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CPLR 5105: Enforcement of Judgment by Contempt Available Where Defendant Is Only a Remedial Fiduciary

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ARTICLE 51 — ENFORCEMENT OF JUDGMENTS AND ORDERS GENERALLY

CPLR 5105: Enforcement of judgment by contempt available where defendant is only a remedial fiduciary.

CPLR 5105(2) provides that a judgment or order may be enforced by contempt if the judgment or order requires a person acting in a *fiduciary* capacity "to pay a sum of money for a wilful default or dereliction of his duty." Generally, if a fiduciary relationship is not present, the judgment is deemed one for money only and, as such, is solely enforceable by execution under Article 52.

In *National Surety Corp. v. Silver*,[189] the appellate division, first department, directed defendant to make monthly payments to plaintiff, an insurer. Defendant, a bonded employee, had embezzled funds from his employer, the plaintiff's insured. If defendant refused or willfully neglected to obey the court's order, he would be subject to punishment for contempt (CPLR 5105(2) and 5104).

The court declared that the broadened remedies against fiduciaries contained in CPLR 5105(2) apply, as here, even to a constructive trustee, a mere remedial fiduciary. In so holding, the court stated: "although remedial relationships—such as constructive trust—are frequently judicial constructs designed to secure an equitable accommodation between the parties, there is no reason to exclude them from the scope of CPLR 5105(2)."[190]

CPLR 5105(2) is derived from CPA § 505(5) which was included in our practice statute to overcome a number of decisions which denied enforcement by contempt against fiduciaries who willfully refused or neglected to perform their trusts.[191] After the inclusion of CPA § 505(5) fiduciary relationships were held to exist, *inter alia*, between an executor and all parties interested in an estate,[192] between joint venturers[193] and between a mother and her daughter to whom she had turned over funds in trust.[194] In each of the above situations a *consensual* trust was involved. In the instant case, the court has, for the first time, applied CPLR 5105(2) to a situation where only a *remedial* trust was involved.

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[189] 23 App. Div. 2d 398, 261 N.Y.S.2d 511 (1st Dep't 1965).

[190] *Id.* at 400, 261 N.Y.S.2d at 513; 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5105.07 (1965).

[191] See 1947 N.Y. LEG. DOC. No. 19, THIRTEENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL 242-46.

[192] Lefkowitz v. Grosswald, 33 Misc. 2d 905, 225 N.Y.S.2d 386 (Sup. Ct. Bronx County), *aff'd without opinion*, 16 App. Div. 2d 889, 229 N.Y.S.2d 736 (1st Dep't 1962).

[193] R. C. Gluck & Co. v. Tankel, 12 App. Div. 2d 339, 211 N.Y.S.2d 602 (1st Dep't 1961).

[194] Pieper v. Renke, 4 N.Y.2d 410, 151 N.E.2d 837, 176 N.Y.S.2d 265 (1958).

It would appear that this case is authority (at least in the first department) for the enforcement of a judgment, by contempt, against any defendant found by the court to be a "constructive trustee."

With respect to the court's construction of CPLR 5105(2) it should be remembered that the public policy of this state is vigorously opposed to imprisonment for debt.[195] It is, in fact, this very policy that prohibits the use of the contempt power to enforce purely legal money judgments.[196] It is respectfully submitted, therefore, that as the use of the contempt power is broadened, courts must remain mindful of our policy and assure defendants sufficient protection against any possible misuse of this section.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201: Determination of what is a debt subject to attachment.

Recently, the issue of the attachability of certain commercial paper was raised in New York.[197] Involved were twenty drafts with a face value of $100,000 each drawn on a Uruguayan bank and guaranteed by the central bank of Uruguay. The drafts were scheduled to be sold in New York, but this was prevented by the petitioner's attachment. Subsequently, the Uruguayan bank became insolvent. The court held that these drafts were not attachable, noting that the instruments on their face did not represent money owed to the bank, but rather money owed by it. Thus it was held that the drafts were not property, and therefore, unattachable.[198] It was noted, however, that if the respondent had obligated itself to purchase all or part of the drafts, there would have existed a debt running to the bank which would be susceptible of attachment. In response to the argument that the written instruments themselves, as distinguished from the rights to which they related,[199] were attachable, the court considered the drafts to have no intrinsic value, and thus refused to order an attachment of these "trifles."

In essence, this case portrays to the practitioner the difficulties created by a premature levy. If the creditors of the bank had waited until the issuance of the drafts, the conditions of the guaranty of the central bank of Uruguay would have been met and the

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[195] See N.Y. CIV. RIGHTS LAW § 21; Burns v. Newman, 274 App. Div. 301, 83 N.Y.S.2d 285 (1st Dep't 1948).

[196] See 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5105.07 (1965).

[197] Underwriters Bank, Inc. v. First Chicago Int'l Banking Corp., 47 Misc. 2d 539, 262 N.Y.S.2d 828 (Sup. Ct. N.Y. County 1965).

[198] *Cf.* Coddington v. Gilbert, 17 N.Y. 489 (1858).

[199] N.Y. GEN. CONSTR. LAW § 39.