

CPLR 7501: No Right to Jury Trial on Threshold Questions

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CPLR 6214: Extension for perfection of attachment may be granted even after ninety-day limitation period.

CPLR 6214 provides that a levy upon any interest in personal property or debts made by service of an order of attachment is void after ninety days unless: (1) the sheriff has taken into his control the thing attached; or, (2) the plaintiff has commenced a special proceeding to compel payment or delivery of the res; or, (3) the plaintiff has procured an extension of the ninety-day limitation.

Under the CPA, where an action was in rem and the levy had not been perfected within the ninety-day period, the order of attachment as well as the levy became void. Since the in rem action was based upon the attachment, it had to be dismissed.¹⁶³ It has also been held under the CPA that a motion for an extension of time in which to perfect the levy of attachment had to be made within the ninety-day period.¹⁶⁴ However, because of the broad language used in CPLR 6214(e), some writers have felt that an extension of time may be given even after the levy has become void.¹⁶⁵

In *Seider v. Roth*,¹⁶⁶ the appellate division, second department, granted an extension of time in which to perfect a levy on the defendant's interest in a liability insurance policy even though the ninety-day period had expired. Because of "the novelty of the question, the uncertain state of the law and the fact that the requirement of CPLR 6214 is largely ministerial as it relates to intangible property . . .,"¹⁶⁷ the court thought it appropriate to grant an extension even though ninety days had already elapsed.

ARTICLE 75 — ARBITRATION

CPLR 7501: No right to jury trial on threshold questions.

In *Liberty Mutual Insurance Co. v. Gottlieb*,¹⁶⁸ the insurer applied to stay arbitration of a claim against it, and sought an immediate jury trial on the issue of whether or not the automobile

¹⁶³ *Sturcke v. Link*, 176 Misc. 93, 26 N.Y.S.2d 748 (Sup. Ct. N.Y. County 1941).

¹⁶⁴ See *Nemeroff v. National City Bank*, 262 App. Div. 145, 28 N.Y.S.2d 295 (1st Dep't 1941).

¹⁶⁵ 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 6214.15 (1965).

¹⁶⁶ 28 App. Div. 2d 698, 280 N.Y.S.2d 1005 (2d Dep't 1967). For a full analysis of the *Seider* case's complication, see 7B MCKINNEY'S CPLR 5201, sup. commentary 13-31 (1967).

¹⁶⁷ *Seider v. Roth*, 28 App. Div. 2d 698, 699, 280 N.Y.S.2d 1005, 1007 (2d Dep't 1967).

¹⁶⁸ 54 Misc. 2d 184, 281 N.Y.S.2d 596 (Sup. Ct. Queens County 1967).

operated by respondent was in physical contact with a hit and run automobile. The supreme court, Queens County, held that the insurer was not entitled to the jury trial requested, but, rather, to a preliminary hearing by the court on the issue.¹⁶⁹

While there is no constitutional right to a jury trial of issues raised on a motion to stay arbitration,¹⁷⁰ Sections 1450 and 1458(2) of the Civil Practice Act granted a statutory right to such a trial. Although these sections were not transposed to the CPLR, the general feeling of authors¹⁷¹ and commentators,¹⁷² based on the Second Report of the Advisory Committee on Practice and Procedure, was that the new arbitration provisions were not intended to eliminate trial by jury if desirable or constitutionally required. This seemingly clear evidence of legislative intent regarding the right to jury trial weakens, somewhat, the arguments posed by the court in favor of their holding, *i.e.*, that the legislature has had ample time to correct any alleged error and that calendar delay demanded the decision.

NEW YORK INSURANCE LAW

Ins. Law § 167: Defense of failure to cooperate difficult to establish.

Section 167 of the Insurance Law provides that, upon the service of notice, a judgment creditor of an insured may maintain a direct suit against a judgment debtor's insurance company in order to satisfy a judgment. The insured's failure to cooperate with the insurer is a defense of the insurer to this direct action. However, the burden of proving such lack of cooperation is upon the insurer.¹⁷³

In *Thrasher v. United States Liability Insurance Co.*,¹⁷⁴ plaintiffs, judgment creditors of an insured, sought to satisfy their judgments against the judgment debtor's insurer. The defendant

¹⁶⁹ *Liberty Mutual Insurance Co. v. Gottlieb*, 54 Misc. 2d at 185, 231 N.Y.S.2d at 598.

¹⁷⁰ *Andolina v. MVAIC*, 23 App. Div. 2d 958, 259 N.Y.S.2d 938 (4th Dep't 1965); *MVAIC v. Cocco*, 40 Misc. 2d 1038, 244 N.Y.S.2d 972 (Sup. Ct. Kings County 1963).

¹⁷¹ "Although the specific provisions of sections 1450 and 1458(2) are omitted from the CPLR, the new arbitration provisions were 'not intended to eliminate trial by jury if it is desirable or constitutionally required.'" 4 WEINSTEIN, KORN & MILLER, *NEW YORK CIVIL PRACTICE* ¶4101.28 (1966). See also 8 *id.* ¶7503.25; "[T]here was no intention on the part of the draftsmen to eliminate the right to trial of the issues of the existence of an arbitration agreement and compliance with the agreement when a jury trial is desirable or constitutionally required."

¹⁷² 7B MCKINNEY'S CPLR 7503, commentary 488 (1963).

¹⁷³ N.Y. INS. LAW § 167(5).

¹⁷⁴ 19 N.Y.2d 159, 225 N.E.2d 503, 278 N.Y.S.2d 793 (1967).