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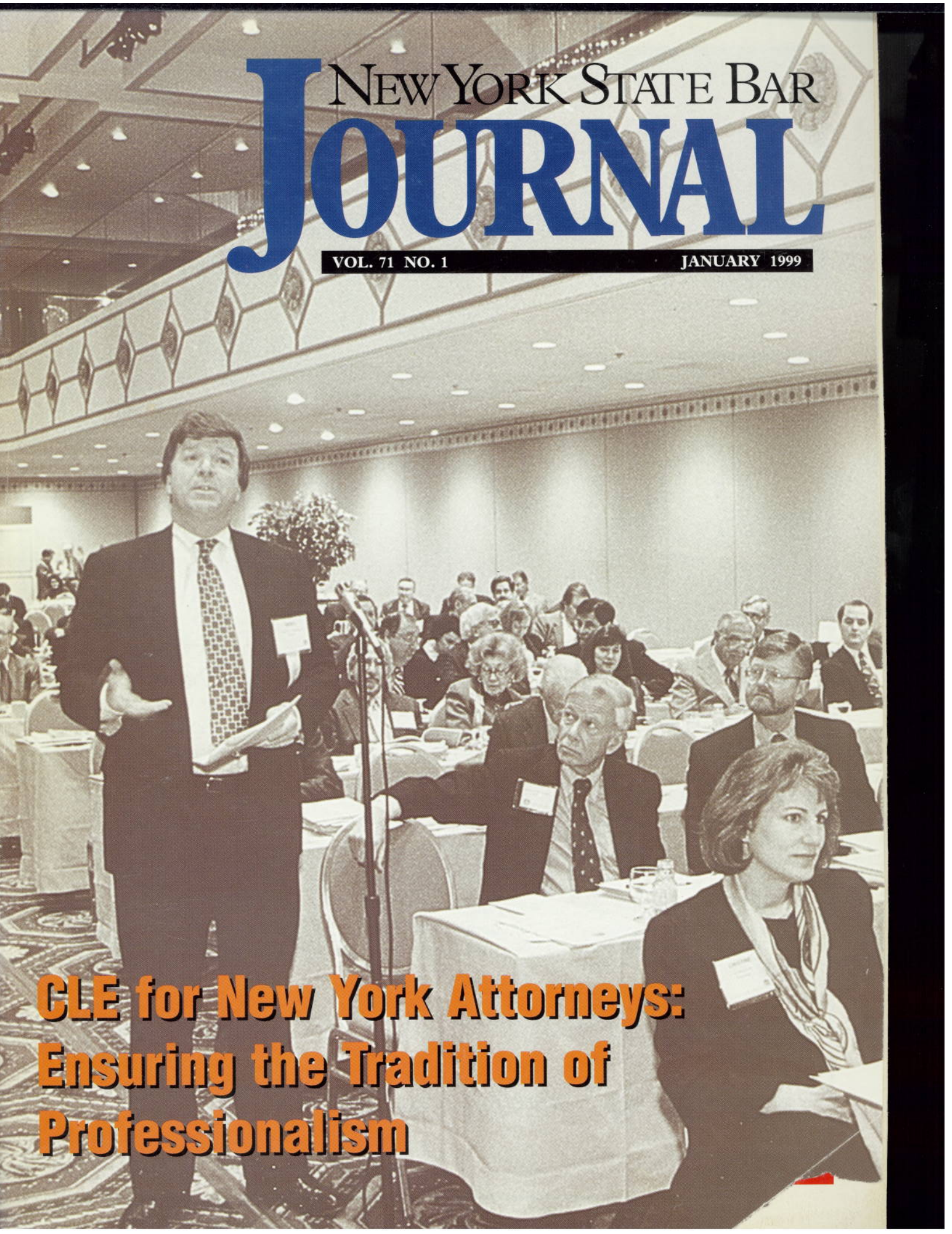

CLE for New York Attorneys: Ensuring the Tradition of Professionalism

Special Procedures Apply To Enforcing Judgments In Small Claims Courts

An article in the December 1998 issue of the New York State Bar Journal *described the filing and resolution of claims in the small and commercial claims courts. Although the courts are designed to be friendly to* pro se *litigants, attorneys who are familiar with their basic operation can provide valuable guidance to clients. The following covers the opportunities available for vacating, modifying or appealing a small claims decision and the procedures for enforcing judgments.*

BY GERALD LEBOVITS

The pretrial and trial aspects of cases in the small and commercial claims courts constitute an entire body of law. But winning is not everything. Victorious small and commercial claimants must still sustain and collect their awards. And losers should not give up all hope.

Default judgments can be opened, although in practice the process is more formal upstate than downstate. Arbitrations, which profess to be final, can be vacated. An arbitrator's award may not be set aside for errors of law or fact. However, misconduct and awards that exceed an arbitrator's authority may lead to *vacatur*.

Arbitrators who hear inquests are referees. A referee's recommendation may be set aside for mistakes that do not amount to misconduct. Even if an arbitrator's award or referee's recommendation cannot be vacated, modification is still an option if an arbitrator miscalculates numbers or misdescribes persons or things.

A judge's decision is appealable directly if the error of substantive law is readily apparent. Procedural errors lead to reversal only if the mistake is so shocking that it denies substantial justice. This limited right of appeal suggests that litigants in jurisdictions that have arbitrators should consider arbitration, which leads to an immediate hearing using the same substantive law and procedure seen in trials before judges.

Although there is no appeal from an arbitrator's decision, an arbitrator's award may be subjected to motions to vacate or modify, and an appeal may be taken from a decision on that motion.

There are no issue-preclusion effects to small and commercial awards. Claim preclusion, however, still allows a claimant who wins a judgment in the amount sued for to sue again in a higher court, if the claim fits within the higher court's jurisdiction. Counterclaims not brought originally may be brought later.

