CIVIL TRIAL, PART IV: SUMMATIONS, JURY INSTRUCTIONS & POST-TRIAL MOTIONS

PUPILLAGE GROUP:

Chair:	Harry H. Kutner, Jr. (Master)
Panel:	Hon. Steven M. Jaeger (Master)
	Richard A. Librett (Master)
	Laura M. Dilimetin (Master)
	Omid Zareh (Master)
	Robert A. Ruescher (Master)
	Renton D. Persaud (Barrister)
Law students:	Nicole I. Romano (St. John's 2L)
	Steven F. Ingrassia (St. John's 2L)

Biographical resumes of each panelist are attached.

HARRY H. KUTNER, JR.

136 Willis Avenue
Mineola, New York 11501

Education:

Fordham University School of Law, New York, NY 1973

Iona College, New Rochelle, New York 1969

Admitted:

New York, 1974
U.S. District Courts, 1975 (EDNY and SDNY)
U.S. Court of Appeals, Second Circuit 1980
U.S. Supreme Court 1980
U.S. Tax Court 1982

Professional experience:

Legal career in a general practice spanning nearly thirty-nine years, noteworthy for its variety and results across a wide spectrum of legal issues, in both civil and criminal litigation in federal and state courts. Reported cases involve personal injury, wrongful death, zoning and land use, class action frauds, estates, real estate, commercial sales and financing, civil rights, extradition, intentional torts, medical malpractice, Article 78, criminal, and commercial.

Professional Affiliations:

Theodore Roosevelt American Inn of Court (1993-present)
Criminal Courts Bar Association (1974-present, Past President '89-'90)
Catholic Lawyers Guild (1974-present, Past President '86-'87)
Nassau Community College, Trustee ('91-'97)
Nassau County Planning Commission, Commissioner ('79-'82)

Military service:

U.S.M.C. 1970-1972 (Honorable Discharge)

Hon. Steven M. Jaeger
County Court Judge, Nassau County, New York
Acting Supreme Court Justice

In November, 2004, Judge Steven M. Jaeger was elected to the County Court of Nassau County and currently serves as an Acting Supreme Court Justice in that Court's Civil Term. Judge Jaeger previously served in Criminal Term in a felony trial part and set up the Judicial Diversion (Felony Treatment Court) part in Nassau County in 2009 and 2010. He also served as a Nassau County District Court Judge from January, 2002 through 2004.

Judge Jaeger was admitted to the practice of law in New York in 1977 and worked as a criminal defense lawyer in New York City and as appellate counsel for the Legal Aid Society of the City of New York. From 1981 to 1984, he was Law Secretary to the late Hon. Alexander Vitale in both Nassau County Court and New York State Supreme Court. From 1984 through 1999 he was engaged in the private practice of law on Long Island and New York City. He served as Law Secretary to Nassau County Court Judge Meryl J. Berkowitz during 2000 and 2001.

Judge Jaeger is the Immediate Past President of the Theodore Roosevelt American Inn of Court, Corresponding Secretary of the Nassau Lawyers' Association, and serves on the Board of Directors of the Jewish Lawyers Association of Nassau County. He is an active member of the Bar Association of Nassau County, the Women's Bar Association of Nassau County, and the Criminal Courts Bar Association of Nassau County.

Judge Jaeger received his undergraduate degree in political science from the University of Pennsylvania and his law degree from NYU Law School.

RICHARD A. LIBRETT

A 1973 graduate of the Albany Law School of Union University, Richard spent several years as a prosecutor until founding the firm of Librett Friedland and Lieberman in 1976. He has two children and resides on Long Island.

Over a long and varied career as a criminal defense attorney and commercial litigator, he has been involved in many high profile cases including The Howard Beach Case, the New York City Traffic Violations Bureau Scandal, The Boarder Baby Arson Case, The New York City Carting Case and many others. In addition to his background as a Criminal Defense Attorney, Richard has represented many corporations, officers, executives and shareholders in business disputes involving substantial assets and complex issues and enjoys a reputation as a concerned and aggressive advocate.

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Bar Admissions
New York State 1974
U.S. Court for the Eastern District of NY 1975
U.S. Court for the Southern District of NY 1975
U.S. Court for the Northern District of NY 1974

Professional Associations
New York State Bar Association
American Bar Association
Nassau County Bar Association
National Association of Criminal Defense Attorneys
New York State Association of Criminal Defense Attorneys
New York City Criminal Bar Association
American Inns of Court

Laura M. Dilimetin

Email: **lmd@lawfirmonline.com**

LAURA M. DILIMETIN, admitted to the bar in 1990, New York State and U.S. District Court, Southern and Eastern Districts of New York, and the Supreme Court of the United States of America; Education: Bucknell University (B.A. 1987); St. John's University School of Law (J.D. 1990). Member: Theodore Roosevelt American Inn of Court, Nassau County Bar Association, National Employment Lawyers Association, St. John's University Law School Alumni Association, New York State Trial Lawyers Association, New York State Criminal Defenders Association.

Ms. Dilimetin concentrates in corporate/commercial litigation, employment, real estate, general liability and criminal defense. Ms. Dilimetin has just joined Morici + Morici, LLP as head of the Litigation Department and brings with her over twenty years of successful litigation experience, including all phases of trial work. Ms. Dilimetin has spent the last seventeen years as the managing partner of DILIMETIN & DILIMETIN, P.C. where she worked along side her father, Anthony K. Dilimetin, also concentrating on all phases of commercial litigation, employment matters, real estate and criminal defense. Ms. Dilimetin is counsel to celebrity clients and corporations alike, and has handled complex media and high profile cases including cases against the City of New York and against the Attorney General's office of the State of New York. In addition, Ms. Dilimetin spent 1990-1994 at the Kings County District Attorney's office trying a wide variety of cases and having served in the elite Sex Crimes Unit. Ms. Dilimetin's expertise and extensive trial experience is reflected in her successful track record.

in their Garden City office

Ms. Dilimetin is an active member of the North Hills Country Club in Manhasset, NY and a member of the Metropolitan Woman's Golf Association. She is also involved with a number of local community and charitable organizations including General Counsel to Manhasset Women's Coalition Against Breast Cancer.

OMID ZAREH

Omid Zareh is a founding partner of Weinberg Zareh & Geyerhahn, LLP. He focuses on the needs of executives and their companies in all phases of corporate and litigation matters. He advises in areas of law including technology, intellectual property, and corporate disputes. Mr. Zareh is an active member of the Nassau County Bar Association where he currently serves as the Vice Chair of the Intellectual Property Committee and the Co-Vice Chair of the Ethics Committee. He also has participated in a number of community and professional organizations, and taught business law. While attending New York University Law School, Mr. Zareh was the Legal Theory Editor of the Review of Law and Social Change.

st. john's UNIVERSITY

Robert A. Ruescher

Professor of Legal Writing and Director, LL.M. in U.S. Legal Studies, B.A., Columbia College; J.D Columbia University School of Law (Harlan Fiske Stone Scholar).

Professor Ruescher is a Professor of Legal Writing and Director of the law school's LL.M. in U.S Legal Studies Program. Before joining the law faculty in 2001, Professor Ruescher taught first-year writing, introductory research, and various upper-class writing courses at New York Law School. He also helped develop and administer that school's Writing Program courses and served as Assistant Director of the Program in 1999-2000. In addition, he has practiced banking corporate, and securities law at several law firms, principally Moses & Singer in Manhattan.

Professor Ruescher presently serves as faculty advisor to the St. John's Law Review. He is a co author of The Lawyer's Craft (Anderson Publishing Co. 2001), a first-year legal writing text. He teaches Civil Procedure, Applied Legal Analysis, and Advanced Legal Writing for Foreign Lawyers, as well as a workshop series on academic Legal Writing.

Related Links

Selected Publications
Office Hours
Courses
To Contact

RENTON D. PERSAUD
136 Willis Avenue
Mineola, New York 11501

Education:

St. John's University School of Law, J.D., 2010, Deans List, Senior Staff Member, *American Bankruptcy Institute Law Review*

St. John's University, B.S., 2007, *summa cum laude*

Admissions:

Admitted to practice in the State of New York and in the United States District Court for the Eastern District of New York.

Professional Experience:

Renton is an associate in the Law Office of Harry H. Kutner, Jr. He joined the firm as an intern in 2005 while still an undergraduate at St. John's University. He currently practices in the areas of civil plaintiff litigation, criminal defense, real estate, and trusts and estates.

Professional Affiliations:

Member of the Nassau County Bar Association, the New York State Bar Association, and the Theodore Roosevelt American Inns of Court.

NICOLE I. ROMANO
84-23 Lander Street, Apt. 4RR
Briarwood, NY 11435
(516) 509-7305
niromano@gmail.com

EDUCATION

ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, NY
Candidate for J.D., June 2014
GPA: 3.61 Rank: 29/230
Honors: Academic Achievement Award for the 2012-2013 School Year; Dean's List Spring 2012 and Fall 2012; Dean's Award for Excellence in Refugee and Immigration Rights Clinic-Part I (highest grade); *St. John's Law Review*.
Activities: Participated in the 2011 National Civil Rights Trial Competition; Competed in the 2012 Tinnelly Moot Court Competition.

STONY BROOK UNIVERSITY, Stony Brook, NY
B.S., *cum laude,* Psychology (major) and Music (minor), May 2009
GPA: 3.69
Honors: Four-year Presidential Scholarship covering tuition, room, board, and fees; Honors College member; Phi Beta Kappa.
Activities: Teaching Assistant for an upper division Psychology course; Research assistant in a Psychology lab; Resident Hall Association Representative.

LEGAL EXPERIENCE

IMMIGRATION AND REFUGEE RIGHTS CLINIC, CATHOLIC CHARITIES, New York, NY
Clinic Member, August 2012 to May 2013
Interview clients. Conduct full-scale fact investigations. Perform legal research. Develop case theories that integrate relevant facts and law. Represent clients at administrative hearings and court proceedings. Draft motions, applications, and a brief to the Second Circuit Court of Appeals.

QUEENS DISTRICT ATTORNEY'S OFFICE, Kew Gardens, NY
Legal Intern, Kew Gardens I Bureau (felony trial bureau), June 2012 to August 2012
Conducted legal research related to criminal charges and criminal procedure. Examined police records, medical records, and department of corrections records for evidence. Interviewed and prepared witnesses for trial. Drafted and compiled motions. Attended hearings and trials.
Paralegal, Intake Bureau, August 2010 to August 2012
Interviewed law enforcement personnel and victims and witnesses of felonies and misdemeanors such as robbery, burglary, assault, rape, forgery, identity theft and larceny. Assessed merits of arrests made by law enforcement personnel, analyzed evidence, and determined which charges to apply. Drafted complaints and issued orders of protection.

PEÑA & KAHN, PLLC, Bronx, NY
Paralegal, March 2010 to August 2010
Obtained clients' medical records for personal injury litigation. Drafted and compiled legal documents such as subpoenas, summons and complaints, and bills of particulars. Coordinated clients' no-fault insurance medical appointments.

INTERESTS

Playing classical piano.

STEVEN F. INGRASSIA
222 Stuart Road
Valley Stream, NY 11581
(516) 639-7793
steven.ingrassia11@stjohns.edu

EDUCATION

St. John's University School of Law, Queens, NY
Candidate for Juris Doctor, June 2014
Honors: *Articles Editor, St. John's Law Review*
St. Thomas More Scholar (Full Tuition Scholarship)

Fairfield University, College of Arts and Science, Fairfield, CT
Bachelor of Science, Economics, January 2011
Bachelor of Arts, Politics, January 2011
Academics: G.P.A. 3.70
Honors: Presidential Scholarship (academic)
Dean's List (5 of 7 semesters)

EXPERIENCE

Hon. Norman Janowitz, Nassau County Supreme Court Matrimonial Center, Mineola, NY
Intern, June 2012 to August 2012
Researched matrimonial legal issues on Westlaw and LexisNexis. Drafted memoranda and assisted in writing decisions. Attended attorney pre-trial conferences and various child support and divorce settlement hearings.

Muscarella & DiRaimo, Garden City, NY
Intern, June 2012 to August 2012
Responded to demands for Verified Bills of Particulars and Notices for Discovery and Inspection in personal injury, motor vehicle accident cases. Prepared reports to provide defendants' insurance carriers with updated notifications of court proceedings. Attended court hearings and conferences in Nassau and Queens County Supreme Courts.

R. Markey & Sons, Inc., New York, NY
Commodities Sampling Specialist, January 2010 to July 2011
Assisted Senior Commodity Sampler by obtaining samples of recently imported coffee, cocoa, and sugar shipments from warehouses in the Northeast in strict compliance with federal and state regulations. Delivered samples to the Manhattan office and to the New York Commodity Exchange.

Valley Stream Parks and Recreation, Valley Stream, NY
Seasonal Staff Employee, Summers, 2005 to 2009
Managed admissions and cash register at Village pool and park complex. Head office duties included computer processing, verifying residency, and handling applications.

PROGRAM OUTLINE

I. Introduction — Harry H. Kutner, Jr. — 5 mins.

II. Close of evidence motions — Omid Zareh — 20 mins.

A. controlling law

B. trial considerations

C. this case

III. Requests to charge & charge conference — Renton D. Persaud — 20 mins.

A. controlling law

B. when?

C. how structured

D. special trial considerations

general or special verdicts, special interrogatories - CPLR § 4111

E. this case

IV.	Summations	Richard A. Librett	15 mins.
	A. controlling law		
	B. general do's and don'ts		
V.	Parties' summations	Laura M. Dilimetin	
	A. defendant's		15 mins.
	B. plaintiff's		15 mins.
VI.	Comments from audience		10 mins.
VII.	Court's perspective	Hon. Steven M. Jaeger	10 mins.
	errors, omissions, and missed opportunities ?!		
VIII.	Trial considerations	Harry H. Kutner, Jr.	10 mins.
	post-trial motions		
	entry of judgment		

Program materials

Blue Chip Emerald v. Allied Partners, 299 A.D.2d 278 (1st Dept. 2002)

Centro Empres. Compresa v. America Movil, 17 N.Y.3d 269 (2011)

CPLR §§ 4016, 4101, 4110-b, 4111, 4211, 4401, 4402, 4403, 4404, 4406, 5001, 5016, 5018, 5513, 5514, Articles 80-82

CPL §§ 260.30, 290.10, 330.30-50, 460.10

FRCP 50, 51, 54, 58, 59

FRAP 4

Parties' proposed charges (this case)

299 A.D.2d 278
Supreme Court, Appellate Division,
First Department, New York.

BLUE CHIP EMERALD LLC,
et al., Plaintiffs–Appellants,
v.
ALLIED PARTNERS INC., et
al., Defendants–Respondents.

Nov. 26, 2002.

A joint venturer and its owners that sold interest to a co-venturer brought action against the buying venturer and its principals to recover for fraud and breach of fiduciary duty leading to sale of the joint venture's property at large profit two weeks after the buy-out. The plaintiffs also alleged legal malpractice by joint venture's attorneys. The Supreme Court, New York County, Herman Cahn, J., granted motions to dismiss. Plaintiffs appealed. The Supreme Court, Appellate Division, held that: (1) principals were, as managing co-venturers, fiduciaries of the selling venturer until the buy-out closed; (2) they thus owed a duty of loyalty and had no right to keep silent about or misrepresent material facts concerning their efforts to sell or lease the venture's property; (3) selling venturer's waivers, disclaimers, and release in buy-out agreement were voidable if principals breached their fiduciary duty; and (4) selling venturer stated legal malpractice claim.

Reversed.

West Headnotes (7)

[1] **Joint Adventures**
- Mutual Rights, Duties, and Liabilities of Parties

Principals of buying joint venturer were, as managing co-venturers, fiduciaries of the selling venturer in matters relating to the venture until the moment that the buy-out of the selling venturer's interest closed, and, thus, they owed to the selling venturer a duty of undivided and undiluted loyalty and had no right to keep to themselves or misrepresent material facts concerning their efforts to sell or lease the venture's property after the buy-out, such as the prices prospective purchasers were offering to pay

12 Cases that cite this headnote

[2] **Fraud**
- Duty to Disclose Facts

When a fiduciary, in furtherance of its individual interests, deals with the beneficiary of the duty in a matter relating to the fiduciary relationship, the fiduciary is strictly obligated to make full disclosure of all material facts.

13 Cases that cite this headnote

[3] **Contracts**
- Effect of Invalidity

Fraud
- Duty to Disclose Facts

A fiduciary is obligated in negotiating a transaction with a beneficiary to disclose any information that could reasonably bear on the beneficiary's consideration of the fiduciary's offer; absent such full disclosure, the transaction is voidable.

11 Cases that cite this headnote

[4] **Joint Adventures**
- Mutual Rights, Duties, and Liabilities of Parties

Selling joint venturer's waivers and disclaimers in buy-out agreement were voidable as the fruit of the fiduciary's breach of its obligation to make full disclosure, if the principals of the buying joint venturer kept silent about or misrepresented material facts concerning their efforts to sell or lease the venture's property; thus, even though the selling venturer was commercially sophisticated and advised by counsel, the principals allegedly obtained, by breach of the fiduciary duty of full disclosure, waivers of any claim for fraud or breach of loyalty or fiduciary duty and all interest in any profit realized by the principals on a future sale of the property to any of the disclosed third parties.

32 Cases that cite this headnote

[5] **Release**

Fraud and Misrepresentation

Release

General Release

General release that selling joint venturer executed in favor of buying joint venturer's principals and their attorneys pursuant to a buy-out agreement was ineffective at the pleading stage to bar selling venturer's claims for fraud and breach of fiduciary duty in connection with buy-out agreement and subsequent sale of the venture's property at large profit; if the principals obtained the release by breaching fiduciary duty of full disclosure, it would be voidable.

14 Cases that cite this headnote

[6] **Fraud**

Defenses

A fiduciary cannot by contract relieve itself of the fiduciary obligation of full disclosure by withholding the very information the beneficiary needs in order to make a reasoned judgment whether to agree to the proposed contract.

5 Cases that cite this headnote

[7] **Attorney and Client**

Pleading and Evidence

A selling joint venturer sufficiently alleged an attorney-client relationship with and stated a legal malpractice claim against the buying joint venturer's attorneys; the selling venturer alleged a reasonable belief that the attorneys were acting as its counsel and advisor in discussing the venture's business, at least during the time period after the formation of the venture and prior to the commencement of the negotiation of the buy-out agreement.

Attorneys and Law Firms

****293** Eric J. Wallach, for Plaintiffs-Appellants.

Gerard E. Harper, Thomas J. Fleming, for Defendants-Respondents.

TOM, J.P., ANDRIAS, RUBIN, FRIEDMAN, and MARLOW, JJ.

Opinion

***278** Order, Supreme Court, New York County (Herman Cahn, J.), entered October 10, 2001, which granted defendants' motions to dismiss the complaint pursuant to CPLR 3211(a)(1), (5) and (7), unanimously reversed, on the law, with costs, the motions denied, and the complaint reinstated to the extent not previously withdrawn by stipulation.

Plaintiff Blue Chip Emerald LLC, which is owned by the three other plaintiffs bringing this action (collectively BCE), held an interest of approximately 50% in a joint venture known as Ceppeto Enterprises LLC (the Venture). The remainder of the Venture was owned by its managing member, defendant Ceppeto Holding Enterprises LLC, the principals of which are defendants Eric Hadar and Richard Hadar (collectively with the other defendants controlled by the Hadars, the Hadar Defendants). The Venture's sole substantial asset was the commercial building located at One East 57th Street in Manhattan (the Property). Eight months after the formation of the Venture and its purchase of the Property, BCE sold its interest therein to the Hadar Defendants for a price based on an $80 million valuation of the Property. Two weeks later, the Hadar Defendants entered into a contract to sell the Property to a third party (LVMH) for $200 million.

BCE's complaint, after giving effect to a stipulation withdrawing other claims, asserts causes of action for fraud and breach of fiduciary duty against the Hadar Defendants, among others, seeking to recover the additional $60 million of profit BCE allegedly would have realized if it still had held its one-half interest in the Venture when the Property was sold. BCE alleges that it was induced to sell its interest in the Venture for an unfairly low price by the Hadar Defendants' misrepresentations and omissions concerning the discussions they were then conducting with third parties for the purpose of bringing about a sale or lease of the Property. Most significantly, the Hadar Defendants allegedly failed to disclose and misrepresented to BCE both the true price range

in which they were negotiating with LVMH for a sale of the Property and the alleged existence, as of the date BCE sold its interest, of LVMH's oral agreement to purchase the Property for $200 million. The Hadar Defendants also allegedly made other misrepresentations concerning the need for renovations that led BCE to seek a quick exit from the Venture.

Defendants moved to dismiss the complaint as barred by certain representations and disclaimers BCE made in the **279 agreement governing the sale of its interest in the Venture (the Buy-Out Agreement). BCE acknowledged that it was entering into the Buy-Out Agreement without having received any " representations or warranties" from the Hadar Defendants as to, **294 inter alia, "the actual or projected value of the Property for sale or leasing or to any other matter affecting or related to the Property," with the sole exception of the disclosure that, as of the date of the agreement, the Hadar Defendants had discussed the possible "operation, leasing, sale and/or valuation of the Property" with 16 third parties named on "Exhibit B" to the agreement, among whom LVMH, the ultimate purchaser, was included. BCE acknowledged that it had been "afforded an opportunity to conduct its own due diligence" with respect to the third parties listed on Exhibit B, and was "satisfied" with the information made available to it in conducting such due diligence. Further, BCE expressly disclaimed (1) all interest in any profit realized by the Hadar Defendants on a future sale of the Property to any of the disclosed third parties, and (2) "any claim for fraud, breach of loyalty or fiduciary duty" arising out of their participation in the Venture, with the sole exception of a claim that the Hadar Defendants sold or leased the Property to a third party not listed on Exhibit B to the extent such transaction arose from discussions held on or before the date of the Buy-Out Agreement. The IAS court concluded that, in light of these contractual representations and disclaimers, it was required to dismiss the complaint in its entirety. We disagree.

[1] [2] [3] The key fact overlooked by the IAS court is that the Hadar Defendants, as co-venturers and, in particular, as managing co-venturers (*see Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 465, 541 N.Y.S.2d 746, 539 N.E.2d 574, citing *Meinhard v. Salmon*, 249 N.Y. 458, 468, 164 N.E. 545), were fiduciaries of BCE in matters relating to the Venture until the moment the buy-out transaction closed, and therefore "owe[d][BCE] a duty of undivided and undiluted loyalty ..." (*Birnbaum v. Birnbaum*, 73 N.Y.2d at 466, 541 N.Y.S.2d 746, 539 N.E.2d 574, citing *Matter of Rothko*, 43 N.Y.2d 305, 319, 401 N.Y.S.2d 449, 372 N.E.2d 291, and *Meinhard v. Salmon*, 249 N.Y. at 463-464, 164 N.E. 545). Consistent with this stringent standard of conduct, which the courts have enforced with "[u]ncompromising rigidity" (*Meinhard v. Salmon*, 249 N.Y. at 464, 164 N.E. 545), it is well established that, when a fiduciary, in furtherance of its individual interests, deals with the beneficiary of the duty in a matter relating to the fiduciary relationship, the fiduciary is strictly obligated to make "full disclosure" of all material facts (*Birnbaum v. Birnbaum*, *supra*). Stated otherwise, the fiduciary is obligated in negotiating such a transaction "to disclose any information that could reasonably bear on [the beneficiary's] consideration of [the fiduciary's] offer" (*Dubbs v. Stribling & Assocs.*, 96 N.Y.2d 337, 341, 728 N.Y.S.2d 413, 752 N.E.2d 850). Absent such *280 full disclosure, the transaction is voidable (*see Birnbaum v. Birnbaum*, 117 A.D.2d 409, 416, 503 N.Y.S.2d 451).

[4] [5] [6] It follows from the foregoing principles that, in negotiating the Buy-Out Agreement, the Hadar Defendants had no right to keep to themselves or misrepresent material facts concerning their efforts to sell or lease the Venture's Property, such as, for example, the prices prospective purchasers were offering to pay. If the Hadar Defendants kept silent about such matters, or misrepresented them, as alleged in the complaint, the contractual disclaimers the IAS court invoked as grounds for dismissing this action would be voidable as the fruit of the fiduciary's breach of its obligation to make full disclosure. Defendants have not brought to our attention any authority, from either New York or Delaware (the state under whose law the Venture was organized), that would give effect to a waiver of a fiduciary's **295 duty of full disclosure that the fiduciary obtained by means of its breach of that very duty, even where the party that gave the waiver was, like BCE, commercially sophisticated and advised by its own counsel. Thus, even if the disclaimers of the Buy-Out Agreement would have negated any allegation of reliance on the Hadar Defendants by a party to whom they owed no fiduciary duty (*see e.g. Citibank v. Plapinger*, 66 N.Y.2d 90, 94-95, 495 N.Y.S.2d 309, 485 N.E.2d 974; *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 323, 184 N.Y.S.2d 599, 157 N.E.2d 597), such disclaimers must be deemed ineffective, on this motion addressed to the pleadings, as against BCE, to whom the Hadar Defendants did owe such a duty. Similarly ineffective to bar this action at the pleading stage is the general release BCE executed in favor of the Hadar Defendants and their attorneys, among others, pursuant to the Buy-Out Agreement. In sum, a fiduciary cannot by contract relieve itself of the fiduciary obligation of full disclosure by withholding the very information the

beneficiary needs in order to make a reasoned judgment whether to agree to the proposed contract

In declining to give effect to BCE's statements in the Buy-Out Agreement that it had been afforded an opportunity to conduct its own "due diligence" investigation into the disclosed potential purchasers of the Property, and that it was "satisfied" with the information it had obtained, we note that it cannot be said as a matter of law that BCE had at its disposal ready and efficient means for obtaining or verifying the relevant information on its own (*cf. e.g. CJ Associates of New York v. Hanson Indus.*, 274 A.D.2d 892, 895, 711 N.Y.S.2d 232 [buyer had access to real property to make its own estimate of environmental clean-up costs]; *Stuart Lipsky, P.C. v. Price*, 215 A.D.2d 102, 103, 625 N.Y.S.2d 563 [buyer could have reviewed financial statements to determine true condition of business]). ***281** For example, there is no reason to believe that BCE could have learned the substance of the Hadar Defendants' discussions with potential purchasers from public sources or from some easily located private source, such as the Venture's financial records. Indeed, such offers might well not have been documented at all (as the complaint alleges that the Hadar Defendants specifically requested in its discussions with one company interested in leasing substantial space in the Property), or might have been reflected only in letters, e-mail, or notes that could be discovered only through a full-blown, litigation-style review of the Hadar Defendants' files. Moreover, in view of the competitive nature of business and the natural presumption that BCE should look to its own partner for information about the Venture, it cannot be assumed, as the Hadar Defendants suggest, that BCE had only to make phone calls to the potential purchasers identified in the Buy-Out Agreement to learn what they were offering for the Property. The allegations of the complaint offer no basis on which to believe that the potential purchasers would have been any more forthcoming with this information than the Hadar Defendants allegedly were

[7] BCE is also suing in this action the Hadar Defendants' attorneys, the law firm of Olshan Grundman Frome Rosenzweig & Wolosky LLP and one of its partners (collectively, the Olshan Defendants). Besides representing the Hadar Defendants in the formation of the Venture and the negotiation of the Buy-Out Agreement, the Olshan Defendants represented the Venture in its dealings with third parties, such as the purchase of the Property and subsequent efforts to find a buyer and tenants. In substance, BCE alleges that the Olshan Defendants participated in, and aided and ****296** abetted, the Hadar Defendants' alleged fraud and breach of fiduciary duty, as described above. Since the Olshan Defendants make substantially the same arguments as do the Hadar Defendants for affirming the dismissal of such causes of action, we reinstate the complaint against them to that extent for the reasons already discussed. BCE also asserts an eighth cause of action for legal malpractice against the Olshan Defendants alone, based on the contention that, by virtue of their representation of the Venture, the Olshan Defendants also had an attorney-client relationship with BCE. We reinstate this cause of action as well. On this motion addressed to the pleadings, it cannot be said as a matter of law that BCE will not be able to prove that it reasonably believed the Olshan Defendants to have been acting as BCE's counsel and advisor in discussing the Venture's business with BCE, at least during the time period after the formation of the Venture and prior to ***282** the commencement of the negotiation of the Buy-Out Agreement.

Parallel Citations

299 A.D.2d 278, 750 N.Y.S.2d 291, 2002 N.Y. Slip Op. 08798

17 N.Y.3d 269
Court of Appeals of New York.

CENTRO EMPRESARIAL
CEMPRESA S.A. et al., Appellants,
v.
AMÉRICA MÓVIL, S.A.B.
DE C.V., et al., Respondents.

June 7, 2011.

Synopsis

Background: Former holders of indirect minority interest in Ecuadorian mobile telephone company brought action against owner of majority interest in company and its affiliates, alleging they were fraudulently induced to sell their ownership interests in company and to release defendants from claims arising out of that ownership. The Supreme Court, New York County, Richard B. Lowe, III, J., denied defendants' motion to dismiss, and they appealed. The Supreme Court, Appellate Division, 76 A.D.3d 310, 901 N.Y.S.2d 618, reversed. Plaintiffs appealed as of right.

Holdings: The Court of Appeals, Ciparick, J., held that:

[1] parties' release agreement encompassed unknown fraud claims;

[2] parties' release agreement barred sellers' fraud claims; and

[3] a sophisticated principal is able to release its fiduciary from claims where the fiduciary relationship is no longer one of unquestioning trust so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into, abrogating *Littman v. Magee*, 54 A.D.3d 14, 860 N.Y.S.2d 24, *Blue Chip Emerald v. Allied Partners, Inc.*, 299 A.D.2d 278, 750 N.Y.S.2d 291, *Collections v. Kolber*, 256 A.D.2d 240, 682 N.Y.S.2d 189.

Affirmed.

West Headnotes (12)

[1] **Release**
- Operation and effect in general

Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release.

6 Cases that cite this headnote

[2] **Release**
- Operation and effect in general

If the language of a release is clear and unambiguous, the signing of a release is a "jural act" binding on the parties.

2 Cases that cite this headnote

[3] **Release**
- Mistake

Release
- Fraud and Misrepresentation

Release
- Duress

Release
- Legality of consideration

Release may be invalidated for any of the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake.

