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CPLR 7503(c): Service of Demand for Arbitration Deemed Complete When First Attempt at Delivery Is Made

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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

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[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).

unless the party served applies to stay the arbitration within ten days after such service he shall thereafter be precluded from objecting . . . [to arbitration]." Such a demand for arbitration may be served by registered mail, return receipt requested.

In *Finest Restaurant Corp. v. L & A Music Co.*,[133] the respondent served a demand for arbitration with the ten-day caveat clause by registered mail, return receipt requested. The demand was mailed on September 30, 1966 and received by the petitioner on October 3. Petitioner replied with an application for a stay on October 11, eleven days after posting of the notice, but only eight days after its receipt. On a motion to set aside the application for a stay as untimely, the respondent contended that service of the notice was complete upon posting. The court rejected this contention and held that the ten-day period began to run when the first attempt at delivery was made by the postal authorities. Therefore, petitioner's application for a stay was timely.[134]

The court noted that if service were deemed complete on posting, the transmittal time would deprive the petitioner of the full ten days in which to reply. The court reasoned that the legislature did not intend to create a de facto distinction between those served by mail and those personally served by giving the latter, and not the former, ten full days.[135] Further support for rejecting the "complete when posted" view was found in the requirement of a receipt. It would be idle, the court reasoned, to require a receipt unless to determine when the demand was *delivered.*

However, since *actual* delivery can easily be delayed by the addressee, it was felt that the statute contemplated *constructive* delivery as completing service. The court took judicial notice of the postal practice of indicating the date of actual delivery on the receipt, or the date of attempted delivery on the envelope if it is returned undelivered. As such verification was deemed contemplated by the statutory requirement of registered mail, "return receipt requested," the court concluded that service by mail is complete on the date the postman actually delivers or first attempts to deliver the demand.

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[133] 52 Misc. 2d 87, 275 N.Y.S.2d 1 (Sup. Ct. N.Y. County 1966).

[134] Although the court held for the petitioner, it rejected his contention that CPLR 2103(b)(2) applied, thus giving petitioner three extra days from the date of mailing in which to apply for a stay. That provision was held to apply to interlocutory papers only.

[135] This section's predecessor, CPA § 1458(2), permitted only personal service of the notice of demand. 7B McKINNEY's CPLR 7503, commentary 489 (1963).