St. John's Law Review

Volume 47
Number 1 *Volume 47, October 1972, Number 1*

Article 36

August 2012

CPLR 7503(c): Party Estopped From Objecting To Time and Method of Service of Application To Stay Arbitration

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tiff, as a matter of law, had waived his right to proceed in arbitration under the agreement.[174] The plaintiff opposed the motion on the grounds that the relief requested by the defendant was inconsistent and would deprive him of all remedies.[175] The Supreme Court, Albany County, relying on case law and CPLR 2201 and 7503(a), held for the defendant.[176]

The *Sowalskie* case is apparently an anomaly. Subsequently, in *A. Burgart, Inc. v. Foster-Lipkins Corp.*,[177] it was held that commencing an action to foreclose a mechanic's lien does not constitute a waiver of the right of arbitration. Pointedly, the purpose of a stay of court action is to force the parties to proceed to arbitration and thereby settle their dispute.

CPLR 7503(c): Party estopped from objecting to time and method of service of application to stay arbitration.

CPLR 7503(c) prescribes the procedure by which a party may move to compel arbitration and the procedure that must be followed by the opposing party if he wishes to stay arbitration. The latter requires a party who has received a notice of intention to arbitrate which includes a statement requiring any objection to be made within ten days to act within ten days to stay arbitration or "be so precluded."

Prior to the Court of Appeals' interpretative ruling in *Knickerbocker Insurance Co. v. Gilbert*,[178] there was much confusion regarding the method of computing this ten-day period. In *Knickerbocker*, the Court held that an application to stay arbitration posted on the tenth day after receipt of a notice of intention to arbitrate was timely.[179] In

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174 *Id.* at 666, 330 N.Y.S.2d at 482.

175 *Id.*

176 *Id.* at 666-67, 330 N.Y.S.2d at 483. CPLR 2201 merely provides: "Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." Moreover, the cases cited by the court to support its denial of all relief to the plaintiff, River Brand Rice Mills v. Latrobe Brewing Co., 305 N.Y. 36, 110 N.E.2d 545 (1953), and Application of Duke Laboratories, 9 Misc. 2d 779, 168 N.Y.S.2d 998 (Sup. Ct. N.Y. County 1957), involved stays of judicial proceedings granted after the time to demand arbitration had expired. As noted by the Court of Appeals, denial of all relief is preferable to permitting a party to wait until the contractual time limit for arbitration has expired before commencing an action at law on a claim which he agreed to arbitrate. *See* River Brand Rice Mills v. Latrobe Brewing Co., 305 N.Y. 36, 41, 110 N.E.2d 545, 547 (1953).

177 63 Misc. 2d 930, 313 N.Y.S.2d 831 (Sup. Ct. Monroe County 1970) (mem.), *aff'd mem.*, 38 App. Div. 2d 779, 328 N.Y.S.2d 856 (4th Dep't 1972), *aff'd mem.*, 30 N.Y.2d 901, 287 N.E.2d 269, 335 N.Y.S.2d 562 (1972). The *Burgart* court held that the plaintiff had a right to continue the lien which he had a statutory right to file without waiving arbitration, under N.Y. LIEN LAW § 35 (McKinney 1966).

178 28 N.Y.2d 57, 268 N.E.2d 758, 320 N.Y.S.2d 12 (1971), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 536, 550 (1971).

179 *Id.* at 64, 268 N.E.2d at 762, 320 N.Y.S.2d at 16.

overruling *State-Wide Insurance Co. v. Lopez*,[180] *Knickerbocker* also settled the question of who should be served with the application for a stay, holding that if a party's attorney serves the notice of intention to arbitrate, he impliedly becomes that party's agent for service of the moving papers when the adverse party subsequently seeks to stay arbitration.[181]

In *Allstate Insurance Co. v. Carrillo*,[182] the defendants served the plaintiff, pursuant to CPLR 7503(c), with a notice of intention to arbitrate. Thereafter, the parties, by stipulation, twice agreed to extend the statutory ten-day period to apply for a stay of arbitration. The plaintiff subsequently made its application within the agreed period by an order to show cause served by regular mail. The defendants contested the application, contending that service of the application was deficient under CPLR 7503(c) on three grounds: (1) that the defendants' attorney was served, while the statute requires the defendants to be personally served; (2) that in lieu of the required registered or certified mail, return receipt requested, regular mail, as authorized by the order to show cause, was employed; and (3) that although service was made within the stipulated time, service after the ten-day statutory period is a jurisdictional defect.[183] In answering the defendants' first objection, the Supreme Court, Westchester County, relied on *Knickerbocker*, and concluded that the defendants' counsel had not avoided the applicability of that decision by deleting from his demand for arbitration the statement that the rules of the American Arbitration Association permitting service of all papers upon the attorney would apply and by expressly stating that only the provisions of CPLR 7503 and other statutes relating to the initiation of arbitration proceedings applied.[184] Relying on *Robinson v. City of New York*,[185] the court further held that the defendants' attorney's suggestion that the plaintiff delay in making its application to stay arbitration estopped them from objecting to the time and method of service of the application.[186] In addition, the court followed[187] *Liberty Mutual*