Regardless of how easy or difficult it is to win an award, many claimants find it infinitely more difficult to collect one. Some debtors are judgment proof. Others, who believe that the procedures in small and commercial claims courts are too informal to take judgment collection seriously, are defiant. Nevertheless, judgment creditors who make persistent efforts to collect will discover that special procedures unique to small and commercial claims can make collection a reality long before the 20-year statute of limitations runs out.

Vacatur

Default judgments in the small and commercial claims courts may be vacated on the same grounds as defaults in other courts. After an inquest conducted by a judge or an arbitrator, small and commercial claims judgments may be vacated only if the defendant provides a reasonable excuse for the default and a meritorious defense to the claim.[1] As a matter of practice in New York City, however, "defaults are vacated rather liberally."[2] Appeals do not lie from default judgments. A defendant must move to vacate the default. Either side may then appeal an order granting or denying that motion.[3]

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One published opinion holds that an award by a small claims arbitrator may never be vacated or modified.[4] But the otherwise unanimous view is that N.Y. Civil Practice Law and Rules 7511(b)(1) (hereinafter "CPLR") governs a motion to vacate an arbitrator's award.[5] There must be corruption, fraud, misconduct, arbitrator partiality, an award that is beyond the arbitrator's power to render or which is imperfectly executed and thus not final and definite, or a failure to follow the procedure in CPLR article 75.

For example, equitable awards, which are beyond the power of an arbitrator,[6] will result in *vacatur*. Small Claims §§ 1801 and 1801-A[7] provide that judges and arbitrators may award "money only." Moreover, "an arbitrator's refusal to hear pertinent and material evidence is misconduct justifying *vacatur* of the award."[8]

Given that small claims arbitrators must adhere to New York's Rules Governing Judicial Conduct,[9] their failure to disqualify or recuse themselves in circumstances that would require judges to disqualify or recuse themselves also compels *vacatur* under the doctrines of misconduct and partiality.[10]

The party moving to vacate an arbitrator's award has the burden of proof[11] because arbitration decisions are "presumptively valid, final and binding on the parties."[12] If the court orders a hearing to ascertain whether the arbitrator was partial—a hearing that must be justified by the moving papers—the arbitrator may be subpoenaed to testify.[13]

Although arbitrators and judges must follow substantive law,[14] an arbitrator's erroneous legal decision cannot lead to *vacatur*: "After a small claims judgment has been entered upon an arbitrator's award, the award and judgment cannot be set aside on the ground that the award was affected by an error of law."[15] Moreover, a small or commercial arbitration may not be vacated "on the ground that the Arbitrator, in making a decision, did so without any foundation in fact [or was] capricious and arbitrary in his determination."[16] But not obtaining an informed, signed consent to arbitrate will vitiate the arbitration.[17] Litigants must be told, and then signify their consent in writing, that "the award is final and no appeal can be taken therefrom. This shall never be treated as *pro forma*."[18] An award will be set aside if a litigant "did not understand that the hearing would result in a final determination."[19]

A claimant need not consent to arbitration when an inquest is referred under CPLR 3215(b) to an arbitrator, who becomes a "referee" for the inquest. Referees in the small and commercial claims courts are like referees in other courts. Their duty pursuant to CPLR 4001 is to hear and then to report and recommend how a judge should rule. Judges in small and commercial claims courts typically will not second-guess a referee's recommendation, which rarely consists of a report or anything more than filling out a case record card and Notice of Judgment form that notes who won and how much, if anything, the claimant or counterclaimant should be awarded. The judge will simply render judgment *pro forma* on that basis, without hearing from the referee orally or in writing.[20] Nor can the judge read the minutes of an arbitration; minutes are not taken.[21] Furthermore, a claimant present at the inquest will not get the opportunity to challenge the referee's report, even if there is one, or the referee's recommendation.

An arbitrator's award may be modified . . . for miscalculating figures, misdescribing persons or things, awarding damages on matters not subject to arbitration or rendering awards that are imperfect in form.

To remedy this problem, which turns referees into arbitrators and short-circuits a litigant's right to reject arbitration, the court in *Pasamanic v. 104 Camera World, Inc.*[22] developed a procedure to allow a judge to withdraw acceptance of a referee's erroneous recommendation on an issue of substantive law. *Pasamanic* permits a judge to grant a claimant's motion to restore the case to the calendar for proceedings *de novo*. A defendant cannot take advantage of *Pasamanic*. A defendant must, rather, move to vacate the default.

Modification

An arbitrator's award may be modified under CPLR 7511(c) for miscalculating figures, misdescribing persons or things, awarding damages on matters not submitted to arbitration or rendering awards that are imperfect in form.

Arbitrators sometimes seek to modify their awards after they render them. They may neither do so unilaterally nor avail themselves of the procedure in CPLR 7509. As one advisory opinion explains, "the weight of authority supports a finding that an arbitrator may not recall his or her award, once rendered, to modify or correct errors."[23] That is because arbitrators who render awards become *functus officio*. Arbitrators who wish to modify their awards, however, "may contact the Small Claims Clerk to have the matter placed back on the Small Claims calendar, with notice to both sides, for review by a presiding judge of the Small Claims Part."[24]

Appeals

Although litigants may appeal a final judgment by a judge in the small or commercial claims courts, this appellate right is often illusory, and not merely because of the expense compared to a possible award or because of the difficulties involved for the self-represented. Because the "appellate right is a very limited one and probably not worth a great deal,"[25] attorneys who shy away from arbitrators to preserve their appellate options might do well to consider the advantages of arbitration.[26] Nevertheless, appeals, even under the limited standard of review available, can be successful and should be pursued if warranted.[27]

Small Claims §§ 1807 and 1807-A provide that small and commercial claimants "shall be deemed to have waived all right to appeal, except that either party may appeal on the sole grounds that substantial justice has not been done between the parties according to the rules and principles of substantive law." Interlocutory appeals are forbidden.[28] Thus, no appeal lies from an order denying summary judgment.[29] Stipulations not reduced to orders are unappealable.[30] Under the doctrine of "substantial justice," credibility determinations will not be reviewed, even if clearly erroneous.[31]

