

Memorandum in Support

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #13

March 12, 2008

S. 3564

By: Senator Volker

A. 7371

By: M. of A. Lancman

Senate Committee: Codes

Assembly Committee: Judiciary

Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to the application made to the supreme court to determine a mistake of fact in an income execution for support enforcement

LAW AND SECTION REFERRED TO: CPLR § 5241

THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES SUPPORTS THIS LEGISLATION

This proposal would change the procedure pursuant to which a “mistake of fact” in an execution for support enforcement may be sought to be corrected in Supreme Court. A “mistake of fact” is defined in CPLR 5241 (a) (8) as “an error in the amount of current support or arrears or in the identity of the debtor or that the order of support does not exist or has been vacated.” Currently, insofar as is pertinent to this proposal, a determination of a mistake of fact may be obtained by application to, *inter alia*, the Supreme Court. If relief is sought in the Supreme Court, the required procedural method is to commence a special proceeding pursuant to CPLR Article 4. This proposal would change the procedural method for obtaining relief from a mistake of fact to a motion in the action in which the order or judgment sought to be enforced was entered. The Committee supports this legislation because it streamlines the time-sensitive process for correcting a mistake of fact, helps to assure that the justice who determined the underlying action will determine the alleged mistake of fact and eliminates the burden on the parties and the clerk for assuring that the matter is assigned to such justice by keeping the matter within the context of the underlying action.

An income execution has a substantial effect on the debtor and the creditor. CPLR § 5241 (e) already recognizes that implicitly by providing for short time limitations both to challenge a mistake of fact (15 days) and to determine such a challenge (45 days). This proposal is consistent with the need for expedition and will work to eliminate potential administrative and procedural delays attendant upon the commencement of a special proceeding, which is a more cumbersome process than merely making a motion in the context of an existing action.

The sponsor’s supporting memorandum indicates that this proposal would eliminate the burden of commencing a new, separate enforcement proceeding, with the concomitant requirements of paying a new index number fee and filing of a request for judicial intervention, solely for the purpose of correcting a mistake of fact arising in an existing action.

The Committee believes that the proposal is appropriate in light of the benefits flowing from: the simplification of commencement procedures; the interests of judicial economy by making it quicker and easier for the judge familiar with the matter to hear the dispute; and fairness to all litigants, with each side benefiting from a rapid determination by a judge with pre-existing knowledge of the parties and the underlying dispute.

The Committee notes that there is a typographical error in the proposal as drafted. “Judgment” is misspelled as “judgement.” While in modern usage, both forms have begun to become acceptable, the former spelling is used elsewhere in section 5241 and should be used here for consistency.

For the foregoing reasons, the Committee on Civil Practice Law and Rules **SUPPORTS** this legislation, subject to the correction of the typographical error noted.

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Chair of the Committee: David L. Ferstendig, Esq.