180 30 App. Div. 2d 694, 291 N.Y.S.2d 928 (2d Dep't 1968), *discussed in The Quarterly Survey*, 43 ST. JOHN'S L. REV. 498, 532 (1969).

181 28 N.Y.2d at 65, 268 N.E.2d at 762, 320 N.Y.S.2d at 18.

182 69 Misc. 2d 350, 329 N.Y.S.2d 985 (Sup. Ct. Westchester County 1972).

183 *Id.* at 351, 329 N.Y.S.2d at 987.

184 *Id.* at 352, 329 N.Y.S.2d at 987.

185 24 App. Div. 2d 260, 265 N.Y.S.2d 566 (1st Dep't 1965), *discussed in The Quarterly Survey*, 41 ST. JOHN'S L. REV. 121, 127 (1966).

186 69 Misc. 2d at 353, 329 N.Y.S.2d at 988. In so deciding, the court distinguished General Acc. Fire & Life Assur. Corp. v. Cerretto, 60 Misc. 2d 216, 303 N.Y.S.2d 223 (Sup. Ct. Monroe County 1969) (mem.), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 758, 768 (1970), which held that a notice of motion served pursuant to CPLR 7503 after the ten-day period was invalid notwithstanding the plaintiff's reliance on an agreement to extend the time for service.

Insurance Co. v. Keane,[188] which held that ordinary mail fulfills the purpose of CPLR 7503 absent any claim or proof of prejudice.

Allstate, properly applying the doctrine of estoppel in accordance with well-settled principles,[189] precludes a morass of technical obstructions to the arbitration procedure. Additionally, it is noteworthy that the Judicial Conference has recently proposed that the time period in CPLR 7503(c) be amended to allow twenty days in which to move for a stay of arbitration.[190]

ARTICLE 80 — FEES

CPLR 8012(b): Sheriff held entitled to full poundage fee when he delayed collection upon request.

Under CPLR 8012(b), a sheriff's poundage fee is based upon a percentage of the amount actually collected.[191] There are several exceptions to the general rule. Where there is a settlement after a levy, a sheriff is entitled to poundage based upon the value of the property levied on, but the amount obtainable cannot exceed the sum of settlement. Also, where an execution is vacated, a sheriff is entitled to poundage limited to the amount specified in the execution. A third exception applies where the sheriff has been hindered in the collection process.[192]

In *Nevada Bank of Commerce v. 43rd Street Estates Corp.*,[193] the plaintiff instituted a tort action against the defendants, the guarantors of a debt of another Nevada corporation. The sheriff levied against certain assets of the corporate defendant which were sufficient to satisfy a default judgment of $956,668. After the sheriff was urged not to take any further action, a Nevada bankruptcy proceeding led to a settlement which enabled the primary obligor to satisfy the debt owed to the plaintiff and thereby terminated the defendants' liability. Eventually, the plaintiff and the corporate defendant arranged a satisfaction and discharge of the attachment for a sum of $1000. The issue of the case was which sum should be used in ascertaining the poundage fee of the sheriff — $1000 or $956,668.

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187 69 Misc. 2d at 353, 329 N.Y.S.2d at 989.

188 157 N.Y.L.J. 43, March 6, 1967, at 21, col. 4 (Sup. Ct. Westchester County).

189 *See* Robinson v. City of New York, 24 App. Div. 2d 260, 265 N.Y.S.2d 566 (1st Dep't 1965) and cases cited therein.

190 JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, REPORT TO THE LEGISLATURE IN RELATION TO THE CIVIL PRACTICE LAW AND RULES AND PROPOSED AMENDMENTS PURSUANT TO SECTION 229 OF THE JUDICIARY LAW 80 (1972).

191 For a general discussion of poundage fees, see 8 WK&M ¶ 8012.03-.09.

192 *See* Flack v. State, 95 N.Y. 461, 466 (1884); Esselsteyn v. Union Sur. & Guar. Co., 82 App. Div. 474, 81 N.Y.S. 532 (2d Dep't 1903).

193 38 App. Div. 2d 227, 328 N.Y.S.2d 565 (1st Dep't 1972).