A judge's decision on a question of substantive law will not be reversed unless it "is 'clearly erroneous' and the deviation from substantive law is 'readily apparent.' "

Indeed, the "clearly erroneous" standard that applies elsewhere to reviewing facts applies to matters of law in appeals of small and commercial claims judgments. A judge's decision on a question of substantive law will not be reversed unless it "is 'clearly erroneous' and the deviation from substantive law is 'readily apparent.' "[32] Moreover, a judge's decision "may not be overturned simply because the determination appealed from involves an arguable point on which an appellate court may differ."[33]

Regarding alleged procedural and evidentiary errors, if "substantial justice has been done, judgment will not be disturbed."[34] A case riddled with a judge's procedural or evidentiary mistakes will be affirmed unless the mistakes are "so shocking as not to be substantial justice."[35]

On the other hand, intermediate appellate courts, especially the Appellate Term for the Second and Eleventh Judicial Districts in the Second Department, occasionally exercise their interest-of-justice discretion to order a retrial if a *pro se* claimant establishes liability at a judge trial but for one reason or another does not prove damages,[36] or if judgment was predicated on a defense not fully developed at trial.[37]

With four exceptions, consenting to arbitration waives any right to appeal. As the Second Department held in 1976,

> the law is settled that finality and invulnerability attach to a judgment entered pursuant to an award by [small and commercial claims] arbitrator[s]. Defendant's express reservation seeking to preserve its right to appeal, and the assurances of the City Court Judge that an appeal could be taken, are ineffectual; neither the parties, the arbitrator, nor the court can confer a right to appeal where none exists as a matter of law.[38]

The first exception is that an arbitrator's award—and a judge's judgment—may, at least in theory, be appealed to the Court of Appeals directly on a constitutional question.[39] Second, a litigant may move to vacate or modify the award on the limited criteria enumerated in CPLR 7511, and the aggrieved party may appeal the judge's decision on that motion.[40] Third, a claimant who loses an inquest may make a *Pasamanic* motion, as explained above, and then appeal the grant or denial of that motion. Fourth, although no published opinion addresses whether a claimant may appeal directly from an inquest, it may be possible for a claimant to do so. After all, judges, not referee-arbitrators, render judgment at an inquest on the referee's report and recommendation. But the absence of a record may make perfecting an appeal daunting, regardless of the right under CPLR 5525(d) to appeal without minutes.

***Res Judicata* and Collateral Estoppel**

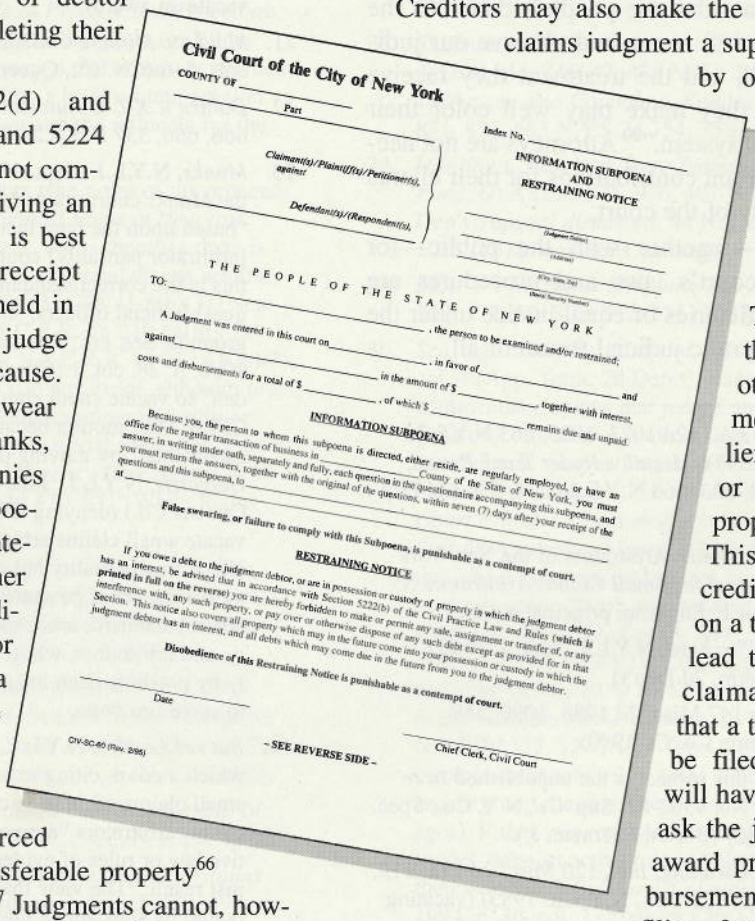
Under Small Claims §§ 1808 and 1808-A, small and commercial claims judgments "may be pleaded as res judicata only as to the amount involved in the particular action and shall not otherwise be deemed an adjudication of any fact at issue or found therein in any other action or court." These sections were "not intended to divest the small claims judgment of its 'claim preclusion' effect, which is the more technical meaning of 'res judicata,' but rather of its 'collateral estoppel' or 'issue preclusion' effect."[41]

The legislature's goal in enacting Small Claims § 1808 was to "give security of finality to the small claims victor but not to prejudice unduly the small claims vanquished when an essentially different cause of action is asserted in a second suit."[42] Although all agree that a small or commercial adjudication ought not "become a vain gesture, a prelude to a later trial elsewhere,"[43]

Small and commercial claims judgments are subject to the 20-year statute of limitations in CPLR 211(b). Creditors earn post-judgment interest, currently 9 percent, pending collection. But since a 1991 amendment, collection attempts may begin immediately on entry of judgment, which by law must occur within two days after a judge or arbitrator signs an award.[60]

For a nominal fee, a judgment creditor may immediately obtain an information subpoena from the office of the small claims clerk, as provided by §§ 1812(d) and 1812-A(d), which the clerk will sign. The subpoenas contain a CPLR 5222(b) restraining notice[61] to prevent third parties from disposing of debtor assets[62] and debtors from depleting their own assets.[63]

