Nevada Bank of Commerce, Plaintiff, v. 43rd Street Estates Corp. et al., Appellants. John T. McCloskey, as Sheriff of the City of New York, Respondent

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

33 N.Y.2d 706*; *304 N.E.2d 372*; *349 N.Y.S.2d 676*; *1973 N.Y. LEXIS 1006

September 17, 1973, Argued
October 18, 1973, Decided

PRIOR HISTORY: [**1] *Nevada Bank of Commerce* v. *43rd St. Estates Corp., 38 A D 2d 227*, reversed.

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered February 8, 1972, which modified, on the law, and, as modified, affirmed an order of the Supreme Court at Special Term (George Postel, J.), entered in New York County, (1) granting a motion to fix the poundage to which the Sheriff of the City of New York was entitled for his levy on real property under a warrant of attachment issued in the above-entitled action, and (2) fixing the poundage in the sum of $ 50. The modification consisted of fixing the poundage in the sum of $ 26,930.04. Plaintiff, a Nevada bank, had commenced the action to recover damages from defendants, a New York corporation, and various individuals, alleging fraud and deceit on their part in the guarantee of a debt owed to plaintiff by a Nevada hotel corporation, not a party to the action. It procured an order of attachment pursuant to which the Sheriff levied upon realty assets owned by corporate defendant. It subsequently obtained a default judgment against defendants in the sum of $ 956,668, and an execution was issued [**2] and delivered to the Sheriff, but, at the request of the parties, who told him they were trying to effect a settlement, he did not proceed to sell the assets levied upon, the value of which was sufficient to pay the judgment. Subsequently, and as a result of an arrangement made in a bankruptcy proceeding in Nevada, plaintiff's claim against the Nevada hotel corporation was paid in full, and it thereafter agreed to accept a payment of $ 1,000 in settlement of its New York action against defendants. Defendants alleged that the Sheriff's poundage should be based on this settlement figure, while the Sheriff alleged that it should be based on the value of his levy, or the full amount of the judgment obtained by plaintiff. *CPLR 8012* (subd. [b]) provided that "1. A sheriff is entitled, for collecting money by virtue of * * * an order of attachment * * * to poundage of 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 an execution, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the sum at which the settlement [**3] is made. Where an execution is vacated or set aside, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the amount specified in the execution * * *. 3. Where a settlement is made, either before or after judgment, after a levy by virtue of an order of attachment, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the sum at which the settlement is made. Where an order of attachment is vacated or set aside, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the amount specified in the order of attachment". The majority at the Appellate Division stated, *inter alia*, that the only exceptions to the general provision that the right of the Sheriff to receive poundage depended on amounts actually collected were the two set forth in the above statute, i.e., where there was a settlement and where an execution or attachment was vacated or set aside, and a third, based in case law, where there was interference with the collection by the Sheriff; that the Sheriff had done all he was required or permitted to do to earn his fee and, if he had not been requested [**4] to withhold action, the judgment could have been satisfied by him, and that, assuming it was entered into in good faith, the $ 1,000 "settlement" which followed the Nevada payment in full by the primary obligor could not be the settlement envisioned by CPLR. The dissent at the Appellate Division concluded that Special Term had properly limited the poundage on the basis of the $ 1,000 paid in settlement of the New York action, stating, *inter alia*, that the statutory exceptions authorizing poundage in cases of noncollection were in derogation of common law and had to be strictly construed; that the statute said "not exceeding the sum at which the settlement is made", and that the matter should end there, particularly in the instant case where, once the primary obligation was paid by the primary obligor, no obligation at all remained as to defendants.

HEADNOTES

Sheriffs -- poundage -- after Nevada bank brought action in New York to recover damages from defendants, alleging fraud and deceit in guarantee of debt owed to it by Nevada hotel corporation, and procured order of attachment pursuant to which Sheriff levied upon assets owned by one defendant, it obtained default judgment against [**5] **defendants in sum of $ 956,668, but, at request of parties, Sheriff did not sell assets levied upon, of sufficient value to pay judgment -- subsequently, in Nevada bankruptcy proceedings, bank's claim against Ne-**

vada hotel corporation was paid in full, and it thereafter agreed to accept $ 1,000 in settlement of New York action -- allegation by defendants that Sheriff's poundage should be based on $ 1,000 settlement figure, and allegation by Sheriff that it should be based on $ 956,668 judgment -- Special Term fixed poundage in sum of $ 50, and Appellate Division modified by fixing it in sum of $ 26,930.04 -- order of Appellate Division reversed and order of Special Term reinstated, on dissenting opinion at Appellate Division.

COUNSEL: *Samuel Kirschenbaum* and *Milton Brandon* for appellants.

Joseph P. Brennan, Frederick Weinberger and *H. William Kehl* for respondent.

JUDGES: Concur: Judges Burke, Gabrielli, Jones and Wachtler. Chief Judge Fuld and Judges Breitel and Jasen dissent and vote to affirm on the opinion at the Appellate Division.

OPINION

[*709] Order reversed, without costs, and the order of Special Term reinstated on the dissenting opinion at the Appellate [**6] Division.