5 Cases that cite this headnote

[4] **Release**
- Presumptions and burden of proof

Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release shifts the burden of going forward to the plaintiff to show that there has been fraud, duress or some other fact which will be sufficient to void the release.

7 Cases that cite this headnote

[5] **Release**
- Fraud and Misrepresentation

Plaintiff seeking to invalidate a release due to fraudulent inducement must establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation,

knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury.

19 Cases that cite this headnote

[6] **Release**

Scope and extent in general

Release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is fairly and knowingly made.

7 Cases that cite this headnote

[7] **Release**

Release of specific indebtedness or liability in general

Release agreement granted in connection with buy-out transaction, covering "all manner of actions" whether "future" or "contingent," encompassed unknown fraud claims.

1 Cases that cite this headnote

[8] **Release**

Indebtedness or liability in general

Shareholders who sold their minority interest in parent company to majority shareholders failed to show that release granted in connection with buyout was induced by fraud separate from fraud alleged in complaint, and thus minority shareholders' fraud claims, alleging they were fraudulently induced to sell their ownership interest in company, were barred by parties' release agreement, since fraud claims alleged in complaint fell squarely within scope of release.

6 Cases that cite this headnote

[9] **Release**

Reality of assent in general

Broad release of any and all claims, "whether past, present or future, actual or contingent," granted in connection with majority shareholders' purchase of minority shareholders' ownership interest in parent company, was enforceable against minority shareholders, despite existence of fiduciary relationship between majority and minority shareholders, since minority shareholders were sophisticated parties advised by counsel, fiduciary relationship between parties was no longer one of unquestioning trust, and minority shareholders knowingly entered into release and understood that majority shareholders were acting in their own interests.

8 Cases that cite this headnote

[10] **Release**

Reality of assent in general

A sophisticated principal is able to release its fiduciary from claims where the fiduciary relationship is no longer one of unquestioning trust so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into; abrogating *Littman v. Magee*, 54 A.D.3d 14, 860 N.Y.S.2d 24, *Blue Chip Emerald v. Allied Partners, Inc.*, 299 A.D.2d 278, 750 N.Y.S.2d 291, *Collections v. Kolber*, 256 A.D.2d 240, 682 N.Y.S.2d 189.

7 Cases that cite this headnote

[11] **Release**

Indebtedness or liability in general

Shareholders who sold their minority interest in parent company to majority shareholders failed to allege they justifiably relied on majority shareholders' allegedly fraudulent statements in executing release granted in connection with buy-out, as required to render release unenforceable in action alleging minority shareholders were fraudulently induced to sell their ownership interests in company.

3 Cases that cite this headnote

[12] **Fraud**

Duty to Investigate

When the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it; it cannot reasonably rely on such representations without making the additional inquiry to determine their accuracy.

3 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

***272 OPINION OF THE COURT**

CIPARICK, J.

**997 Plaintiffs claim they were fraudulently induced to sell their ownership interests in a company they co-owned with one of the defendants, and to release defendants from claims arising out of that ownership. We affirm the Appellate Division's determination that this action is barred by the release.

Plaintiffs Centro Empresarial Cempresa S.A. (Centro) and Conecel Holding Limited (CHL) allege they once owned substantial shares of an Ecuadorian telecommunications company, defendant Consorcio Ecuatoriano de Telecomunicaciones S.A. Conecel (Conecel). The complaint alleges that, in 1999, they approached defendant Carlos Slim Helú (Slim), the "moving force behind" defendant Teléfonos de México, S.A. de C.V. (Telmex Mexico), which owned defendant AMX Ecuador LLC, then known as Telmex Wireless LLC (Telmex), about the possibility of Telmex investing in Conecel.

Through a "Master Agreement" executed in March 2000, Telmex obtained a 60% indirect interest in Conecel, while plaintiffs each retained a minority interest, all held through a new entity, defendant Telmex Wireless Ecuador LLC (TWE). In exchange for its interest, Telmex contributed $150 million to TWE and paid CHL $35 million to cancel Conecel debts. The parties simultaneously entered into various other agreements. Under the "Limited Liability Company Agreement," the members of TWE agreed that Telmex would manage accounting, tax, and record-keeping for TWE, and that TWE would provide quarterly financial statements to all its members. In the ***273** "Agreement Among Members," the members of TWE agreed that if Telmex ever consolidated —or "rolled up"— its Latin American telecommunications interests into a single entity "for purposes of selling the equity securities of such entity in international capital markets" at a time when plaintiffs owned 5% or more of TWE, plaintiffs could "negotiate in good faith (for a period not to **998 ***6 exceed 20 days)" to exchange their TWE units for equity shares in the new company "at a mutually satisfactory rate of exchange." The Agreement also stated that, prior to any roll-up, Telmex and TWE would provide "financial, accounting and legal information with respect to Conecel and [TWE] as may reasonably be requested." A fourth agreement, the "Put Agreement," gave plaintiffs the right to require Telmex to purchase plaintiffs' TWE units at a set "floor price" during three separate 180–day periods between March 2002 and March 2006. Plaintiffs could exercise these put options for up to 50% of their units during the 2002 period; up to 75% during the 2004 period; and up to 95% during the 2006 period.

In September 2000, Telmex Mexico formed defendant América Móvil, S.A.B. de C.V. (América Móvil), which became the holding company for several entities, including TWE. Plaintiffs allege that, under the Agreement Among Members, this triggered their right to negotiate an exchange of their TWE units for shares in América Móvil. They allege that in March 2001 they asked defendant Daniel Hajj Aboumrad (Hajj), Slim's son-in-law and CEO of América Móvil, for financial information about Conecel and TWE for use in the contemplated negotiations. Plaintiffs assert that they never received the information, despite repeated requests. They also allege that throughout 2001 Hajj falsely represented that Conecel was financially weak and had not generated any profits to distribute to TWE.

At this point, the complaint states, plaintiffs were "wary of the threat that Defendants would never negotiate in good faith and would never distribute the Conecel profits ... as agreed." Thus left with "no practical alternative," plaintiffs exercised the first put option in March 2002 and sold Telmex 50% of their TWE units, the maximum number allowed in the first 180–day period, for which the put agreement entitled them to over $66 million. Over the next year, plaintiffs allege that they repeatedly attempted to open exchange negotiations, but

defendants refused to negotiate. In 2003, defendants provided Conecel's balance sheet, which indicated that the company was not doing well, and made further representations to that effect.

***274** In 2003, Telmex offered to purchase plaintiffs' remaining units at the floor price, and plaintiffs—allegedly relying on the false financial information—agreed, entitling them to additional substantial consideration. In July 2003, plaintiffs entered a Purchase Agreement with América Móvil, AM Wireless, LLC (formerly Telmex), and Wireless Ecuador LLC (formerly TWE). The parties executed various releases in connection with the sale. In the "Release for Agreement Among Members" (Members Release), the sellers released Telmex and its affiliates, shareholders, and agents from

> "all manner of actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands, liability, whatsoever, in law or equity, whether past, present or future, actual or contingent, arising under or in connection with the Agreement Among Members and/or arising out of, based upon, attributable to or resulting from the ownership of membership interests in [TWE] or having taken or failed to take any action in any capacity on behalf of [TWE] or in connection with the business of [TWE]."

A second release, the "Release for Master Agreement" (Master Release), employed nearly identical language, but added a proviso. ****999** *****7** It released the Telmex-related parties from claims,

> "relating to (A) the ownership by the Telmex Released Parties of the [TWE] Units, or (B) any matter arising under or in connection with the Master Agreement, or any other document, agreement, instrument related thereto or executed in connection therewith ... provided that the foregoing release shall not release any claims involving fraud."

In June 2008, plaintiffs commenced this action against Telmex Mexico and several of its affiliates: América Móvil, AMX Ecuador (formerly Telmex), Wireless Ecuador LLC (formerly TWE), Conecel, Slim, and Hajj. The complaint asserts 12 causes of action for, among other things, breach of contract, breach of fiduciary duty, fraud, and unjust enrichment. The crux of plaintiffs' claim is that defendants failed to provide them with accurate tax and financial statements for Conecel and were unwilling to negotiate in good faith for a share exchange. ***275** Plaintiffs allege that they only discovered that defendants supplied them with fraudulent information in 2008, after the Ecuadorian government audited Conecel and released the results. They seek a minimum of $900,000,000 in damages—the amount they claim they would have made if a good faith share exchange had been accomplished under the terms of the Members Agreement—plus interest.

Defendants moved to dismiss the complaint on several grounds, including that a defense is founded on documentary evidence (*see* CPLR 3211[a][1]) and the action is barred by a release (*see* CPLR 3211[a][5]). Supreme Court, ruling from the bench, denied the motion.

The Appellate Division reversed and granted the motion to dismiss, holding that plaintiffs' claims, "are barred by the general release they granted defendants in connection with the sale of their interest" (*Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 76 A.D.3d 310, 311, 901 N.Y.S.2d 618 [1st Dept.2010]). After finding that the release "includes any claim possibly to be discovered in the future that defendants had misrepresented the value of Conecel" (*id.* at 317, 901 N.Y.S.2d 618), the court concluded that the release was not fraudulently induced, since plaintiffs failed to allege any fraud "separate and distinct" from that contemplated by the release (*id.* at 317–318, 901 N.Y.S.2d 618). That Telmex, as the majority shareholder, owed plaintiffs a fiduciary duty did not alter the court's analysis. Further, the court noted, plaintiffs were allegedly aware that they lacked a full picture of Conecel's internal finances and that the relationship between the parties had become adversarial, yet they failed to condition the release on the truth of the information supplied by defendants, obtain representations or warranties to that effect, or insist on viewing additional information.

Two justices dissented on the ground that the release was fraudulently induced, since plaintiffs did not realize the depths of the alleged fraud and a fiduciary cannot be released from liability unless it has fully disclosed its tortious conduct (*see id.* at 329, 901 N.Y.S.2d 618 [Catterson, J., dissenting]). The dissent emphasized that the complaint does not allege that plaintiffs had knowledge of defendants' fraud, and plaintiffs were "reasonably justified in their expectations that the defendants," as fiduciaries, "would disclose any information in their possession that might affect plaintiffs' decision on their best course of action" (*id.* at 330, 901 N.Y.S.2d 618). Moreover, in the dissent's view, the release did not "mention[ ] or contemplate [ ]" fraud claims (*id.* at 331, 901 N.Y.S.2d 618). ****1000** *****8** Plaintiffs appealed as of right pursuant to CPLR 5601(a).

***276** Plaintiffs argue that, as the Appellate Division dissent found, the Members Release was not intended to reach fraud claims. They further contend that the release itself was fraudulently induced, particularly in light of the parties' fiduciary relationship, and that their reliance on defendants' financial disclosures was justified.

[1] [2] [3] Generally, "a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 98, 824 N.Y.S.2d 210 [1st Dept.2006]). If "the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties" (*Booth v. 3669 Delaware*, 92 N.Y.2d 934, 935, 680 N.Y.S.2d 899, 703 N.E.2d 757 [1998], quoting *Mangini v. McClurg*, 24 N.Y.2d 556, 563, 301 N.Y.S.2d 508, 249 N.E.2d 386 [1969]). A release "should never be converted into a starting point for ... litigation except under circumstances and under rules which would render any other result a grave injustice" (*Mangini*, 24 N.Y.2d at 563, 301 N.Y.S.2d 508, 249 N.E.2d 386). A release may be invalidated, however, for any of "the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake" (*id.*).

[4] [5] Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release "shifts the burden of going forward ... to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release" (*Fleming v. Pontoni*, 21 N.Y.2d 105, 111, 247 N.E.2d 114 [1969]). A plaintiff seeking to invalidate a release due to fraudulent inducement must "establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury" (*Global Mins.*, 35 A.D.3d at 98, 824 N.Y.S.2d 210).

[6] Notably, a release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is "fairly and knowingly made" (*Mangini*, 24 N.Y.2d at 566–567, 301 N.Y.S.2d 508, 249 N.E.2d 386, *Allegheny Corp. v. Kirby*, 333 F.2d 327, 333 [2d Cir.1964]). As the Appellate Division majority explained below (*Centro*, 76 A.D.3d at 318, 901 N.Y.S.2d 618), a party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release (*see Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 527–528 [2d Cir.1985]). Were this not the case, no party could ever settle a fraud claim with any finality.

[7] ***277** As a preliminary matter, the parties here debate whether the Members Release encompasses unknown fraud claims. We find that it does. The broad language of the release reaches "all manner of actions ... whatsoever ... whether past, present or future, actual or contingent, arising under or in connection with the Agreement Among Members and/or arising out of ... the ownership of membership interests in [TWE]." The phrase "all manner of actions," in conjunction with the reference to "future" and "contingent" actions, indicates an intent to release defendants from fraud claims, like this one, unknown at the time of contract (*see Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1312 [5th Cir.1983]; *Consorcio Prodipe, S.A. de C.V. v. Vinci, S.A.*, 544 F.Supp.2d 178, 192 [S.D.N.Y.2008]).

*****9** ****1001** Plaintiffs note that the Master Release, executed at the same time as the Members Release, is substantially similar but expressly excludes fraud claims. They argue—apparently for the first time in their briefs before us—that the fraud exception in the Master Release should be read into the Members Release. Even assuming we can reach this argument (*see Matter of SoHo Alliance v. New York City Bd. of Stds. & Appeals*, 95 N.Y.2d 437, 442, 718 N.Y.S.2d 261, 741 N.E.2d 106 [2000]), "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 72, 412 N.Y.S.2d 827, 385 N.E.2d 566 [1978]). We see no reason to import the Master Release's express statement into the Members Release. If anything, the explicit exclusion of fraud claims from the Master Release suggests that the

Members Release is not so limited. Plaintiffs' claims are either brought under the Agreement Among Members, under which Telmex agreed to negotiate in good faith and provide Conecel and TWE's financial information, or otherwise "aris[e] out of" their "ownership of membership interests in [TWE]." They therefore fall under the Members Release.

[8] Having executed this release, plaintiffs cannot now claim that defendants fraudulently misled them regarding the value of their ownership interests in TWE unless the release was itself induced by a separate fraud. The fraud described in the complaint, however, falls squarely within the scope of the release: plaintiffs allege that defendants supplied them with false financial information regarding the value of Conecel and TWE, and that, based on this false information, plaintiffs sold their interests in TWE and released defendants from claims in connection with that sale. Thus, as the Appellate Division ***278** observed: "plaintiffs seek to convert the 2003 release into a starting point for new ... litigation, essentially asking to be relieved of the release on the ground that they did not realize the true value of the claims they were giving up" (*Centro*, 76 A.D.3d at 317, 901 N.Y.S.2d 618).

[9] That the parties had a fiduciary relationship does not alter our conclusion. It is true that Telmex, as a majority shareholder in a closely held corporation, owed a fiduciary duty to plaintiffs, minority shareholders (*see Fender v. Prescott*, 64 N.Y.2d 1077, 1079, 489 N.Y.S.2d 880, 479 N.E.2d 225 [1985]). Telmex was therefore required to "disclose any information that could reasonably bear on plaintiffs' consideration of [its purchase] offer" (*Dubbs v. Stribling & Assoc.*, 96 N.Y.2d 337, 341, 728 N.Y.S.2d 413, 752 N.E.2d 850 [2001]).

[10] A sophisticated principal is able to release its fiduciary from claims--at least where, as here, the fiduciary relationship is no longer one of unquestioning trust--so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into (*see Allegheny Corp.*, 333 F.2d at 333 ["There is no prerequisite to the settlement of a fraud case that the (fiduciary) defendant must come forward and confess to all his wrongful acts in connection with the subject matter"]; *Consorcio Prodipe, S.A. de C.V.*, 544 F.Supp.2d at 191). To the extent that Appellate Division decisions such as *Littman v. Magee*, 54 A.D.3d 14, 17, 860 N.Y.S.2d 24 (1st Dept.2008), *Blue Chip Emerald v. Allied Partners*, 299 A.D.2d 278, 279-280, 750 N.Y.S.2d 291 (1st Dept.2002) and *H.W. Collections v. Kolber*, 256 A.D.2d 240, 241, 682 N.Y.S.2d 189 (1st Dept.1998) suggest otherwise, they misapprehend our case law. Plaintiffs here are large corporations engaged in complex ****1002** *****10** transactions in which they were advised by counsel. As sophisticated entities, they negotiated and executed an extraordinarily broad release with their eyes wide open. They cannot now invalidate that release by claiming ignorance of the depth of their fiduciary's misconduct.

[11] In addition to failing to allege that the release was induced by a separate fraud, plaintiffs have failed to allege that they justifiably relied on defendants' fraudulent statements in executing the release. As we recently reiterated:

> "[I]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he ***279** must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations" (*DDJ Mgt., LLC v. Rhone Group L.L.C.*, 15 N.Y.3d 147, 154, 905 N.Y.S.2d 118, 931 N.E.2d 87 [2010], quoting *Schumaker v. Mather*, 133 N.Y. 590, 596, 30 N.E. 755 [1892]).

Here, according to the facts alleged in the complaint, plaintiffs knew that defendants had not supplied them with the financial information necessary to properly value the TWE units, and that they were entitled to that information. Yet they chose to cash out their interests and release defendants from fraud claims without demanding either access to the information or assurances as to its accuracy in the form of representations and warranties. In short, this is an instance where plaintiffs "have been so lax in protecting themselves that they cannot fairly ask for the law's protection" (*id.* at 154, 905 N.Y.S.2d 118, 931 N.E.2d 87).

[12] In certain circumstances, a fiduciary's disclosure obligations might effectively operate like a written representation that no material facts are undisclosed, and this might satisfy a principal's obligation to investigate further (see *id.* at 154-155, 905 N.Y.S.2d 118, 931 N.E.2d 87). Where a principal and fiduciary are sophisticated parties engaged in negotiations to terminate their relationship, however, the principal cannot blindly trust the fiduciary's assertions. This is particularly true where, as alleged here, the principal has actual knowledge that its fiduciary is not being entirely forthright: "[W]hen the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without making additional inquiry to

determine their accuracy" (*Global Mins.*, 35 A.D.3d at 100, 824 N.Y.S.2d 210 [citations omitted]; *see also Littman*, 54 A.D.3d at 17, 860 N.Y.S.2d 24 [if the fiduciary is "aware of information that rendered (its) reliance unreasonable, or if (it) had enough information to create a duty to investigate further, the requisite reliance cannot be established"]).

Plaintiffs repeatedly and unsuccessfully attempted to hold defendants to their disclosure obligations for years before negotiating and executing the sale of their shares and the accompanying releases. Moreover, the complaint alleges that plaintiffs were driven to sell because they were "wary of the threat that Defendants would never negotiate in good faith and would never distribute the Conecel profits." Plaintiffs therefore cannot be said to have reasonably relied on defendants' assertions regarding Conecel's performance in executing the releases.

***280** In sum, the 2003 Members Release was intended to bar the very claims that plaintiffs now bring, and plaintiffs fail to allege that the release was induced by any fraud beyond that contemplated by the ****1003** *****11** release. In any event, the fraudulent statements plaintiffs point to cannot support a conclusion that the release was fraudulently induced, since plaintiffs allege that they released defendants from claims relating to the sale of their TWE units without conducting even minimal diligence to determine the true value of what they were selling. The Appellate Division majority was therefore correct in concluding that, fully crediting plaintiffs' allegations, they would not be able to prevail as a matter of law.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge LIPPMAN and Judges GRAFFEO, READ, SMITH, PIGOTT and JONES concur.
Order affirmed, with costs.

Parallel Citations

17 N.Y.3d 269, 952 N.E.2d 995, 929 N.Y.S.2d 3, 2011 N.Y. Slip Op. 04720

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 40. Trial Generally (Refs & Annos)

McKinney's CPLR Rule 4016

Rule 4016. Opening and closing statements

Effective: August 17, 2004
Currentness

(a) Before any evidence is offered, an attorney for each plaintiff having a separate right, and an attorney for each defendant having a separate right, may make an opening statement. At the close of all the evidence on the issues tried, an attorney for each such party may make a closing statement in inverse order to opening statements.

(b) In any action to recover damages for personal injuries or wrongful death, the attorney for a party shall be permitted to make reference, during closing statement, to a specific dollar amount that the attorney believes to be appropriate compensation for any element of damage that is sought to be recovered in the action. In the event that an attorney makes such a reference in an action being tried by a jury, the court shall, upon the request of any party, during the court's instructions to the jury at the conclusion of all closing statements, instruct the jury that:

(1) the attorney's reference to such specific dollar amount is permitted as argument;

(2) the attorney's reference to a specific dollar amount is not evidence and should not be considered by the jury as evidence; and

(3) the determination of damages is solely for the jury to decide.

Credits
(Formerly § 4016, L.1962, c. 308. Redesignated Rule 4016, L.1962, c. 318, § 19. Amended L.2003, c. 694, § 2, eff. Nov. 27, 2003; L.2004, c. 372, § 1, eff. Aug. 17, 2004.)

<LAWS 1962, CHAPTER 308>

Editors' Notes

PRACTICE COMMENTARIES

By David D. Siegel

Rule 4016 carries over with no fundamental change the traditional trial practice on the right to open and close. The usual procedure is for the plaintiff to make the opening statement and to close (sum up) last, with the defendant opening second and at the other terminal summing up first. *See* CPLR 4016(a). When separate actions have been consolidated, the court usually adjusts the right to open and close by having the plaintiff in the first-commenced action

open first and close last, the plaintiff in the second-commenced action open second and close next-to-last, etc. *See* Siegel, New York Practice 4th Ed. § 128.

The right to open and close is based on who has the burden of proof, and for that reason usually goes to the plaintiff. But there can be variations on that theme. For a discussion of these and related issues concerning the right to open and close, see *id.*, § 395.

The right to open and close is most sensitive, and most coveted, in a trial by jury. It technically applies just as well when the trial is by the court or by a referee, but there is much less formality on that scene, especially in respect of the opening statement. Some judges, for example, familiar with the issues from a pretrial conference or an earlier motion in the case, may dispense with an opening statement altogether and direct the parties to get right on with their proof.

Whether a party in a personal injury or wrongful death case, where damages are often unliquidated and depend entirely on the jury's appraisal, could mention specific monetary sums to the jury was a disputed issue among the judges prior to 2003. The adoption of paragraph (b) in that year addresses and tries to resolve the matter.

The 2003 amendment designated the prior content of CPLR 4016 to be subdivision (a) and then added subdivision (b). The new subdivision explicitly allowed the parties in money actions to mention specific figures in both the opening and closing statements at the trial. As to the opening statement, the legislature changed its mind a year later and barred such mention, but retained permission for lawyers to cite amounts in closing statements.

The addition was part of the same bill that amended CPLR 3017(c) to prohibit inclusion of a monetary demand in the complaint in personal injury and wrongful death actions. So, while mention of the amount is now barred from the complaint in these actions, the CPLR 4016(b) amendment goes in the other direction and allows it to be mentioned in summations at the trial.

If the trial is by jury, and a figure has been suggested by a party, the court is required to instruct the jury--this is verbatim from CPLR 4016(b)--that

(1) the attorney's reference to such specific dollar amount is permitted as argument;

(2) the attorney's reference to a specific dollar amount is not evidence and should not be considered by the jury as evidence; and

(3) the determination of damages is solely for the jury to decide.

This is largely a codification of prior practice, or in any event a clarification. Insofar as the summation is concerned, the Court of Appeals made the point years ago in *Tate v. Colabello*, 58 N.Y.2d 84, 445 N.E.2d 1101, 459 N.Y.S.2d 422 (1983), that it is "counsel's privilege" to suggest to the jury the sum counsel believes appropriate as damages. (*See* Siegel, New York Practice 4th Ed. § 397.) The dimension temporarily added in 2003 but then withdrawn in 2004 was in allowing counsel to suggest figures in the opening statement as well.

LEGISLATIVE STUDIES AND REPORTS

The first and third sentences of rule 161 of the rules of civil practice are the source of this rule. In the original draft of this rule, the Revisers had inserted a sentence providing: "The court may vary the order or limit the time for statements." In their accompanying comment, they stated that the discretion granted to limit statements cannot be utilized to deprive a party of the right to make a statement. Lyman v. Fidelity & Casualty Co., 65 A.D. 27, 72 N.Y.S. 498 (1st Dep't 1901). As a matter of practice coparties with separate rights are permitted to make separate statements and this practice has been codified. It is contemplated

that the courts will follow the practice of permitting the party having the burden of proof to open first. However, in the final draft, the above mentioned sentence was omitted, and they remark that the court will retain whatever power it has. See rule 4011.

Official Reports to Legislature for this rule:

2nd Report Leg Doc. (1958) No. 13, p. 212.

5th Report Leg.Doc. (1961) No. 15, p. 517.

6th Report Leg.Doc. (1962) No. 8, p. 361.

Notes of Decisions (112)

McKinney's CPLR Rule 4016, NY CPLR Rule 4016
Current through L.2013, chapter 4.

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 41. Trial by a Jury (Refs & Annos)

McKinney's CPLR § 4101

§ 4101. Issues triable by a jury revealed before trial

Currentness

In the following actions, the issues of fact shall be tried by a jury unless a jury trial is waived or a reference is directed under section 4317, except that equitable defenses and equitable counterclaims shall be tried by the court:

1. an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only;

2. an action of ejectment; for dower; for waste; for abatement of and damages for a nuisance; to recover a chattel; or for determination of a claim to real property under article fifteen of the real property actions and proceedings law; and

3. any other action in which a party is entitled by the constitution or by express provision of law to a trial by jury.

Credits
(L.1962, c. 308.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by David D. Siegel

2010

When Judgment Debtor Owns Fund, Issue of Whether Fund Itself Owns Certain Property Is Jury Triable

The estate of P, murdered in a terrorist attack in Israel, got a federal default judgment against D, an entity claimed to have been acting for a Palestinian group. The judgment was what the court calls "domesticated" in New York, apparently meaning that it was converted into a New York judgment through the facile docketing procedure of CPLR 5018(b). Now P brought a declaratory action in New York to declare that assets held by a Swiss entity in New York are assets belonging to D, hoping, if successful, to apply those assets to the judgment.

We reported in SPR 202:4 the lower court opinion in the case, *Strachman v. Palestinian Authority*, which upheld P's demand for a jury trial of the ownership issue. The appellate division now affirms that determination in 73 A.D.3d 124, 901 N.Y.S.2d 582 (1st Dep't, March 30, 2010). We also noted it in the 2009 Supplementary Commentary C3001:17 on McKinney's CPLR 3001, the statute governing the declaratory judgment device.

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 41. Trial by a Jury (Refs & Annos)

McKinney's CPLR § 4110-b

§ 4110-b. Instructions to jury; objection

Currentness

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court, out of the hearing of the jury, shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Credits
(Added L.1973, c. 233, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

By David D. Siegel

Section 4110-b was added to the CPLR in 1973. It was modeled on Rule 51 of the Federal Rules of Civil Procedure and was designed to substitute (or at least to pave the way) for the federal procedures governing requests to charge.

Too often it happens that a party's attorney, although well prepared on the law he wants charged, did nothing about it until the judge had already drawn her charge and given it to the jury. Then, in front of the jury, a series of colloquies would begin between court and counsel in which the court would be asked to qualify part of its charge, or to add such-and-such charge, etc. Frequently counsel would at such time read a lengthy request to charge and upon its completion the court would merely say, "I so charge", and the jury, treated during all of this time almost as a bystander, would be expected to absorb this additional piece of jurisprudence as well.

The purpose of the amendment is to invite court and counsel to set up a little "session" among themselves, out of the hearing of the jury, perhaps even in chambers if no objection is made, in which each lawyer presents to the court, in writing, his requests to charge. The judge, advised of these positions in advance of formulating her charge, would be able to draw one cohesive charge that would also embody those portions of the requests to charge that the judge has sustained.

Carried out as intended, the procedure would in most instances obviate the post-charge requests, in which the jury's understanding is often lost in the colloquy and in which the judge is compelled to rule spontaneously on additional points that she may or may not have prepared.

The new section is ideal, but what it contemplates may prove a bit too idealistic for what the courts in some parts of the state, in view of calendar congestion, are capable of doing without falling still further behind. Ideal would be the word if counsel, early in the trial and perhaps even at the very beginning of it, were to furnish the court and each other with trial memos. This would embody the principles of law applicable to the case, as each party viewed them. If pretrial disclosure has been fully exploited, enabling each party to know what aggregate of proof is likely to appear at the trial, it would not be too early even at the trial's outset to submit requests to charge.

Whatever the burden to a side in having to undertake this, it would often be offset by the advantage of having the other side do it in return. It can avoid the occasional embarrassment of a summation built around a legal assumption the judge may shortly reject in her charge to the jury.

May the lawyer who has made no request to charge object to a portion of it? He may. CPLR 4110-b says that counsel "may" make a request to charge, not that he must. The lawyer who does not make it should still be permitted to object to the court's charge in whole or in part. The only requirement here is that the lawyer make his objections known to the court before the jury retires.

It has been held that CPLR 4110-b does not prevent the court from considering objections to the charge notwithstanding that they were not timely made below; that if the error in the charge can be regarded as "fundamental", the appellate court can in its discretion review it despite the absence of an objection in the trial court. *See DiGrazia v. Castronova*, 48 A.D.2d 249, 368 N.Y.S.2d 898 (4th Dept., 1975).

It is of course unwise to depend on that kind of judicial indulgence. Any error an attorney perceives in the charge should be excepted to, promptly and clearly and on the record. It does the lawyer no harm, especially the lawyer about to litigate in a court or county she is not familiar with, to ask about local practice on CPLR 4110-b. And best yet, to secure as early as possible the trial judge's preferences in the particular case. An inquiry like that can be made at a pretrial conference, or perhaps just by a letter sent to the judge with a copy to the other side. The judge may want CPLR 4110-b strictly adhered to only if the case is complex, or otherwise likely to last a long time. It may be best just to let the judge decide.

Notes of Decisions (313)

McKinney's CPLR § 4110-b, NY CPLR § 4110-b
Current through L.2013, chapter 4.

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 41. Trial by a Jury (Refs & Annos)

McKinney's CPLR Rule 4111

Rule 4111. General and special verdicts and written interrogatories

Effective: November 12, 2009
Currentness

(a) General and special verdict defined. The court may direct the jury to find either a general verdict or a special verdict. A general verdict is one in which the jury finds in favor of one or more parties. A special verdict is one in which the jury finds the facts only, leaving the court to determine which party is entitled to judgment thereon.