Small Claims §§ 1812(d) and 1812-A(d) and CPLR 5223 and 5224 provide that creditors who do not comply within seven days of receiving an information subpoena (which is best sent by certified, return-receipt requested mail)[64] risk being held in contempt by a small claims judge hearing an order to show cause. Perjury may attach if debtors swear falsely. When served on banks, landlords, credit-card companies and utilities, information subpoenas can lead to a wealth of material for enforcement. It is further possible for a "judgment creditor . . . to compel the debtor or his garnishee to appear for a deposition . . . concerning the debtor's assets."[65]



Civil Court of the City of New York

COUNTY OF _____

Part

Claimant(s)/Plaintiff(s)/Petitioner(s), against

Defendant(s)/(Respondent(s),

Index No. _____

INFORMATION SUBPOENA AND RESTRAINING NOTICE

THE PEOPLE OF THE STATE OF NEW YORK

TO: _____, the person to be examined and/or restrained;

A Judgment was entered in this court on _____, in favor of _____ and against _____, in the amount of $ _____, together with interest, costs and disbursements for a total of $ _____, of which $ _____ remains due and unpaid.

INFORMATION SUBPOENA

Because you, the person to whom this subpoena is directed, either reside, are regularly employed, or have an office for the regular transaction of business in _____ County of the State of New York, you must answer, in writing under oath, separately and fully, each question in the questionnaire accompanying this subpoena, and you must return the answers, together with the original of the questions, within seven (7) days after your receipt of the questions and this subpoena, to _____ at _____

False swearing, or failure to comply with this Subpoena, is punishable as a contempt of court.

RESTRAINING NOTICE

If you owe a debt to the judgment debtor, or are in possession or custody of property in which the judgment debtor has an interest, be advised that in accordance with Section 5222(b) of the Civil Practice Law and Rules (which is printed in full on the reverse) you are hereby forbidden to make or permit any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt except as provided for in that Section. This notice also covers all property which may in the future come into your possession or custody in which the judgment debtor has an interest, and all debts which may come due in the future from you to the judgment debtor.

Disobedience of this Restraining Notice is punishable as a contempt of court.

Date

Chief Clerk, Civil Court

CIV-SC-60 (Rev. 2/96)

~ SEE REVERSE SIDE ~

Enforcing Collection

Judgments can be enforced against any assignable or transferable property[66] or any debt owed to a debtor.[67] Judgments cannot, however, be enforced against exempt property.[68]

Creditors who locate non-exempt assets should contact an "enforcement officer"—a county sheriff or a privately retained city marshal. Debtors pay the officers' fees when a judgment is collected.[69] Practitioners should be aware that marshals, who work on a percentage system, are traditionally lax in enforcing small and commercial claims. Their profits from enforcing these claims are too low, they believe, to justify maximum collection efforts unless they receive information on a silver platter.[70] But sheriffs, and perhaps marshals as well, may be sued if they do not fulfill their mandate "on behalf of the public"[71] to collect small and commercial claims. Either the small claims clerk or the creditor's attorney signs and gives the sheriff or marshal property and income execution forms.

A property execution directs the enforcement officer "to satisfy the judgment . . . out of the real and personal property of the judgment debtor . . . and the debts due to him or her."[72] If a debtor has a joint bank account, a creditor must have a judge sign a "turnover order." Real property executions are not an idle threat. In 1983, a court upheld a forced co-op sale after a recalcitrant debtor refused to pay a $350 judgment. The sale caused the debtor to lose $185,000 of equity.[73]

Creditors may also make the small or commercial claims judgment a supreme court judgment by obtaining a transcript of judgment from the small claims clerk's office and filing it with the county clerk, as clerk of the supreme court. The judgment may then be filed in any other county. The judgment will operate as a lien if the debtor owns or comes to own real property in that county. This may affect a debtor's credit rating and appear on a title report; it can also lead to a sheriff's sale. A claimant who anticipates that a transcript will have to be filed or that executions will have to be served should ask the judge or arbitrator to award prospectively, as "disbursements," the transcript's filing fees and the "sheriff's fees for receiving and returning an execution."[74]

Enforcement officers may also serve income executions on debtors to direct that payment be made to the officer on the creditor's behalf.[75] If the debtor does not pay, the person paying the debtor, such as the debtor's employer, may be levied.[76] The creditor may sue payors who fail to pay the officer.

Finally, although arrest under CPLR 5250 may be unconstitutional,[77] debtors about to leave the state or who are in hiding may be arrested for failing to pay small and commercial claims judgments. The few judges who enforce this mechanism are always amazed

at how quickly following arrest debtors find previously nonexistent assets to pay their small claims judgments.

Conclusion

New York State's small and commercial claims courts—renowned the world over as the people's court—have the mandate to dispense fair, speedy, informal and inexpensive justice according to the rules of substantive law. The judges who preside there know that "[i]mportant principles are often hidden in humble cases."[78] The volunteer arbitrators are the "angels of the court system."[79] The court officers and clerks, who assure that litigants have their day (or night!) in court, are trained to appreciate that the people's court "is the vehicle [for New Yorkers] to see and observe our judicial process first hand, and the treatment they receive and the observations they make may well color their view of the entire legal system."[80] Attorneys are not necessary but make important contributions for their clients and assure the integrity of the court.

And the litigants—together with the public—for whom the people's court's laws and procedures are designed are the beneficiaries of equal justice under the law in our most democratic judicial forum of all.

