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Article 47

CPLR 5231: Form Over Substance--Or Substance Over Form?

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mined solely from levy of execution or filing of an order and not from the use of other enforcement devices. This variance, however, would not affect the result in the instant case since the ranking of Neilson's judgment was not involved.

The practitioner should note with interest the fact that among all the outstanding liens attached to the fund, the attorney's fee had priority. Neilson, in fact, conceded that the attorney was to be paid before all the other claimants. It appears that the rationale for this approach lies in the fact that it was the attorney's efforts which brought the MVAIC fund into existence. The situation is analogous to the priority given to a mechanic's lien.[211]

Finally, in regard to the assignments of the *proceeds* of the personal injury action, the court noted that they did not violate the prohibition against the assignment of a personal injury cause of action.[212] The priority among the assignments was determined by the date of making, the earlier one having priority. Thus, by virtue of these statutory liens and assignments, the debtor had effectively and completely disassociated himself from the MVAIC fund, leaving no debt available to Neilson.

The decision is illustrative of the broad plenary powers given the court in a CPLR 5227 special proceeding.[213]

CPLR 5231: Form over substance—or substance over form?

Recently, the courts of this state were presented with the following situation. In essence, the petitioner recovered a judgment in the New York City Civil Court against defendants who lived within the city but were employed beyond its limits. An income execution was delivered to the enforcing officer but was returned unsatisfied. Thereafter, a transcript of the judgment was issued out of the civil court and filed with a county clerk. An income execution was then served on the employer by the sheriff in a county beyond New York City.

In *Schleimer v. Gross*,[214] the court refused to order the sheriff to accept and serve an income execution upon the employer. In so doing, the court noted that under Section 701(a) of the New York City Civil Court Act, the authority of the enforcing officer to serve an income execution is limited to the city of New York. In addition, under section 702 of the same act once the judgment or transcript is issued out of the civil court and filed with the county clerk, *only* a sheriff can enforce it (as though it were rendered by the supreme court). As a consequence of these provisions, the

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211 N.Y. LIEN LAW § 3.

212 N.Y. GEN. OBLIG. LAW § 13-101; Grossman v. Schlosser, 19 App. Div. 2d 893, 244 N.Y.S.2d 749 (2d Dep't 1963).

213 Ruvolo v. Long Island R.R., *supra* note 203.

214 46 Misc. 2d 931, 261 N.Y.S.2d 670 (Sup. Ct. Nassau County 1965).

supreme court held that the attempted service on the debtors in New York City by the civil court's enforcing officer was a nullity. The court reasoned that in order to serve the income execution on the employer under these circumstances, it would be necessary to attempt service *again* on the debtor, this time by its own enforcing officer (the sheriff), and upon the inability to do so or the debtor's default, *then* to serve the employer. In essence, the procedure specified in CPLR 5231 would have to be followed to the letter without regard to the income execution attempted by the civil court's enforcing officer.

In conflict with this decision is *Republic Associates, Inc. v. McRae,*[215] wherein the court rejected the above stated procedure and gave full effect to the attempted income execution of the civil court's enforcing officer on the debtor and ordered its sheriff to serve the employer directly. The court reasoned that the action of the civil court's enforcing officer in attempting to serve the debtor was to be deemed the action of the sheriff within the meaning of CPLR 5231.

The *Republic* case appears to offer a more desirable result for several reasons. First, the purpose of requiring the debtor to be served before his employer is to give the debtor an opportunity to satisfy the judgment before the employer learns about it.[216] This purpose was fulfilled by the attempt made by the civil court's enforcing officer and to repeat this procedure seems to place form over substance. In addition, since the civil court's enforcing officer may in any instance be either a marshal or a sheriff,[217] it is possible that under *Schleimer*'s holding, the same individual acting as sheriff would be required to perform duplicate acts merely because the initial income execution issued out of the civil court. The court in *Republic* appeared to appreciate this possibility since it placed great stress on the general powers, duties, and liabilities of marshals[218] in holding that a marshal's action was to be deemed that of a sheriff within the meaning of CPLR 5231.

This interpretation does not alter the established law which holds any civil court execution issued to a sheriff outside the city of New York to be void.[219] The civil court's execution in *Republic* was proper. It was also, however, unsatisfied. *Republic* only held that the condition precedent existing under CPLR 5231, as to giving a debtor an opportunity to satisfy the judgment before notice was

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[215] 46 Misc. 2d 1098, 261 N.Y.S.2d 777 (Sup. Ct. Westchester County 1965).

[216] 7B McKINNEY'S CPLR 5222, supp. commentary 23 (1965); see 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5231.16 (1965).

[217] N.Y. CITY CIVIL COURT ACT § 701(a).

[218] See N.Y. CITY CIVIL COURT ACT § 1609.

[219] American Metal Climax, Inc. v. Seaboard Die Casting Corp., 43 Misc. 2d 781, 252 N.Y.S.2d 475 (Sup. Ct. Suffolk County 1964).

given to his employer, was fulfilled by the civil court's enforcing officer, so that the supreme court's enforcing officer was not required to repeat the process.

ARTICLE 57 — APPEALS TO THE APPELLATE DIVISION

CPLR 5701: Order denying motion to dismiss after jury fails to return a verdict held not appealable.

In *Covell v. H.R.H. Constr. Corp.*,[220] after the jury failed to return a verdict, the defendant's motion to dismiss the complaint was denied by the trial court. The defendant then appealed from the order denying the motion, but the appellate division refused to entertain the appeal. In refusing to allow the appeal of a denial of a motion to dismiss upon failure of the jury to return a verdict, the court noted that it recognized an alleged change in the CPLR deleting the specific authority for such appeal. Normally, there would be no adverse effect from such a holding, since the movant could appeal from a final judgment. However, there will be no final judgment in a case where the jury fails to return a verdict, and thus, any appeal of a possibly erroneous order becomes effectively blocked. The disposition of this case turns upon the CPLR's failure to incorporate into CPLR 5701(a) the last sentence of CPA § 457-a, despite advice to do so by the Advisory Committee on Practice and Procedure.[221] CPA § 457-a provided that "in the event a verdict was not returned an appeal may be taken from the order denying a motion for judgment. . . ."[222] The omission has been said to be a mere inadvertence with no intention to change prior law.[223]

Furthermore, CPLR 5701(a)(2) grants appeals as of right where the order involves some part of the merits or affects a substantial right.[224] It is contended that the denial of a motion to dismiss after the jury has failed to return a verdict does affect a substantial right since the parties must now go through a new trial necessitated by the failure of a jury verdict.

This appeal for the purpose of protecting defendant's substantial right of appeal of a question of law should have been allowed by a liberal interpretation of CPLR 5701(a). Furthermore, if the omission of CPA § 457-a in the CPLR was a mere inadvertence, the court should have "read in" such a right to appeal, especially

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[220] 24 App. Div. 2d 566, 262 N.Y.S.2d 370 (2d Dep't 1965).
[221] SECOND REP. 118-20. See CPLR 5701(a)(2); CPA § 457-a.
[222] CPA § 457-a.
[223] 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5701.19 (1965); See also 7B McKINNEY's CPLR 5701, commentary 553 (1963).
[224] CPLR 5701(a)(2).