(b) Special verdict. When the court requires a jury to return a special verdict, the court shall submit to the jury written questions susceptible of brief answer or written forms of the several findings which might properly be made or it shall use any other appropriate method of submitting the issues and requiring written findings thereon. The court shall give sufficient instruction to enable the jury to make its findings upon each issue. If the court omits any issue of fact raised by the pleadings or evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without demand, the court may make an express finding or shall be deemed to have made a finding in accordance with the judgment.

(c) General verdict accompanied by answers to interrogatories. When the court requires the jury to return a general verdict, it may also require written answers to written interrogatories submitted to the jury upon one or more issues of fact. The court shall give sufficient instruction to enable the jury to render a general verdict and to answer the interrogatories. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court shall direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or it shall require the jury to further consider its answers and verdict or it shall order a new trial. When the answers are inconsistent with each other and one or more is inconsistent with the general verdict, the court shall require the jury to further consider its answers and verdict or it shall order a new trial.

(d) Itemized verdict in medical, dental, or podiatric malpractice actions. In all actions seeking damages for medical, dental, or podiatric malpractice, or damages for wrongful death as a result of medical, dental, or podiatric malpractice, the court shall instruct the jury that if the jury finds a verdict awarding damages it shall in its verdict specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element, including but not limited to medical expenses, dental expenses, podiatric expenses, loss of earnings, impairment of earning ability, and pain and suffering. In all such actions, each element shall be further itemized into amounts intended to compensate for damages which have been incurred prior to the verdict and amounts intended to compensate for damages to be incurred in the future. In itemizing amounts intended to compensate for future wrongful death damages, future loss of services, and future loss of consortium, the jury shall return the total amount of damages for each such item. In itemizing amounts intended to compensate for future pain and suffering, the jury shall return the total amounts of damages for future pain and suffering and shall set forth the period of years over which such amounts are intended to provide compensation. In itemizing amounts intended to compensate for future economic and pecuniary damages other than in wrongful death actions, the jury shall set forth as to each item of damage, (i) the annual amount in current dollars, (ii) the period of years for which such compensation is applicable and the date of commencement for that item of damage, (iii) the growth rate applicable for the period of years for the item of damage, and (iv)

a finding of whether the loss or item of damage is permanent. Where the needs change in the future for a particular item of damage, that change shall be submitted to the jury as a separate item of damage commencing at that time. In all such actions other than wrongful death actions, the jury shall be instructed that the findings it makes with reference to future economic damages, shall be used by the court to determine future damages which are payable to the plaintiff over time.

(e) Itemized verdict in certain actions. In an action brought to recover damages for personal injury, injury to property or wrongful death, which is not subject to subdivision (d) of this rule, the court shall instruct the jury that if the jury finds a verdict awarding damages, it shall in its verdict specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element including, but not limited to, medical expenses, dental expenses, loss of earnings, impairment of earning ability, and pain and suffering. Each element shall be further itemized into amounts intended to compensate for damages that have been incurred prior to the verdict and amounts intended to compensate for damages to be incurred in the future. In itemizing amounts intended to compensate for future damages, the jury shall set forth the period of years over which such amounts are intended to provide compensation. In actions in which article fifty-A or fifty-B of this chapter applies, in computing said damages, the jury shall be instructed to award the full amount of future damages, as calculated, without reduction to present value.

(f) Relettered (e) by L.2009, c. 494, § 5, eff. Nov. 12, 2009.

Credits

(L.1962, c. 308. Amended L.1976, c. 955, § 8; L.1984, c. 701, § 3; L.1985, c. 294, § 6; L.1985, c. 760, § 5; L.1986, c. 485, § 7; L.1986, c. 682, § 7; L.1994, c. 100, § 5; L.2003, c. 86, § 1, eff. July 26, 2003; L.2009, c. 494, pt. F, §§ 4, 5, eff. Nov. 12, 2009.)

<LAWS 1962, CHAPTER 308>

Editors' Notes

PRACTICE COMMENTARIES

By David D. Siegel

CPLR 4111 allows for three different categories of return from the jury: the general verdict, the special verdict (subdivision [b]), and the combination of them, described as a general verdict accompanied by answers to interrogatories (subdivision [c]).

The general verdict is the one in which the jury merely finds for one party or the other, including a sum of money if it's a verdict for the plaintiff on a money claim. The special verdict is not a finding for either party, but a list of questions that the jury answers, with the court determining who has judgment based on the answers.

The third category--the general verdict accompanied by interrogatories--combines the two by eliciting a general verdict from the jury along with the answers to specific questions. The answers are expected to be consistent with the general verdict. If they aren't, the court may direct judgment in accordance with the answers, subordinating the general verdict accordingly, or it may either direct the jury to reconsider the verdict and the answers, or it may order a new trial. The choice is the court's. The new trial would not be the preferred route unless the jury is in essence deadlocked, and unable to resolve the inconsistencies, or it has already been discharged.

The alternative of the judge's merely allowing the answers to prevail over the general verdict is not offered when there is an inconsistency among the answers themselves as well as between the verdict and one of the answers.

The Court of Appeals has said that the practice of submitting questions to the jury rather than relying exclusively on a general verdict is "a technique especially well suited to cases with multiple parties and legal theories". *Marine Midland Bank v. John E. Russo Produce Co., Inc.*, 50 N.Y.2d 31, 405 N.E.2d 205, 427 N.Y.S.2d 961 (1980). Whether it involves only the special verdict, or the general verdict accompanied by interrogatories, which is a combination of the general and special verdicts, the eliciting of specific answers offers a much clearer picture of the jury's deliberations. It also enables an appellate court to make a wider variety of adjustments without having to resort to the otherwise wasteful alternative of a new trial.

Which form of verdict to use is of course up to the court, but for the foregoing reasons, and because of several developments in recent years in the tort cases that occupy so much of the courts' calendars today--mainly the personal injury and wrongful death claims--the appellate divisions have expressed a preference for the use of the special verdict by the trial courts. *See, e.g, Corbett v. Brown*, 32 A.D.2d 27, 32, 299 N.Y.S.2d 219, 224 (3 Dept., 1969).

One of these developments is the evolution of additional theories to support the tort recovery. The negligence theory, which at one time stood alone, is today often accompanied by the additional theories of warranty and strict products liability, especially when a product has some causative role. Sometimes statutory liability is an added ground. Because those theories are not identical in their elements, a detailed set of findings helps determine whether the jury has found the elements requisite to a given theory.

Other developments expanding the use of the special verdict are the Court of Appeals landmark 1972 decision in *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), allowing the apportionment of responsibility among tortfeasors for contribution purposes (see Siegel, New York Practice 4th Ed. §§ 170-172); the codification of *Dole* in Article 14 of the CPLR two years later; the adoption in 1975 of Article 14-A of the rule of comparative negligence to replace the contributory negligence rule (*id.*, § 168E); and the enactment in 1986 of Article 16, partially abating the rigid rule of "joint" liability among tortfeasors (*id.*, §§ 168A-168D). All of these things require the jury to make far more detailed findings than were necessary in the simpler tort world of years ago, and with that the special verdict has come into its own.

A further contributor on that front was the adoption of the so-called "collateral source" rule, now embodied in CPLR 4545. It credits defendants with certain payments that plaintiffs may have received towards their injuries from outside sources. Subdivisions (d), (e), and (f) in CPLR 4111 itself are coordinates of CPLR 4545. In their requirement of the itemization of damages, they call in essence for a special verdict on damages even if a special verdict has not been called for on the issue of liability. Articles 50-A and 50-B, providing for a periodic payment rather than a lump-sum payment of projected future damages--this is sometimes called a "structured settlement" or "structured judgment"--are yet other things that may make a special verdict necessary for implementation.

Even items of older vintage are helped by the special verdict. An example is the doctrine of collateral estoppel (issue preclusion). By clarifying the jury's findings, it can facilitate their dispositive application to common issues in other actions.

There are some well known categories of defective verdict. (*See* Siegel, *id.*, § 401.) One of them is the so-called "compromise" verdict, which can be discerned as such merely be looking at the verdict in light of the evidence. Compromise verdicts appear infrequently today. They were seen more often when New York followed the contributory negligence rule, under which any negligence at all on the part of the plaintiff would destroy the case entirely. (The contributory negligence rule was replaced by the comparative negligence rule, CPLR Article 14-A, as of September 1, 1975.)

A compromise verdict under the pre-1975 rule would sometimes appear in a tort action involving extensive injuries (and hence damages) but doubtful liability. A verdict for the plaintiff in a grossly inadequate sum would manifest that the jury was sympathetic to the plaintiff but did not really find the defendant at fault, "compromising" its verdict by faulting the defendant but underassessing the damages. Such a verdict could not stand.

The comparative negligence rule, under which the plaintiff with a share of fault is allowed to recover but with damages reduced by that share, validates that kind of verdict today and removes it from the tainted "compromise" category. Hence the compromise verdict is a relative rarity today, but does put in an appearance from time to time, such as in *Guarneros v. Green 286 Madison, LLC*, 6 Misc.3d 704, 791 N.Y.S.2d 332 (Sup. Ct., Bronx Co., 2004).

The case involved a worker's fall from a 16-foot high "sidewalk" bridge. The plaintiff said his foot caught in a loose board. The defendant/owner's witnesses said the accident was the plaintiff's own fault because he was awkwardly seeking to look at a building clock at the time. The jury made a modest award for past pain and suffering but none for future pain and suffering. At the same time, however, it made a vast award for both past and future medical expenses. To the court, this showed an "impermissible compromise" on liability and damages, necessitating a retrial of everything (not just the damages element, as the plaintiff argued).

There is no mention in the case of the comparative negligence rule, apparently because in the court's view it couldn't explain away the verdict. Perhaps the factor that sidestepped the rule is that the total damages were not collectively reduced--as might be compatible with a comparative fault finding--but instead separated into different elements with what the court felt to be an inexplicable discrepancy between them.

Implicit in the court's *Guarneros* decision is the premise that when medical expenses are great, pain and suffering must be concomitantly great. Perhaps that's okay as a general proposition, but the door is likely to be kept open to exceptions in exceptional cases.

(For further discussion of the verdict, see Siegel, *id.* § 399.)

LEGISLATIVE STUDIES AND REPORTS

This rule, which replaces §§ 458 and 459 of the civil practice act, is adapted from rule 49 of the Federal Rules of Civil Procedure, 28 U.S.C.A. It is stated by the Revisers in the Second Report to the Legislature that while this rule retains the basic provisions of New York law with respect to general and special verdicts, it makes some minor changes.

They further comment that to avoid the confusion in terminology between "special verdicts" (facts found by the jury to be used as a basis for judgment by the court) and "special findings" (facts found by the jury in support of a general verdict), the term "special" is restricted to special verdicts and the term "answers to written interrogatories" is used for findings in support of a general verdict.

The requirement that a special verdict must find all the facts necessary to judgment has been the major difficulty in the use of special verdicts. Under this rule, the inadvertent omission of a material issue of fact from the special verdict can invalidate a jury trial. See Fromer v. Glamour-Wear Mfg. Co., 276 A.D. 420, 95 N.Y.S.2d 302 (1st Dep't 1950); Coulter v. Pomeroy, 265 A.D. 51, 38 N.Y.S.2d 22 (3d Dep't 1942); Manning v. Monaghan, 23 N.Y. 539 (1861). In order to eliminate this difficulty, this rule provides that if the court omits any issue of fact in submitting the issues to the jury each party waives his right to a jury trial of the omitted issue unless, before the jury retires, he demands its submission to the jury. As to an issue omitted without such demand, the rule further provides that the court may make a finding or, if it fails to do so, it shall be deemed to have made a finding in accordance with the judgment.

It is also said that where the answer to a written interrogatory is inconsistent with the general verdict, C.P.A. § 459 provides that the court must give judgment based on the answer to the written interrogatory. Under this rule, the court is given the additional options of directing the jury to further consider its answers or of ordering a new trial. Moreover, the court's power to direct the entry of judgment based on the answer to a written interrogatory which is inconsistent with the general verdict is restricted to the situation where the answers to all the written interrogatories submitted to the jury are consistent with each other.

Rule 4112 covers the provision in § 459 of the civil practice act requiring the special verdict or special finding to be filed with the clerk and entered in the minutes.

Official Reports to Legislature for this rule:

2nd Report Leg.Doc. (1958) No. 13, p. 233.

5th Report Leg.Doc. (1961) No. 15, p. 528.

6th Report Leg.Doc. (1962) No. 8, p. 371.

Notes of Decisions (286)

McKinney's CPLR Rule 4111, NY CPLR Rule 4111
Current through L.2013, chapter 6.

End of Document

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Chapter Eight. Of the Consolidated Laws
Article 42. Trial by the Court (Refs & Annos)

McKinney's CPLR Rule 4211

Rule 4211. Issues to be decided by the court

Currentness

The court shall decide any issue not required to be tried by a jury unless it is referred to a referee to determine pursuant to section 4317.

Credits
(L.1962, c. 308. Amended Jud.Conf.1968 Proposal No. 1.)

Editors' Notes

PRACTICE COMMENTARIES

By David D. Siegel

In a trial by jury when the jury is present as of right, the jury of course decides all the facts. In the absence of a jury, the judge decides the facts. The only other permissible trier of the facts besides a judge is a referee to determine. A mere referee to report does not decide the facts, but reports her findings to the judge. It is then the judge who must make the ultimate findings and decision, accepting or rejecting the report. The same is true of an advisory jury if one has been used: the verdict is advisory only and the court can take it or leave it.

LEGISLATIVE STUDIES AND REPORTS

The Revisers comment in the Second Report to the Legislature that this rule integrates § 427 of the civil practice act, requiring trial by the court where the parties are not entitled to trial by jury, and § 428 of the civil practice act, requiring trial by the court where the right to jury trial has been waived. A reference is permitted by both sections. However, only § 427 permits issues to be submitted to an advisory jury. See C.P.A. § 430. Under rule 4212 a jury may be utilized in either type of case. See notes to rule 4212.

It is further said that the committee considered omitting this rule as unnecessary because the law is clear that determination by the court is required unless jury trial or a reference to determine is obtained pursuant to statute or rule. Vincent v. Cooperman, 283 A.D. 812, 128 N.Y.S.2d 634 (2d Dep't 1954); S. Klein, Inc. v. New Deal Bldg. Corp., 171 Misc. 1058, 14 N.Y.S.2d 323 (Sup.Ct.1939). However, it was decided to include the rule to preclude an inference that the law was changed.

To indicate that a trial pursuant to rule 4212 is included, the Revisers used the word "decide" instead of "tried."

Official Reports to Legislature for this rule:

2nd Report Leg.Doc. (1958) No. 13, p. 239.

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Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 44. Trial Motions (Refs & Annos)

McKinney's CPLR Rule 4401

Rule 4401. Motion for judgment during trial

Currentness

Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties.

Credits
(L.1962, c. 308. Amended L.1962, c. 315, § 1.)

<LAWS 1962, CHAPTER 308>

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by David D. Siegel

2012

C4401:5. Time for Motion for "Directed Verdict".

Directed Verdict for P Must Await Conclusion of D's Case Even If It's "Improbable" That D Can Prevail

The appellate division repeated an important lesson on CPLR 4401 recently in *Griffin v. Clinton Green South, LLC.*,... A.D.3d..., 948 N.Y.S.2d 8 (1st Dep't, June 14, 2012). The statute says that a motion for judgment (i.e., a directed verdict) may not be made by a party until "after the close of the evidence presented by an opposing party", except based on admissions. There were no such admissions in *Griffin*, so the rule stood bare and got a strict interpretation.

Plaintiff was seriously hurt at a construction site while dismantling a scaffold. He based his personal injury claim on several counts against the contractors, including one based on Labor Law § 240(1), a statute commonly known, in fact, as the "scaffold law". That's the only count of concern here.

After plaintiff concluded his case, he moved for judgment on the § 240(1) claim. The trial court granted it even though the defendant had not even started (much less completed) its defense. In a unanimous opinion by Justice Roman, the court holds this to be error, reverses, and remands for a new trial.

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McKinney's CPLR Rule 4402

Rule 4402. Motion for continuance or new trial during trial

Currentness

At any time during the trial, the court, on motion of any party, may order a continuance or a new trial in the interest of justice on such terms as may be just.

Credits
(L.1962, c. 308. Amended L.1962, c. 315, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

By David D. Siegel

CPLR 4402 has the wordy caption of "motion for continuance or new trial during trial", but it's best known to the bar as the "mistrial" motion. It's a device to abort a trial in order to start a new trial before a new jury, or perhaps just continue the trial at a later time before the same jury. It used to be known as a motion "to withdraw a juror", see *Schultze v. Huttlinger*, 150 A.D. 489, 135 N.Y.S. 70 (1st Dept., 1912), which resulted in an incomplete jury and a breakdown of the trial by that method. The technicians of the common law, with their devotion to form and their love of fictions, found it a good way to remedy certain prejudicial defects in the course of a trial by jury. The "mistrial" motion is still its popular name today, especially when the trial aborts entirely and a new jury has to be impanelled.

An alternative to aborting the trial altogether is to postpone it ("order a discontinuance" in the phraseology of CPLR 4402), an alternative that the court would use when the defect is curable with reasonable expedition, such as when a key witness has not appeared in time, or some surprise element has arisen at the trial and a party needs some time to secure evidence to meet it. A refusal to order an adjournment when an adjournment is reasonable may invite a rebuke by the appellate court, as occurred in *Murphy v. City of New York*, 273 A.D. 492, 78 N.Y.S.2d 191 (1st Dept., 1948), where the judge would not wait half an hour for the imminent arrival of medical experts.

It has been held that even an adjournment of several weeks may be appropriate in order secure the testimony of a key witness. *See Bruce v. Hospital for Special Surgery*, 34 A.D.2d 963, 312 N.Y.S.2d 765 (2d Dept., 1970).

A side that deems itself prejudiced by some conduct during the trial should move for a mistrial promptly upon learning of it. It can't hold the datum as a trump card, speculating on a favorable verdict and then moving the mistrial only if the jury doesn't oblige. *Schein v. Chest Service Co.*, 38 A.D.2d 929, 330 N.Y.S.2d 147 (1st Dept., 1972).

When misconduct of some kind is the basis for the objection, a mere continuance will not offer a cure and there may be no choice but to terminate the trial and start a new one. The misconduct that can necessitate a new trial need

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McKinney's CPLR Rule 4403

Rule 4403. Motion for new trial or to confirm or reject or grant other relief after reference to report or verdict of advisory jury

Currentness

Upon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, the verdict of an advisory jury or the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing. The motion shall be made within fifteen days after the verdict or the filing of the report and prior to further trial in the action. Where no issues remain to be tried the court shall render decision directing judgment in the action.

Credits
(Formerly § 4403, L.1962, c. 308. Redesignated Rule 4403, L.1962, c. 315, § 1.)

<LAWS 1962, CHAPTER 308>

Editors' Notes

PRACTICE COMMENTARIES

By David D. Siegel

The verdict of an advisory jury and the report and recommendation of a referee to report (as opposed to a referee to determine) are not binding on the court. The court can of course accept the verdict or recommendation, but under CPLR 4403 the court can instead reject it and make new findings. As a further option, the court can take testimony over or take new testimony altogether, or it can order a new trial or hearing.

All of these alternatives are available to the court. Whichever of them a party seeks--confirm, reject, modify, rehear, retry, etc.--the party is given 15 days in which to move for the relief, measured from the rendition of the advisory verdict or the filing of the referee's report.

It is the court's duty to decide the case. Unless the court decides on a new hearing or trial, in which case a final decision by the court must of course abide the event, the court is required by CPLR 4213(c) to render its decision within 60 days after the CPLR 4403 motion. CPLR 4213(c) doesn't say whether it means to measure the 60 days from the making of the motion, or from its submission, but the point is really academic. As pointed out in the Commentary on CPLR 4213, the 60 days is merely precatory. The passing of the period does not divest the court of its jurisdiction to make the decision, and a decision made late is therefore a valid one.

LEGISLATIVE STUDIES AND REPORTS

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McKinney's CPLR Rule 4404

Rule 4404. Post-trial motion for judgment and new trial

Currentness

(a) Motion after trial where jury required. After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

(b) Motion after trial where jury not required. After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue.

Credits
(Formerly § 4404, L.1962, c. 308. Redesignated Rule 4404, L.1962, c. 315, § 1.)

<LAWS 1962, CHAPTER 308>

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by David D. Siegel

2010

C4404:4. Additur and Remittitur.

Court of Appeals Changes Course and Holds That Party Stipulating to Altered Damages Does *Not* Forfeit Right to Appeal on Liability

This concerns the devices of additur and remittitur, in which the court orders a new trial on the issue of damages unless the plaintiff stipulates to accept a court-set lower figure (remittitur) or the defendant agrees to accept a court-set higher figure (additur). (See Siegel, New York Practice 4th Ed. § 407.) The acceptance of the stipulation bars the stipulator from appealing the damages issue. But what about the liability finding? Does the party who stipulates to the altered damages also forfeit the right to appeal on the issue of liability?

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 44. Trial Motions (Refs & Annos)

McKinney's CPLR Rule 4406

Rule 4406. Single post-trial motion

Currentness

In addition to motions made orally immediately after decision, verdict or discharge of the jury, there shall be only one motion under this article with respect to any decision by a court, or to a verdict on issues triable of right by a jury; and each party shall raise by the motion or by demand under rule 2215 every ground for post-trial relief then available to him.

Credits
(Formerly § 4406, L.1962, c. 308. Redesignated Rule 4406, L.1962, c. 315, § 1.)

<LAWS 1962, CHAPTER 308>

Editors' Notes

PRACTICE COMMENTARIES

By David D. Siegel

There are several grounds listed under CPLR 4404 for a post-trial motion, but only one such motion is allowed. Hence a party bent on any motion under CPLR 4404 should see to it that all possible grounds are joined. The loser on the verdict, for example, may move for judgment n.o.v., or, in the alternative if judgment n.o.v. is denied, for a new trial on the ground that the verdict is contrary to the weight of the evidence.

If a motion is made by any party for any CPLR 4404 relief, and any other party would also raise a CPLR 4404 ground, that party must do so by the expedient of a cross-motion under CPLR 2215. This is designed to assure that the court will have to consider only one CPLR 4404 motion, and that all possible grounds urged by all interested parties will be there together.

The contemplation of CPLR 4404-4406 is of a formal, written motion. Allowable "in addition" are the oral motions made immediately after the verdict or decision. In many if not most cases, of course, the oral motions are the only ones used. If a written one is used, however, the restrictions of CPLR 4405 and 4406 must be observed.

LEGISLATIVE STUDIES AND REPORTS

This rule has no counterpart in the civil practice act or in the rules of civil practice. The Revisers comment in the Second Report to the Legislature that it contemplates a single post-trial review of the verdict or decision in which the court has the opportunity to hear and consider all arguments for relief at once. Under the civil practice act, a motion for judgment notwithstanding the verdict under subd. 3 of § 457-a may be made independently of a motion for new trial under § 549. Successive motions for new

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 50. Judgments Generally (Refs & Annos)

McKinney's CPLR § 5001

§ 5001. Interest to verdict, report or decision

Currentness

(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

(b) Date from which computed. Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.

(c) Specifying date; computing interest. The date from which interest is to be computed shall be specified in the verdict, report or decision. If a jury is discharged without specifying the date, the court upon motion shall fix the date, except that where the date is certain and not in dispute, the date may be fixed by the clerk of the court upon affidavit. The amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded.

Credits
(L.1962, c. 308. Amended L.1992, c. 55, § 71.)

<LAWS 1962, CHAPTER 308>

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

By David D. Siegel

2008

C5001:1 Interest on Litigated Obligations, Generally.

Court of Appeals Holds That in Interpleader Context, Winning Claimant Has No Right to Interest from Loser

Interest on a money claim is so routinely awarded and infrequently disputed that the applicable statute, CPLR 5001(a), rarely gets a probing visit from the courts. It gets a big visit from the Court of Appeals in *Manufacturer's & Traders Trust Co. v. Reliance Ins. Co.*, 8 N.Y.3d 583, 838 N.Y.S.2d 806 (May 3, 2007), in an interpleader action.

The stakeholder/plaintiff was a bank (B) in which G, the general contractor on a major building project, deposited some $5.3 million in escrow after a dispute broke out that also involved S, a subcontractor, and SS, the subcontractor's subcontractor, and others. The deposit was made by G as an assurance to the subcontractors that they would be paid, this done in order to keep the project moving.

The dispute that led to the interpleader arose after the escrow funds were reduced to $2.4 million. Conflicting claims were made to the money by S and SS; and G, the original depositor, claimed that it was itself entitled to get the balance back. Not sure of who was due the money, B resorted to the traditional device used by one in that position: an interpleader action against all of the claimants.

The plaintiff stakeholder, not sure of whom to pay and of course concerned with a possible double liability if it should pay the wrong one, deposits the money into court and asks the court to let it out of the action, leaving the conflicting claimants to fight it out. B did that, and was discharged of any further liability, the money to go to whichever of the claimants the court should ultimately find entitled to it. That turned out to be G itself, and the court ordered the money to be paid to G.

Because the money had lain in escrow for several years, G also wanted interest on it from the subcontractors. Deeming G's judgment the equivalent of just another money claim in favor of a litigation winner, the lower courts allowed the interest. On that point, however, the Court of Appeals reverses. Citing its 2005 *Bello* decision (see New York State Law Digest No. 550), the court explains that interest awards are "purely a creature of statute".

Taking a closer look at CPLR 5001(a), the court finds in none of it any basis for allowing G interest on the present facts. The general rule of law the court pronounces is in the statement with which the opinion opens: "CPLR 5001(a) does not authorize an award of interest against unsuccessful claimants in an interpleader action".

Sifting these several bases on which CPLR 5001(a) allows interest, the court's resolution of each of them against the winning claimant produces a significant parsing of the statute.

With our own numbering of its several provisions for convenience, CPLR 5001(a) reads that "[i]nterest shall be recovered upon a sum awarded

[1] because of a breach of performance of a contract, or

[2] because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that

[3] in an action of an equitable nature, interest ... shall be in the court's discretion."

The court finds interest barred in this case at the statute's very outset, in the phrase "sum awarded".

In the context of interpleader, all claimants align as defendants and no sum is "awarded" against those who lose. They just don't collect the disputed money: the plaintiff stakeholder, or the court in which the money was deposited, simply pays the money over to the winner. The phrase "upon a sum awarded", as the court sees it, implies "that the interest must be paid by the party *against whom* the sum was awarded", and no sum was awarded "against" the losing co-claimants. The court asserts that

[t]he purpose of interest is to require a person who owes money to pay compensation for the advantage received from the use of that money over a period of time.

Here the money was held by the clerk of the court, not the losing co-claimants. Awarding interest against them "would be to penalize them for a delay that brought them no benefit", and, quotes the court from its 1991 *Love* decision, "interest is not a penalty". (If it were, then an interest award against the losing co-claimants might be justified on the ground that the very assertion of their claims wrongfully deprived the ultimate winner of the money.)

And anyway, if there is any fault, it's "the inexplicable failure by all concerned to arrange for the payment of a meaningful interest rate on the escrowed money", explains the court. In that suggestion lies the main lesson of the *Manufacturer's* case.

G made arguments based on all three of the listed CPLR 5001(a) categories. It maintained that the escrow was a by-product of the losers' breach of contract under [1], or in any event that their acts interfered with G's "possession or enjoyment" of property under [2]. The arguments were by no means off the wall, and in fact convinced both the trial court and the appellate division. They didn't convince the Court of Appeals, however.

Perhaps G's most hopeful basis for interest was item 3 on the list, dealing with equity actions. If the claim sounds in equity, the court can take note of everything about the situation and decide for itself, sui generis, whether to award interest. The court recognizes that interpleader is indeed an equitable remedy, but it indicates that the statute's initial "upon a sum awarded" phrase must be read as applying to the equity category as well.

So, before G finally got the money, it lay on deposit with an escrow agent and then with the court. Didn't it draw interest of any kind while so located? Did the escrow bank itself, directly or indirectly, enjoy interest on the money? Or did the court? Did the entity--bank or court--that held the money derive any benefit from it at all during the time held? If it did, is it a benefit that G would be entitled to share? Perhaps these issues, not before the court in *Manufacturer's*, will be resolved in some future case. Small consolation to the winning claimant in this one, however; it gets no interest.

The major lesson of the case is that those escrowing money or depositing it into court should insofar as possible discuss and resolve in advance any issues about interest. (Even court-deposited money does not necessarily lie dormant. See CPLR 2601.)

PRACTICE COMMENTARIES

By David D. Siegel

C5001:1 Interest on Litigated Obligations, Generally.

C5001:2 Interest on Claim Until Verdict or Decision.

C5001:3 Need to Itemize Damages.

C5001:4 Point from Which Interest Computed.

C5001:5 Fixing Dates and Making Computations.

C5001:6 Waiving Interest by Failing to Seek It at Trial.

C5001:1 Interest on Litigated Obligations, Generally.

The CPLR provides three distinct periods for interest on money obligations. The first, governed by CPLR 5001, is interest on the cause of action from the time it accrues until the time of verdict or decision. The second, governed by CPLR 5002, is interest on the verdict or decision until judgment is entered on it. And the third, governed by CPLR 5003, is interest on the judgment until it is paid. The rate of interest is the subject of CPLR 5004.

Interest in the second and third categories attaches uniformly to all money obligations once reduced to verdict or judgment, including money awards incidental to equitable relief. Those categories are considered in the Commentaries on CPLR 5002 and 5003. In the present Commentary we consider category one, governed by CPLR 5001, where there are exceptions to note and special points to consider.

C5001:2 Interest on Claim Until Verdict or Decision.

Under subdivision (a) of CPLR 5001, generally speaking, interest on a money claim up to the time it is reduced to the verdict of a jury or the decision of the court (in a court-tried case) is uniformly treated in contract and property damage cases without distinction. But a distinction is made between law actions and equity actions. Where the contract or property damage case is brought at law, interest is recoverable as a matter of right. Where it is brought in equity, both the awarding of interest, which would otherwise be governed by CPLR 5001, as well as the rate of interest, which would otherwise be governed by CPLR 5004, are in the discretion of the court.