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1. *Martin v. Pitcher*, 243 A.D.2d 1023, 1023, 663 N.Y.S.2d 437, 437 (3d Dep't 1997); *Mezail v. Ryder Truck Rental, Inc.*, 241 A.D.2d 902, 903, 660 N.Y.S.2d 234, 235 (3d Dep't 1997).
2. Association of Small Claims Arbitrators of the New York City Civil Court, *Manual for Small Claims Arbitrators* 55 (4th ed. 1998) (Arthur F. Engoron, principal author).
3. *See, e.g.*, *Winner v. Witschard*, N.Y.L.J., June 12, 1987, p. 18, col. 1 (App. Term, 2d Dep't).
4. *See Jarvis v. Regdos*, 147 Misc. 2d 1088, 1090, 559 N.Y.S.2d 777, 779 (Erie Co. Ct. 1990).
5. The seminal case on this subject is the unpublished *In re Roth v. Egeth*, Index No. 9502-82, Sup. Ct., N.Y. Co., Spec. T., Pt. 1 (Aug. 6, 1982) (Burton Sherman, J.).
6. *Scott v. Dale Carpet Cleaning, Inc.*, 120 Misc. 2d 118, 119, 465 N.Y.S.2d 680, 681 (Civ. Ct., N.Y. Co. 1983) (vacating an award ordering defendant-cleaner to "redo" a couch). Arbitrators may, however, grant conditional awards to prevent unjust enrichment. Small Claims §§ 1805, 1805-A. *See, e.g.*, *Mongelli v. Cabral*, 166 Misc. 2d 240, 244–45, 632 N.Y.S.2d 927, 930 (Yonkers City Ct. 1995) (awarding claimant money unless defendant returned "Peaches," a pet Molluccan cockatoo, within ten days of receiving judgment).
7. Aside from minor procedural differences, small claims law and practice is uniform across the state. Depending on where the action is heard, the governing statute is article 18 of the New York City Civil Court Act, the Uniform City Court Act, the Uniform District Court Act or the Uniform Justice Court Act, plus court rules enacted under the authority of those acts in the Uniform Rules for New York State Trial Courts. Accordingly, this article cites to the small claims acts generically as "Small Claims § 18xx." The statutes applicable to small commercial claims generally mirror article 18 in the applicable acts and are cited to here as "Small Claims § 18xx-A."
8. *Fisher v. Weinstock*, N.Y.L.J., May 14, 1991, p. 24, col. 5 (App. Term, 2d Dep't).
9. N.Y. Comp. Codes R. & Regs. tit. 22, § 10.6(A) (hereinafter "N.Y.C.R.R.") (binding those who "perform judicial functions within the judicial system"); *see also* Code of Judicial Conduct (Compliance Canon), *reprinted in* McKinney's Cons. Laws of N.Y., Bk. 29, vol. 3.
10. David D. Siegel, *New York Practice* § 584, at 924 (2d ed. 1991) (suggesting that an undisclosed blood relationship between an arbitrator and a litigant constitutes a ground to vacate an award).
11. *Munks v. Miracle Collision*, N.Y.L.J., Sept. 15, 1997, p. 29, cols. 5–6 (Civ. Ct., Queens Co.).
12. *Dahlke v. X-L-O Automotive Accessories, Inc.*, 40 A.D.2d 666, 666, 337 N.Y.S.2d 86, 87 (1st Dep't 1972).
13. *Munks*, N.Y.L.J., Sept. 15, 1997, p. 29, cols. 5–6. Note that the *Munks* court granted a CPLR 7511 hearing because, "based upon the bare facts shown in the moving papers, [arbitrator partiality] could be an issue." Not all agree that this is the correct standard or that arbitrators, who serve as quasi-judicial officers, should be subpoenaed on such flimsy grounds. *See, e.g.*, *Landro v. D'Amond*, N.Y.L.J., Dec. 9, 1998, p. 28, col. 1 (Civ. Ct., N.Y. Co.) (noting "heavy burden" to vacate small claims arbitrator's award and denying CPLR 7511 motion because partiality was not "clearly established" by moving papers); *Demetropoulos v. Halvatzis*, N.Y.L.J., June 22, 1990, p. 28, col. 5 (Civ. Ct., Queens Co.) (denying CPLR 7511 hearing on motion to vacate small claims arbitrator's award when papers did not allege true partiality but rather sought to "review on the merits the proof presented at trial"). If *Munks* articulates the correct standard, arbitrations would not be subject to finality, and arbitrators, whose integrity could be challenged easily by potshots from losing parties, would become reluctant to serve *pro bono*.
14. *But see Landro*, N.Y.L.J., Dec. 9, 1998, p. 28 cols. 1–2, in which a court, citing to a 1990 Second Department non-small claims arbitration case, noted in *dictum* that small claims arbitrators "are not bound by principles of substantive law or rules of evidence, but solely by a duty to reach a just result." The view that judges or arbitrators are not bound by substantive law is strongly disputed in the small claims article published in the December 1998 *Journal*. The policy justifications for the rule that small claims arbitrators must follow substantive law include the fact that few people would elect arbitration if they believed that the arbitrators, despite their status as quasi-judicial officers, were not bound by the law. And if small claims arbitrators did not follow the law, those who should lose their cases might win—a most unjust result.
15. *Molloy v. Froyton*, 148 Misc. 2d 481, 481, 567 N.Y.S.2d 197, 198 (App. Term, 2d Dep't 1985) (collecting authorities), *reconfirming* 124 Misc. 2d 865, 479 N.Y.S.2d 842 (App. Term, 2d Dep't 1984).
16. *O'Connor v. Katz*, 17 Misc. 2d 486, 487, 186 N.Y.S.2d 790, 791 (Manhattan Mun. Ct. 1959).

