

CPLR 5231 and Personal Property Law Section 49-b: Simultaneous Deductions Under Support Order and Income Execution Allowed

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otherwise, the determination must be appealed and the case clarified lest a subsequent suit be precluded by the defense of collateral estoppel.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5231 and Personal Property Law Section 49-b: Simultaneous deductions under support order and income execution allowed.

Defendant-employer in *Costa v. Chevrolet-Tonawanda, Division of General Motors Corp.*,¹⁰¹ was directed by an order pursuant to Personal Property Law Section 49-b to deduct a certain sum from an employee's salary to be allocated for the support of the employee's wife. Thereafter, defendant was served with an income execution against the employee's salary. The City Court of Buffalo, seeming to rely heavily on the facts of the case, ruled that the priority provision of section 49-b did not preclude a simultaneous income execution deduction under CPLR 5231, so long as the support money for the wife remained untouched.¹⁰² The court pointed out that section 49-b was for an obligation, both legal and moral, arising out of the marital relationship.¹⁰³ Since the defendant would be liable for the support obligation anyway, and since the legislature limited income execution to ten percent of the debtor's income to keep the remainder available for support of the family, concurrent imposition of both the income execution and the support order was found by the court to be consistent.¹⁰⁴

However, in *Matter of Beahm*,¹⁰⁵ a section 49-b order for support was made subsequent to an outstanding CPLR 5231 income execution. The Family Court, Richmond County, held that the support order suspended the CPLR 5231 income execution until reinstated by another court.¹⁰⁶

The *Costa* and *Beahm* decisions, though apparently at odds, are capable of resolution. In *Beahm*, the family court was merely deferring final determination as to the simultaneous deductions to the court from whence the income execution issued.

¹⁰¹ 53 Misc. 2d 252, 278 N.Y.S.2d 275 (Buffalo City Ct. 1963), *aff'd mem.*, 24 App. Div. 2d 732, 263 N.Y.S.2d 319 (4th Dep't 1965).

¹⁰² *Ibid.*

¹⁰³ *Id.* at 253, 278 N.Y.S.2d at 276-77.

¹⁰⁴ *Id.* at 253-54, 278 N.Y.S.2d at 276-77.

¹⁰⁵ 47 Misc. 2d 900, 263 N.Y.S.2d 533 (Family Ct. Richmond County 1965). See 7B MCKINNEY'S CPLR 5231, *supp. commentary* 63 (1966).

¹⁰⁶ *Ibid.*

It should also be noted that the courts seem to adopt an *ad hoc* approach in deciding cases of this nature. Thus, it may very well be that the resolution of a particular simultaneous deduction case may lie buried within its facts.

CPLR 5231: Employer must comply with both tax levy and income execution.

While CPLR 5231(h) provides a scheme of priorities where two or more income executions are levied against the wages of a judgment debtor, there is no priority provision as respects a tax levy and an income execution.

In *Royal Business Funds Corporation v. Rooster Plastics, Incorporated*,¹⁰⁷ a judgment creditor brought an action, pursuant to CPLR 5231(e), against a judgment debtor's employer to recover accrued unpaid installments of an income execution. Defendant-employer was deducting ten percent of the judgment debtor's weekly salary under a prior federal income tax levy and pursuant to an agreement with the Internal Revenue Service.

The Supreme Court, New York County, held that it was the duty of the employer to comply with the income execution notwithstanding the additional deductions being made pursuant to the federal tax levy.¹⁰⁸ If both deductions proved too burdensome for the judgment debtor, the court added, his remedy would be to move, under CPLR 5231(g), for modification of the income execution.¹⁰⁹

CPLR 5231: Morris Plan rule not applied.

CPLR 5231 requires an income execution to be issued to the sheriff of the county of a judgment debtor's residence or employment and to be first served upon the debtor.¹¹⁰ This requirement creates a problem when a judgment debtor neither resides nor is employed in New York.¹¹¹ Under previous legislation¹¹² the problem did not arise since provision was made for an order which initially would run against the employer.¹¹³ Furthermore,

¹⁰⁷ 53 Misc. 2d 181, 278 N.Y.S.2d 350 (Sup. Ct. N.Y. County 1967).

¹⁰⁸ 53 Misc. 2d 181, 182, 278 N.Y.S.2d 350, 352 (Sup. Ct. N.Y. County 1967).

¹⁰⁹ CPLR 5231(g) provides: "At any time, the judgment creditor or the judgment debtor may move, upon such notice as the court may direct, for an order modifying an income execution." See, e.g., *First Westchester Nat'l Bank v. Lewis*, 42 Misc. 2d 1007, 249 N.Y.S.2d 537 (Westchester County Ct. 1964).

¹¹⁰ 7B MCKINNEY'S CPLR 5231, commentary 161 (1963).

¹¹¹ 7B MCKINNEY'S CPLR 5231, commentary 162 (1963).

¹¹² CPA. § 684.

¹¹³ 7B MCKINNEY'S CPLR 5231, commentary 163-64 (1963).