Two important exceptions, in which interest is not awarded at all under CPLR 5001, are the personal injury and punitive damage claims.

The exception for punitive damages recognizes that interest is designed to compensate for the loss of the use of money. Almost all money awards in litigation are compensatory and therefore earn interest. A punitive award, on the other hand, is designed not to compensate the plaintiff, but to punish the defendant so as to deter similar conduct in the future. Hence, no interest is due until the plaintiff is entitled to the money, and the plaintiff is not entitled to the punitive money until the verdict (or decision) itself awards it. That's why punitive damages does carry interest in the post-verdict categories of CPLR 5002 and 5003, but not in the pre-verdict category of CPLR 5001.

The personal injury exception has no similar logic to back it up, because the personal injury award does have the usual compensatory function. Denying the personal injury claim interest under CPLR 5001(a) is enmeshed with politics as much as policy. The drafters cited "difficult policy considerations". The official reason cited is that the award often includes future damages, and it would be windfall, not compensation, to offer interest from the time of a prior event on damages that won't even be sustained until some future time. That can be readily cured, however, by having the jury itemize damages, which it has to do today for a variety of reasons. *See* CPLR 4111 and the Commentary on it. Unofficial but more powerful reasons for continuing the personal injury exception are that personal injury verdicts are felt in some quarters to be too high, and the insurance lobby too powerful. Compromise proposals are seen annually in the legislature, which proposals would allow interest on the personal injury claim from some later pre-verdict moment, like the commencement of the action or the filing of the note of issue. These, too, have gotten nowhere, at least as of the present writing.

A personal injury claim may be predicated on a breach of warranty instead of, or in addition to, negligence or strict products liability. There was a conflict for a while about whether a warranty-based personal injury claim, since warranty is a form of contract, could bear interest from accrual until verdict. The Court of Appeals resolved the conflict in 1968 by holding that not even warranty would support interest on a personal injury claim. *See Gillespie*

v. Great Atlantic & Pacific Tea Co., 21 N.Y.2d 823, 21 N.Y.2d 823, 288 N.Y.S.2d 907 (1968), affirming 26 A.D.2d 953, 276 N.Y.S.2d 372 (2d Dept., 1966).

These restrictions concern only the period from the accrual of the cause of action to the time of verdict or decision. Once verdict or decision is reached, of course, CPLR 5002 governs and allows interest from that moment on.

Whether to allow interest under CPLR 5001 on a quantum meruit claim, or on a treble damages claim, has been addressed by some cases. For convenience of reference, these are treated under separate captions, below.

Interest on Quantum Meruit Claim Denied Because of Delay in Pursuing Claim, Although Claim Itself Is Sustained

As already noted, all actions for money seeking in essence to recover for property loss--as opposed to personal injury--whether sounding in contract or in tort, get interest as a matter of right for the pre-verdict (or pre-decision) period under CPLR 5001. This is so if the action is one at law, in any event, which means that it is so in most categories of money actions, almost all of which sound at law. Also as already noted, if the money demand is incidental to an equitable claim, whether to allow interest at all under CPLR 5001 is left to the court's discretion.

The question arises whether a quantum meruit claim is a legal one or an equitable one for this purpose. Reviewing the contents of a quantum meruit claim substantively, the Third Department in *Precision Foundations v. Ives*, 4 A.D.3d 589, 772 N.Y.S.2d 116 (2004), holds implicitly that it's a claim in equity. Whether to award interest on it is therefore subject to the court's discretion, says *Precision*, and, on an exercise of discretion on the facts, the court denied the interest.

The action itself was a money action, brought some four years after the plaintiff rendered the services for which he was seeking to be compensated. If the claim was in the traditional sense an equitable one, however, the claim itself would presumably have been subject to the defense of the laches doctrine. The court does not appear to have entertained laches with respect to the claim itself, however, and whether it was brought too late under the laches doctrine. It sustained the claim, applying the laches defense only with respect to the interest.

Pre-Verdict Interest Allowed on Treble Damages

One of the claims that does not get category 1 interest under CPLR 5001(a) is the claim for punitive damages. Does a treble damages award qualify as punitive for this purpose? A federal district court, applying New York law in *H & P Research, Inc. v. Liza Realty Corp.*, 943 F.Supp. 328 (S.D.N.Y., 1996), thinks not. It held that prejudgment interest in the CPLR 5001 category does apply to a treble damages award, and to the entirety of it. The case arose under Real Property Actions and Proceedings Law § 853, which authorizes treble damages on a plaintiff's claim of being "disseized, ejected, or put out of real property in a forcible or unlawful manner".

Holding that treble damages do not fall under the category of punitive damages for purposes of CPLR 5001 interest is at best controversial. While of statutory origin, and computed as a multiple of the actual damages found, the extra segment is intended as a punishment and should probably be treated as such under CPLR 5001.

In an earlier case that also arose under RPAPL § 853, *Rental & Management Associates, Inc. v. Hartford Ins. Co.*, 206 A.D.2d 288, 614 N.Y.S.2d 513 (1st Dept., 1994), an analogous issue arose. Under an insurance policy that contained an exception for punitive damages, the court held that treble damages comes under the punitive caption, so that the policy would not apply to a treble damages award. Parallel reasoning would seem to apply to the interest issue as well.

Comparing New York and Federal Rules on Awarding Prejudgment Interest

Interest on a judgment is clearly provided for in both New York and federal practice. In New York, CPLR 5003 governs and allows interest on any money obligation once reduced to judgment, including judgments on claims that do not carry interest prior to judgment. A federal statute does the same thing in federal practice. The main statute there is 28 U.S.C.A. § 1961, which provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court".

The more contentious issue is the extent to which interest is allowed on a money claim before judgment. In New York the matter is governed by CPLR 5001. On the federal side, prejudgment interest in a diversity case would be governed by state law under the *Erie* doctrine: prejudgment interest, if there is to be any, is in essence a part of the substantive claim itself. (Postjudgment interest even in a diversity case is governed by 28 U.S.C.A. § 1961, however, not state law.) In a federal question case prejudgment interest would of course be permissible on a federal cause of action based on a statute explicitly authorizing it, but absent such authorization the matter is governed by principles worked out in caselaw. An extensive discussion of the subject appears in the Second Circuit decision in *Wickham Contracting Co., Inc. v. Local Union No. 3*, 955 F.2d 831 (N.Y., 1992).

C5001:3 Need to Itemize Damages.

The Advisory Committee that drafted the CPLR warned plaintiffs' lawyers in tort cases to demand separate verdicts when property damage and personal injury causes of action are joined in the action and tried together. Because the personal injury claim carries no interest before the verdict, while the property damage claim does, the failure to demand distinct verdicts on them may result in the waiver of whatever interest might have been awarded on the property damage claim.

Much has happened since the time of the committee's warning, and today the need to compute interest is only one of many reasons for having the jury (or judge, in a court-tried case) itemize damages. Itemizing damages has been made mandatory in some cases, notably tort actions. *See, e.g.*, subdivisions (d) and (f) of CPLR 4111 and subdivision (b) of CPLR 4213. The various developments that have made itemization necessary are discussed in the Commentaries on those provisions.

C5001:4 Point from Which Interest Computed.

Subdivision (b) of CPLR 5001 provides that interest shall be measured from the earliest time at which it may be said that the cause of action existed, which assumes that whatever damages are sought are shown to have been sustained at least by that time. In some instances, of course, perhaps as much in contract as in tort cases, items of damage may accrue at different times. In that event interest can be computed separately on each segment, measured from its own moment of accrual, at least when it is possible to ascertain with precision the date on which each item accrued.

When precision isn't practicable, subdivision (b) allows the fact-trier to select "a single reasonable intermediate date" from which interest may be computed on all of the items together.

The compounding of interest is not allowed under CPLR 5001(a). The interest is simple. This raises some interesting issues when payments are due periodically under some kind of installment contract, or on such as a promissory note calling for repayment in monthly segments.

The wrongful death case also poses special problems in computing interest.

We discuss each of these subjects distinctly under separate captions below.

Separate Interest Computations in Monthly Installment Cases Is Not Considered "Compounding" of Interest

As noted in Commentary C5001:1 at the outset of this Commentary on CPLR 5001, interest on litigated obligations falls into three distinct periods: (1) interest on the claim from accrual until a verdict or a decision establishing liability is governed by CPLR 5001; (2) interest on the verdict or decision until judgment is entered is governed by CPLR 5002; and (3) interest on the judgment from the time of its entry until it is paid is governed by CPLR 5003. A compounding of interest does occur as the claim steps from one category into the next. The interest computed from accrual under CPLR 5001, for example, is added to the principal and the total of both is deemed the verdict or decision on which interest now runs under CPLR 5002 until judgment is entered.

Interest within each category undergoes no compounding, however. Interest on a claim outstanding for, say, two years since its accrual does not get compounded monthly, or even yearly. Interest on the claim under CPLR 5001 makes a straight run into category two without any interior compounding. That's clear enough when all of the claim accrued at one time, as where a promissory note drawing X percent of interest falls due on a specified date in one lump sum with interest part of it.

Suppose, however, that the note calls for monthly payments of interest and that the borrower is in default on several of them. Is the lender entitled to a separate CPLR 5001 interest measure on each default individually? Here CPLR 5101(b) is relevant, contemplating a separate calculation of interest from each default individually.

The Court of Appeals had this issue in *Spodek v. Park Property Development Associates*, 96 N.Y.2d 577, 759 N.E.2d 760, 733 N.Y.S.2d 674 (2001). The note in *Spodek* called for interest at a fixed rate, to be paid monthly. (Payments towards principal were also scheduled for inclusion along the way.) Defendant was in default, and for so long that the statute of limitations expired on many of the required payments and only the last six years' worth were alive for suit. For the live ones, the plaintiff was held entitled to have each unpaid monthly sum draw a distinct CPLR 5001 interest calculation.

The defendant contended that since each monthly payment included interest under the terms of the note, allowing a different CPLR interest computation on each unpaid installment would amount to interest on interest, i.e., a compounding of interest, not simple interest.

The Court answered that this *is* simple interest. If the note itself, as it did here, calls for monthly payments, each default requires a separate calculation of interest running from each default individually. Appearing at the time of verdict or decision, then, will be a number of overdue unpaid installments, each requiring a separate assessment of CPLR 5001 interest as the eldest garners the highest interest because it is outstanding for the longest time, the youngest garners the least interest because it is outstanding for the shortest time, and all the little in-between siblings drawing interest from their respective in-between stations.

While they arrive at the wire at the same time, each originated at a different starting gate and accumulated a different sum along the way. All the monitor does at the wire is add them all up. Totaling all such separately calculated amounts at verdict or decision time is therefore not the compounding of interest, but a mere process of addition.

Interest in Wrongful Death Cases; "Discounting" Future Damages

First is the fact that a separate statute, outside the CPLR, governs interest in wrongful death cases. EPTL § 5-4.3 provides that interest in a wrongful death case is to run from the decedent's death. But on what is it to run? Much of

the recovery in a wrongful death action is for future damages, but if future damages are awarded now, and interest is added as of the time of death, the recipient will be getting a windfall. To avoid that, future damages may be "discounted". This means that with the testimony of an expert, an adjustment of projected future damages can be made by determining what smaller amount, awarded now and reasonably invested, would produce the lump sum of damages expected over the future course of what the decedent's life expectancy would have been. That present amount is the "discounted" sum.

If that sum has been discounted only to the time of the verdict, then the award itself represents the real loss sustained for future damages and no interest should be added to it for the post-death pre-verdict period (although interest will of course run on the judgment itself until it is paid). If the award has been discounted back to a time before the verdict, however, such as to the time of death itself, then interest should be computed from that earlier time until the verdict. So it is with future damages, as held by the Court of Appeals in *Milbrandt v. A.P. Green Refractories Co.*, 79 N.Y.2d 26, 588 N.E.2d 45, 580 N.Y.S.2d 147 (1992).

As to past (post-death but pre-verdict) damages awarded by the jury, the question is whether there should be (1) a computation of interest on the whole of it, measured from the time of death, or (2) separate measurements of interest for each item of loss from the time it was incurred or from some intermediate point that strikes a balance on all the items. *Milbrandt* adopts (2), which is the method prescribed by CPLR 5001(b).

These matters are largely governed by Articles 50-A and 50-B of the CPLR. containing specific instructions for the "Periodic Payment of Judgments in Medical and Dental Malpractice Actions" (Article 50-A) and in "Personal Injury, Injury to Property and Wrongful Death Actions" (Article 50-B). *See* the Commentaries on those articles, below.

C5001:5 Fixing Dates and Making Computations.

Subdivision (c) requires that the trier of the facts, whether court, referee, or jury, fix the dates relevant to a computation of interest.

All of the facts concerning the dates should be ready and in place in the evidence before the case goes to the trier of the facts. In a jury case, a failure to adduce the facts on which a finding of dates can be predicated may result in a waiver of the right to have the jury decide them: subdivision (c) provides that the jury's discharge without having fixed the dates will leave the matter to the court, or, when the dates are not disputed, to the clerk.

As long as dates have been fixed, the actual computation of interest is left to the clerk. The amount fixed is then included with the main sum found on the claim, and the total of both together constitutes the figure on which interest on the verdict, i.e., interest in the CPLR 5002 category, is then to run.

C5001:6 Waiving Interest by Failing to Seek It at Trial.

As just noted, interest on a cause of action, as opposed to interest on a verdict already rendered on a cause of action (which is governed by CPLR 5002), will often require specific findings of fact. There may be issues as to when the cause of action accrued, for example, and yet other issues on which an accurate computation of interest under CPLR 5001 may depend. The failure, therefore, to raise those issues during the trial, so as to assure a decision or verdict that will adequately incorporate whatever may be due as interest on the claim, can result in a waiver.

A graphic illustration of how costly a waiver can be appears in *Lee v. Joseph E. Seagram & Sons, Inc.*, 592 F.2d 39 (2d Cir., 1979), a federal action in which state law governed. (In federal actions in which jurisdiction is based on

diversity of citizenship, substantive rights are determined by state law under the *Erie* rule, and the right to interest on a cause of action qualifies as a substantive element for that purpose.)

The plaintiff in *Lee* did not seek interest on the claim during the trial. Some two years after judgment was entered, the plaintiff belatedly attempted to obtain the interest, relying on several provisions in the Federal Rules of Civil Procedure. These, thought plaintiff, might hopefully supply authority for the undoing of the judgment, at least to the extent of allowing the interest to be inserted now. All of the provisions relied on, however, were found inapplicable, either because they authorized such a post-judgment amendment only for clerical oversights (Federal Rule 60[a]), which interest under CPLR 5001 is not, or, though perhaps applicable to authorize the change, they had internal time limitations that had already expired (Rules 59[e] and 60[b]).

The amount of interest lost was $88,000.

An interest accrual in that sum is a by-product of a big case. The bigger the claim, of course the greater the interest on it. Lawyers understandably preoccupied with preparing and litigating the merits of the case itself must not overlook the interest issue: they must have ready, during or in any event at the conclusion of the trial, whatever proof may be needed to determine accrual dates and the like. There may be an issue of fact about that. The lawyer should try to inject the issue as part of the trial so as to have the fact-trier resolve it as part of the verdict or decision.

Some judges might allow the proof immediately after a verdict, but others may not appreciate having to keep the jury around for a new "mini trial". It seems best, therefore, to have prepared the proof relevant to interest for presentation at some appropriate point during the main trial itself. The $88,000 forfeiture in the *Lee* case is a good lesson in all cases in which there is any possibility that interest will depend on some as-yet-unresolved issue of fact.

Creditor's Waiver of Interest by Miscrediting Debtor's Payment on Judgment

A peculiar situation, in which P (a judgment creditor) applied the payments of D (the judgment debtor) to the principal of the money owed on the judgment, instead of to interest due on it, which P had the option to do. The court applied the rule that absent agreement to the contrary, "[a] creditor may apply partial payments to principal or to interest or to both, as and when he or she elects to do so". P here elected to apply it to principal, only realizing her error years later, too late to correct it. *Baiz v. Baiz*, 10 A.D.3d 375, 780 N.Y.S.2d 770 (2d Dept., 2004).

P was owed about $43,000 on a Texas judgment. It was earning interest at 10% per year. She got it converted into a New York judgment through the easy registration procedures of Article 54 of the CPLR. That was done in 1989. Ten years later, in 1999, P sought to renew the judgment pursuant to CPLR 5014, so as to prolong it. D had made payments over the years, and when D defaulted on P's CPLR 5014 application, P applied those payments to principal, leaving about $41,000 still due and taking judgment for that.

Three years later, realizing that she should have applied the money to interest first, P now sought on application under CPLR 5019(a) to amend the renewed judgment and raise it to $78,000. This she could not do, held the court. CPLR 5019(a) permits the court to cure a "mistake, defect or irregularity" if it does not affect a substantial right, but the right involved here was substantial and the statute held inapplicable.

So P apparently loses the difference. What remedy? Presumably a malpractice action against her attorney, assuming she had one, and assuming further that the time for bringing it--three years under CPLR 214(6)--would still be open.

The obvious lesson is for creditors, or in any event creditors with options--i.e., those not obliged by contract to apply payments to principal--to make it a general rule to credit payments from an obligor to interest first, and to so advise the obligor, and anyone else who cares.

LEGISLATIVE STUDIES AND REPORTS

Subd. (a) establishes a single rule for the awarding of interest in all contract and property damage cases. The provision for contract actions is a simplification of the second sentence of § 480 of the civil practice act with no change in meaning intended, states the Third Report to the Legislature.

The provision for property damage actions is new, and is adopted from a 1950 proposal of the Law Revision Commission. N.Y.Law Rev.Comm'n Rep. 95, 97 (1950). It abolishes the distinction between property damage actions in which interest is granted as of right and those in which it is granted in the discretion of the trier of fact. The distinction is commonly stated as one between negligence and non-negligence cases, with interest a matter of right in the latter type of action only. The Court of Appeals has sharply criticized the former law, terming it "manifestly unsound, because interest is essential to complete indemnity in both classes of cases." Flamm v. Noble, 296 N.Y. 262, 268, 72 N.E.2d 886, 888 (1947). See also Wilson v. City of Troy, 135 N.Y. 96, 104-105, 32 N.E. 44, 46 (1892); Committee on State Legislation, Bulletin No. 3, 100-101 (Association of the Bar of the City of New York 1957); Committee on State Legislation, Bulletin No. 6, 299-301 (Association of the Bar of the City of New York 1956); Committee on State Legislation, Bulletin No. 1, 21-22 (Association of the Bar of the City of New York 1955); Committee on State Legislation, Bulletin No. 2, 103-104 (Association of the Bar of the City of New York 1954); Committee on State Legislation, Bulletin No. 1, 15-16 (Association of the Bar of the City of New York 1953); Committee on State Legislation, Bulletin No. 2, 53-57 (Association of the Bar of the City of New York 1950).

The artificiality of the former law was demonstrated by the fact that interest could apparently be recovered as of right in certain cases of negligent injury to property because the action could be considered one in contract under § 480 of the civil practice act. See Flamm v. Noble, supra at 267, 72 N.E.2d at 887; A. L. Russell, Inc. v. City of New York, 138 N.Y.S.2d 455, 457-58 (Sup.Ct.1954); Squibb & Sons Inter-American Corp. v. Springmeier Shipping Co., 194 Misc. 813, 814, 87 N.Y.S.2d 876, 878 (Sup.Ct.1949).

In addition to its failure to assure complete indemnification to an injured party, the distinction between "as of right" and "discretion" cases has been criticized as an uncertain one; there is doubt, for example, about cases of trespass to real property. See N.Y. Law Rev.Comm'n Rep. 95, 124-25 (1950).

Finally, there was serious dispute about the state of the law. Three decisions have relied upon the dictum in Flamm v. Noble to hold interest recoverable as of right in cases of negligent injury to property rights. Harmon & Regalia, Inc. v. City of New York, 286 A.D. 825, 141 N.Y.S.2d 877 (1st Dep't 1955); A. L. Russell v. City of New York, 138 N.Y.S.2d 455 (Sup.Ct.1954); Barry v. Doctor's Hospital, Inc., 137 N.Y.L.J. no. 91, p. 7, col. 6 (N.Y.C.Ct.1957). Concurrently, other decisions have held interest in such cases to be discretionary only, usually citing the same Flamm decision as authority. Keilson v. City of New York, 126 N.Y.S.2d 606, 607 (N.Y.C.Munic.Ct.1953); Hamburger v. Met. Dist., 135 N.Y.L.J. no. 70, p. 10, col. 4 (N.Y.C.Ct.1956); Cocchiarella v. HiHat Distributors, Inc., 126 N.Y.L.J. p. 1427, col. 3 (N.Y.C.Ct.1951). See also Stein Hall & Co. v. Sealand Dock and Terminal Corp., 2 Misc.2d 727, 733, 149 N.Y.S.2d 537, 543 (Sup.Ct.1955). A compounding of this confusion results from a 1955 Second Circuit Court of Appeals decision, where Judge Learned Hand, in a dictum reviewing the effect of the Flamm case, stated: "[A]nd, although, as the plaintiff says, that was only a dictum, the lower courts of that state have taken it as authoritative, and so must we." Newburgh Land & Dock Co. v. The Texas Co., 227 F.2d 732, 735 (2d Cir.1955). This subdivision is designed to bring a measure of certainty to this area.

Interest on damages for personal injuries involves difficult policy considerations because it often includes compensation for future loss and damages of a speculative nature. In view of the Temporary Commission on the Courts' conclusion not to recommend legislation allowing interest in personal injury cases, the advisory committee did not consider changing the status of the law. See N.Y.Temp.Comm'n on the Courts Rep. IV 48, Leg.Doc. 6(c) (1957); see also Institute of Judicial Administration, Recovery of Interest as Damages in Personal Injury Cases 15-18 (March 4, 1957); but cf. Committee on State Legislation, Bulletin No. 3, 169-71 (Association of the Bar of the City of New York 1959).

Where a suit combines causes of action for property damage and personal injury, the plaintiff should request separate verdicts on each cause of action. Otherwise, there will be no basis upon which to compute interest for any property damage award, and the right to such interest will be waived. See Helman v. Markoff, 255 A.D. 991, 8 N.Y.S.2d 448 (2d Dep't 1938), aff'd, 280 N.Y. 641, 20 N.E.2d 1012 (1939).

This subdivision, continues the Third Report, contemplates the award of interest on compensatory damages only. Since punitive damages, which may be awarded in certain tort actions, are intended only to impose punishment upon a defendant, interest on such damages for the period before verdict is unnecessary to assure full compensation to an injured party. See 2 Clark, New York Law of Damages 83 et seq. (1925). Once the punitive damages have been awarded, however, they become a debt due the plaintiff, and interest will be earned under §§ 5002 and 5003.

The committee adopted a proposal to make the award of interest in equity actions discretionary. See N.Y. Law Rev.Comm'n Rep. 101, 114-16 (1950). Such discretion is presently exercised in tort actions arising in equity (e.g., Ellis v. Kelsey, 241 N.Y. 374, 379-80, 150 N.E. 148 (1925); Frey Realty Co. v. Ten West 46th Street Corp., 1 Misc.2d 371, 145 N.Y.S.2d 670 (Sup.Ct.1955)), whereas in actions based upon a contract, the second sentence of § 480 of the civil practice act is held to make the award of interest at the legal rate mandatory. See Frey Realty Co. v. Ten West 46th Street Corp., supra at 372, 145 N.Y.S.2d at 672.

Subd. (b), contains a reference to the date from which interest is to be measured, which is new, states the Third Report to the Legislature. The date the cause of action accrued was the time normally used in computing interest. See, e.g., Greater New York Coal & Oil Corp. v. Philadelphia & Reading Coal & Iron Co., 278 N.Y. 270, 272, 15 N.E.2d 801, 802 (1938); Aronowsky v. Goldberger-Raabin Co., 250 A.D. 731, 293 N.Y.S. 527 (2d Dep't 1937); E. R. Squibb & Sons Inter-American Corp. v. Springmeier Shipping Co., 194 Misc. 813, 815, 87 N.Y.S.2d 876, 878 (Sup.Ct.1949); Freedman v. Hart & Early Co., 162 Misc. 487, 488, 293 N.Y.S. 525, 526-27 (N.Y.C.Ct.1935). Where this date is a matter of conjecture, the courts normally awarded interest from the time of commencement of the action. Aronowsky v. Goldberger-Raabin Co., supra; Leehoke Corp. v. Plastoid Corp., 193 Misc. 208, 83 N.Y.S.2d 672 (Sup.Ct.1948), aff'd without opinion, 276 A.D. 908, 94 N.Y.S.2d 903 (1st Dep't 1950); Freedman v. Hart & Early Co., supra; Sacks-Sons Luggage Corp. v. Louis DeJonge & Co., 135 N.Y.L.J. no. 85, p. 11, col. 6 (Sup.Ct.1956). This subdivision encompasses these rules, but also permits the awarding of interest from any earlier date at which it can be ascertained that the cause of action had already accrued. This provision is based upon the method of computing interest employed by the court in Mathis v. Matthews, 39 N.Y.S.2d 242, 244 (Sup.Ct.1943). It is intended to insure fuller indemnification of an injured party wherever possible. In the Mathis case, plaintiff secured damages for breach of a contract to construct a building resulting from a failure to do so in a good, workmanlike manner. Since the date of breach could not be determined, the court awarded interest from the day after completion of the work, stating that the breach must have occurred at least by that time.

This subdivision offers a method for arriving at a fair award of interest in cases involving items of damage arising after the accrual of the cause of action. It avoids both the underindemnification of a successful claimant by an award which computes interest from the time of commencement of suit, as well as the granting of a "windfall" to such a party by an award of interest from the first accrual of a cause of action. Where there are various items of damage, alternative methods of computation are provided: each item may be separately computed or a constructive single date utilized.

Subd. (c), has no counterpart in the C.P.A. Cf. C.P.A. § 480 (part of first sentence). Under former practice interest for the period prior to verdict, report or decision could in the first instance be awarded by the trier of fact. Where a jury failed to award interest in a case in which it accrued as of right, the court could do so. Mayaquez Drug Co. v. Globe & Rutgers Fire Ins. Co., 260 N.Y. 356, 183 N.E. 523 (1932). The failure of the civil practice act to place the responsibility for fixing interest solely upon either the trier of fact or the court frequently left unsettled whether a jury verdict included interest; the courts would add interest to a verdict only when it was clear that the verdict did not already include it. See, e.g., Mayaguez Drug Co. v. Globe & Rutgers Fire Ins. Co., supra; First Int'l Pictures, Inc. v. F. C. Pictures Corp., 262 A.D. 21, 22, 27 N.Y.S.2d 816, 818 (4th Dep't 1941); Gottesman v. Havana Importing Co., 72 N.Y.S.2d 426, 428 (Sup.Ct.1947); McQuade v. Monroe, 135 N.Y.L.J. no. 97, p. 10,

col. 4 (N.Y.C.Ct.1956). The cases have sought to minimize this problem by creating a rebuttable presumption that interest was not included in a verdict where no instruction was given to do so. Mathis v. Matthews, 39 N.Y.S.2d 242 (Sup.Ct.1943); Sacks-Sons Luggage Corp. v. Louis DeJonge & Co., 135 N.Y.L.J. no. 85, p. 11, col. 6 (Sup.Ct.1956); Richard Silk Co. v. Bernstein, 130 N.Y.L.J. 1159, col. 2 (Sup.Ct.1953).

Normal procedure has been to instruct a jury that interest must be added to damages awarded in certain types of actions. At least one trial judge, however, instructs juries not to consider the question of interest at all. Kaufman v. Farah, 131 N.Y.L.J. no. 122, p. 6, col. 7 (Sup.Ct.1954); Milco Garage Corp. v. Wendy Garage Inc., 131 N.Y.L.J. no. 62, p. 8, col. 7 (Sup.Ct.1954). In order to avoid later confusion as to whether a verdict contains interest, the jury is advised that "the law will take care of that subject [interest] by awarding interest on the recovery from the time plaintiff was entitled to the money." Milco Garage Corp. v. Wendy Garage Inc., supra. This subdivision, states the Third Report to the Legislature by placing the responsibility for adding interest to a verdict solely upon the clerk of the court, seeks to overcome the above difficulties. The jury is required only to fix a date. Should the plaintiff fail to request an instruction that the date from which interest is to accrue be specified in the verdict, he will be deemed to have waived his right to a jury trial on this question and the court will fix the date. Where the demand for the addition of interest comes at a time before the jury has been discharged, however, the interest date question should be submitted to it.

A motion to add interest to an award under this subdivision may be made at any time prior to execution of judgment in the action. See McLaughlin v. Brinkerhoff, 222 A.D. 458, 226 N.Y.S. 623 (1st Dep't 1928), distinguishing Urband v. Lubell, 245 N.Y. 156, 156 N.E. 649 (1927).

A referee may correct his omission to specify the date from which interest is to be computed, since the CPLR permits post-trial motions addressed to him.

Official Reports to Legislature for this section:

3rd Report Leg.Doc. (1959) No. 17, p. 86.

5th Report Leg.Doc. (1961) No. 15, p. 104.

6th Report Leg.Doc. (1962) No. 8, p. 427.

Notes of Decisions (689)

McKinney's CPLR § 5001, NY CPLR § 5001
Current through L.2013, chapter 6.

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McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 50. Judgments Generally (Refs & Annos)

McKinney's CPLR Rule 5016

Rule 5016. Entry of judgment

Currentness

(a) What constitutes entry. A judgment is entered when, after it has been signed by the clerk, it is filed by him.

(b) Judgment upon verdict. Judgment upon the general verdict of a jury after a trial by jury as of right shall be entered by the clerk unless the court otherwise directs; if there is a special verdict, the court shall direct entry of an appropriate judgment.

(c) Judgment upon decision. Judgment upon the decision of a court or a referee to determine shall be entered by the clerk as directed therein. When relief other than for money or costs only is granted, the court or referee shall, on motion, determine the form of the judgment.

(d) After death of party. No verdict or decision shall be rendered against a deceased party, but if a party dies before entry of judgment and after a verdict, decision or accepted offer to compromise pursuant to rule 3221, judgment shall be entered in the names of the original parties unless the verdict, decision or offer is set aside. This provision shall not bar dismissal of an action or appeal pursuant to section 1021.