17. 22 N.Y.C.R.R. §§ 208.41(n)(2), 208.41-a(n)(2) (New York City Civil Court); 22 N.Y.C.R.R. §§ 210.41(m)(2), 210.41-a(m)(2) (city courts); 22 N.Y.C.R.R. §§ 212.41(m)(2), 212.41-a(m)(2) (district courts).
18. Administrative Directive of (then) N.Y.C. Civil Court Administrative Judge Israel Rubin, No. 401, Sept. 10, 1982.
19. *Gilmore v. Jackson*, 120 Misc. 2d 690, 690, 466 N.Y.S.2d 623, 624 (Mount Vernon City Ct. 1982).
20. The authorities are nearly unanimous that arbitrators should not issue written opinions following trials or inquests. *See, e.g., Manual for Small Claims Arbitrators*, *supra* note 2, at 50 ("Written opinions are neither necessary nor desirable, in part because an arbitrator's decision, which cannot be appealed, should not constitute precedent"); *but see* Arthur C. Kellman, *Arbitrator's Guide to Practice and Procedure in Small Claims Court* 19 (1986) (monograph for White Plains City Court) ("It is encouraged that wherever practicable, the award be accompanied by a brief written opinion which recites the findings of fact and the rationale for the award").
21. Some recommend that arbitrators take notes of the proceedings, *e.g.*, Richard Lee Price, *Small Claims in New York City*, N.Y.L.J., Jan. 21, 1980, p. 1, col. 1, because there is no official record of a small or commercial claims arbitration, 22 N.Y.C.R.R. §§ 208.41(n)(3), 208.41-a(n)(3) (New York City Civil Court); 22 N.Y.C.R.R. §§ 210.41(m)(3), 210.41-a(m)(3) (city courts); 22 N.Y.C.R.R. §§ 212.41(m)(3), 212.41-a(m)(3) (district courts). In any event, although proceedings before judges are recorded stenographically or mechanically, the absence of a judge-trial transcript is not a ground for a new trial. *Glass v. Regency Park Assocs.*, 100 Misc. 2d 179, 180, 418 N.Y.S.2d 870, 871 (White Plains City Ct. 1979).
22. 116 Misc. 2d 972, 456 N.Y.S.2d 977 (Civ. Ct., N.Y. Co. 1982). The court noted "irregularities" in the inquest and "sufficient questions regarding [claimant's] belief that he had established a right of recovery." *Id.* at 974.
23. Advisory Letter on Small Claims Procedure No. 1-89 of (then) N.Y.C. Civil Court Administrative Judge Jacqueline W. Silbermann, *reprinted in* 1 *Small Claims J.* (N.Y.C. Civ. Ct. Ass'n of Small Claims Arbitrators) 6, 6 (No. 2) (1989).
24. *Id.* (citing *Knoweles v. International Furniture Rental, Inc.*, 87 Misc. 2d 326, 384 N.Y.S.2d 77 (Civ. Ct., N.Y. Co. 1976)).
25. Brian G. Driscoll, De Minimis Curat Lex—*Small Claims Courts in New York City*, 2 Fordham Urb. L.J. 479, 498 (1974).
26. In jurisdictions that use arbitrators, a litigant elects arbitration by answering "ready." To elect a judge trial, a litigant answers "by the court." Litigants request a pretrial motion by answering the calendar call with "application."
27. Appeals in the First and Second Departments go to the appellate term, the appellate division and then the Court of Appeals. In the Third and Fourth Departments, they go to county court, the appellate division and then the Court of Appeals.
28. *Jaysons Interiors, Inc. v. Leopold*, 158 Misc. 2d 994, 994, 607 N.Y.S.2d 533, 534 (App. Term, 2d Dep't 1993).
29. *See, e.g., Pitelli v. Colarito*, N.Y.L.J., Feb. 13, 1992, p. 24, col. 6 (App. Term, 2d Dep't). Note that summary judgment motions are disfavored, *Caruso v. Throne*, N.Y.L.J., Sept. 23, 1998, p. 21, col. 1 (App. Term, 1st Dep't), although they may be filed when counsel represents both sides, *Senti v. Ace Auto Body & Towing, Ltd.*, N.Y.L.J., Aug. 11, 1998, p. 23, col. 4 (App. Term, 2d Dep't) (republished opinion), as they may in the court's discretion outside New York City. *See* Part I of this article in the December 1998 *Journal*.
30. *Westport Aviation Corp. v. Kuntz*, 228 A.D.2d 978, 978, 644 N.Y.S.2d 840, 840 (3d Dep't 1996).
31. *Moses v. Randolph*, 236 A.D.2d 706, 707, 653 N.Y.S.2d 214, 214 (3d Dep't 1997).
32. *Lockwood v. Niagara Mohawk Power Corp.*, 112 A.D.2d 495, 496, 491 N.Y.S.2d 211, 213 (3d Dep't 1985); *see also Makas v. Every*, 224 A.D.2d 793, 794, 638 N.Y.S.2d 178, 179 (3d Dep't 1996).
33. *Shiffman v. Deluxe Caterers of Shelter Rock, Inc.*, 100 A.D.2d 846, 846–47, 474 N.Y.S.2d 87, 88–89 (2d Dep't 1984); *see also Coppola v. Kandey Co., Inc.*, 236 A.D.2d 871, 871, 653 N.Y.S.2d 754, 755 (4th Dep't 1997).
34. *Harding v. New York State Teamsters Council Welfare Trust Fund*, 60 A.D.2d 975, 976, 401 N.Y.S.2d 634, 635 (4th Dep't), *appeal dismissed*, 44 N.Y.2d 641, 405 N.Y.S.2d 1025 (1978) (citations omitted).
35. *Blair v. Five Points Shopping Plaza, Inc.*, 51 A.D.2d 167, 169, 379 N.Y.S.2d 532, 535 (3d Dep't 1976).
36. *See, e.g., Santulli v. Mancini*, N.Y.L.J., Oct. 27, 1987, p. 16, col. 4 (App. Term, 2d Dep't). Based on this principle, one commentator opines that judges and arbitrators may declare a mistrial at a trial or inquest "[i]n the interest of justice" if the claimant "proves liability but fails to produce adequate evidence of damages." Leonard Weinstein, *Small Claims Court Practice* 13 (monograph for Practicum Project, Suffolk Academy of Law) (1994). If that is so, the discretion should be exercised in rare cases only, in part because mistrials cause delays and because adjournments are discouraged. *But cf. De Leon v. Katz*, 124 Misc. 2d 1064, 1066, 479 N.Y.S.2d 935, 936 (App. Term, 1st Dep't 1984) (entitling defendant to an adjournment the first time a case is calendared); *Shane v. Miele*, 18 Misc. 2d 439, 439, 193 N.Y.S.2d 323, 324 (App. Term, 2d Dep't 1959) (reversing because court refused to grant claimant an adjournment to secure counsel and to obtain additional evidence of damages). Either way, mistrials are avoided if judges and arbitrators "take an active role in helping the parties marshal their evidence." *Celona v. Celona*, N.Y.L.J., March 25, 1994, p. 36, col. 2 (Yonkers City Ct.) ("Judicial passivity will not lead to substantial justice in Small Claims Court"). It is an open question whether arbitrators, who may not grant adjournments unilaterally, may grant a mistrial without a judge's permission.
37. *Miller v. LaGuerta*, 18 Misc. 2d 457, 457, 193 N.Y.S.2d 315, 315 (App. Term, 2d Dep't 1959).
38. *Brownstein v. County of Westchester Dep't of Parks, Recreation & Conservation*, 51 A.D.2d 792, 792, 380 N.Y.S.2d 62, 63 (2d Dep't 1976) (citations omitted); *see also Heller v. Sable*, 39 Misc. 2d 343, 344, 240 N.Y.S.2d 234, 235 (App. Term, 2d Dep't 1963).
39. *Rymer v. Leider*, 122 Misc. 2d 873, 874–77, 471 N.Y.S.2d 733, 734–36 (Civ. Ct., Queens Co. 1983) (citing NYC Civ. Ct. Act § 1707).

