.¹²⁶ If this caveat were absolutely true it would seem that a right to proceeds which *may* be paid is not sufficiently certain to satisfy the statute. However, past cases, such as *Baumgold Bros., Inc. v. Schwarzschild Bros., Inc.*¹²⁷ and *Seider v. Roth*,¹²⁸ indicate that certain debts, though contingent, are, nevertheless, within the purview of 5201(a). This judicial expansion of the seemingly even language of the section offers strong, albeit tangential, support for the court's conclusion.

CPLR 5231: Procedure for withholding of installments.

After a judgment was obtained in *Spatz Furniture Corp. v. Lee Letter Serv., Inc.*,¹²⁹ copies of the subject income execution were served on the judgment debtor and, after twenty days, on defendant, his corporate employer.¹³⁰ Defendant, at the time, under a prior income execution, was deducting less than 10 per cent of the judgment debtor's weekly salary pursuant to an agreement with the marshal to whom said deductions were being forwarded. It subsequently satisfied the prior obligation, began deducting an equal percentage from the judgment debtor's salary to pay the plaintiff's judgment, and then ceased paying altogether before the income execution was fully satisfied. Plaintiff then instituted a special proceeding under CPLR 5231(e) predicated upon defendant's failure to honor the execution.

¹²⁴ N.Y. GEN. OBLIGATIONS LAW § 13-101.

¹²⁵ *Grossman v. Schlosser*, 19 App. Div. 2d 893, 244 N.Y.S.2d 749 (2d Dep't 1963). Apparently an assignment of this nature is not violative of public policy.

¹²⁶ *E.g.*, 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5201.04 (1966); 7B MCKINNEY'S CPLR 5201, commentary 25 (1963).

¹²⁷ 276 App. Div. 158, 93 N.Y.S.2d 658 (1st Dep't 1949). In this case, decided under the Civil Practice Act, a levy was allowed on the proceeds of an insurance policy after the loss, but before the proof of loss was filed.

¹²⁸ 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). Here, the Court of Appeals allowed the attachment of an auto liability policy on the ground that the carrier's obligations to defend and indemnify were "debts" within the definition of CPLR 5201(a).

¹²⁹ 52 Misc. 2d 291, 276 N.Y.S.2d 219 (N.Y.C. Civ. Ct. 1966).

¹³⁰ CPLR 5231(c), (d).

The court in *Spatz* found that had the defendant deducted the full 10 per cent, he would have been able to satisfy both the prior and the subject income execution. Thus, it held him liable to the plaintiff for the balance due on the plaintiff's income execution. The court reasoned that while an agreement modifying the terms of an income execution was permissible,¹³¹ as soon as a subsequent judgment creditor's rights become involved, defendant continued to pay less than 10 per cent at his peril. The court indicated that the proper procedure would be for a person deducting less than 10 per cent of the debtor's salary by agreement under a prior income execution to make a motion, on notice to the second judgment creditor, to allow such a percentage to be deducted, thereby adequately insuring the subsequent creditor's right to be heard on a matter of possible prejudice to his interest.

ARTICLE 62 — ATTACHMENT

CPLR 6201: Attachment vacated since cause of action merged in the foreign judgment.

In *McCormick v. American Press Publications, Inc.*,¹³² plaintiff sought to recover the proceeds of a foreign judgment for fraud and deceit by an action on the judgment in New York. A warrant of attachment on defendant's property was obtained by virtue of CPLR 6201(7) which allows an attachment when "there is a cause of action to recover damages . . . for fraud or deceit." Defendant moved to vacate the attachment. The court, in granting defendant's motion, ruled that the attachment could not be based on CPLR 6201(7) since the suit was "not [one] to recover damages for fraud or deceit."

The court distinguished a suit for fraud or deceit from a suit to recover on a foreign judgment resulting from a suit for fraud or deceit. A suit of the latter type did not fall within the scope of 6201(7) since the fraud or deceit, if any, merged in the prior judgment being sued upon.

ARTICLE 75 — ARBITRATION

CPLR 7503(c): Service of demand for arbitration deemed complete when first attempt at delivery is made.

CPLR 7503(c) provides that "a party may serve upon another party a notice of intention to arbitrate . . . stating that

¹³¹ *Spatz Furniture Corp. v. Lee Letter Serv., Inc.*, 52 Misc. 2d 291, 296, 276 N.Y.S.2d 219, 224 (N.Y.C. Civ. Ct. 1966).

¹³² 52 Misc. 2d 297, 275 N.Y.S.2d 429 (Sup. Ct. N.Y. County 1966).