

# CPLR 5101: Court Has Implied Power to Grant Stays

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are placed at the mercy of the plaintiff who may, at his option, object to the verdict or accept it.<sup>198</sup>

ARTICLE 51 — ENFORCEMENT OF JUDGMENTS AND  
ORDERS GENERALLY

*CPLR 5101: Court still has implied power to grant stays.*

CPA § 1520 provided that the non-payer of motion and other interlocutory costs was subject to an automatic stay of all proceedings on his part, except to review or vacate the order. CPLR 5101, which superseded CPA § 1520, omitted any mention of automatic stays as a means of enforcing payment of motion costs.<sup>199</sup> It was held, however, in *Associated Sales Analysts, Inc. v. Weitz*,<sup>200</sup> that the implied, discretionary power to grant stays for nonpayment of costs in prior actions was not nullified by this omission.

There are text writers who conflict with the court's interpretation of the legislative intent in omitting that portion referring to automatic stays in the CPLR.<sup>201</sup> It is their opinion that with execution available under Article 52, a stay of proceedings was entirely unwarranted as an additional method of enforcing the payment of motion costs.<sup>202</sup> While there is some language to this effect in the Fourth Report of the Advisory Committee,<sup>203</sup> there is no further mention made in any of the subsequent reports.<sup>204</sup> The court, however, reasoned that the incomplete legislative history, which dealt only with interlocutory costs, was insufficient to support the conclusion that the discretionary power to stay subsequent actions, a common-law power predating the mandatory stay provisions of the older statutes,<sup>205</sup> had been nullified. The court further reasoned that although execution might prove unsatisfactory, an irresponsible litigant might nevertheless continue to harass his adversary. Finally, the court noted that unlimited

<sup>198</sup> See Gregory, *Tort Contribution Practice In New York*, 20 CORNELL L.Q. 269, 271 (1935). In this regard, the plaintiff is presented with a choice analogous to his power to select his defendants from a number of joint tortfeasors. 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1401.02 (1965).

<sup>199</sup> *Associated Sales Analysts, Inc. v. Weitz*, 25 App. Div. 2d 64, 266 N.Y.S.2d 852 (1st Dep't 1966).

<sup>200</sup> *Ibid.*

<sup>201</sup> See 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 5101.06-.07 (1965); 23 CARMODY-WAIT, NEW YORK PRACTICE §§ 302-04 (Supp. 1965).

<sup>202</sup> *Ibid.*

<sup>203</sup> FOURTH REP. 226.

<sup>204</sup> *Associated Sales Analysts, Inc. v. Weitz*, *supra* note 199, at 66, 266 N.Y.S.2d at 855.

<sup>205</sup> CPA § 1520, which was preceded by RCP 74.

execution had always been available to enforce judgment costs, as opposed to motion costs.

It is important to note that the stay power is discretionary. The court will take into consideration the merits of the case, the impecunious status of the litigant, as well as other circumstances in determining whether to exercise the stay. Lastly, although the subsequent action need not be identical to the prior action, it must be shown to be sufficiently similar to it, *i.e.*:

the common law discretionary power to stay will be available if the second action has the purpose of seeking some form of relief, previously available, for the same or substantially the same conduct in the same sequence of events regardless of the form of action or the legal categories in which the conduct may be classified.<sup>206</sup>

*CPLR 5105: Enforcement of money judgment by contempt held not to apply to remedial fiduciary situation.*

As a general rule, money judgments can be enforced *solely* by execution under Article 52.<sup>207</sup> CPLR 5105(2) is an exception; it provides that where the judgment "requires a trustee or person acting in a fiduciary relationship to pay a sum of money for a willful default or dereliction of his duty,"<sup>208</sup> contempt proceedings under CPLR 5104 may be employed to enforce the judgment. The basic reason for the enactment of this statute and its predecessor, CPA § 505(5), was that the law, as a matter of policy, requires a higher standard of conduct of a fiduciary or trustee than of a person with whom one deals at arm's length.<sup>209</sup> As a consequence, the fiduciary is vulnerable to contempt proceedings when he violates this trust. It has been argued that remedial relationships such as constructive trusts,<sup>210</sup> should be included within the scope of CPLR 5105(2), giving the term fiduciary its broadest meaning.<sup>211</sup> However, it must be recognized that such an expansive reading of the term "fiduciary" would greatly increase the number of exceptions to the present rule, so as to make the con-

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<sup>206</sup> Associated Sales Analysts, Inc. v. Weitz, *supra* note 199, at 69, 266 N.Y.S.2d at 857.

<sup>207</sup> 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5105.01 (1965).

<sup>208</sup> *Ibid.*

<sup>209</sup> See 1947 N.Y. LEG. DOC. NO. 19, THIRTEENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL 242.

<sup>210</sup> These constructive trusts are frequently judicial constructs designed to secure an equitable accommodation between the parties. *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 303, 346 (1966).

<sup>211</sup> 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5105.07 (1965).