40. *See, e.g.*, *Ritiu v. Keller*, N.Y.L.J., Dec. 23, 1991, p. 23, col. 3 (App. Term, 1st Dep't); *Molloy v. Froyton*, 124 Misc. 2d 865, 865, 479 N.Y.S.2d 842, 842 (App. Term, 2d Dep't 1984) ("No appeal lies from a judgment entered pursuant to an award by an arbitrator in a small claims proceeding. Defendant's remedy . . . is to move to set aside the judgment. Upon determination of such a motion, the aggrieved party may . . . appeal") (citations omitted).
41. Siegel, *supra* note 10, § 585, at 925.
42. John J. Markwardt, *The Nature and Operation of the New York Small Claims Courts*, 38 Alb. L. Rev. 196, 222 (1974).
43. *Levins v. Bucholz*, 208 Misc. 597, 600, 145 N.Y.S.2d 79, 83 (App. Term, 1st Dep't 1955), *aff'd*, 2 A.D.2d 351, 155 N.Y.S.2d 770 (1st Dep't 1956).
44. *Chang v. Chiariello*, 114 Misc. 2d 186, 188–89, 450 N.Y.S.2d 993, 995 (Civ. Ct., Queens Co. 1982).
45. *See Carp v. Van Tassel*, 234 A.D.2d 715, 717, 650 N.Y.S.2d 900, 901 (3d Dep't 1996) (barring plaintiff-initiated private arbitration because earlier small claims case resolved dispute partially in defendant's favor); *Omara v. Polise*, 163 Misc. 2d 989, 990, 625 N.Y.S.2d 403, 404 (App. Term, 2d Dep't 1995) (affirming summary judgment for defendant who was sued unsuccessfully in small claims court on same cause of action for amount lower than sued for subsequently, "notwithstanding the technical language" of § 1808); *Supreme Burglar Alarm Corp. v. Mason*, 204 Misc. 185, 187, 122 N.Y.S.2d 398, 400 (App. Term, 1st Dep't 1953) (dismissing claim identical to dismissed small counterclaim); *64 West Park Ave. Corp. v. Parlong Realty Corp.*, 77 Misc. 2d 1019, 1020, 354 N.Y.S.2d 342, 344 (Sup. Ct., Nassau Co. 1974) (barring second claim on same cause of action following small claim dismissal on default); *Rosen v. Parking Garage, Inc.*, 40 Misc. 2d 178, 179, 242 N.Y.S.2d 677, 678 (Civ. Ct., Bronx Co. 1963) (barring plaintiff's subsequent action in higher court after losing in small claims court); Siegel, McKinney Practice Commentary, N.Y.C. Civ. Ct. § 1808 (1989) (contrasting possibilities depending on whether claimant won or lost small claim for "amount involved").
46. *Stern v. Hausberg*, 22 A.D.2d 669, 669, 253 N.Y.S.2d 447, 449 (1st Dep't 1964) (holding that dentist's successful small claim for nonpayment does not bar patient's later suit for malpractice); *Czora v. Ahrens*, 74 Misc. 2d 601, 602–3, 344 N.Y.S.2d 621, 622–23 (Erie Co. Ct. 1973) (holding that small claims defendant who did not counterclaim for property damage and who lost case could sue in second case for damages resulting from same accident); *Thaler v. Town & Country Oil Corp.*, N.Y.L.J., Sept. 19, 1995, p. 31, col. 4 (Yonkers City Ct.) (holding that oil company, which won first small claim for nonpayment, may be sued subsequently for late delivery).
47. *See Shalit v. New York State Dep't of Motor Vehicles*, 153 Misc. 2d 241, 242, 580 N.Y.S.2d 836, 837–38 (Sup. Ct., Nassau Co. 1992) (differentiating between small claim, which seeks damages, and administrative proceeding, which considers licensure).
48. Debra Ruth Wolin, Note, *How to Defeat the Jurisdiction (and Purpose) of the Small Claims Court for Only Fifteen Dollars*, 44 Brook. L. Rev. 431, 432 n.8 (1978).
49. Gerald Lebovits & Arthur F. Engoron, *How to Help Judgment Creditors Collect: The Effective Use of Civil Court Act Article 18*, N.Y.L.J., Jan. 27, 1998, p. 1, col. 1.
50. Josephine Y. King, *Small Claims Practice in the United States*, St. John's L. Rev. 42, 63 n.139 (1977).
51. *Bruna v. National Westminster Bank*, 138 Misc. 2d 548, 551–52, 524 N.Y.S.2d 1009, 1012 (Civ. Ct., Queens Co. 1988); *cf.* CPLR 5019(a) (forbidding judgment from being stayed or impaired by a mistake in papers not affecting party's substantial rights).
52. N.Y.C. Civil Court Act § 1901(c); Uniform District Court Act § 1901(c); Uniform City Court Act § 1901(c) (hereinafter "Court Acts").
53. Filing fees are awarded in practice as "disbursements." Under Court Acts § 1901(c), in fact, these fees must be awarded in the "disbursements" category to the winning party.
54. Some argue that attorneys' fees under §§ 1813(a) and 1813-A(a) should be awarded to the self-represented in the amount of "the reasonable fees an attorney would have been able to charge for similar efforts." *See, e.g.*, Siegel, McKinney Practice Commentary, N.Y.C. Civ. Ct. Act § 1813 (1989).
55. 22 N.Y.C.R.R. §§ 208.41(n)(4), 208.41-a(n)(4) (New York City Civil Court); 22 N.Y.C.R.R. §§ 210.41(m)(4), 210.41-a(m)(4) (city courts); 22 N.Y.C.R.R. §§ 212.41(m)(4), 212.41-a(m)(4) (district courts).
56. *See, e.g.*, *In re Cofino*, 211 A.D.2d 298, 301, 627 N.Y.S.2d 644, 645 (1st Dep't 1995); *In re Meehan*, 174 A.D.2d 92, 93, 578 N.Y.S.2d 250, 250 (2d Dep't 1992). Attorneys who frustrate a small claims judgment execution are liable to discipline. *In re Israel*, 205 A.D.2d 101, 102–3, 618 N.Y.S.2d 269, 270 (1st Dep't 1994). So are attorneys who, as *pro se* litigants, fail to disclose information in a small claim. *In re Patel*, 209 A.D.2d 100, 114, 625 N.Y.S.2d 137, 145 (1st Dep't 1995).
57. Office of Court Administration ("OCA") Form CIV-GP-20.
58. OCA Form CIV-SC-50.
59. OCA Form CIV-SC-93.
60. "Notice of entry" occurs when a clerk enters judgment. 22 N.Y.C.R.R. §§ 208.41(n)(5), 208.41-a(n)(5) (New York City Civil Court); 22 N.Y.C.R.R. §§ 210.41(m)(5), 210.41-a(m)(5) (city courts); 22 N.Y.C.R.R. §§ 212.41(m)(5), 212.41-a(m)(5) (district courts).
61. OCA Form CIV-SC-60.
62. OCA Form CIV-SC-61.
63. OCA Form CIV-SC-62.
64. *Metropolitan Life Ins. Co. v. Young*, 157 Misc. 2d 452, 453, 596 N.Y.S.2d 653, 654 (Civ. Ct., N.Y. Co. 1993) ("Actual receipt of the subpoena is necessary, not only for compliance, but as a predicate for a contempt if noncompliance is alleged").
65. King, *supra* note 50, at 65 n.148.
66. CPLR 5201(b). Such property includes corporate stock, CPLR 5201(c)(1); interests in a decedent's estate, CPLR 5201(c)(2); partnership interests, CPLR 5201(c)(3); and negotiable instruments, CPLR 5201(c)(4).
67. CPLR 5201(a).
68. *See* CPLR 5205, 5206 (listing exempt property). The remedy for failing to notify a small claims judgment creditor that certain property is exempt from application to judgment is