(e) Final judgment after interlocutory judgment. Where an interlocutory judgment has been directed, a party may move for final judgment when he becomes entitled thereto.

Credits
(L.1962, c. 308. Amended L.1970, c. 93, § 2.)

<LAWS 1962, CHAPTER 308>

Editors' Notes

PRACTICE COMMENTARIES

By David D. Siegel

CPLR 5016 sets forth the general rules about entering judgments.

"Entry" itself occurs when the clerk files the judgment after signing it. It should not be confused with "docketing". Technically, the "docketing" of the judgment is its recording in a set of alphabetized books, or in a block index maintained in some counties, which is what makes the judgment a lien on the defendant's real property in the

county. Docketing is thus a step distinct from entry, although in the supreme and county courts both steps are almost simultaneous--*see* CPLR 5018(a)--because the county clerk, in whose office the docket books or block indexes are maintained, is the clerk of both courts ex officio. *See* County Law §§ 525, 909. In lower courts, however, there is no such "docketing", so that when the term "docketing" is used in those courts, mere "entry" is what is usually intended. *See* Siegel, New York Practice 4th Ed. § 418.

Subdivision (b) refers to a jury trial "as of right". That right may arise either through constitutional provision or statute. *See* CPLR 4101 and the Commentaries on it. When the jury is only advisory (*see* CPLR Rule 4212), it is subdivision (c) that applies.

Either the losing party or the prevailing party may have the judgment entered, although of course it is usually the winner.

There is no time limit stated in the CPLR for the entry of a judgment after a verdict or decision, or, for that matter, for the entry of an order after a motion has been decided, but a court rule may apply to it. The most important of these rules is Uniform Rule 202.48, applicable in the supreme and county courts. It imposes a time limit of 60 days for getting an order or judgment entered after a motion is decided, and with the threat of having the victory on the motion deemed abandoned if the rule is violated.

The Court of Appeals held in *Funk v. Barry*, 89 N.Y.2d 364, 675 N.E.2d 1199, 653 N.Y.S.2d 247 (1996), however, that the 60-day rule does not apply unless the decision explicitly calls for the submission or settlement of an order or judgment. When the order does contain such a direction, and it's violated, the abandoment may be invoked and the consequence can be severe. *See, e.g., Marzullo v. General Motors Corp.*, Sup. Ct., Dutchess Co., Dec. 2, 2005 (Index No. 1993/01; Pagones, J., discussed in Issue 171 of Siegel's Practice Review).

A general discussion of when and how Uniform Rule 202.48 is applied appears in Commentary C2220:3 on McKinney's CPLR 2220.

The more common form of verdict today is the special verdict, in which the jury just answers a series of questions. When the special verdict is used, the court determines what the final judgment shall be.

Subdivision (c) of CPLR 5016 replaces a number of pre-CPLR rules under which different procedures for the entry of judgment were made contingent on diverse and not necessarily logical factors. Subdivision (c), reorganizing those rules, governs in all cases other than those tried of right by jury, which fall under subdivision (b).

It is only the complex judgment that has to be submitted to the court or referee for approval. A simple judgment for money may be entered by the clerk without prior submission to the court or referee.

Subdivision (d) bars a verdict or decision against a party who dies before it is rendered, but death after rendition does not bar entry from proceeding. The death of the party before the case is decided is what suspends things. If the decision is made before death occurs, its reduction to judgment is considered a mere ministerial step and can go forward.

The last sentence of subdivision (d) was added in 1970 to meet a special problem. CPLR 1021 allows the action to be "dismissed" against a party who has died, if an appropriate substitution for the decedent is not forthcoming. When it is the defendant who dies, there is no conflict between CPLR 5016(d) and CPLR 1021 in this respect. A dismissal under CPLR 1021 for non-substitution (or anything else) is a decision in the decedent's favor when the decedent is the defendant, and it is apparently permissible under CPLR 5016(d). But if it is the plaintiff who dies, a dismissal for non-substitution under CPLR 1021 would run afoul of the general direction of CPLR 5016(d) that seeks to bar a

disposition against the interests of a decedent before a personal representative has been substituted (who would see that the decedent's interests are tended to).

To remedy the conflict, subdivision (d) was amended in 1970 to give CPLR 1021 the upper hand. The added sentence permits a dismissal against a plaintiff pursuant to CPLR 1021 when substitution has not been forthcoming even though it amounts to a decision "against" a deceased party.

Interlocutory judgments are rare today, notably because of their abolition in divorce actions (where an interlocutory judgment at one time had to be rendered first, after which a waiting period applied before a final judgment could be entered). *See* Siegel, New York Practice 4th Ed. § 410. When an interlocutory judgment is used, as it sometimes is, for example, in a bifurcated trial in which liability is tried first and the damages trial comes after, a party is entitled to move for final judgment when the time is ripe. So provides subdivision (e) of CPLR 5016. In the bifurcated case, the time would be ripe after a damages verdict is rendered following an interlocutory judgment--if one has been ordered in the case--embodying the earlier liability finding.

For further discussion of the entry of judgment and surrounding issues, see Siegel, *id.*, § 418.

Casualness in Seeing to "Entry" Can Lose Priority or Judgment Creditor

For want of nothing more than the elementary step of seeing to the simple "entry" of its judgment, a judgment creditor lost priority on it and experienced a serious forfeiture in *Firstar Equipment Finance v. Jonathan Travel & Tours, Inc.*, N.Y.L.J., April 10, 2001, p. 18, col. 5 (Solomon, J.), aff'd 292 A.D.2d 275, 738 N.Y.S.2d 853 (1st Dept., 2002).

Claimant C, with an interest in a bus owned by D, wins a judgment against D and takes the initiative of issuing an execution on it to a marshal. The marshal then proceeds to levy and take possession of the bus, all to the presumed advantage of C. But now another judgment creditor, O, comes along and prevails over C because C did not take the simple step of finalizing its judgment with an entry of it. (A judgment is not ripe for enforcement without entry.)

The execution issued to the marshal in *Firstar*, and on which the marshal in fact levied, was ineffective for want of entry of the judgment, and the marshal thereupon became a mere stakeholder of the bus for whomever the court determines to be the creditor with the higher right. Here that turns out to be O, not C.

It is always painful to a judgment creditor to come close to getting its judgment satisfied, only to lose out just before the wire, when another creditor wins by a nose. In *Firstar*, the pain was more poignant still. C had already won the race and was standing in the winner's circle about to receive the awards of the victory, only to be ousted for the most minor of infractions.

This was a sad lesson for C in the *Firstar* case, but a grand one for all other judgment creditors about the importance of seeing to the formal but simple step of entry.

LEGISLATIVE STUDIES AND REPORTS

Subd. (a) is derived from part of the first part of the first sentence of rule 201 of the rules of civil practice. It omits the administrative directions to the clerk on the operation of his office specified in the remainder of the first sentence, states the Third Report to the Legislature. The Fourth Report to the Legislature adds that "of the court", which followed "clerk", was deleted since the definition of § 105(e) covers the matter.

Subd. (b) is derived from § 495 of the civil practice act and is similar in approach to the first sentence of rule 58, Federal Rules of Civil Procedure, 28 U.S.C.A. It applies only to jury trials as of right, comments the Third Report to the Legislature. In all other cases the decision rests ultimately with the court or referee and is governed by subd. (c).

Section 495 referred to entry of judgment after a general verdict only on the application of the successful party. The usual practice was for the clerk of the trial part to furnish the successful party with an extract from the minutes stating the amount and character of the verdict, which is presented to the clerk of the court where the judgment is to be entered as authority for its entry. Under this subdivision either party could avail himself of this procedure since the words "Upon the application of the party in whose favor a general verdict is rendered" have been omitted. There may be instances in which the losing party wishes to appeal immediately and is willing to enter the judgment. Cf. § 5513(a). If the judgment debtor enters the wrong amount, the judgment creditor could move to correct the judgment. See § 5019(a). The words "[unless] it is otherwise specially prescribed by law" have also been eliminated; in such case the court would otherwise direct.

No special reference to general verdicts accompanied by answers to interrogatories is required because, under rule 4111(c), if the answers are inconsistent with the verdict, the court must direct entry of an appropriate judgment. Cf. rule 58, Federal Rules of Civil Procedure, 28 U.S.C.A. Some of the issues may be separately tried without a severance. In such case the original order of the court requiring separate trial or the order after the nonfinal verdict will make it clear that a judgment is not to be entered. See rule 4112; cf. rule 194, of the rules of civil practice.

Subd. (c) is patterned after the second sentence of rule 58, Federal Rules of Civil Procedure, 28 U.S.C.A. It replaces rules 194 through 199 of the rules of civil practice, and part of the first sentence of § 441 of the civil practice act. These provisions provided different procedures for the entry of judgment depending upon various factors, such as whether the case was tried by the court alone or with the aid of an advisory jury, whether there was a motion for judgment, and, if so, whether such motion involved any questions of fact. They were over-complicated, excessively detailed and unsupported by any rational basis. This provision involves only the practical criterion of whether the judgment is simple (i.e., where it is only for money or costs or is a denial of all relief) or complex. It is only in the latter situation that the judge or referee needs to settle or approve the form of the judgment and direct its entry by the clerk.

This subdivision applies to all cases other than those tried entirely by a jury as of right. It covers cases where an advisory jury or referee to report is used (see rules 194, 199 of the rules of civil practice) and those decided on a motion for judgment under CPLR Rules 3211, 3212 and CPLR § 3213, whether or not issues of fact requiring a trial arose in the same action. See rules 195-197 of the rules of civil practice. Entry of default judgments, however, is governed by the special provisions of § 3215.

No special treatment of a referee's decision in a marital action (C.P.A. § 1174) is required. Under rule 4312(2) only an official referee can determine an issue in a matrimonial action so that a judgment could not be entered by a clerk on the determination of an unofficial referee in such an action. This is the result of C.P.A. § 1174. See also § 4320(b).

The phrase "on motion" requires notice to every party not in default for failure to appear. See § 2212(c). The practice of the parties submitting their proposed form of judgment will be followed, states the Third Report to the Legislature.

Subd. (d) is taken from § 478 of the civil practice act without change of substance. The opening clause replaces the last two sentences of § 478. The first of these sentences stated that no judgment should be entered against a party who died before a verdict, report or decision was rendered. Such a statement is unnecessary under the formulation of this subdivision, since there could be no verdict or decision upon which the judgment could be based, states the Fourth Report to the Legislature. The remainder of the subdivision is simply a rewording of the first sentence of § 478. The second sentence of that section related to liens and is treated in § 5203(a)(4).

The similar provisions of C.P.A. § 89 are omitted since they are covered by this subdivision and by McKinney's Decedent Estate Law §§ 118 and 119, which provide for the survival of all personal injury actions after the death of a party. Section 89 provided that after "verdict, report or decision in action to recover damages based upon a cause of action which does not survive the death of a party, the action does not abate by the death of either party"; and further stated that if the verdict, report or decision was reversed no punitive damages were to be awarded in any subsequent new trial. The section apparently related only to actions for

personal injuries. It expressly so stated until 1935, when it was amended as part of the Law Revision Commission legislation concerning survival of personal injury actions; although the section was reworded and the words "for a personal injury" omitted, the Commission's report indicates that no change in this respect was intended. See N.Y.Law Rev.Comm'n Rep. 166 (1935). The 1935 legislation provided, in McKinney's Decedent Estate Law §§ 118 and 119, for the survival of all personal injury actions after the death of either party, except actions based on breach of promise to marry, seduction, criminal conversation and alienation of affections. See id. at 161, 162. With the abolition of these actions (C.P.A. §§ 61-a to 61-i), McKinney's Decedent Estate Law §§ 118 and 119 became applicable to all personal injury actions, making redundant the provision in C.P.A. § 89 for survival in the limited situation where the death occurs after verdict, report or decision. The limitation in § 89 concerning punitive damages on a new trial was also covered by McKinney's Decedent Estate Law §§ 118 and 119.

Subd. (e) is based upon rule 187 of the rules of civil practice. It restates the first sentence of that rule. The second sentence of the rule stating that a referee, required to be appointed by the interlocutory judgment, must be appointed by the judgment or by order on motion is omitted as unnecessary, comments the Third Report to the Legislature. Cf. rule 4311.

The second sentence of § 441 of the civil practice act is also omitted. Like the provisions replaced by subdivision (c) of this rule, this sentence was a model of unnecessary procedural detail, states the Fourth Report to the Legislature. A court possesses the power, without such specific authorization, to direct a final judgment conditional upon compliance with specified terms or directions; and whether such an order or interlocutory judgment is called for in a particular case is entirely within its discretion. Where an interlocutory judgment does direct such a conditional final judgment, the motion authorized by this subdivision is unnecessary. Cf. rule 196 of the rules of civil practice. Moreover, the primary purpose of the second sentence of § 441, added to the Throop Code in 1879, appeared to have been to meet a problem of appealability of the decision on a demurrer (see Code Civ.Proc. § 1021, note (Throop ed. 1890)) which would not arise under the CPLR appeals provisions.

Official Reports to Legislature for this rule:

3rd Report Leg.Doc. (1959) No. 17, p. 206.

4th Report Leg.Doc. (1960) No. 20, p. 215.

5th Report Leg.Doc. (1961) No. 15, p. 584.

6th Report Leg.Doc. (1962) No. 8, p. 433.

Notes of Decisions (87)

McKinney's CPLR Rule 5016, NY CPLR Rule 5016
Current through L.2013, chapter 6.

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McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 50. Judgments Generally (Refs & Annos)

McKinney's CPLR § 5018

§ 5018. Docketing of judgment

Currentness

(a) Docketing by clerk; docketing elsewhere by transcript. Immediately after filing the judgment-roll the clerk shall docket a money judgment, and at the request of any party specifying the particular adverse party or parties against whom docketing shall be made, the clerk shall so docket a judgment affecting the title to real property, provided, however, that where the clerk maintains a section and block index, a judgment affecting the title to, or the possession, use or enjoyment of, real property may be entered in such index in lieu thereof. If the judgment is upon a joint liability of two or more persons the words "not summoned" shall be written next to the name of each defendant who was not summoned. Upon the filing of a transcript of the docket of a judgment of a court other than the supreme, county or a family court, the clerk of the county in which the judgment was entered shall docket the judgment. Upon the filing of a transcript of the docket of a judgment which has been docketed in the office of the clerk of the county in which it was entered, the clerk of any other county in the state shall docket the judgment. Whenever a county clerk dockets a judgment by transcript under this subdivision, he shall notify the clerk who issued it, who, upon receiving such notification, shall make an entry on the docket of the judgment in his office indicating where the transcript has been filed. A judgment docketed by transcript under this subdivision shall have the same effect as a docketed judgment entered in the supreme court within the county where it is docketed.

(b) Docketing of judgment of court of United States. A transcript of the judgment of a court of the United States rendered or filed within the state may be filed in the office of the clerk of any county and upon such filing the clerk shall docket the judgment in the same manner and with the same effect as a judgment entered in the supreme court within the county.

(c) Form of docketing. A judgment is docketed by making an entry in the proper docket book as follows:

1. under the surname of the judgment debtor first named in the judgment, the entry shall consist of:

(i) the name and last known address of each judgment debtor and his trade or profession if stated in the judgment;

(ii) the name and last known address of the judgment creditor;

(iii) the sum recovered or directed to be paid in figures;

(iv) the date and time the judgment-roll was filed;

(v) the date and time of docketing;

(vi) the court and county in which judgment was entered; and

(vii) the name and office address of the attorney for the judgment creditor;

2. under the surname of every other judgment debtor, if any, the entry shall consist of his name and last known address and an appropriate cross-reference to the first entry.

If no address is known for the judgment debtor or judgment creditor, an affidavit executed by the party at whose instance the judgment is docketed or his attorney shall be filed stating that the affiant has no knowledge of an address.

(d) A county clerk may adopt a new docketing system utilizing electro-mechanical, electronic or any other method he deems suitable for maintaining the dockets.

Credits

(L.1962, c. 308. Amended L.1964, c. 292; L.1965, c. 773, § 12; L.1966, c. 707; L.1970, c. 661, § 1; L.1991, c. 648, § 2.)

<LAWS 1962, CHAPTER 308>

Editors' Notes

PRACTICE COMMENTARIES

By David D. Siegel

Subdivision (a)

This subdivision establishes a uniform procedure for the docketing of judgments of all courts with the county clerk of the county in which the judgment was rendered. Such docketing with the home county clerk is a prerequisite to the docketing of the judgment with the county clerk of any other county.

It is the "docketing" of the judgment that makes it a lien on the real property of the defendant (now judgment debtor) in the county. CPLR 5203(a).

Since the county clerk is ex officio the clerk of the supreme and county courts within his county (County Law §§ 525, 909), the filing of the judgment-roll in an action in either of those courts, which is done when the judgment is entered (*see* CPLR 5017), results immediately in the docketing of the judgment with the "county clerk", and effects the desired real property lien. This is not true of judgments rendered by other than those two courts, however, because each of the other courts has its own clerk. If the judgment is rendered by such other court, therefore, an additional procedure must be followed before the judgment can be "docketed" with the county clerk of the county so as to be made a lien.

The procedure consists of obtaining from the clerk of the court that rendered the judgment a transcript of the judgment. The transcript is then filed with the home county clerk, as required by subdivision (a) of CPLR 5018, whereupon, as provided in the last sentence of the subdivision, it becomes the equivalent of a supreme court judgment and may be enforced accordingly.

As the equivalent of a supreme court judgment, it may now be docketed with other county clerks, making it a lien on real property in other counties. The procedure for docketing with other county clerks consists of securing a transcript of the judgment from the home county clerk. Thus, to docket a judgment of a lower court with the home county clerk, the transcript that results in the docketing is the one furnished by the lower court's clerk; and thereafter to docket the judgment with the county clerk of another county, the transcript that results in the docketing is the one furnished by the home county clerk.

This uniform procedure for the docketing of lower court judgments with county clerks outside the home county settles a problem that existed before 1959, when the court acts of several lower courts purported to allow a transcript furnished by the lower court's clerk to be filed directly with the county clerk of other than the home county. CPLR 5018 rejects that procedure, and makes the home county clerk's office a clearing house for the docketing with other county clerks of judgments rendered by lower courts within the county.

The subdivision follows the procedure enacted in 1959 (by L.1959, chapters 238 and 681) on recommendation of the Judicial Conference (*see* the Conference's 4th Annual Report, pp. 125-173). The provision is terse and logical, and is able to accomplish in a central place and in simple language what the 1959 legislation, since it had to work with the then-applicable and much more prolix Civil Practice Act, had to do in a series of amendments.

By virtue of subdivision (a), it is no longer necessary that the court acts of the lower courts spell out the procedure for docketing their judgments with county clerks. The lower court acts merely recite that "[t]he docketing of the judgment with the clerk of the county, and thereafter with other county clerks, shall be governed by the CPLR." *See* § 1502 of the civil, district, city, and justice court acts (McKinney's Vol.29A, Parts 2 and 3).

Subdivision (a) contains a requirement that a county clerk with whom a transcript is filed notify the clerk who issued it, with the issuing clerk required to indicate on his dockets the fact that the transcript has been filed with the notifying clerk. In the case of a judgment docketed in many counties, the requirement makes it possible, by merely perusing the dockets of the home county clerk, to determine in what other counties the judgment has been docketed. Under prior law, the home county clerk's dockets did not contain such information.

Docketing Real Property Judgments

The "docketing" under subdivision (a), with its use of alphabetical books, is the procedure followed primarily for money judgments. While the subdivision also permits alphabetical docketing for judgments directly affecting real property, with real property judgments docketing is only an alternative. At the clerk's option, if the particular clerk maintains a section or block index, which is in effect an index keyed to the property itself rather than to the name of the judgment debtor, such an index may be used instead. Whether the real property judgment is so recorded, or merely recorded under the name of the party whose interest in the land has been affected by the judgment (i.e., "docketed"), it should still constitute adequate notice to any would-be buyer or encumbrancer of the land, just as a money judgment, when "docketed" pursuant to CPLR 5018(a), constitutes a lien against the defendant's real property in the county and warns the world of it. *See* CPLR 5203(a).

Only the real property judgment is affected. The procedure of block indexing is not available for a judgment for money only, nor is it appropriate there. (We use the phrase "real property judgment" to denote any judgment, other than a money judgment, that has or may have an encumbering effect on the land and of which a potential buyer or encumbrancer should be on notice. The statute uses "title to, or the possession, use or enjoyment of, real property" as criteria. *See* also CPLR 6501, the lis pendens provision, whose similar language can offer a guidepost.

The "may" language of the statute, which offers the option of using the block index "in lieu" of an ordinary alphabetical docketing, is an option for the clerk rather the judgment creditor. This is designed to conform to CPLR 2222. As far as title searchers are concerned, it would seem to be even easier for them to have judgments affecting the parcel recorded directly against the parcel itself. Searchers will still have to check the alphabetical dockets as well, of course, because of the lien effect that even a mere money judgment can have against real property under CPLR 5203. The judgment creditor has no complaint as long as the requisite public notice of the creditor's rights is effected.

Writing "Not Summoned" at Names of Unbound Parties

The sentence about writing "not summoned" next to the names of certain defendants has to do with actions in which several defendants may be named, but the judgment is valid against only some of them. The judgment should not even be entered against the name of such a defendant. But sometimes, notably in actions involving joint liability, like that of a partnership sued in contract, several partners may be named. Only those actually served ("summoned"), however, are liable on the judgment. A subsequent action would be necessary, in fact, to charge an unsummoned one with the amount unpaid on the earlier judgment. *See* CPLR 1502. Should the entry of judgment be made in the name of an unsummoned one--an archaic practice by any light--subdivision (a) requires that the words "not summoned" be written next to the name to assure that no enforcement will be tried against that defendant.

Docketing Effective Only for Enforcement

The transcripting procedure affects the status of a judgment only for enforcement purposes, and for the judgment's effect as a lien. For other purposes, the judgment must continue to be treated only as a judgment of the court that rendered it. A motion to vacate the judgment, for example, must be made to the original court. The transcripting procedure does not authorize entertainment of such a motion by any other court or in any other county. *See, e.g., Wood v. Ford*, 78 A.D.2d 585, 432 N.Y.S.2d 572 (4th Dept., 1980).

Nor does a transcripting secure general jurisdiction over the defendant. *See* the caption, "Mere Docketing Doesn't Get 'Jurisdiction' of Debtor", under the treatment of subdivision (b), below.

Subdivision (b)

This subdivision concerns the judgments of federal courts.

If the judgment was rendered by a federal court in New York, a transcript of the judgment, secured from the federal court's clerk, may be filed with the county clerk of any county.

If it was rendered by a federal court outside the state, the judgment creditor's best step is to file in a federal district court in New York a certified copy of the judgment, as authorized by 28 U.S.C.A. § 1963. Under that section, the judgment so filed has the "same effect" as a judgment of a federal district court in New York. Having such effect, it may now be docketed by transcript with any county clerk of the state as provided in subdivision (b) of CPLR 5018.

Mere Docketing Doesn't Get "Jurisdiction" of Debtor

The procedure of docketing a judgment onto a county clerk's records from another court, such as a federal court or lower court under subdivisions (a) or (b) of CPLR 5018--which gives the docketed judgment the "same effect" as a local supreme court judgment--does not secure jurisdiction of the judgment debtor for all purposes. It is only a convenience offered for enforcement purposes.

Suppose, for example, that a subpoena is now issued out of the supreme court under CPLR 5224--as it may be--in enforcement of a duly docketed federal judgment, and is served on the judgment debtor but is disobeyed. Now the creditor makes an application to punish the debtor for contempt. Because the judgment debtor has not yet been subjected to the personam jurisdiction of the New York Supreme Court, the application must take the form of a special proceeding (not a mere motion), and its initiatory papers must be served in the same manner as a summons (not by mere mail). So holds *Federal Deposit Insurance Corp. v. Richman*, 98 A.D.2d 790, 470 N.Y.S.2d 19 (2d Dept., 1983).

Subdivision (c)

Subdivision (c) concerns the form of docketing, listing the items that should be included.

When a clerk is called upon to issue a transcript of a judgment, the transcript should contain essentially the same particulars. For the transcript of the judgment, as well as the certificate of any change that has been made in the status of the judgment (*see* CPLR 5019[d]), there are official forms to follow, and the forms enumerate the contents. *See* Judiciary Law § 255-c, New York's Uniform Transcript and Certificate Act.

Subdivision (d)

Under a 1991 amendment that added subdivision (d) to CPLR 5018, the state accedes to the inevitable: each county clerk is allowed to adopt a docketing system that uses "electro-mechanical, electronic or any other method he deems suitable for maintaining the dockets".

The clerk turning to any electronic means must turn carefully. Foul-ups can cause titles to fail, liens to lapse, time-consuming disputes to develop, and clerk liabilities to rise.

LEGISLATIVE STUDIES AND REPORTS

Subd. (a) sets up a comprehensive scheme for docketing judgments anywhere in the state. It is derived from the beginning of § 501 and from § 502 of the civil practice act. The remainder of § 501 is embodied in subdivision (c). While the first sentence of the subdivision requires docketing, as did the former law, it is recognized that the attorney for the judgment creditor will often waive this requirement. There is no intention to change this practice, states the Third Report to the Legislature.

The only kind of judgments that were docketed were money judgments, although § 501 so indicated only by implication in subparagraph 3, in requiring that the docket state "the sum recovered or directed to be paid." Docketing and the docket book are to be distinguished from recording the judgment in the "judgment book." Rule of civil practice 201 required that all judgments be recorded in the judgment book, although the form of that book varies in different clerk's offices--in New York county, for instance, the judgment book is actually a set of microfilm records of the judgments.

Apparently, the practice is not uniform in docketing judgments directing the payment of a sum of money, as opposed to judgments for a sum of money; some clerk's offices do not docket the former. No reason is perceived for failing to docket directions to pay. Like judgments for a sum of money, they are enforceable only by execution (see Harris v. Elliott, 163 N.Y. 269, 57 N.E. 406 (1900); Hennig v. Abrahams, 246 A.D. 621, 282 N.Y.S. 970 (2d Dep't 1935); § 504 of the civil practice act), with specific exceptions. Civil practice act §§ 505(4) (payment into court); 505(5) (payment by fiduciary for dereliction of duty); 1171, 1171-a, 1172 (matrimonial actions). Further, continues the Third Report, they created a lien upon real property (civil practice act § 510), but only if they were docketed. Id. § 509. Accordingly, this provision and the others affecting docketing (e.g., §§ 5019(b) and 5020(a) refer to a "money judgment" which is defined in § 105(n) to include judgments for, and judgments directing the payment of, a sum of money.

This section goes beyond the former provisions in allowing the docketing of judgments affecting the title to real property. Under former law a notice of pendency was the only method of apprising interested persons of a change in the title to real property, even after judgment. It is obviously inferior to to docketing for this purpose, since it does not indicate the outcome of the litigation and since its duration, under recently enacted § 121-a of the civil practice act, was only three years unless extended by motion. See 2 N.Y.Jud.Conference Rep. 114-16. Docketing was allowed alternatively with indexing with notices of pendency under rule 74 of the rules of civil practice for final orders in a special proceeding affecting the title to real property; such special provision was presumably required because a notice of pendency ordinarily was not available in a special proceeding, where no complaint was filed. The CPLR instead authorizes docketing for any judgment or order affecting the title to real property. The instant subdivision does so for judgments, which includes the final order in special proceeding by virtue of rule 411 and rule 2222 does so for orders.

Where such a judgment is docketed the clerk may make appropriate modifications in the forms prescribed for the docket by subdivision (c) of this section and for a transcript or certificate by McKinney's Judiciary Law § 255-c which are drawn to cover the usual case of a money judgment docket, adds the Fourth Report.

The Third Report states that the requirement that the clerk who issued a transcript be notified and make an entry of where it is filed is new. Where a judgment of a court below the Supreme or County Court is involved, after the judgment is docketed by the county clerk, his docket rather than the one in the lower court will serve as the foundation for enforcement procedures. See e.g., § 5230. Where transcripts of a county clerk's docket are filed in other counties, the notation of where they are filed will enable the judgment debtor to have them all discharged upon making satisfaction. Further, it will apprise the court of where executions may have issued and enable it to protect the sheriff's right to fees where a deposit into court is made pursuant to § 5021(a)(3). It thus accords with the design of § 5021 in making the clerk's office of the court which rendered the judgment, or the county clerk's office, if a lower court judgment has been docketed there, the center of information as to the status of the judgment and its enforcement.

The Fourth Report also informs us that the addition of the second sentence of subdivision (a) providing that "If the judgment is upon a joint liability of two or more persons the word 'summoned' shall be written next to the name of each defendant who was summoned."

This addition covers the requirement of the third sentence of civil practice act § 222-a, as to partnerships, and the first sentence of civil practice § 1200, as to persons jointly liable generally, states the Fourth Report to the Legislature. Since this entry is a part of the docket it will appear on any transcript and in the docket of any other county clerk with whom the judgment is subsequently docketed upon receipt of a transcript; accordingly, the express language to this effect in §§ 222-a and 1200 is omitted.

The plan of requiring docketing in the home county clerk's office before the judgment may be docketed, upon the filing a transcript of the docket issued by such county clerk, in any other county clerk's office, accords with the 1959 amendments to § 502. See 4 N.Y.Jud.Conference Rep. 131-34 (1959).

Subd. (b) is a rewording of § 502-a of the civil practice act, with no change of substance. It uses the term "filed" to cover judgments of Federal courts rendered in other states but filed in this state pursuant to § 1963 of Title 28 of the United States Code Annotated. The committee was not able to devise an effective method for the state to provide centralized docketing of Federal judgments equivalent to that in subdivision (a), comments the Third Report to the Legislature.

Subd. (c) embodies part of § 501 of the civil practice act. With regard to the docketing of Federal judgments, it should be noted that a Federal transcript may not contain all of the information contained in the docket of a judgment of a state court. See rule 79(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. Thus, states the Third Report to the Legislature, subpar. 4 of this subdivision is not applicable to Federal judgments. This situation existed under former law, but in practice, the county clerks docketed Federal judgments without difficulty.

Official Reports to Legislature for this section:

3rd Report Leg.Doc. (1959) No. 17, p. 211.

4th Report Leg.Doc. (1960) No. 20, p. 218.

5th Report Leg.Doc. (1961) No. 15, p. 588.

