Overpayment Via Default Judgment: Rights and Remedies

By Vesselin Mitev

Your client, before he was your client, moves, hastily and fails to change his address. As a result, he finds himself with a default judgment, for say, $20,000.00 in additional child support as college expenses, by dint of him not showing up to court.

The $20,000 is ultimately paid via the child support collections bureau. At some point, your client wakes up, retains you and notes that the parties' stipulation of settlement did not provide for payment of college expenses; rather, that the parties agreed that they would apply to a court of competent jurisdiction when and if the time came.

Inevitably, your client is served with a second enforcement/violation petition, this time seeking to levy judgment for additional college expenses purportedly incurred on behalf of the parties' other child, who is now eager to begin his first semester at the University of Oregon, where he will no doubt seek to change the world by majoring in medieval languages but will more than likely end up as a local coffee shop barista six figures in debt by the time it's all said and done.

What to do. If mindlessly scrolling through Westlaw or searching through crumpled up back copies of The Suffolk Lawyer for this column don't sound particularly appealing, the answer lies where it usually does: the CPLR; and as a seasoned jurist once said to me, "If it ain't in the CPLR, don't ask me for it, cause you ain't getting it." Since the Family Court is a creature created by statute, it has limited jurisdiction and said jurisdiction, as in derogation of common law, is strictly construed.

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Therefore, if the parties' stipulation itself (a binding contract until and if ever set aside) provided that college contributions were not automatic but instead contingent on an application for same being made in the first instance, then, something, something, something (as the hamster in the wheel inside your brain slows from a gallop to a trot, then to a dejected can-kicking shuffle) it doesn't seem right that your client was hit with a $20,000 judgment, even if it was on a default.

CPLR 3211 holds the key. Importantly, as one may recall, subject matter jurisdiction is never waived, even on appeal, even if it is not asserted as an affirmative defense or in a pre-answer motion to dismiss. It cannot be acquired by consent, waiver, or estoppel; the gate to the courthouse is figuratively locked (from the inside) since the court lacks the power to even venture out on the veranda and hear the matter to begin with.

In this case, the initial award, you argue, was jurisdictionally improper (amongst other things), since the parties' own contract barred the court from directing that the college expenses be paid, arrears-like; rather, the procedure according to the contract required a petition seeking contribution to college in the first instance.

The usual anticipated objections: failure to appeal, failure to seek leave to reargue or renew, failure to set aside the default, squarely do not apply, although they appear to have merit at first blush, since the matter is one of subject matter jurisdiction in the first instance – lacking same, the award could not have been made and no appeal or re-argument is necessary to establish that point.

Moreover, you note in your bleary-eyed Westlaw haze, that a court retains the inherent power to vacate its own judgment, order or decree for "sufficient reason and in the interests of substantial justice," see *Ladd v. Stevenson*, 112 NY 325 (1889), see also *Woodson v. Leasing Corp*. 100 NY2d 62 (2003) "the drafters of CPLR 5015 (a) intended that courts retain and exercise their inherent discretionary power in situations that warranted vacatur but which the drafters could not easily foresee."

Finally, procedural arguments aside, you remember having read somewhere that while child support overpayments may not be recovered by reducing future support payments (*see Matter of Maksimyadis v Maksimyadis*, 275 AD2d 459, 461 [2000]), "public policy does not forbid offsetting add-on expenses against an overpayment" (*Coull v Rottman*, 35 AD3d 198, 201 [2006]), see *Goehringer v Vozza-Nicolosi*, 139 AD3d 949, 949-50 [2d Dept 2016]; such as applying the $20,000.00 improper college award to off-setting add-on expenses for the children here.

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