to vacate the restraining notice and execution. *Friedman v. Mayerhoff*, 156 Misc. 2d 295, 298, 592 N.Y.S.2d 909, 911 (Civ. Ct., Kings Co. 1992). Note that a bankruptcy filing stays all small and commercial proceedings. Discharge orders operate as injunctions against all attempts to collect a discharged debt. 11 U.S.C. § 524(a)(2).

69. Court Acts § 1908(a), (e).
70. Driscoll, *supra* note 25, at 502–3.
71. *Ange Wang v. Bartel*, 163 Misc. 2d 600, 601, 624 N.Y.S.2d 735, 736 (App. Term, 2d Dep't 1994).
72. CPLR 5230(b). The property includes personal property "not capable of delivery," such as a debt, by "levy by service of execution." CPLR 5232(a). Personal property "capable of delivery," such as a vehicle, is subject to "levy by seizure." CPLR 5232(b). Real property sales are governed by CPLR 5235, 5236.
73. *See House v. Lalor*, 119 Misc. 2d 193, 462 N.Y.S.2d 772 (Sup. Ct., N.Y. Co. 1983).
74. Court Acts § 1908(e).
75. *See* CPLR 5231(a), (b), (d).
76. CPLR 5231(e)–(g).
77. *See* Siegel, *supra* note 10, § 513, at 793; *but see Weinstein, Skoller & Kaye, P.C. v. Lynard Properties, Ltd.*, 79 A.D.2d 987, 988, 434 N.Y.S.2d 469, 471 (2d Dep't 1981) (noting that "arrest of a judgment debtor is permissible pursuant to CPLR 5250").
78. *Lortz v. Lortz*, 162 Misc. 2d 539, 539, 616 N.Y.S.2d 876, 876 (Monroe Co. Ct. 1994) (invalidating Rochester City Court's practice of transferring small claims to regular part of court and then subjecting them to mandatory arbitration); *see also Ware v. Grossman*, 177 Misc. 2d 320, 320, 676 N.Y.S.2d 844, 844 (Dist. Ct., Nassau Co. 1998) ("[M]otions involving small claims should be returnable in the small claims part of the court, and not in the regular civil motion part").
79. *See* Justice Fern Fisher-Brandveen's column accompanying Part I of this article in the December 1998 *Journal*.
80. Gilbert Rabin, *Substantial Justice in Small Claims Court—Equity and Damages* I-16 (undated monograph).