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Article 63

CPLR 5201: Debt, a Property Subject to Enforcement

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awards to separate plots of condemned land, which was required since the lands were not homogeneous. Therefore, the appellate division held that the trial court had failed to provide facts which would permit adequate judicial review, and remanded the case to the lower court to formulate proper findings of fact. Although the court indicated its basic reluctance to make findings of fact, it clearly implied that it would, in appropriate circumstances, exercise its jurisdiction as a trial court to determine the essential facts itself under CPLR 4213.²⁴³

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201: Debt, a property subject to enforcement.

In the case of *Fishman v. Sanders*,²⁴⁴ the second department held that the insurer's contractual obligation in an automobile liability policy to defend and indemnify the insured is a debt or cause of action capable of being attached.²⁴⁵ It thus rejected the argument that the insured's interest in the policy was purely contingent. This position was recently reaffirmed in *Seider v. Roth*.²⁴⁶ In this decision, however, Judge Ughetta, who had concurred in *Fishman*, dissented stating that the court in *Fishman* "indulged in erroneous dictum." He remarked that the insurer's obligation was not attachable because the indebtedness was not absolutely payable.²⁴⁷

It has been held, however, that a purchaser's right in airplanes subject to a conditional sales contract, in which the vendor retained legal title, was attachable by the vendee's creditors. This was so, even though the vendor could recover possession of the aircraft from the vendee or creditor upon a default in the contract.²⁴⁸ The solution to the question of what is contingent and thus not attachable is not readily ascertainable. In the practical light of enforcing money judgments, it would appear that if a right or property is able to be given a monetary value it is sufficiently

²⁴³ The appellate division generally confines the exercise of such power to instances where the record is complete and the missing facts are of a non-technical nature. See *Mellon v. Street*, 23 App. Div. 2d 210, 259 N.Y.S.2d 900 (3d Dep't 1965).

²⁴⁴ 18 App. Div. 2d 689, 235 N.Y.S.2d 861 (2d Dep't 1962).

²⁴⁵ Cf. *Matter of Riggie*, 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

²⁴⁶ 23 App. Div. 2d 787, 258 N.Y.S.2d 795 (2d Dep't 1965).

²⁴⁷ *Id.* at 788, 258 N.Y.S.2d at 796. In support of the uncertainty of actual indebtedness, Judge Ughetta noted that several conditions had to be satisfied before the policy became effective and that nothing was due under the policy until the plaintiff recovered a judgment. *Ibid.*

²⁴⁸ *Intermediate Credit Corp. v. Overseas Nat'l Airways, Inc.*, 41 Misc. 2d 522, 245 N.Y.S.2d 749 (Sup. Ct. 1963).

definite for attachment purposes. Applying this to the conditional sales contract situation, the debtor-purchaser had a right to possess the aircraft even though the vendor had legal title. It was this possessory right for which a monetary value could be determined and thus it was attachable.

In *Seider*, the court was not presented with the problem of determining the worth of the insurer's contractual obligation to defend and indemnify the insured. It has been suggested, however, that the premium reflects a minimum value to be accorded to this obligation.²⁴⁹ This suggestion fails to consider that the premium purchases coverage, similar to any consumer item, and does not reflect in any aspect the actual value of the obligation to indemnify and defend. In essence, it appears that Judge Ughetta's objection to *Seider* is the practical difficulty in fixing pecuniary value to this obligation. His objection appears to be well-founded and may find voice in future decisions.

CPLR 5222: Restraining notices—income execution.

A good illustration of the interaction of sections 5222(b) (effect of restraint), 5205(e) (income exemptions) and 5231(d) (levy upon default of debtor) is present in the case of *Power v. Loonam*.²⁵⁰ In this decision the debtor moved to vacate a restraining notice served on his employer. Under CPLR 5205(e), ninety per cent of the debtor's income is exempt except as to such part the court determines to be unnecessary for reasonable requirements of the judgment debtor and his dependents.²⁵¹ This in effect is an exception to CPLR 5222(b) which prohibits, once a restraining notice is served, the transfer of all property or debts in which the judgment debtor has an interest. If this order were effective against the employer it would tie up all of the earnings of the judgment debtor. In addition, the court noted that CPLR 5231(d) authorizes service of the restraining notice on the employer only after the debtor defaults in payment or where the debtor is unavailable to accept service. This affords the debtor an opportunity to satisfy the judgment before the employer learns about it.²⁵² In the instant case, the judgment debtor had not defaulted and was available for service. On these grounds, the court vacated the restraining notice against the employer. The practitioner

²⁴⁹ *Matter of Riggle*, 11 App. Div. 2d 51, 56, 205 N.Y.S.2d 19, 25 (2d Dep't 1960), *aff'd*, 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

²⁵⁰ 45 Misc. 2d 818, 258 N.Y.S.2d 136 (Sup. Ct. Nassau County 1965).

²⁵¹ See *Widder v. Kaffee*, 19 App. Div. 2d 817, 818, 243 N.Y.S.2d 601, 603 (1st Dep't 1963).

²⁵² 7B MCKINNEY'S CPLR 5231, *supp. commentary* 38 (1965).