6th Report Leg.Doc. (1962) No. 8, p. 436.

Notes of Decisions (43)

McKinney's CPLR § 5018, NY CPLR § 5018
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 55. Appeals Generally (Refs & Annos)

McKinney's CPLR § 5513

§ 5513. Time to take appeal, cross-appeal or move for permission to appeal

Effective: June 22, 1999
Currentness

(a) Time to take appeal as of right. An appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

(b) Time to move for permission to appeal. The time within which a motion for permission to appeal must be made shall be computed from the date of service by a party upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry, except that when such party seeking permission to appeal has served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.

(c) Additional time where adverse party takes appeal or moves for permission to appeal. A party upon whom the adverse party has served a notice of appeal or motion papers on a motion for permission to appeal may take an appeal or make a motion for permission to appeal within ten days after such service or within the time limited by subdivision (a) or (b) of this section, whichever is longer, if such appeal or motion is otherwise available to such party.

(d) Additional time where service of judgment or order and notice of entry is served by mail or overnight delivery service. Where service of the judgment or order to be appealed from and written notice of its entry is made by mail pursuant to paragraph two of subdivision (b) of rule twenty-one hundred three or by overnight delivery service pursuant to paragraph six of subdivision (b) of rule twenty-one hundred three of this chapter, the additional days provided by such paragraphs shall apply to this action, regardless of which party serves the judgment or order with notice of entry.

Credits
(L.1962, c. 308. Amended L.1970, c. 108, §§ 1, 2; L.1977, c. 30, §§ 1, 2; L.1996, c. 214, § 1; L.1999, c. 94, § 1, eff. June 22, 1999.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by David D. Siegel

2004

C5513:1. Time to Appeal or Move for Leave, In General

To Start Appeal Time, Papers Served on Loser Must Include Reference to "Entry"

The Court of Appeals, in *Reynolds v. Dustman*, 1 N.Y.3d 559, 772 N.Y.S.2d 247 (Dec. 23, 2003), makes an important technical point concerning the start of the 30-day time in which to appeal an order or judgment.

CPLR 5513(a) starts the appeal time from the winner's service on the loser of a copy of the objectionable judgment or order with "written notice of its entry". Including the appealed paper without also including the datum about the time and place of its "entry" is therefore ineffective to start the running of the appeal period, holds the court. It sustains an appeal taken half a year after the respondent's mailing of papers to the petitioner.

What the respondent mailed was a copy of the objectionable order with a cover letter advising only of "decision filed" and the date of the filing. There was no mention of "entry", and that, holds the court in a memorandum decision, is a sine qua non under the statute.

The Court distinguishes its earlier decision in *Norstar Bank v. Office Control Systems, Inc.*, 78 N.Y.2d 1110, 578 N.Y.S.2d 868 (1991), because while the cover letter in *Norstar* did not refer to "entry", the enclosed order itself specified the date it was "entered", and that sufficed. In *Reynolds*, neither the cover letter nor the enclosed order referred to entry.

The paper enclosed in *Reynolds* was not even the conventional "order", but only a copy of the court's "decision". That might on its own have been deemed a defect in earlier years, but today the decision itself may be treated as an order if it contains all the terms of one. (Note in this connection the promulgation of Uniform Rule 202.8[g] in 1993, applicable in the supreme and county courts, providing that absent the need for settlement of the order, the court "shall incorporate" the order into the decision itself. This is designed to save the parties the need to draft and submit an order by making the decision itself serve also as the order whenever possible. (See the discussion in Siegel's Practice Review 5:1.)

When the court wants the decision to serve also as the order, it should make it clear. The decision in *Reynolds* did that, unambiguously, ending by reciting--increasingly common in practice now--that "[t]his decision shall constitute the order of the court". All was okay on that front, therefore; the culprit was just the omission of the word "entry". Paltry, but in appellate practice potent.

If the reader should inquire about why all this ado about whether a "decision" can qualify as an "order", the answer comes from CPLR 5512(a), instructing that only a "judgment or order" is appealable. A decision is not. Hence the decision must have language indicating that it is also designed to be a "judgment or order" before it can serve as such.

2000

C5513:1. Time to Appeal or Move for Leave, In General.

Overcoming Presumption of Whether and When Notice of Entry Was Served

There are many contexts in which a notice of entry is required to start a time period running, but none so critical as when it is relied on to start the running of the time to appeal under CPLR 5513. If one side says it served the notice of entry (with the order or judgment sought to be appealed), how can that be refuted?

In *De Leonardis v. Gaston Paving Co.*, 271 A.D.2d 839, 706 N.Y.S.2d 254 (3d Dep't, April 20, 2000), D furnished an affidavit of service of notice of entry, allegedly made on March 10. That created a presumption of service. P's lawyer said he never received it, swore to his "usual course of business and office practice", and swore unequivocally that he had no record of receipt of the notice of entry until May 10. He took the appeal on May 12.

The court upholds the appeal as timely. It boiled down to an issue of credibility.

1999

C5513:1. Time to Appeal or Move for Leave, In General.

The 1999 Amendment Resolving Dispute About Application of CPLR 2103(b)(2) Five-Day Addition When Appellant Serves Judgment or Order Itself

The 1997 Commentary, below, notes and discusses this dispute. During the past year the legislature resolved the dispute by opting to allow the appellant the extra time under CPLR 2103(b) (for mailing or overnight delivery) even when the appellant itself is the party who serves the objectionable judgment or order on the other side: the appellant now clearly gives itself the extra time in which to take the appeal when the appellant serves the judgment or order, with notice of entry, on the winner.

The change, implemented through the enactment of a new subdivision (d) added to CPLR 5513, is adopted despite objections in some quarters based on the self-evident proposition that the very purpose of CPLR 2103(b) in adding extra time when some method other than personal delivery has been used is to recognize the delay occasioned by the mailing, or even by an overnight delivery, presumably shortening the period of time (30 days in the case of an appeal) that the recipient of the paper has in which to take the necessary responsive step (in the case of an appeal, the taking of the appeal through the service and filing of a notice of appeal).

Even though this purpose of CPLR 2103(b) is in no way implicated when the party required to take the responsive step is the very party who serves the paper that starts the time running on the responsive step, the legislature has decided that uniformity in the method of measurement is more important than the implementation of that purpose.

Two provisions of CPLR 2103(b) are implicated: paragraph 2, which extends the applicable responsive period by five days when mail is used, and paragraph 6, which extends the applicable responsive period by one day when overnight delivery is used. The new subdivision (d) of CPLR 5513 applies to both.

The amendment may brew trouble on other fronts on which a similar issue can arise. The notable example here is the recently added provision of CPLR 3211(e) that requires a defendant who has raised an objection to improper service as a defense in the answer (instead of taking it by a threshold motion to dismiss) to move for summary judgment on the defense within 60 days after asserting it, i.e., serving the answer containing it. Here is another example of where a party, in this case the defendant, may believe that its own service of the answer by (e.g.) mail extends from 60 to 65 days the time for making the summary judgment motion.

The defendant in that situation could previously draw an analogy to those cases on CPLR 5513 that allowed the extra time for the notice of appeal in similar circumstances. Can the reader sense the trouble caused by the 1999

amendment that adds subdivision (d) to CPLR 5513? By deliberately allowing the appellant the extra time for the notice of appeal under CPLR 5513, the legislature can be deemed, by negative implication, to intend to deny the extra time in the CPLR 3211(e) and like situations. See the 1999 Commentary C3211:56 on McKinney's CPLR 3211.

Effective Date and Transition Cases

The amendment adding subdivision (d) to CPLR 5513 became law on June 22, 1999, took effect "immediately", and was made applicable to "judgments and orders with notices of entry served on or after such date". Since the impact of the amendment is to overrule any cases that may have held against the extra time allowance for the appellant who has served the judgment or order itself, the extra time supplied by CPLR 2103(b) should be allowed in all such cases.

1997

C5513:1 Time to Appeal or Move for Leave, In General.

Dispute About Application of CPLR 2103(b)(2) Five-Day Addition When Appellant Itself Serves Judgment or Order

When the winner serves on the loser a copy of the judgment or order with notice of entry, the loser's 30-day appeal time starts to run. And when that service is by mail, the 30 days become 35 days under the operation of CPLR 2103(b)(2). But what about the situation in which the loser does not wait for the winner to make the service, but secures the entry of the judgment or order itself and then effects its service on the winner (which is a permissible procedure)? Does the extra five days also get added to the 30 when the loser does the serving?

At pages 169-170 of the main volume, the Fourth Department case of *Oliver v. Alcog* is cited and discussed. It holds that the five days get added on even in that situation.

Disagreeing in effect with *Oliver*, the First Department holds implicitly in O'Connor v. Lansdown Entertainment Corp. (M-3970, Index No. 126441/93), a brief memorandum handed down at its September Term in 1996, that the losing party--the would-be appellant--does not get the extra five days in that situation. The memorandum in *O'Connor* merely announces the granting of a motion to dismiss an appeal from an order of Supreme Court, New York County, but the chronology of the events spells out the conflict with *Oliver*. The relevant dates appear to be the following:

April 10	Court denies D's summary judgment motion
April 17	Date of the order
May 2	D (appellant) serves notice of entry
June 1	Saturday, expiration of 30-day appeal period
June 3	Monday, to which 30 days extended (because last day was Saturday)
June 7	P (respondent) receives D's notice of appeal in envelope postmarked June 6

If D was able to rely on the five-day mail extension of CPLR 2103, the notice of appeal would have been timely. That the motion to dismiss was granted therefore indicates that D does not get the five extra days that CPLR 2103(b)(2) offers when mail is used. The *O'Connor* case is noted in Siegel's Practice Review 49:4.

Until the Court of Appeals resolves this conflict, or the legislature does, the only safe lesson for would-be appellants to draw is that the First Department position is the correct rule. The loser's taking the appeal within the 30 days following the loser's service of the objectionable judgment or order will preserve the appeal; taking it at any point afterwards, even between the 31st to 35th day, may forfeit it. And since all it takes to "take" the appeal is the mailing of the notice of appeal to the appellant and the lower court clerk--see Commentary C5515:1 on CPLR 5515 in the main volume--the forfeiture is all the less excusable.

Practitioners must bear in mind that CPLR 2004, so readily available to extend time periods at trial level, has no application to the time for taking an appeal or for moving for leave to appeal, whatever application it may have to the subsequent steps needed on appeal, which are part of the perfecting rather than the "taking" of the appeal.

1996

C5513:1 Time to Appeal or Move for Leave, In General.

The 1996 Amendment Requiring Service by *Party* Before Appeal Time Starts

In the ordinary case the winner serves a copy of the order or judgment on the loser with notice of entry, and that starts the loser's appeal time running. It's also provided, however, that the loser can itself serve the paper with notice of entry so as to facilitate its own appeal--an appeal before entry is premature--and that an appellant doing that starts the appeal time running against itself.

Both situations are reasonably clear. The difficult one that the 1996 amendment deals with is where the court itself has served the notice of entry, or has otherwise acted in such a way that the appeal time may be deemed to start from the court's action instead of a party's. See, for example, the *Corteguera* case discussed in this Commentary in the main volume and in Issue 29 of Siegel's Practice Review.

Given the rigidity of the 30-day appeal period and the jurisdictional defect that lateness gives rise to, forfeiting the appeal, the 1996 amendment seeks to avoid any ambiguity that may appear when the court itself serves the judgment or order, either outright, or, as in *Corteguera*, through some other phenomenon that amounts to the same thing. The amendment provides that only the service of the judgment or order (with notice of entry) by a party will start the time running.

If the court has itself served it, this may mean that the would-be appellant is being notified twice. No matter. There must be unambiguous service by a party or the time won't start.

No change is made in the provision that starts the time from the would-be appellant's own service of the paper, as noted earlier. That, too, will be deemed service by a party under the statute.

Apart from the 30 days for appealing the order after its entry is the 60-day period for securing entry in the first place under court rules. Uniform Rule 202.48, for example, supplies such a time limit in supreme and county court practice. When the court itself makes some kind of service, similar problems arise with the 60-day period. A case in point is Simmons v. Mercer, Sup.Ct., Albany County, March 15, 1990 (Index 11624-86, Doran, J.), treated in a lead note in New York State Law Digest No. 373. In *Simmons*, an order was signed by the judge and apparently sent to the parties but not forwarded to the clerk for filing and entry. That was assumed to be the attorney's task, and the attorney's failure to carry it out worked an abandonment of the motion under Rule 202.48.

To assure the running of the loser's appeal time in multiple-party cases, it is also a good idea for each winner to serve its own notice of entry, regardless of what other parties--even winning parties--may do. See the note in SPR 27:3.

The effective date of the amendment is January 1, 1997. Those reading these words before then should be alert to the fact that service made by a court prior to that day may still trigger the appeal period.

PRACTICE COMMENTARIES

by David D. Siegel

Generally

C5513:1 Time to Appeal or Move for Leave, In General.

Subdivision (a)

C5513:2 Time to Appeal of Right.

Subdivision (b)

C5513:3 Time to Move for Permission to Appeal.

Subdivision (c)

C5513:4 Cross-Appeal.

Generally

C5513:1 Time to Appeal or Move for Leave, In General.

The time in which to appeal or to move for leave to appeal if leave is necessary is one of the most rigid in all of procedure. Its passing without the proper step being taken forfeits the appeal and puts an end to the matter, often just as effectively as the doctrine of res judicata would do. In fact, the passing of the period is deemed to go to the jurisdiction of the court--to its subject matter jurisdiction--so that not even a stipulation of the parties can preserve the appeal if the time has expired. See Haverstraw Park v. Runcible Properties Corp., 33 N.Y.2d 637, 347 N.Y.S.2d 585, 301 N.E.2d 553 (1973).

CPLR 2004, which applies to permit the court in its discretion to extend almost any time period set forth in the CPLR, does not apply to the time in which to appeal or to move for leave to appeal. The few grounds on which an extension of the appeal time is statutorily recognized are contained in CPLR 5514 and 5520 in the appeals article, and in CPLR 1022 (involving substitution of parties). See CPLR 5514(c).

An appellate court often has its staff sift through the papers of a case to enable the court to determine, without waiting for a motion to dismiss by the respondent, whether the appeal has been timely taken or the motion for leave timely made, dismissing for untimeliness sua sponte if the time requirement has been violated.

The basic period to appeal or move for leave is 30 days. While it is not extendable in the discretion of the court, the period does get the extra days allowed by CPLR 2103(b)(2) (presently five days) if the service of the judgment or order with notice of entry, which starts the appeal period running, was by mail. Messner v. Messner, 42 A.D.2d 889, 347 N.Y.S.2d 589 (1st Dep't 1973). The period thus becomes 35 days when mail is used. The would-be appellant should not experiment with these terminals; given the jurisdictional impact of an oversight, the appellant should act promptly.

It is also permissible for the loser itself to serve a copy of the judgment or order and notice of entry. When that happens CPLR 5513 says that the 30 days start from that service. It has been held that the extra five days get added in that situation, too, so that the losing party--the appellant--can take the appeal within 35 days of its own service of the order. Oliver v. Alcog, 155 A.D.2d 1001, 548 N.Y.S.2d 132 (4th Dep't 1989).

The extra five days are supposed to compensate for the mail delay before the party who has to take some step in response to the served paper receives it. In view of that purpose, the *Oliver* interpretation is generous. A loser/appellant who has itself served the order hardly needs notice of it, and, if all that anxious to appeal, ought to do it fast enough to avoid having to rely on this extra five-day gift.

The copy of the judgment or order served must be an accurate one. It has been held that the service of an incorrect copy doesn't start the time, so that the party taking the appeal will not be restricted to the 30 days of CPLR 5513. Masters, Inc. v. White House Discounts, Inc., 119 A.D.2d 639, 500 N.Y.S.2d 790 (2d Dep't 1986). The judgment in *Masters* involved directions to make a certain assignment and conferred enforcement powers on designated persons. The copy served mixed up who had to do what. It also omitted interest and in several places it omitted the judge's initials. These were deviations from the original judgment that the court deemed substantial enough to void the copy served as an effective one to start the time.

It is not unusual for the typed draft of a judgment or order to be altered by the judge by hand. If handwritten or for that matter any other changes are made in the judgment, the party must see to it that the copy served bears the same changes. The best idea is to get a photostat of the final version of the judgment or order and serve that. That automatically picks up the base document with whatever changes were made in it. A party failing to do that is either in too big a rush too far away from a duplicator, or else is not using the safety valve that xerography has meant for the practice of law.

Ironically, this most rigid of time periods involves the most facile of steps: the mere service of a paper (a notice of appeal) for an appeal as of right, or a set of motion papers when leave to appeal is required.

If the appellant has not taken the appropriate step in time, the respondent may move to dismiss the appeal, or ask the court to deny or dismiss the motion for leave to appeal. The application must be made to the appellate court, since the issue is deemed to involve its jurisdiction.

When an oral decision has been rendered, the judge's short-form cover sheet referring to the oral decision, even if a transcription of the decision is not appended, has been held to suffice, when served on the loser with notice of entry, to start the appeal time. Corteguera v. City of New York, 179 A.D.2d 362, 577 N.Y.S.2d 837 (1st Dep't 1992). It constitutes, in other words, the equivalent of a formal written order.

The result in *Corteguera* was that the appeal was dismissed as untimely. The court said that the parties are presumed to know the contents of an in-court oral decision anyway, because the parties are present when it's rendered.

Subdivision (a) of CPLR 5513 provides the time for an appeal as of right, subdivision (b) the time for moving for leave to appeal when the appeal needs leave. Subdivision (c) provides an alternative time period for what is known as a "cross-appeal". The following Commentaries treat the three subdivisions seriatim.

Subdivision (a)

C5513:2 Time to Appeal of Right.

The time to take an appeal of right is 30 days. The period starts when the winner (destined to be the respondent on the appeal) serves on the loser (the appellant) a copy of the objectionable judgment or order with notice of its entry. It is this formal service that starts the period. The notice of entry should be included. Omitting it may prevent the appeal time from running. It makes no difference that the appellant may have notice of both the judgment or order and notice of the entry from other sources.

Notice of "entry" means just that, held Halpin v. Perales, 203 A.D.2d 675, 610 N.Y.S.2d 367 (3d Dep't 1994); notice of only the "filing" of the judgment does not suffice to start the running of the loser's time for appealing. If the case seems too technical, it also offers a simple lesson. Add the word "entry" and be done with the matter.

As indicated in the prior Commentary, if the judgment or order with notice of entry is served by mail, five days are added and the appeal time stretches to 35 days.

The step that the appellant is required to take within the applicable period, in order to "take" the appeal, is to serve on the respondent and file with the court a simple paper called a "notice of appeal". CPLR 5515(1).

An appeal technically does not lie until the judgment or order is formally entered with the clerk of the lower court. If the winning party does not have the paper entered, the losing party--the appellant--can have it done, drawing an appropriate judgment or order and presenting it to the clerk for entry. As far as time is concerned, the 30-day period still does not begin until service of the judgment or order with notice of entry, but in this instance it will be the service made by the appellant on the respondent, and not vice-versa, which is of course the more usual case.

The appeal might be deemed premature if the appellant, although having had the paper entered, has not served it, but in that instance the defect should be remediable by permitting a nunc pro tunc service. Prematurity, unlike lateness, should be curable by the quickest procedural route. A wise appellant should follow all requirements to the letter and avoid these questions. The time to appeal is not a subject for innovation.

From the winner's point of view, there is everything to lose by not drawing the judgment or order and having it promptly entered and served on the loser. If the entry is never made, or the paper never served with notice of entry, the time to appeal is extended indefinitely, although it may face a charge of laches. Dobess Realty Corp. v. City of New York, 79 A.D.2d 348, 436 N.Y.S.2d 296 (1st Dep't 1981).

The *Dobess* decision offers another helpful warning: when several parties are winners in the case, the 30-day period in which to appeal will not start to run with respect to any given one of them until that party itself serves the notice of entry. It makes no difference that such service has been made by some other party. Each winner should make it a point to serve its own notice of entry in order to start the loser's appeal time running against itself, or at least to co-sign a notice of entry signed by other winners. See Issue 27 of Siegel's Practice Review.

Subdivision (b)

C5513:3 Time to Move for Permission to Appeal.

In several instances in New York practice, notably but not exclusively when an appeal to the Court of Appeals is involved, an appeal may require permission. When it does, the appellant's procedure in first instance is not to serve a notice of appeal, but to serve motion papers seeking permission to appeal. The time in which to serve the motion papers is the same as on an appeal taken as of right, 30 days, and it begins to run from the same moment: the service on the would-be appellant of a copy of the judgment or order with notice of its entry.

When the appellant is the one who has the judgment or order entered, and serves it, the time for her to move for leave to appeal runs from the service by her rather than on her.

When appeal is sought from one appellate court to another, and leave is required, there are some instances in which the permission may first be sought from the appellate court that rendered the order to be appealed, and afterwards from the court to which the appeal is to go if the first court denies permission. See, e.g., CPLR 5602(a). In that instance, the time in which to make the motion in the higher appellate court is measured from the service of the lower appellate court's order denying permission. This dual-option procedure also applies in the relatively rare instance when an appeal from a court of original jurisdiction needs permission. See CPLR 5701(c).

The mere making of the motion within the applicable period satisfies the time requirement even if the motion is not returnable until after, and even substantially after, the period's expiration. CPLR 5516 assures that it won't be returnable too far in the future, by requiring that the return day of the motion be the first motion day available in the court more than eight days after the service of the motion papers (the eight days being the minimal period of notice the statute assures the respondent).

Subdivision (c)

C5513:4 Cross-Appeal.

It may happen that both sides, X and Y, are aggrieved by different aspects of the judgment or order, and both wish to appeal. Subdivision (c) of CPLR 5513 offers an alternative time period, after one party appeals, in which the other may cross-appeal. If X serves a timely notice of appeal on Y, Y can serve one on X, doing so within the usual 30-day period as provided in subdivision (a) of CPLR 5513. But if X's notice of appeal is served towards the end of the 30-day period, Y may receive it too late to serve a notice of appeal of his own within the original 30 days. Y may serve it within 10 days after the service of X's notice of appeal notwithstanding the expiration of the 30 days.

The same is true when permission is required. If X's motion papers (seeking permission) are served on Y within the 30 days but too late for Y to serve his own motion papers and still be within the period, Y has 10 days from the service of X's papers in which to serve his own. The five days of CPLR 2103(b)(2) should also apply if X serves his motion papers by mail, stretching the 10 days to 15.

The underlying assumption of subdivision (c) is that X's service on Y is timely. If it is not, having come about after the 30 days, the appellate court obtains no jurisdiction of X's appeal and the service by Y within 10 days after X's service would not validate Y's appeal or motion. An untimely service by the first party appealing (or moving for leave) should not make the 10-day alternative period operative.

In awarding a distinct 10-day period in which a party can appeal after receiving a co-party's notice of appeal even though the original 30-day appeal period has expired, CPLR 5513(c) refers only to the notice of appeal served by an "adverse" party. Literally read, it is only from an "adverse" party's notice of appeal that the 10 days for a cross-

appeal runs. What if the notice of appeal has been served on the would-be cross-appellant by a party on the same side? Should it start the fresh 10-day period for a cross-appeal? A strong case can be made for a yes answer. The drafters of CPLR 5513(c) were apparently concentrating on the common "cross-appeal" situation of the obviously "adverse" plaintiff and defendant, but it can of course happen, and does, that both the original appellant and the cross-appellant are "adverse" even though both are, e.g., defendants.

Suppose, for example, that injured person P has sued two tortfeasors, A and B. P gets a verdict against both, with liability apportioned 40% against A and 60% against B. At first only B appeals, serving her notice of appeal near the end of the allowable 30 days. A, who would have been content to accept the judgment and hence did not initiate an appeal, should be able to take a cross-appeal within 10 days after being served with B's notice of appeal. Under the discernible criteria that guides CPLR 5513(c), A would be within the protected group.

LEGISLATIVE STUDIES AND REPORTS

Subd. (a) is derived from C.P.A. §§ 592(1), 612, 624(1), 632, 634-a. In the Second Report to the Legislature, it is stated that this subdivision has the effect of reducing the time to appeal as of right to the Court of Appeals from 60 to 30 days after service has been made. The longer period serves only to prolong the appeal. This subdivision governs all appeals as of right, whether from a final or interlocutory decision or a nonfinal order, in the absence of a statutory provision.

Subd. (b) is based on § 578-a of the civil practice act. The Revisers omitted the second paragraph of § 578-a of the civil practice act "because it is covered by the more general terms" of this subdivision. They further remark that a third-party defendant or subsequent party plaintiff who is served with a timely notice of appeal may cross-appeal within the longer of the two time periods provided by subdivision (a) and this subdivision despite the fact that prior to such service he was served with a notice of appeal by another party and the time within which to cross-appeal with regard to such other party has expired.

Subd. (c) is taken from subds. (2) and (3) of § 592 of the civil practice act. The Second Report of the Advisory Committee, which accompanied the original draft of this subdivision, provided that this subdivision establishes different time provisions within which to move for permission to appeal depending upon where the motion is made and whether the determination sought to be reviewed is final or non-final. A 30 day period is allowed only when permission to appeal from a final determination is sought from the court to which the appeal would be taken. In the other situations only a 10 day period is allowed because motions in these cases will not involve the necessity of drawing papers to familiarize a court with the entire case. The final draft of this subdivision increased to 30 days the time within which a motion in the court to which the appeal is sought to be taken to appeal from a non-final determination must be made, and the time within which a motion in the court whose determination is sought to be reviewed must be made "to accord with subdivision (a) [of this section] and to provide uniform time limits for motions to appeal."

The sentence providing "A motion for permission to appeal must be made within thirty days" was added in the final draft of this subdivision, and is derived from the last phrases of § 592(2), (3) of the civil practice act. The Revisers state that this provision was inserted to indicate when the motion is returnable. See 1957 and 1958 amendments to § 592 of the civil practice act. Laws 1957, c. 274; Laws 1958, c. 92.

The original draft of this subdivision also failed to take account of the situation where, for example, both the Appellate Division and the Court of Appeals are authorized to grant leave to appeal and the motion for such leave is made in the first instance to the Appellate Division. In the final draft, the Revisers incorporated the phrase "or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of copy of such order and written notice of its entry." It is noted by the Revisers that the time within which a second motion for leave to appeal must be made in the Court of Appeals in the event of refusal by Appellate Division should be measured, not from the date of service of a copy of the judgment or order sought to be appealed from, but from the date of service of the Appellate Division order denying leave to appeal.

Official Reports to Legislature for this section:

2nd Report Leg.Doc. (1958) No. 13, p. 323.

5th Report Leg.Doc. (1961) No. 15, p. 648.

6th Report Leg.Doc. (1962) No. 8, p. 519.

Notes of Decisions (150)

McKinney's CPLR § 5513, NY CPLR § 5513
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 55. Appeals Generally (Refs & Annos)

McKinney's CPLR § 5514

§ 5514. Extension of time to take appeal or to move for permission to appeal

Currentness

(a) Alternate method of appeal. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

(b) Disability of attorney. If the attorney for an aggrieved party dies, is removed or suspended, or becomes physically or mentally incapacitated or otherwise disabled before the expiration of the time limited for taking an appeal or moving for permission to appeal without having done so, such appeal may be taken or such motion for permission to appeal may be served within sixty days from the date of death, removal or suspension, or commencement of such incapacity or disability.

(c) Other extensions of time; substitutions or omissions. No extension of time shall be granted for taking an appeal or for moving for permission to appeal except as provided in this section, section 1022, or section 5520.

Credits
(L.1962, c. 308.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by David D. Siegel

2005

Example of Where Court Treats Appeal from Non-Appealable Order as Motion for Leave to Appeal, and Grants Leave

This is not a frequent occurrence. P's application in this case was for an adjournment. It was made ex parte and was denied. P appealed the order of denial but an appeal of right did not lie from an ex parte order; it required permission. Finding the equities to be in P's favor, however (P had to travel from Korea), the court treated the appeal as a motion for leave, granted it, reversed it on the merits, and allowed the adjournment. *Kim v. A & J Produce Corp.*, 15 A.D.3d 251, 790 N.Y.S.2d 19 (1st Dep't, Feb. 15, 2005).

PRACTICE COMMENTARIES

by David D. Siegel

Subdivision (a)

C5514:1 Mistaking Method.

Subdivision (b)

C5514:2 Disability of Attorney.

Subdivision (c)

C5514.3 Extending the Appeal Period.

Subdivision (a)

C5514:1 Mistaking Method.

If the appellant mistakes the method appropriate to the particular situation, and appeals of right when permission is necessary or moves for permission when appeal lies of right, subdivision (a) of CPLR 5514, and in the permission category CPLR 5520(b) as well, permits correction of the mistake without forfeiture of the appeal. Assuming that the "wrong" step was taken within the applicable period--subdivision (a) has no forgiveness if nothing at all was done within the 30-day period as measured by CPLR 5513--it permits the right step to be taken during a fresh 30-day period.

If the appeal was taken of right but required leave, subdivision (a) states that the new period, in which to seek leave, is measured from the "dismissal"; and that if leave was needlessly sought because appeal lay as of right, the new period is measured from the "denial" of the motion seeking leave. It would thus seem, on the face of subdivision (a), that the fresh 30-day period starts from the "dismissal or denial" itself, and not from the service of the order containing it. So pervasive, however, is the bar's assumption that it is service (of the dispositive order) that starts the 30-day period, see CPLR 5513 and its Commentaries, that the Court of Appeals has deemed it best to apply the same starting point to the corrective period allowed by CPLR 5514. Thus, the time for taking the right step is to be measured from the service of the order (with notice of entry) disposing of the wrong step. Park East Corp. v. Whalen, 38 N.Y.2d 559, 381 N.Y.S.2d 819, 345 N.E.2d 289 (1976).

The possibility exists that an appellant will seek to extend her appeal time, without the pressure of having to perfect the appeal, by deliberately taking the wrong step, knowing that a dismissal or denial will result, but with the assurance of being able to take the right step at that later time because of CPLR 5514(a). Perhaps the motive will be to prolong the appellate process in anticipation of a favorable change in the law expected from an appellate court in a pending case. Whatever the motive, the "unless" clause, which concludes subdivision (a) of CPLR 5514, guards against all such ulterior motives by empowering the court to refuse permission to take the corrective step for which the subdivision otherwise provides.

