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CPLR 6212: Recovery for Legal Services Allowed in Wrongful Attachment When There Is Inducement and Causation

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Conference recommended the insertion of this provision. This subsection vests in the appellate court the discretion, when the interests of justice so demand, to treat as valid and effective a notice of appeal which is either premature or which contains an incorrect description of the order or judgment appealed from.

ARTICLE 57 — APPEALS TO THE APPELLATE DIVISION

CPLR 5704(b): Amendment.

This amendment eliminates a limitation on the general appellate power of the appellate term in the first and second departments. Prior to the CPLR, the appellate term could hear ex parte orders under their rules only from expressly enumerated courts. The original CPLR section limited the hearing of ex parte orders to the Civil Court of the City of New York. The new amendment eliminates this limitation, and provides that the appellate term may review such orders made "by any court or a judge thereof from which an appeal would lie to such appellate term...."

ARTICLE 62 — ATTACHMENT

CPLR 6212: Recovery for legal services allowed in wrongful attachment when there is inducement and causation.

Upon a motion for an order of attachment, the moving party is required to furnish an undertaking promising to pay all of the defendant's legal fees sustained by reason of the attachment "if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property...." [102] The present wording of the statute was employed by the revisers to make clear that "the undertaking is not to be used to pay the defendant if an attachment is vacated for merely technical defects . . . [or where] it is no longer necessary." [103] Where, however, the cause of action, as a matter of law, did not furnish a basis for a warrant of attachment, the defendant cannot later recover the cost of legal services in vacating the attachment.[104] The reason for this rule is that the defendant should not recover his legal costs where he has proceeded to defend on the merits and thereby incurred additional expenses *if* the attachment could have been vacated by motion.[105]

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[102] CPLR 6212(b); see 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 6212.07-.08 (1965).

[103] THIRD REP. 341.

[104] Olsen v. United States Fid. & Guar. Co., 230 N.Y. 31, 128 N.E. 908 (1920). This was an equity action to compel specific performance of a contract for money damages, whereas plaintiff is entitled to an order of attachment only in an action for a money judgment.

[105] *Id.* at 36, 128 N.E. at 909.

On the other hand, where a non-domiciliary has property in New York, an attachment on this property is valid on its face for the purpose of conferring jurisdiction on the court [106] and would not be subject to a motion to dismiss. Therefore, where the non-domiciliary defendant brings an action to recover his legal expenses, the question presented is whether they were incurred by reason of the attachment.[107] A defendant must use every remedy available before resorting to a trial on the merits, so that the chain of causation is not broken if a trial is required.[108] Likewise, since an attachment against the property of a non-domiciliary can normally be vacated only *after* a trial on the merits, it must be concluded that where there is such a trial, the non-domiciliary can be said to have been induced into the state by the attachment.[109]

In *A.C. Israel Commodity Co. v. Banco Do Brasil, S.A.*,[110] the defendant had procured an attachment on plaintiff's property in a prior action. This attachment was, however, vacated on the ground that the complaint failed to state a cause of action upon which a claim could be recognized in New York. The plaintiff, in the instant case, sought a judgment for the cost of legal services rendered in *obtaining and sustaining* the vacatur of attachment. The court held that such expenses were recoverable as damages, since there was *causation and inducement*; they were the natural and proximate consequences of the wrongful attachment.

It is significant to note that the damages allowed in this action included the cost of counsel fees on appeal of the vacatur. The court reasoned that these fees should be recoverable since both the attachment proceedings and appeals were induced by the warrant of attachment, and since there was a reasonable apprehension that reversal of the vacatur would cause the plaintiff an undue financial burden. Since the plaintiff [the defendant in the prior action] was doing business in this state, it was apparently amenable to personal service without the necessity of the attachment. Thus, this action by Banco Do Brasil in procuring the attachment order and in seeking to uphold it may have been decisive on the question of inducement. Nevertheless, based on all the circumstances the court found that both causation and inducement were present.

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[106] See CPLR 6201(1). This section provides that an order may be granted in any action where the plaintiff has demanded a money judgment against a defendant where the latter is a foreign corporation or a non-domiciliary. Thus, through the section, jurisdiction over the defendant is obtained.

[107] Thropp v. Erb, 255 N.Y. 75, 174 N.E. 67 (1930).

[108] *Id.* at 79, 174 N.E. at 68. "No futile motion is necessary to complete the chain of causation between the warrant of attachment and the expenses incurred in the successful defense." *Ibid.*

[109] *Id.* at 80-81, 174 N.E. at 69.

[110] 50 Misc. 2d 362, 270 N.Y.S.2d 283 (Sup. Ct. N.Y. County 1966).

This decision clarifies the law in New York. Now there is a direct holding that where there is a wrongful attachment, legal services rendered, both in the trial court and on appeal, are recoverable as an element of damages provided inducement and causation are shown.

ARTICLE 75 — ARBITRATION

CPLR 7501: State not insulated from arbitration by sovereign immunity.

In Section 8 of the Court of Claims Act, New York State has waived its sovereign immunity and, in Section 9, it has provided that the Court of Claims shall have exclusive jurisdiction of all suits involving tort and contract claims wherein the state is a defendant. However, this waiver of immunity only applies where the "claimant complies with the limitations of this article," [111] and where there has been a direct waiver of sovereign immunity.[112]

Prior decisions have stated that where the party sued is an agency of the state, it was incumbent upon the courts to interpret the relationship between the agency and the state to determine whether the agency or authority was an "arm of the state." [113] For example, it has been held that the New York Thruway Authority was an "arm of the state," and that suit against it was forbidden in all state courts except the Court of Claims.[114] On the other hand, in *Braun v. State,*[115] the court held that the New York State Dormitory Authority was "a separate body politic, for whose tortious acts the State was not responsible";[116] and, therefore, a suit against the authority could be brought in another court of the state.

In *Dormitory Auth. v. Span Elec. Corp.,*[117] the Court of Appeals held that the doctrine of sovereign immunity did not

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[111] CT. CL. ACT § 8.

[112] Benz v. New York State Thruway Auth., 9 N.Y.2d 486, 489, 174 N.E.2d 727, 728, 215 N.Y.S.2d 47, 48 (1961).

[113] See, *e.g.,* Matter of Plumbing, Heating, Piping & Air Conditioning Contractors Ass'n, Inc. v. New York State Thruway Auth., 5 N.Y.2d 420, 158 N.E.2d 238, 185 N.Y.S.2d 534 (1959).

[114] Easley v. New York State Thruway Auth., 1 N.Y.2d 374, 135 N.E.2d 572, 153 N.Y.S.2d 28 (1956). See N.Y. PUB. AUTH. LAW §§ 350-75.

[115] 203 Misc. 563, 117 N.Y.S.2d 601 (Ct. Cl. 1952). The enabling act which established the Dormitory Authority is found in N.Y. PUB. AUTH. LAW §§ 1675-90.

[116] Braun v. State, 203 Misc. 563, 564, 177 N.Y.S.2d 601, 602 (Ct. Cl. 1952). See also Thompson Constr. Corp. v. Dormitory Auth., 48 Misc. 2d 296, 298, 264 N.Y.S.2d 842, 845 (Sup. Ct. Albany County 1965).

[117] 18 N.Y.2d 114, 218 N.E.2d 693, 271 N.Y.S.2d 983 (1966).