

CPLR 5201(a): Order of Attachment Vacated Because Right to Receive Rent Income Held Contingent

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ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201(a): *Order of attachment vacated because right to receive rent income held contingent.*

Under CPLR 6202, any debt against which a money judgment may be enforced under CPLR 5201 is also subject to attachment. According to CPLR 5201(a), a money judgment may be enforced against any debt which is yet to become due, *certainly* or upon demand of the judgment debtor. The requirement that the debt be "certain" is thereby made applicable to attachable property. It is well settled that a debt is not attachable unless it is absolutely payable at present or in the future and not subject to any contingency.⁶⁹

In a recent case, *Glassman v. Hyder*,⁷⁰ the court examined the acquisition of quasi in rem jurisdiction by the attachment of a tenant's obligation to the defendants for the payment of rent on a twenty-year lease. In granting the defendants' motion to vacate the order of attachment, the court held that since no debt was presently due, and since the payment of future rents was contingent, there was no valid attachment.

It could be argued that a lease is less contingent and more valuable than most future contractual debts. Usually, the act of executing the lease constitutes substantial performance on the part of the landlord who then may only be required to perform minor duties. The tenant will be obligated upon the lease for continuing payments regardless of his occupation of the premises. Nevertheless, this decision seems to be consistent with precedent indicating that if a contractual obligation is contingent in *any* respect, it is not attachable under CPLR 5201 and 6202.⁷¹

It is submitted that part of the future rent income could perhaps be attachable under CPLR 5231. According to this section, where a judgment debtor will receive more than thirty dollars per week from *any person*, execution is allowable up to ten per cent of such income. The Advisory Committee's notes indicated an intent to exempt income execution under CPLR 5231 from the requirement that the obligation be "certain."⁷² Although CPLR 5231 refers only to execution, it was held in *Cohen v. Carl M. Loeb*,

⁶⁹ *Sheehy v. Madison Square Garden Corp.*, 266 N.Y. 44, 193 N.E. 633 (1934); *Dutch-American Mercantile Corp. v. Safticraft*, 17 App. Div. 2d 421, 234 N.Y.S.2d 683 (1st Dep't 1962); *Frederick v. Chicago Bearing Metal Co.*, 221 App. Div. 588, 224 N.Y. Supp. 629 (1st Dep't 1927).

⁷⁰ 51 Misc. 2d 535, 273 N.Y.S.2d 385 (N.Y.C. Civ. Ct. 1966).

⁷¹ 6 WEINSTEIN, KORN & MILLER, *NEW YORK CIVIL PRACTICE* ¶ 5201.04 (1965). *But see*, *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

⁷² THIRD REP. 101.

Rhoades & Co.,⁷³ that future trust income, despite its contingent nature, could also be attachable to the extent of ten per cent. If such a result could be reached with respect to *trust* income, it also could occur with *rent* income, since CPLR 5231 covers income received from "any person."

However, a possible implied statutory limitation to this section might be found in CPLR 5205(e)(1) and (2) which exempt ninety per cent of certain trust income and earnings from personal services from the satisfaction of a money judgment. The ten per cent eligibility under CPLR 5231 and the ninety per cent exemption under CPLR 5205(e)(1) and (2) could be interpreted as making the two sections coordinate, and thereby impliedly limiting CPLR 5231 to trust income and personal earnings. Although courts have construed CPA § 684,⁷⁴ the predecessor of CPLR 5231, liberally in its application to trust income and various types of compensation for personal service,⁷⁵ they have not extended its coverage beyond these areas.

If rental income is made attachable to the extent of ten per cent, by the same reasoning, other types of income could be attachable under CPLR 5231. Such an interpretation of this section might encourage contract breaches on the part of a defendant, so that the plaintiff's attachment would become valueless. However, this tendency could also occur in connection with employment contracts which are presently within the scope of CPLR 5231. Furthermore, this tendency would be minimized because of the liability resulting from such breach.

There are instances where the right to receive continuing payments, subject to certain minor contingencies, is more valuable than a debt which is "certain" though difficult or impossible to collect. A construction of the CPLR which would permit attachment of such substantial property rights, where this process is the only basis of securing jurisdiction, would be highly desirable.

⁷³ 48 Misc. 2d 159, 264 N.Y.S.2d 463 (Sup. Ct. N.Y. County 1965). This case is treated in *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 121, 153-55 (1966). See also *Morris Plan Industrial Bank v. Gunning*, 295 N.Y. 324, 67 N.E.2d 510 (1946).

⁷⁴ CPA § 684 provided for a levy upon "any wages, debts, earnings, salary, income from trust funds or profits. . . ."

⁷⁵ See, e.g., *William F. Kasting Co. v. Whittle*, 174 App. Div. 224, 159 N.Y. Supp. 909 (3d Dep't 1916); *Burns v. Maurer*, 72 Misc. 481, 131 N.Y. Supp. 344 (Erie County Ct. 1911).