Subdivision (b)

C5514:2 Disability of Attorney.

If the attorney of the would-be appellant dies or is removed or suspended or becomes in some way incapacitated or disabled before the time to appeal or move for leave to appeal expires, the notice of appeal or the motion papers seeking leave to appeal may be served within 60 days from the date of the disabling occurrence. This applies, of course, only if the original period is still alive when the incapacitating event occurs.

The 60-day period does not run from the substitution of a new attorney, but from the event disabling the prior one, which means that the appellant must proceed promptly to the appointment of another lawyer. For the result when it is the respondent's attorney who dies or becomes disabled, see CPLR 321(c).

The "otherwise disabled" language affords the court some leeway in determining whether an event affecting the attorney can reasonably be said to have unfairly prejudiced the appeal rights of the client. Compare Hughes v. Geller, 183 Misc. 771, 51 N.Y.S.2d 647 (Sup.Ct., Kings County, 1944), holding that entering the military service qualifies as a disability. (The case does not involve the appeal period, however.)

Subdivision (c)

C5514:3 Extending the Appeal Period.

The time in which to appeal is rigid. Subdivision (c) of CPLR 5514 provides that it may not be extended except under the several sections referred to, which means that CPLR 2004, which supplies broad judicial discretion to extend the time for doing almost any time-restricted act under the CPLR, does not apply to the time in which to appeal (or move for leave to appeal).

The only four instances subdivision (c) recognizes for extending CPLR 5513's appeal period are these:

1. Where a party mistakes only the method, not the time period, purporting to appeal of right when leave is needed, or seeking leave when appeal of right lies. CPLR 5514(a), 5520(b).

2. Where the appellant's attorney becomes disabled. CPLR 5514(b).

3. Where an event permitting a substitution of parties occurs. CPLR 1022.

4. Where a party has taken the appeal by timely serving the notice of appeal but not filing it in time, or vice-versa. CPLR 5520(a).

It has been held that the failure to recite in an order the papers on which it was based, as required by CPLR 2219(a), does not prevent the order's being appealed. Hence an appellant who doesn't appeal the order on time, instead waiting for the outcome of a motion to resettle the order (to include a recitation of the papers) and appealing only the resettled order, finds the whole appeal dismissed. See the *Singer* case discussed in Commentary C2219:3 on McKinney's CPLR 2219.

LEGISLATIVE STUDIES AND REPORTS

This section consolidates all provisions relating to extensions of time to take an appeal and expands the scope of § 99 of the civil practice act to encompass specifically motions for permission to appeal.

Subd. (a), derived from C.P.A. § 592(3), (5), is applicable to all appeals and not merely to appeals to the Court of Appeals. The Revisers, in the Second Report to the Legislature, state that this subdivision covers the exceptions which are enumerated specifically in subd. (5) of § 592 of the civil practice act, and it also encompasses subd. (3) of such § 592 where an application for permission to appeal is made to the Court of Appeals after denial by the Appellate Division, and includes applications to the Appellate Division after denial by the lower court under § 5701(c) or after denial by an Appellate Term under § 5703(a).

Subd. (b) is from § 99(3) of the civil practice act and has been expanded to cover motions for permission to appeal. The discussion of this subdivision in the Second Report to the Legislature states that the time periods within which to take an appeal or move for permission to appeal apply from the commencement of any disability, in contrast to § 99(3) of the civil practice act which provides for an automatic 60 day extension in the case of death, removal or suspension and requires action by the court in the case of mental or physical incapacity. Court approval should not be necessary in any case of disability. The appealing party bears the burden of establishing the disability and normally it is established by affidavit. The final draft of this subdivision replaced the provision for a 60 day period found in subd. (3) of § 99 of the civil practice act. The Revisers remark in the Sixth Report that "In the case of a disability the usual short periods may place a severe burden on the aggrieved party who may not learn of the disability in time."

The original draft of this subdivision also omitted the words "removed" and "suspended" in order to make it clear that additional time to take an appeal or move for permission to appeal cannot be secured by the removal or discharge of an attorney by his client, however, the final draft retained the words "removed or suspended" so that it will accord with the language of § 99(3) of the civil practice act.

Subd. (c) is derived from C.P.A. § 99(1) insofar as it relates to appeals. The Revisers note that "specific recognition is given to the fact that there are exceptions to the general rule."

Official Reports to Legislature for this section:

2nd Report Leg.Doc. (1958) No. 13, p. 325.

5th Report Leg.Doc. (1961) No. 15, p. 650.

6th Report Leg.Doc. (1962) No. 8, p. 521.

Notes of Decisions (21)

McKinney's CPLR § 5514, NY CPLR § 5514
Current through L.2013, chapter 6.

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McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules
Chapter Eight. Of the Consolidated Laws
Article 80. Fees

McKinney's CPLR Ch. EIGHT, Art. 80, Refs & Annos
Currentness

Editors' Notes

PRACTICE COMMENTARIES

By Joseph M. McLaughlin

Article 80, regulating the fees payable to witnesses, county clerks, sheriffs and the like, was sponsored by the Judicial Conference of the State of New York and was principally designed to make uniform the various fees charged throughout the state. Prior to 1962, more than 40 different sections of law set forth the various fees for the various counties, there being little or no relationship between charges in one county as compared with another. As a result of the 1962 amendment, the practitioner can readily determine what the fee will be in any county.

Another salutary effect of the 1962 amendment was to establish an index number system for the filing of papers in the Supreme and County Court. When papers are filed in an action in the Supreme or County Court a number is assigned to the action, and all papers in the action are filed in the same folder. Consequently, a person desiring to examine the record in a case need only look in one folder to see the entire case. Once the index fee is paid there is no further charge for filing, indexing or docketing most other papers in the action.

The fees established in Article 80 are a matter of statutory entitlement. Accordingly, a witness who is subpoenaed to testify at a trial is entitled to two dollars per day plus mileage. CPLR 8001(a). Although the fee is grossly unrealistic and the attorney calling the witness invariably has to pay him at least a day's wages, the losing party may still be taxed only for the statutory amount. Cf. Marine Midland Trust Co. v. Forty Wall St. Corp., 1961, 13 A.D.2d 118, 213 N.Y.S.2d 689, aff'd, 11 N.Y.2d 679, 225 N.Y.S.2d 755, 180 N.E.2d 909. The CPLR has not changed this practice. County of Sullivan v. Emden, 1977, 59 A.D.2d 957, 400 N.Y.S.2d 376. See also CPLR 8301(d).

Because fees are a matter of statutory entitlement, a claim that the sheriff or county clerk did not earn his fee will usually fall upon deaf ears. For example, a sheriff is entitled to five percent of the value of the property levied upon under an order of attachment, even though the case is eventually settled. CPLR 8012(b)(3). When an insurance policy is levied upon, the levy is accomplished merely by serving the attachment papers at the office of the insurance company in New York.

In Considine v. Pichler, 1979, 72 A.D.2d 103, 422 N.Y.S.2d 429, two liability insurance policies were attached in a wrongful death action. Eventually the case was settled for $130,000. The Appellate Division held that the sheriff was entitled to his statutory five percent ($6,500) for serving the attachment papers. Constitutional attacks upon this system have also been turned back in federal courts. See Liquifin Aktiengesellschaft v. Brennan, D.C.N.Y.1978, 446 F.Supp. 914.

McKinney's CPLR Ch. EIGHT, Art. 80, Refs & Annos, NY CPLR Ch. EIGHT, Art. 80, Refs & Annos
Current through L.2013, chapter 6.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 80. Fees (Refs & Annos)

McKinney's CPLR § 8001

§ 8001. Persons subpoenaed; examination before trial; transcripts of records

Currentness

(a) Persons subpoenaed. Any person whose attendance is compelled by a subpoena, whether or not actual testimony is taken, shall receive for each day's attendance fifteen dollars for attendance fees and twenty-three cents as travel expenses for each mile to the place of attendance from the place where he or she was served, and return. There shall be no mileage fee for travel wholly within a city.

(b) Persons subpoenaed upon an examination before trial. If a witness who is not a party, or agent or employee of a party, is subpoenaed to give testimony, or produce books, papers and other things at an examination before trial, he shall receive an additional three dollars for each day's attendance.

(c) Transcripts of records. Wherever the preparation of a transcript of records is required in order to comply with a subpoena, the person subpoenaed shall receive an additional fee of ten cents per folio upon demand.

Credits
(L.1962, c. 308. Amended L.1988, c. 23, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

by Vincent C. Alexander

The mandate of CPLR 8001(a) that a fact witness served with a subpoena be paid a $15-per-day fee does not preclude a party from voluntarily paying such witness additional amounts to compensate him or her for time lost "in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses." N.Y. Rules of Professional Conduct, Rule 3.4(b)(1) (22 N.Y.C.R.R. § 1200.0). The court in *Caldwell v. Cablevision Systems Corp.*, 2011, 86 A.D.3d 46, 925 N.Y.S.2d 103 (2d Dep't), however, holds that when the payment of an amount purportedly for time lost reasonably appears disproportionately high, the jury must be charged that it may draw an inference that the witness has given tainted testimony, even if unconsciously, in favor of the payor. Such was the situation in *Caldwell*, where an orthopedic surgeon, testifying as a fact witness, not as an expert, was paid $10,000 by the defendant for an afternoon's trial testimony. On appeal from a judgment for the defendant, the plaintiff sought reversal on the ground that the payment to the witness rendered his testimony inadmissible on the ground that he became incompetent to testify.

The Appellate Division agreed that the payment raised reasonable suspicion about the fairness of the witness's testimony, but held that the witness was not rendered unqualified to testify. (The court found no need to make a finding that the amount was actually in excess of the witness's lost time because this was neither a case seeking enforcement of an illegal contract nor a disciplinary proceeding.) In accordance with modern principles of witness competency (see, e.g., CPLR 4512), the apparent overpayment here was to be treated as a basis for impeachment of the witness's credibility on the ground of bias. Thus, "where one might reasonably infer that a fact witness has been paid a fee for testifying," the party against whom such witness testifies should be allowed to cross-examine the witness about the amount of the payment and to stress the point to the jury during summation, both of which the trial court here allowed. Furthermore, the trial court should deliver a jury instruction specifically allowing the jury to consider whether a payment was "disproportionate to the reasonable value of the witness's lost time," alerting the jury to the danger that excessive payments pose to the objectivity of a witness's testimony. The trial court here failed to fulfill the latter obligation by giving only a general charge on the relevance of witness bias, but the error was not so prejudicial on the facts of the case as to require reversal.

LEGISLATIVE STUDIES AND REPORTS

Subd. (a). Although witness and mileage fees may not be intended to compensate completely for the losses incurred in attending, there is no need to allow the sum to become absurdly small. Since 1840, the only change has been to raise witness fees in response to a subpoena duces tecum from fifty cents to one dollar a day. New York's witness compensation fares poorly in comparison with that allowed in other states, and the amount provided for in this section accords with that allowed by statutes recently adopted in Maine and Wisconsin.

Mileage fees are allowed for travel and return as is the rule in most jurisdictions. Since the process compels attendance even if return is not made immediately, the return when made is a result of the process. As in former practice, the most direct route is the one to be used. Mileage within city limits will not be reimbursed.

Provisions governing various nonjudicial proceedings and those in § 1541 of the civil practice act, relating to judicial proceedings, made certain persons ineligible to receive fees. Thus, in non-judicial proceedings, officials, applicants or the person being investigated are ineligible.

This section does not affect the proceedings. In judicial proceedings, fees are not allowed to parties testifying in their own behalf, or on the part of someone united in interest, or to attorneys testifying for their clients. Thus, former § 1541 prevented a party from ordering himself or his attorney to appear so that he could burden his opponent with costs. This section was dropped, since common sense is sufficient to deal with this tactic, states the First Report to the Legislature.

The Sixth Report to the Legislature states that the fee was reduced from five to two dollars, on the basis of suggestions that the original proposal was too high.

Subd. (b). The appropriate form will bring this subdivision to the attention of the witness.

The Sixth Report to the Legislature comments that the fee was reduced from ten to three dollars, on the basis of suggestions that the original proposal was too high.

Subd. (c) extends the provision of § 1540-a of the civil practice act to all proceedings where a transcript must be prepared in response to a subpoena.

Official Reports to Legislature for this section:

1st Report Leg.Doc. (1957) No. 6(b), p. 174.

5th Report Leg.Doc. (1961) No. 15, p. 200.

6th Report Leg.Doc. (1962) No. 8, p. 680.

Notes of Decisions (28)

McKinney's CPLR § 8001, NY CPLR § 8001
Current through L.2013, chapter 6.

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McKinney's CPLR § 8002

§ 8002. Stenographers

Effective: August 16, 2000
Currentness

Unless otherwise provided by law, a stenographer is entitled, for a copy fully written out from his or her stenographic notes of testimony or other proceedings taken in a court, and furnished upon request to a party or his or her attorney, to the fee set forth in the rules promulgated by the chief administrator of the courts.

Credits
(L.1962, c. 308. Amended L.1965, c. 980, § 1; L.1973, c. 458, § 1; L.1984, c. 846, § 1; L.2000, c. 279, § 5, eff. Aug. 16, 2000.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section is based on § 1544 of the civil practice act, which is derived from § 3311 of the Code of Civil Procedure. As to most areas of the state, the amount prescribed has remained unchanged since the Code was enacted over eighty years ago.

As a practical matter, the statutory fee was seldom observed, but since, under former law, only the statutory fee could be taxed as a disbursement (see Miss Susan v. Enterprise & C.U. Co., 66 N.Y.S.2d 266 (Sup.Ct.), rev'd on other grounds, 273 A.D. 768, 75 N.Y.S.2d 538 (1st Dep't 1947), the former section served a function. It has been retained because stenographers, as officers of the court (see McKinney's Judiciary Law § 290) and monopolists of the material they transcribe, should be subject to regulation. No fixed statewide fee would be suitable, however, in view of variations in comparable fees based upon time and local conditions. Nevertheless, the section serves to get a standard to guide a court or taxing officer in the reasonableness of fees actually charged. Moreover, the section implements special provisions concerning stenographers' fees. See, e.g., McKinney's Judiciary Law § 309.

Although it was originally held that any agreement to deviate from the rates prescribed was unenforceable (McCarthy v. Bonynge, 12 Daly 356 (N.Y.C.P.1884), aff'd, 101 N.Y. 668 (1886)), the section was amended in 1887 to allow a party to agree with the stenographer to an amount different from the statutory fee, states the Fourth Report to the Legislature. Laws 1887, c. 399. Nevertheless, it remained, and still remains, the duty of a stenographer to furnish the required copy "with all reasonable diligence" when paid the "fees allowed by law." Code Civ.Proc. § 86; McKinney's Judiciary Law § 302. In Cavanaugh v. O'Neil, 20 Misc. 233, 45 N.Y.Supp. 789 (Sup.Ct.1897), the court dealt with the problem presented by an agreement to pay a fee in excess of the statutory amount, which might be considered to be without consideration since it is an agreement with a public officer to do what he is obligated by statute to do. The court resolved the difficulty by declaring that payment in excess of the statutory amount would entitle a party to a transcript prepared with "more than reasonable diligence," while payment of only the statutory amount would entitle him to the transcript, but "only 'with all reasonable diligence.' " The court's statement apparently expresses the status of the question. See Kenda v. Bortle, 2 Misc.2d 797, 154 N.Y.S.2d 248 (Sup.Ct.1955).

Commenting on the rates specified in this section, the Fifth Report to the Legislature states "A number of objections have been made to the concededly unrealistic stenographic fee of ten cents per folio. The Committee agrees that it should be raised. Because substantial sums are involved from governmental agencies and because any changes must take into account variations in practice and in salaries to court stenographers, the Committee decided to recommend no change. It should be noted that the Judicial Conference is engaged in a complete review of fee schedules."

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 89.

5th Report Leg.Doc. (1961) No. 15, p. 202.

6th Report Leg.Doc. (1962) No. 8, p. 681.

Notes of Decisions (14)

McKinney's CPLR § 8002, NY CPLR § 8002
Current through L.2013, chapter 6.

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McKinney's CPLR § 8003

§ 8003. Referees

Currentness

(a) Generally. A referee is entitled, for each day spent in the business of the reference, to fifty dollars unless a different compensation is fixed by the court or by the consent in writing of all parties not in default for failure to appear or plead.

(b) Upon sale of real property. A referee appointed to sell real property pursuant to a judgment is entitled to the same fees and disbursements as those allowed to a sheriff. Where a referee is required to take security upon a sale, or to distribute, apply, or ascertain and report upon the distribution or application of any of the proceeds of the sale, he or she is also entitled to one-half of the commissions upon the amount secured, distributed or applied as are allowed by law to an executor or administrator for receiving and paying out money. Commissions in excess of fifty dollars shall not be allowed upon a sum bid by a party, and applied upon that party's judgment, without being paid to the referee. A referee's compensation, including commissions, upon a sale pursuant to a judgment in any action cannot exceed five hundred dollars, unless the property sold for fifty thousand dollars or more, in which event the referee may receive such additional compensation as to the court may seem proper.

(c) This section shall not apply to judicial hearing officers who have been designated referees.

Credits
(L.1962, c. 308. Amended L.1976, c. 700, § 1; L.1983, c. 840, § 8; L.1996, c. 225, § 1.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

Subd. (a) is based upon § 1545 of the civil practice act. The only change of substance is an increase in the amount of the statutory fee in a supplementary proceeding to the same fee ($25.00 per day) as in any other special proceeding. In practice, the amount of fees and the method of payment are usually stipulated and the statutory amount has little function, states the Fourth Report to the Legislature.

Subd. (b) is based upon § 1546 of the civil practice act with no change in substance.

Official Reports to Legislature for this section:
4th Report Leg.Doc. (1960) No. 20, p. 90.

5th Report Leg.Doc. (1961) No. 15, p. 202.

6th Report Leg.Doc. (1962) No. 8, p. 681.

Notes of Decisions (89)

McKinney's CPLR § 8003, NY CPLR § 8003
Current through L.2013, chapter 6.

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McKinney's CPLR § 8004

§ 8004. Commissions of receivers

Currentness

(a) Generally. A receiver, except where otherwise prescribed by statute, is entitled to such commissions, not exceeding five per cent upon the sums received and disbursed by him, as the court by which he is appointed allows, but if in any case the commissions, so computed, do not amount to one hundred dollars, the court, may allow the receiver such a sum, not exceeding one hundred dollars, as shall be commensurate with the services he rendered.

(b) Allowance where funds depleted. If, at the termination of a receivership, there are no funds in the hands of the receiver, the court, upon application of the receiver, may fix the compensation of the receiver and the fees of his attorney, in accordance with the respective services rendered, and may direct the party who moved for the appointment of the receiver to pay such sums, in addition to the necessary expenditures incurred by the receiver. This subdivision shall not apply to a receiver or his attorney appointed pursuant to article twenty-three-a of the general business law.

Credits
(L.1962, c. 308.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

Subd. (a) is based upon § 1547 of the civil practice act with no change in substance. The first sentence of § 804-a of the civil practice act is also covered by this subdivision.

Subd. (b) is based upon § 1547-a of the civil practice act with no change in substance.

Official Reports to Legislature for this section:
4th Report Leg.Doc. (1960) No. 20, p. 91.

5th Report Leg.Doc. (1961) No. 15, p. 204.

6th Report Leg.Doc. (1962) No. 8, p. 683.

Notes of Decisions (156)

McKinney's CPLR § 8004, NY CPLR § 8004

Current through L.2013, chapter 6.

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McKinney's CPLR § 8005

§ 8005. Commissions of trustees; advance payment of fees of an attorney-trustee

Currentness

A trustee of an express trust shall be entitled to commissions and the allowance of his expenses and compensation and, if he be an attorney admitted to practice in this state, to the allowance of a sum on account of his compensation for legal services theretofore rendered to the trust, in the same manner and amount as that provided by sections twenty-one hundred eleven, twenty-three hundred eight and twenty-three hundred eleven of the surrogate's court procedure act for testamentary trustees, if the trust was established on or before August thirty-first, nineteen hundred fifty-six, or as that provided by sections twenty-one hundred eleven, twenty-three hundred nine and twenty-three hundred eleven of the surrogate's court procedure act for testamentary trustees, if the trust was established after August thirty-first, nineteen hundred fifty-six or as that provided for by sections twenty-one hundred eleven and twenty-three hundred eleven for testamentary trustees and twenty-three hundred twelve of the surrogate's court procedure act except that the statements required thereunder to be furnished annually in order to retain certain annual commissions need be furnished during the settlor's lifetime only to beneficiaries currently receiving income. The court shall make such determinations and allowances as the named sections require or authorize the surrogate to make, and the term "will" used in those sections shall be construed to mean the instrument creating the trust and the phrase "the court from which his letters were issued" shall be construed to mean the court having jurisdiction of the trust.

Credits

(L.1962, c. 308. Amended L.1965, c. 543; L.1972, c. 172, § 1; L.1980, c. 185, § 1; L.1984, c. 936, § 10.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section is based upon civil practice act §§ 1548 and 1548-a. In order to avoid inadvertent differences between the fees of inter vivos trustees and those of testamentary trustees, the sections have been replaced by a reference to Surrogate's Court Act §§ 285a and 285b, which are almost identical. Expenses, compensation and commissions are mentioned because the sections cover expenses paid out by the trustee, compensation for legal services if the trustee is an attorney and has performed such services, and enumerated commissions from principal. the provision that the court shall make the allowances and determinations required by the Surrogate's Court Act to be made by the Surrogate is included to preclude any argument based upon the use of "surrogate" in that act. Similarly, the word "will" in the Surrogate's Court Act should be construed for inter vivos trusts to mean any "instrument creating the trust," the term used in the civil practice act.

Another minor difference between the two sections appears in subdivisions (6)(c): the civil practice act section referred to a trust "established on or before" April 1, 1948, while the Surrogate's Court Act refers to a trust "created prior to" that date. There is no apparent reason for this difference. The change effected by this section will thus be that an inter vivos trust established on the one day, April 1, 1948, will not be covered by the clause.

Subdivisions (9)(c) of the two sections also differ in that the civil practice act referred to a trustee who "was not entitled to retain an annual principal commission," while the Surrogate's Court Act adds to this phrase "or was required to credit such annual principal commission against his commission for receiving principal." It would seem that a trustee who was required to credit a commission should be treated in the same manner as one who was not entitled to the commission. The Surrogate's Court Act phrasing, made applicable by this section, is thus preferable, for it is the more explicit.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 92.

5th Report Leg.Doc. (1961) No. 15, p. 205.

6th Report Leg.Doc. (1962) No. 8, p. 684.

Notes of Decisions (34)

McKinney's CPLR § 8005, NY CPLR § 8005
Current through L.2013, chapter 6.

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McKinney's CPLR § 8006

§ 8006. Premiums on undertakings by fiduciaries

Currentness

A receiver, assignee, guardian, trustee, committee, conservator or person appointed under section one hundred eleven of the real property law or under section twenty of the personal property law, required by law to give an undertaking as such, may include as a part of his necessary expenses such reasonable sum, not exceeding one per cent per annum upon the amount of such undertaking paid his surety thereon, as the court appointing him shall allow.

Credits
(L.1962, c. 308. Amended L.1981, c. 115, § 28.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section is derived from § 1549 of the civil practice act with minor changes in language. Although the section relates to expenses, and not to fees, it has been retained with the fee provisions for convenience. The reference in the section to appointees under McKinney's Real Property Law and Personal Property Law relates to persons who replace the last surviving trustee, states the Fourth Report to the Legislature. The term "undertaking" has been substituted for "bond" to conform usage in CPLR. For the same reason, the phrase, "or judge" has been deleted.

Former § 1549 was derived from the last sentence of § 3320 of the Code of Civil Procedure. Because the first two sentences of the latter section are now in § 1547 of the civil practice act, the reference to "such" court or judge in § 1549 was not clear and it has been clarified in this section.

Although former § 1549 was almost identical to § 286 of the Surrogate's Court Act, it was so short that no economy would be gained by utilizing a reference to the latter.

Official Reports to Legislature for this section:
4th Report Leg.Doc. (1960) No. 20, p. 93.

5th Report Leg.Doc. (1961) No. 15, p. 205.

6th Report Leg.Doc. (1962) No. 8, p. 684.

Notes of Decisions (3)

McKinney's CPLR § 8006, NY CPLR § 8006
Current through L.2013, chapter 6.

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McKinney's CPLR § 8007

§ 8007. Printers

Effective: September 16, 2009
Currentness

Except where otherwise prescribed by law, the proprietor of a newspaper is entitled for publishing a summons, notice, order or other advertisement, required to be published by law or by the order of any court, or of the clerk of a court, to twenty-nine cents per line of a column width not less than ten pica ems, provided that in computing such charge per line the line shall average at least five words for each insertion in newspapers having a circulation of less than two thousand five hundred; twenty-nine and one-half cents per line for newspapers having two thousand five hundred or more circulation and less than five thousand; thirty and one-half cents per line for newspapers having five thousand or more circulation and less than seven thousand five hundred; thirty-one and one-half cents per line for newspapers having seven thousand five hundred or more circulation and less than ten thousand; thirty-two and one-half cents per line for newspapers having ten thousand or more circulation and less than fifteen thousand; and three and one-half cents per line, in addition to the thirty-two and one-half cents for the initial fifteen thousand circulation, for each additional five thousand circulation up to thirty-five thousand circulation and one and one-half cents per line for each additional five thousand possessed by a newspaper. To all of the above rates nine cents per line shall be added to the initial insertion charge of each separate advertisement. To all of the above rates for the initial insertion eight cents per line shall also be added for tabular matter or intricate composition. In reckoning line charges allowance shall be made for date lines, paragraph endings, titles, signatures and similar short lines as full lines where the same are set to conform to the usual rules of composition. Display advertising shall be charged agate measurement (fourteen lines to each inch), ten to thirteen pica ems wide, depending on the makeup of the newspaper publishing such copy. This rate shall not apply to any newspaper printed, principally circulated or having its principal office in the counties of New York or Bronx within the first judicial district or in the county of Kings within the second judicial district or in the county of Richmond within the thirteenth judicial district or in the county of Nassau within the tenth judicial district or in the county of Queens within the eleventh judicial district or in the county of Westchester within the ninth judicial district or in any city having a population of over one hundred seventy-five thousand inhabitants within the eighth judicial district, where the rate for such publication may be equal to but shall not exceed the regularly established classified advertising rate of such newspapers. Every newspaper making claim for compensation under the provisions of this section must be established at least one year and entered in the post office as second class matter.

Credits

(L.1962, c. 308. Amended L.1966, c. 458, 2; L.1966, c. 885, § 2; L.1971, c. 1198, § 2; L.1974, c. 691, § 2; L.1979, c. 719, § 1; L.1980, c. 500, § 1; L.1984, c. 679, § 1; L.1988, c. 354, § 1; L.1990, c. 776, § 1; L.1991, c. 449, § 1; L.2009, c. 450, § 1, eff. Sept. 16, 2009.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section is derived from § 1551 of the civil practice act with only two minor changes. The phrase "or judge thereof" is omitted as unnecessary. The phrase "or of a surrogate" has also been omitted as unnecessary because fees for printing items

which a Surrogate requires to be published are covered by § 287 of the Surrogate's Court Act, which is virtually identical with former § 1551 of the civil practice act. The only difference between the two sections is that the Surrogate's Court Act section includes a citation in its list of possible publications, while the civil practice act section included a summons. In fact, both sections derive from § 3317 of the Code of Civil Procedure. Though it would be economical to recombine them, publication is as important in general litigation as it is in Surrogate's Court matters, and any incorporation by reference should be made in the Surrogate's Court Act, in connection with an overall revision and study of its provisions, comments the Fourth Report to the Legislature.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 94.

5th Report Leg.Doc. (1961) No. 15, p. 206.

6th Report Leg.Doc. (1962) No. 8, p. 685.

Notes of Decisions (2)

McKinney's CPLR § 8007, NY CPLR § 8007
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McKinney's CPLR § 8008

§ 8008. Fees and expenses of officer to be paid before transmission of paper

Currentness

Each provision of law requiring a judge, clerk or other officer to transmit a paper to another officer, for the benefit of a party, is to be construed as requiring the transmission only at the request of the person so to be benefited, and upon payment by him of the fees allowed by law for the paper transmitted, or any copy or certificate connected therewith, and the expenses specified in section sixty-eight of the public officers law.

Credits
(L.1962, c. 308.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section is derived from § 1564 of the civil practice act without change.

Official Reports to Legislature for this section:
4th Report Leg.Doc. (1960) No. 20, p. 96.

5th Report Leg.Doc. (1961) No. 15, p. 208.

6th Report Leg.Doc. (1962) No. 8, p. 686.

McKinney's CPLR § 8008, NY CPLR § 8008
Current through L.2013, chapter 6.

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McKinney's CPLR § 8009

§ 8009. Oaths; acknowledgments; certification or exemplification

Currentness

Any authorized officer is entitled, for the services specified, to the following fees:

1. for administering an oath or affirmation, and certifying it when required, except where another fee is specially prescribed by statute, two dollars;

2. for taking and certifying the acknowledgment or proof of the execution of a written instrument, two dollars for one person and two dollars for each additional person, and two dollars for swearing each witness thereto; and

3. for certifying or exemplifying a typewritten or printed copy of any document, paper, book or record in his custody, twenty-five cents for each folio with a minimum of one dollar.

Credits

(L.1962, c. 308. Amended L.1972, c. 734, § 1; L.1972, c. 735, § 1; L.1984, c. 679, § 1; L.1988, c. 354, § 1; L.1990, c. 776, § 1; L.1991, c. 143, § 1.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section is derived from civil practice act §§ 1562 and 1563. Section 357 of the civil practice act, which specified those before whom an oath or affidavit could be taken, has been replaced by § 2309.

While the subdivisions of § 1562 were identical with those of § 136 of McKinney's Executive Law, the latter only governs notaries public. Section 2309, however, authorizes persons in addition to notaries public, to administer oaths. The provisions of former § 1562 have therefore been retained in the first two subparagraphs of this section, states the Fourth Report to the Legislature.

The exception in subparagraph 3 for the counties within the city of New York was required by former § 1556.

The Fifth Report to the Legislature states that the "archaic fees of six and twelve cents for administering oaths should be raised to twenty-five cents."

