

CPLR 5231: Morris Plan Rule Not Applied

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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).

in *Morris Plan Industrial Bank v. Gunning*,¹¹⁴ decided prior to the enactment of the CPLR, the Court of Appeals made it clear that income executions were allowed against non-residents provided the garnishee-employer was found within the state.¹¹⁵ In drafting CPLR 5231 the question of the applicability of the decision in *Morris Plan* to the new legislation was not answered.¹¹⁶

In *Brown v. Arabian American Oil Co.*,¹¹⁷ the plaintiff had originally obtained an in personam judgment in New York against an employee of the defendant, a New York corporation. The debtor-employee was working in Saudi Arabia and was, therefore, technically incapable of being served personally in New York. The defendant was served initially with the income execution and the debtor-employee was notified by registered mail. The court held that the attempted execution, as respected 5231, was defective: since the necessary "physical presence" of the debtor within New York was lacking, there could be no preliminary ability to serve him with the income execution as required by 5231. The deficiency in the statute allowing non-resident debtors to escape execution was referred by the court to the legislature for correction.¹¹⁸

While the deficiency in 5231 is primarily the responsibility of the legislature, the court in *Brown* might have accorded the *Morris Plan* decision more weight. *Morris Plan* allowed income execution where the original judgment was obtained in Pennsylvania while in *Brown* it was a New York court with personal jurisdiction over the debtor which had rendered the judgment.¹¹⁹ Furthermore, apparent jurisdictional problems attached to income execution in respect to a non-resident dissipate when faced with the fact that in *Brown*, in personam jurisdiction had already been secured in the main action and all that was sought in the present action was enforcement of a valid judgment. In view of the decision in *Brown*, amendment of 5231 appears necessary to eliminate the instance where a judgment creditor holding an in personam New York judgment cannot obtain income execution upon the New York employer of a non-resident debtor.

¹¹⁴ 295 N.Y. 324, 67 N.E.2d 510 (1946).

¹¹⁵ 7B MCKINNEY'S CPLR 5231, commentary 163 (1963); 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE § 5231.17 (1965). See *Feinman v. Marks*, 294 N.Y. 367, 62 N.E.2d 606 (1945), where an execution levy was held valid against a corporation within the state although the judgment debtor employee was a non-resident.

¹¹⁶ See 7B MCKINNEY'S CPLR 5231, supp. commentary 60 (1967).

¹¹⁷ 53 Misc. 2d 182, 278 N.Y.S.2d 256 (Sup. Ct. Suffolk County 1967).

¹¹⁸ *Ibid.* See 7B MCKINNEY'S CPLR 5231, supp. commentary 60 (1967).

¹¹⁹ See 7B MCKINNEY'S CPLR 5231, supp. commentary 60 (1967).