Official Reports to Legislature for this section:
4th Report Leg.Doc. (1960) No. 20, p. 97.

5th Report Leg.Doc. (1961) No. 15, p. 208.

6th Report Leg.Doc. (1962) No. 8, p. 687.

McKinney's CPLR § 8009, NY CPLR § 8009
Current through L.2013, chapter 6.

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McKinney's CPLR § 8010

§ 8010. County treasurers

Currentness

The treasurer of a county or the commissioner of finance of the city of New York is entitled for the services specified to the following fees:

1. two per cent upon a sum of money paid out of court by him;

2. one-half of one per cent upon a sum of money invested by him;

3. two per cent of the par value of investments transferred or assigned out of court by him, when the investments have been made by him;

4. two per cent of the par value of securities deposited into court and received by him, to be paid at the time of the deposit by the parties making it; and

5. one dollar for each certificate issued by him certifying as to the amount of deposit to the credit of court funds.

Credits
(L.1962, c. 308. Amended L.1964, c. 576, § 94; L.1969, c. 407, § 117; L.1970, c. 547, § 1; L.1978, c. 655, § 32.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section is derived from § 1561 of the civil practice act with no change in substance.

Official Reports to Legislature for this section:
4th Report Leg.Doc. (1960) No. 20, p. 98.

5th Report Leg.Doc. (1961) No. 15, p. 209.

6th Report Leg.Doc. (1962) No. 8, p. 688.

Notes of Decisions (5)

McKinney's CPLR § 8010, NY CPLR § 8010
Current through L.2013, chapter 6.

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McKinney's CPLR § 8011

§ 8011. Fixed fees of sheriffs

Effective: August 19, 2007
Currentness

For the services specified, a sheriff is entitled to the following fees and, where indicated, these shall be paid in advance.

(a) Order of attachment.

1. For receiving an order of attachment, entering it in the appropriate books, and return when required, fifteen dollars, in advance.

2. For levying upon real or personal property, forty dollars, in advance.

3. For each additional levy upon real or personal property by virtue of an order of attachment, forty dollars, in advance.

4. For serving a copy of an order of attachment on a defendant, and for serving a copy on each additional defendant, fifteen dollars, in advance.

5. For serving a summons with or without a complaint, fifteen dollars, in advance.

6. For making and filing a description of real property, or an inventory of personal property, levied upon by virtue of an order of attachment, or an estimate of the value thereof, fifteen dollars.

7. Mileage for services covered in paragraphs two, three and four of this subdivision, in advance, provided, however, that where the services covered in such paragraphs are performed at the same time and place, there shall be only one mileage fee.

(b) Property execution.

1. For receiving an execution against property, entering it in the appropriate books, and return when required, fifteen dollars, in advance, except that in an execution which arises out of an action brought pursuant to article eighteen of the uniform district court act, article eighteen of the uniform city court act, article eighteen of the New York city civil court act or article eighteen of the uniform justice court act, the fees provided in this subdivision shall not be collected in advance.

2. For levying upon property by virtue of an execution, fifteen dollars.

3. For making an inventory of property levied upon by virtue of an execution, fifteen dollars.

4. Mileage for services covered in paragraphs two and three of this subdivision, in advance, provided however, that where the services covered in such paragraphs are performed at the same time, there shall be only one mileage fee.

(c) Income execution; service upon judgment debtor.

1. For receiving an income execution, entering it in appropriate books, and return when required, fifteen dollars, in advance.

2. For serving the income execution upon the judgment debtor, fifteen dollars, in advance.

3. Mileage for service covered in paragraph two of this subdivision, unless such execution is served by mail.

(d) Income execution; levy upon default or failure to serve judgment debtor.

1. For serving an income execution, entering it in the appropriate books, and return when required, fifteen dollars, in advance.

2. For levying upon the money that the judgment debtor is receiving or will receive, fifteen dollars, in advance.

3. Mileage for services covered in paragraph two of this subdivision unless such levy is made by mail.

(e) Recovery of chattel.

1. For receiving an order to recover chattel, entering it in the appropriate books, and return when required, fifteen dollars, in advance.

2. For executing the order of seizure against the defendant's chattel or chattels, seventy-five dollars, in advance.

3. For executing the order of seizure against the chattel or chattels of an additional defendant or any other person in whose possession said chattel or chattels may be found, forty dollars, in advance.

4. For serving an additional copy of the required papers, fifteen dollars, in advance.

5. For serving the summons with or without a complaint, fifteen dollars, in advance.

6. Mileage for services covered in paragraphs two, three, four and five of this subdivision, in advance, provided however, that where the services covered in such paragraphs are performed at the same time and place, there shall be only one mileage fee.

(f) Summary proceeding.

1. Notice of petition and petition.

(i) For receiving a notice of petition and petition, obtaining an index number when required, entering it in the appropriate books, and return, fifteen dollars, in advance.

(ii) For serving the notice of petition on a tenant or other person in possession, fifteen dollars, in advance.

(iii) For serving the notice of petition on each additional tenant, undertenant, subtenant, person or persons in possession, or person or persons not in possession to be served, fifteen dollars, in advance.

(iv) For making an affidavit of military or nonmilitary service, fifteen dollars for each affidavit, in advance.

(v) Mileage for services covered in subparagraph (ii) of this paragraph, and where person or persons named in the petition are to be served at an address or addresses other than the premises described in the petition, additional mileage shall be paid, in advance, except where two or more notices of petition are to be served at the same time, within the same site or location, there shall be only one mileage fee.

2. Warrant of eviction or any mandate requiring delivery of possession of real property and removal of person or persons in possession.

(i) For requisitioning, receiving, entering in the appropriate books, and for the return of a warrant of eviction or any other mandate, fifteen dollars, in advance.

(ii) For service of notice of eviction on a person or persons to be served, fifteen dollars for each person to be served, in advance.

(iii) Mileage of services covered in subparagraph (ii) of this paragraph, in advance, except where two or more notices of eviction are to be served at the same time, within the same site or location, there shall be only one mileage fee.

(iv) For executing a warrant of eviction or any mandate requiring him or her to put a person in possession of real property and removing person or persons in possession, seventy-five dollars, in advance.

(v) Mileage for services covered in subparagraph (iv) of this paragraph, in advance.

(g) Sales.

1. For posting of notice, including advertising real or personal property for sale by virtue of an execution, order of attachment, or other mandate, or in pursuance of a direction contained in a judgment, or for a notice of postponement of a sale, fifteen dollars.

2. For drawing and executing a conveyance upon a sale of real property, twenty dollars, to be paid by the grantee, in advance.

3. For attending a sale of real or personal property, fifteen dollars.

4. For conducting a sale of real or personal property, fifteen dollars.

5. Mileage for services covered in paragraphs three and four of this subdivision provided, however, that where the services covered in such paragraphs are performed at the same time and place, there shall be only one mileage fee.

(h) Summons, subpoenas and other mandates.

1. For serving a summons, with or without a complaint or notice, for serving a subpoena, or for serving civil process, fifteen dollars, in advance.

2. For serving or executing an order of arrest, or any other mandate for the service or execution of which no other fee is specifically prescribed by law, forty-five dollars, in advance, except that when a court has directed the service of an order of protection, there shall be no fee for service of such order and of any related orders or papers to be served simultaneously.

3. Mileage for services subject to fees under paragraphs one and two of this subdivision, in advance.

4. For receiving a precept issued by commissioners appointed to inquire concerning the incompetency of a person, the fee allowed the clerk by subdivision (a) of section eight thousand twenty of this article for placing a cause on the calendar, and for notifying a county clerk or commissioner of jurors pursuant to such a precept, the fee, if any, allowed the clerk by subdivision (c) of section eight thousand twenty of this article for filing a demand for jury trial.

(i) Undertakings; returns; copies.

1. For taking any undertaking which the sheriff is authorized to take one dollar and fifty cents, and the notary's fees to any affidavit or acknowledgements.

2. For making a copy of a description or any inventory of property levied upon by virtue of an order of attachment, or of a summons or complaint, or other mandate, or an affidavit or any other paper served by him or her, ten dollars, in advance.

3. For a certified copy of an execution, and of the return or satisfaction thereupon, or for a certified copy of any undertaking which he or she is authorized to take, ten dollars.

(j) Prisoners.

1. For each person committed to or discharged from prison, ten dollars, in advance, to be paid by the person at whose instance he or she is imprisoned.

2. For attending before an officer for the purpose of surrendering a prisoner, or receiving into custody a prisoner surrendered, in exoneration of his or her bail, ten dollars, for all his or her services upon such a surrender or receipt.

(k) Jurors; view; constables' services.

1. For notifying jurors to attend upon a writ of inquiry, two dollars and fifty cents for each juror notified, including the making and return of the inquisition, when required; and for attending a jury when required in such a case, twenty-eight dollars.

2. For attending a view, ten dollars for each day.

3. For any services which may be rendered by a constable, other than those specifically provided for in this section, section eight thousand twelve or eight thousand thirteen of this article, to the same fees as are allowed by law to a constable for those services.

Credits

(Added L.1992, c. 55, § 403. Amended L.1996, c. 190, § 1; L.2002, c. 655, § 1, eff. Feb. 24, 2003; L.2003, c. 11, § 2, eff. Feb. 24, 2003; L.2007, c. 36, § 1, eff. Aug. 19, 2007.)

Notes of Decisions (13)

McKinney's CPLR § 8011, NY CPLR § 8011
Current through L.2013, chapter 6.

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McKinney's Consolidated Laws of New York Annotated
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McKinney's CPLR § 8011-a

[§ 8011-a. Repealed. L.1992, c. 55, § 403, eff. April 10, 1992]

Currentness

McKinney's CPLR § 8011-a, NY CPLR § 8011-a
Current through L.2013, chapter 6.

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McKinney's CPLR § 8011-b

[§ 8011-b. Repealed. L.1992, c. 55, § 403, eff. April 10, 1992]

Currentness

McKinney's CPLR § 8011-b, NY CPLR § 8011-b
Current through L.2013, chapter 6.

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McKinney's CPLR § 8012

§ 8012. Mileage fees, poundage fees, additional compensation, and limitation on compensation of sheriffs

Effective: August 5, 2008
Currentness

(a) Mileage fees. A sheriff is entitled to the current federal internal revenue service mileage reimbursement rate for each mile necessarily travelled in performing the following services, payable in advance:

1. in serving or executing a mandate upon or against one person, or upon or against two or more persons in the course of one journey, computed from the nearest office of the sheriff in the county to the place of service or execution, and return;

2. in serving or executing two or more mandates in one action upon or against one person at one time, computed from the nearest office of the sheriff in the county to the place of service or execution, and return; and

3. in attending a view, computed from the nearest office of the sheriff in the county to the place of attendance, and return.

(b) Poundage fees.

1. A sheriff is entitled, for collecting money by virtue of an execution, an order of attachment, or an attachment for the payment of money in an action, or a warrant for the collection of money issued by the comptroller or by a county treasurer or by any agency of the state or a political subdivision thereof, or for collecting a fine by virtue of a commitment for civil contempt, to poundage of, in the counties within the city of New York, five per cent of the sum collected and in all other counties, five per cent upon the first two hundred fifty thousand dollars collected, and three per cent upon the residue of the sum collected.

2. Where a settlement is made after a levy by virtue of service of an execution, the sheriff is entitled to poundage upon the judgment or settlement amount, whichever is less. Where an execution is vacated or set aside after levy, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the amount specified in the execution, and the court may order the party liable therefor to pay the same to the sheriff.

3. Where a settlement is made, either before or after judgment, after a levy by virtue of service of an order of attachment, the sheriff is entitled to poundage upon the judgment or settlement amount, whichever is less. Where an order of attachment is vacated or set aside after levy, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the amount specified in the order of attachment, and the court may order the party at whose instance the order of attachment was granted to pay the same to the sheriff. Where an order of attachment is otherwise discharged by order of the court, the sheriff is entitled to the same poundage, to be paid by the party at whose instance the order of attachment is discharged, and the sheriff

is entitled to retain the property levied upon until the poundage is paid. The maximum amount upon which poundage shall be computed, if such a settlement is made or the order of attachment is vacated or set aside, is one million dollars.

4. Where a settlement is made (i) after service of an income execution upon the debtor pursuant to subdivision (d) of section fifty-two hundred thirty-one of this chapter or upon the garnishee pursuant to subdivision (e) of section fifty-two hundred thirty-one of this chapter, or (ii) after issuance of a property execution pursuant to section fifty-two hundred thirty of this chapter and levy against personal or real property pursuant to section fifty-two hundred thirty-two or fifty-two hundred thirty-five of this chapter, the sheriff is entitled to poundage upon the judgment amount or settlement amount, whichever is less. Where an income or property execution is vacated or set aside after levy, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the amount specified in the execution, and the court may order the party liable therefor to pay the same to the sheriff.

5. A sheriff who brings an action in a court of competent jurisdiction to collect such amount provided for in this subdivision may also be awarded reasonable attorney's fees and court costs.

(c) Additional compensation. A sheriff is entitled in any case, including an instance in which a mandate has been stayed, vacated or set aside, or a settlement has been made after a levy, to such additional compensation for his trouble and expenses in taking possession of and preserving property under any mandate or in removing a person in possession of real property and the said person's property, as the court allows, and the court may make an order requiring the party liable therefor to pay the same to the sheriff.

(d) Mileage fees in the city of New York. For mileage travelled wholly within the city of New York the sheriff of the city of New York shall be entitled to twenty-five dollars payable in advance, as provided in section eight thousand eleven of this chapter.

Credits

(L.1962, c. 308. Amended L.1963, c. 532, § 51; L.1969, c. 441; L.1970, c. 859, § 4; L.1972, c. 734, §§ 3, 4; L.1972, c. 735, § 3; L.1976, c. 695, § 1; L.1985, c. 565, § 1; L.1987, c. 218, § 2; L.2000, c. 337, § 1, eff. Oct. 1, 2000; L.2006, c. 31, § 1, eff. May 2, 2006; L.2008, c. 441, § 1, eff. Aug. 5, 2008; L.2009, c. 381, § 1, eff. Aug. 26, 2009, deemed eff. Aug. 5, 2008.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Vincent C. Alexander

2012

CPLR 8012(b) does not specify who must pay the sheriff's poundage fee when settlement occurs after a levy is made pursuant to execution on a judgment. The court in *Cabrera v. Hirth*, 2011, 87 A.D.3d 844, 928 N.Y.S.2d 706 (1st Dep't), upheld the trial court's imposition of the poundage obligation on the plaintiff and plaintiff's counsel. First, the Appellate Division observed that it is "customary" to impose poundage on the party who invoked the services of the sheriff's office, which in this case was the judgment creditor. Second, the plaintiff in this case "thwarted" the collection efforts of the sheriff--actually a city marshal--by failing to notify the marshal that the defendants had

posted security for an appeal of the judgment and by failing to call off the marshal's enforcement activity, and then by accepting payment directly from the defendant's insurers without notifying the marshal.

In contrast, the court in *DePasquale v. DePasquale*, 2011, 89 A.D.3d 672, 931 N.Y.S.2d 689 (2d Dep't), upheld a trial court's imposition of poundage on the defendants where settlement of a judgment occurred after an execution levy was made by the marshal. The Second Department said that the judgment debtor is usually responsible for poundage fees--a general rule that seems to apply only outside the context of a post-levy settlement--and in addition, the defendants in this case "repeatedly interfered with enforcement of the judgment," and they were the parties responsible for the involvement of the marshal in the first place because their failure to abide by the terms of an initial settlement reached during trial is the event that necessitated the entry of judgment.

SUPPLEMENTARY PRACTICE COMMENTARIES

by Vincent C. Alexander

2008

Chapter 441 of the Laws of 2008 amends CPLR 8012 to change the formula for computing poundage in the case of post-levy settlements. Poundage fees traditionally have been linked, in all cases, to the value of the property levied upon by the sheriff. The property value is said to be "an appropriate barometer for the value of the benefit conferred" by the sheriff's services. *Liquifin Aktiengesellschaft v. Brennan,* 1978, 446 F.Supp. 914, 920 (S.D.N.Y.). Pursuant to CPLR 8012(b)(1), the basic measure of poundage is 5% of the value of the property levied upon and collected. (Outside New York City, 5% is applied only to the first $250,000 and the poundage percentage goes down to 3% of the balance over $250,000).

Subdivisions (b)(2) and (3) of the statute alter the formula for poundage when certain litigation contingencies occur after the sheriff has levied but prior to the sheriff's collection of any money. Under pre-amendment law, the value of the property levied upon remained the base to which the poundage percentage applied, subject to a type of statutorily defined cap. Thus, if the property value exceeded the face amount of the execution or order of attachment, the execution or order amount was the maximum base for the computation. In the event of settlement after a levy on an execution or order of attachment, the base was the "value of the property levied upon, not exceeding the sum at which the settlement [was] made." In other words, "[t]he value of the property [was] the major consideration. The amount of the settlement simply mark[ed] the outer limit of the calculation." *Dean v. Dean,* 1997, 174 Misc.2d 171, 173, 662 N.Y.S.2d 1014, 1015 (Sup.Ct.Tompkins Co.). For example, if the property levied upon was worth $50,000 but the parties settled for $30,000, the 5% poundage percentage was applied to the $30,000 settlement amount. In the unusual situation in which the settlement amount exceeded the property value, the property value remained the base to which the 5% was applied. See, e.g., *Dean v. Dean,* supra (net settlement amount was higher than property value because settlement was paid in form of mortgage installment payments with interest; court limited poundage to percentage of property value).

Despite the reasonably satisfactory manner in which the formula has worked over the years, the Legislature saw fit in Chapter 441 to alter the formula in the case of settlements. (The basic formula remains at 5% of the money collected by the sheriff pursuant to levy (CPLR 8012(b)(1)). When settlement occurs after service of an execution levy or attachment levy, poundage will now be a percentage of "the judgment or settlement amount, whichever is less." CPLR 8012(b)(2) & (3). Thus, the statute abandons the traditional notion that the value of the property measures the value of the sheriff's services. Nevertheless, the formula provides a rational, if not perfect, means of determining poundage in the specified contingencies.

The formula should work well enough in the case of an execution (CPLR 8012(b)(2)), because by definition there is a judgment with which to compare the settlement amount. The abandonment of the property-value standard, however, may present some difficulties in the case of attachment levies. CPLR 8012(b)(3). The new formula applies where settlement is made "before or after judgment." But if the post-attachment settlement occurs at any time prior to judgment (a common scenario), how can the settlement amount be compared to the "judgment" for the purpose of determining which is the lesser amount? Technically, since there is no judgment, the "lesser amount" is zero, which would mean no poundage would be due. This would work a radical change in existing law, because the sheriff has been eligible for poundage, based on property value, regardless of the absence of a judgment. It is doubtful that this was the legislative intent, but better drafting would have avoided the issue. Perhaps the courts will put a gloss on the language and allow the settlement amount alone to be used as the base if the settlement occurs pre-judgment. This would be a reasonable outcome, but the statute does not explicitly so provide.

Another potential problem presented by the new formula--at least as regards litigants' pocketbooks--derives from the fact that levies may take place in multiple counties, with separate sheriffs (see CPLR 5230(b)), each of whom will claim a right to poundage based on the new formula. (Because the sheriff is a county official, the sheriff has jurisdiction only over property within his particular county). By eliminating the value of the property levied upon as the base for computation, the new formula will result, in some cases, in higher total poundage fees owed by litigants. Suppose, for example, executions are issued on a $100,000 judgment, and the defendant has a bank account of $5,000 in Erie County and another account of $95,000 in Monroe County. The sheriff in each of those counties levies on the local bank account. After the levies, the parties settle for $70,000. Under prior law, poundage would be $250 payable to the Erie County Sheriff (5% of $5,000) and $3500 to the Monroe County Sheriff (5% of $70,000), for total poundage of $3,750. Under the new formula--where poundage is based on the amount of the judgment or settlement, whichever is less, and irrespective of property value--the Sheriff of Erie may claim he is owed $3500 (5% of $70,000), and the Sheriff of Monroe may also claim $3500 (5% of $70,000), for total poundage of $7,000 owed by the judgment creditor.

The new subdivision (b)(4), providing for poundage based on settlement amount vs. judgment amount, whichever is less, deals with a situation as to which the statute previously was silent: the effect of post-execution settlement in the case of an income execution. The new subdivision resolves a conflict in the caselaw. Assume a plaintiff wins a judgment of $50,000 and issues a garnishment execution on the defendant's wages, which would be a 10% maximum of such wages, payable in installments as the wages are earned. Assume further that at the time of a subsequent settlement, the sheriff has collected only $10,000 from the wages in question. The parties settle for $30,000. One line of authority held that under the first sentence of the prior version of CPLR 8012(b)(2), the sheriff would only be entitled to poundage on the $10,000 of wages actually collected up to that point (based on a comparison between the lesser of the "actual" property levied upon and the settlement amount). *Flying Tiger Line v. Spinetta,* 1948, 190 Misc. 886, 76 N.Y.S.2d 67 (Sup.Ct.N.Y.Co.). Another line, however, held that the comparison should be made between the lesser of the original specified levy amount ($50,000) and the settlement amount. *In re International Distributing Export Co.,* 1963, 219 F.Supp. 412 (S.D.N.Y.). Under the latter view, poundage was calculated on the $30,000 settlement even though this amount was greater than that of the actual wages collected up to that point. The new subdivision (b)(4), in essence, adopts the latter view. If the income execution is vacated or set aside after levy (a non-settlement contingency), the property value becomes the base for the computation.

The new subdivision (b)(5) of the statute confers a financial benefit on the sheriff's office by authorizing the court to award reasonable attorneys' fees to the sheriff in any action brought to collect poundage pursuant to subdivision (b). Are such fees recoverable even if the sheriff loses his claim or recovers an amount that is less than that which is demanded? Compare CPLR 909 (class action plaintiff may be awarded attorneys' fees if judgment is rendered in favor of class); CPLR 8601 (authorizing award of attorneys' fees to party who "prevails" in action against state). Since subdivision (b)(5) makes the award of attorneys' fees discretionary, it is submitted that success on the part of the sheriff should be a major factor in determining the appropriateness of such an award.

During the past year, the Court of Appeals passed upon a different aspect of the poundage statute. As discussed above, the sheriff is entitled to poundage, even in the absence of collecting any money, if the case is settled post-levy. Similarly, the statute provides that poundage is due if the execution or attachment is vacated or set aside after a levy. CPLR 8012(b)(2) & (3). Caselaw of considerable vintage goes one step further and provides that poundage is also owed if the judgment creditor affirmatively "interferes" with the sheriff's collection efforts. *Campbell v. Cothran,* 1874, 56 N.Y. 279, 285. In *Solow Management Corp. v. Tanger,* 2008, 10 N.Y.3d 326, 858 N.Y.S.2d 63, 887 N.E.2d 1121, however, the Court held that the judgment debtor's filing of an appeal bond, which stays enforcement of the judgment (CPLR 5519(a)(2)), does not qualify as "interference" with the sheriff's collection efforts. "To hold otherwise would discourage litigants from seeking further judicial review lest they be charged with poundage fees." 10 N.Y.3d at 331-32, 858 N.Y.S.2d at 66, 887 N.E.2d at 1124.

1995

C8012:1 Poundage Fees.

Although CPLR 8012(b)(3) clearly states that the sheriff is entitled to poundage when there has been a settlement, the statute is not explicit as to which party is responsible for paying the fee. The second sentence of § 8012(b)(3) specifies that the party at whose instance the order of attachment was granted--usually the plaintiff--is the liable party when the order is "vacated" or "set aside." This has been interpreted by courts to cover situations where the attachment was invalid at the outset or the action was dismissed in defendant's favor. The third sentence then provides that where an order is "otherwise discharged" (*see, e.g.*, CPLR 6222), the party liable for poundage is the one who obtains the discharge--usually the defendant. *See generally Liquifin Aktiengesellschaft v. Brennan*, S.D.N.Y.1978, 446 F.Supp. 914, 922. Using this statutory framework as a guide, the court in *Yeshiva University v. Jablonski*, N.Y.L.J. Apr. 17, 1995, p.29, col.4 (Sup.Ct.N.Y.Co.), reasoned that the lifting of an order of attachment based upon a settlement is more nearly analogous to a "discharge" than to a "vacatur," meaning that the defendant is responsible for the sheriff's poundage. Because a settlement does not denigrate the validity of the order of attachment or the merits of plaintiff's cause of action, the situation is simply not akin to a vacatur. Furthermore, if the attachment itself was valid, the plaintiff has no obligation to obtain a release of the property from the sheriff; "it is only defendants who have any interest in redeeming the property." The parties to a settlement may, of course, agree among themselves as to who will pay the sheriff's poundage, but this issue was overlooked by the litigants in their settlement of the instant case.

LEGISLATIVE STUDIES AND REPORTS

Subd. (a) is based upon subd. 7 of § 1558 of the civil practice act. A former par. 4 has been deleted at the suggestion of the Sheriff's Association that habeas corpus is so important a remedy that no fee should limit its availability.

Subd. (b). Subpars. 1-3 are based upon subds. 20-22 of § 1558 of the civil practice act. The phrase at the end of the last sentence of subpar. 3 "even though the value of the property attached shall exceed that amount", comments the Fourth Report to the Legislature, was deleted as unnecessary.

Subd. (c) is based upon subd. 6 of § 1558 of the civil practice act.

Subd. (d) is based upon the last part of subd. 15 of § 1558 of the civil practice act. The remainder of subd. 15 was incorporated into §§ 8011(d) and 8013(a).

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 103.

5th Report Leg.Doc. (1961) No. 15, p. 214.

6th Report Leg.Doc. (1962) No. 8, p. 693.

Notes of Decisions (149)

McKinney's CPLR § 8012, NY CPLR § 8012
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McKinney's CPLR § 8013

§ 8013. Expenses of sheriffs

Currentness

(a) Publication of notice of sale. A sheriff, where real property is to be sold by virtue of an execution or in pursuance of a direction contained in a judgment, is entitled to reimbursement for printer's fees, paid by him for the publication of a notice of the sale. Where the notice is published more than four times, or the sale is postponed, the expense of continuing the publication, or of publishing the notice of postponement, shall be paid by the person requesting it. Where two or more executions against the property of one judgment debtor are in the hands of the sheriff at the time when the proceeds are distributed, the sheriff is entitled to reimbursement for printer's fees upon only the execution issued upon the judgment first docketed in the county.

(b) Appraisal of attached property. A sheriff, where an estimate of the value of property levied upon by virtue of an order of attachment is made, shall be entitled to reimbursement for such compensation to appraisers actually employed thereupon as the court which granted the order of attachment may allow.

(c) Other expenses. A sheriff is entitled to reimbursement of all expenses necessarily incurred in the execution of any mandate and in the protection, presentation, transportation or sale of property.

(d) Payment in advance. A sheriff, whenever he deems it necessary, may require payment to him in advance to cover any or all expenses for which he is entitled to reimbursement; advance payments made in connection with a mandate or direction affecting property shall be repaid by the sheriff out of the proceeds of the sale of the property, if any.

Credits
(L.1962, c. 308.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

Subd. (a) is based upon part of subd. 14 of § 1558. Subd. (d) allows for payment in advance, and so covers the provision to that effect in the former subdivision. The former requirement of one publication in each of six weeks has been cut by § 5236(c) to four publications. Based upon this change, the language here is "four times" rather than "six weeks", states the Fourth Report to the Legislature. Since the first judgment docketed in the county has first lien upon the proceeds of the sale, the prior provision which permitted the sheriff to charge whichever execution in his hands he elected, was changed to require the charge to be made upon the execution issued upon the judgment first docketed in the county.

Subd. (b) is based upon part of subd. 8 of § 1558 of the civil practice act.

Subd. (c) is based upon part of subd. 5 of § 1558. Although said subd. 5 was limited to advancement of expenses, it is clear that the sheriff is also entitled to be reimbursed for expenses necessarily incurred as to which no advance was made. The sheriff's right to advance payment is covered in subd. (d). A former subd. (c) dealing with sheriff's expenses in bringing up a prisoner on a writ of habeas corpus was deleted on the reasoning that such writ is too important to be burdened with fees and costs.

Subd. (d) is based upon part of subd. 5 of § 1558 of the civil practice act, and covers part of subd. 14 thereof.

Official Reports to Legislature for this section:

4th Report Leg.Doc. (1960) No. 20, p. 106.

5th Report Leg.Doc. (1961) No. 15, p. 218.

6th Report Leg.Doc. (1962) No. 8, p. 696.

McKinney's CPLR § 8013, NY CPLR § 8013
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McKinney's CPLR § 8014

§ 8014. Collection of sheriff's fees on execution

Currentness

The fees of a sheriff, upon an execution against property, which are not required by statute to be paid by a particular person and which are not included in the bill of costs of the party in whose favor the execution is issued, shall be collected by virtue of the execution in the same manner as the sum therein directed to be collected.

Credits
(L.1962, c. 308.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section is based on § 1559 of the civil practice act with no change in substance intended.

Official Reports to Legislature for this section:
4th Report Leg.Doc. (1960) No. 20, p. 109.

5th Report Leg.Doc. (1961) No. 15, p. 219.

6th Report Leg.Doc. (1962) No. 8, p. 697.

Notes of Decisions (1)

McKinney's CPLR § 8014, NY CPLR § 8014
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McKinney's CPLR § 8015

§ 8015. County clerk where sheriff is a party or otherwise disqualified

Currentness

A county clerk is entitled for the services specified to the following fees:

1. for performing any duty of a sheriff in an action in which the sheriff, for any cause, is disqualified, the same compensation to which a sheriff is entitled for the same services; and

2. for confining a sheriff in a house by virtue of a mandate, and maintaining him while there, two dollars for each day, to be paid by the sheriff, before he is entitled to be discharged.

Credits
(L.1962, c. 308. Amended L.1963, c. 532, § 52.)

Editors' Notes

LEGISLATIVE STUDIES AND REPORTS

This section is virtually identical with § 1560 of the civil practice act.

Official Reports to Legislature for this section:
4th Report Leg.Doc. (1960) No. 20, p. 109.

5th Report Leg.Doc. (1961) No. 15, p. 220.

6th Report Leg.Doc. (1962) No. 8, p. 698.

McKinney's CPLR § 8015, NY CPLR § 8015
Current through L.2013, chapter 6.

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