

Enforcing Judgments Against Bank Accounts Held Outside the State

By Elisa S. Rosenthal

New York Civil Practice Law and Rules (CPLR) Article 52 dictates the procedures that a judgment creditor must follow to exercise its rights to enforce a judgment entered in New York.

When both the judgment debtor and its assets are located within New York State, the procedure is fairly straightforward. When the assets of the judgment debtor are located outside of New York State, however, the ability to levy upon the judgment debtor's assets can be tricky.

There are several factors that both Federal and State courts in New York have considered in determining whether or not assets held in another state can be used to satisfy a New York judgment, including: (a) the "separate entity" rule; (b) jurisdiction; and (c) the type of proceeding.

The "Separate Entity" Rule

The "separate entity" rule, one which was adopted from the old English common law, provides that each branch of a bank is considered to be a separate entity. The mere fact that a bank may have a branch inside of New York is insufficient to render accounts outside of New York subject to attachment by a New York court. See *Motorola Credit Corp. v. Uzan*, 288 F. Supp. 2d 558 (S.D.N.Y. 2003).

In 2009, the "separate entity" rule was loosened by the Court of Appeals, due to the computerization of bank information and centralized systems, *Digitrex, Inc. v. Johnson*, 491 F. Supp. 66 (S.D.N.Y. 1980). Indeed, in *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533 (2009), the New York State Court of Appeals held that the Legislature intended CPLR Article 52 to have extraterritorial reach when it amended CPLR 5224 (Consol. 2011) to facilitate the disclosure of materials located outside of New York to judgment creditors seeking to collect a judgment.

Following *Koehler*, courts facing similar issues wondered whether the "separate entity" rule had been completely abrogated by *Koehler*. See, e.g., *Global Tech., Inc. v. Royal Bank of Can.*, 34 Misc. 3d 1209(A) (N.Y. Sup. Ct. 2012), *Parbulk II AS v. Heritage Mar., SA*, 35 Misc. 3d 235 (N.Y. Sup. Ct. 2011). Subsequent decisions, particularly



in the First Department, however, have held that if the Court of Appeals had intended to eliminate the "separate entity" rule, it would have, and that "any future exception to the "separate entity" rule would require a pronouncement from the Court of Appeals or an act of the Legislature." *Ayyash v. Koleilat*, 38 Misc. 3d 916, 924 (N.Y. Sup. Ct. 2012), citing *Nat'l Union Fire Ins. Co. v. Advanced Empl. Concepts, Inc.*, 269 A.D.2d 101 (N.Y. App. Div. 1st Dep't 2000).

In fact, several trial courts since *Koehler* have instead held by the traditionally well-settled rule that "in order to reach a particular bank account the judgment creditor must serve the office of the bank where the account is maintained." See, e.g., *Global Tech., Inc. v. Royal Bank of Can.*, 34 Misc. 3d 1209(A) (N.Y. Sup. Ct. 2012), *Parbulk II AS v. Heritage Mar., SA*, 35 Misc. 3d 235 (N.Y. Sup. Ct. 2011). The Court of Appeals' deliberate sidestepping¹ the issue of the "separate entity rule" in *Koehler* may be the impetus for its most recent determination in *Motorola Credit v. Standard Chartered Bank*, decided on October 23, 2014.

In a divided opinion, the Court of Appeals, in *Motorola*, affirmed the long-standing common law tenet of the "separate entity" rule, holding that "limiting the reach of CPLR 5222 restraining notice in the foreign banking context, the separate entity rule promotes international comity and serves to avoid conflicts among competing legal systems." *Motorola Credit v. Standard Chartered Bank*, No. 162, NYLJ 1202674400477 at *11 (Oct. 23, 2014).

Jurisdiction

The Court of Appeals in *Koehler* analyzed the issue of jurisdiction in connection with judgment enforcement proceedings. The Court explained that since a post-judgment enforcement action is against a person, and the purpose of the proceeding is to force the person to convert property he owns into money for payment to a creditor, New York has the authority to order the holder of a judgment debtor's asset to turn over property of the judgment debtor held outside the state if the Court has personal jurisdiction over a judgment debtor. *Koehler*, 12 N.Y.3d at 540, citing Siegel, N.Y. Prac. § 510, at 866 [4th ed].

In *Koehler*, the plaintiff sought to enforce a domesticated foreign judgment as against the defendant by issuing a restraining notice to the Bank of Bermuda, which it asserted held stock on behalf of the defendant.

The Court established personal jurisdiction over the defendant based upon defendant's willingness to subject itself to the Court's jurisdiction without objection. The Court then determined that, based upon its in personam jurisdiction over the defendant, it can extend its reach to assets of the defendant, even when those assets are held outside of New York State, either in another state or another country. *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533 (2009). In fact, the Court in *Koehler* went so far as to hold that the broad language of CPLR Article 52 extends to the turnover of out-of-state assets held by a garnishee. *Id.* at 541.

Utilizing a jurisdictional analysis to determine whether the out-of-state assets of a judgment creditor can be turned over, as in *Koehler*, has precedential support. In *U.S. v. First Nat'l City Bank*, the case involved notice and levy of a federal tax lien upon all of the assets of an Uruguayan corporation. *U.S. v. First Nat'l City Bank*, 379 U.S. 378 (1965). The United States sought to foreclose its tax lien upon all sums held for the corporation in the Montevideo branch office of the bank. *Id.* The bank had been served with an injunction preventing the bank from transferring any assets of the corporation during the pendency of the foreclosure, but the corporation had not been served. *Id.* The U.S. Supreme Court held the bank "has actual, practical control over its branches; it is organized under a federal statute, which authorizes it to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons as one entity, not branch by branch. *Id.* The branch bank's affairs are, therefore, as much within the reach of the in personam order entered by the District Court as are those of the home office..." *Id.*

Although the determinations in *Koehler* and *First Nat'l City Bank* appear to put to bed the issue of New York's jurisdiction over out-of-state bank branches, there remains an important factor to address before determining whether, in fact, a judgment should, or needs to, be domesticated in a foreign state or whether New York can assert its jurisdiction. The remaining issue is determining whether the proceeding is an attachment proceeding, an injunction proceeding or a turnover/garnishment proceeding.

Collection Proceedings

Under New York law, there are several different ways in which a debtor's assets can be reached: (a) attachment; (b) turnover proceeding; and (c) restraining notice/execution.

Attachment

An attachment proceeding is a pre-judgment remedy involving the seizure of the defendant/debtor's property so that they are no longer able to use the property in order to ensure satisfaction of a prospective

judgment. Attachment proceedings in New York are governed by CPLR Article 62, and as stated in *Koehler*, enable a court to have jurisdiction over the property rather than the person. *Koehler*, 12 N.Y.3d at 539 ("It is a fundamental rule that in attachment proceedings, the res must be within the jurisdiction of the court issuing the process in order to confer the jurisdiction.").

In *Abuhamda*, moneys were transferred from a bank branch located in New York to a branch in Jordan. *Abuhamda v. Abuhamda*, 654 N.Y.S.2d 11 (N.Y. App. Div. 1st Dep't 1997). The court held that it had the authority to order a preliminary injunction to direct the bank to freeze the account in Jordan, based upon the Supreme Court's ruling in *First Nat'l City Bank*. *Id.* The fact that the bank did business in New York State subjected the bank to its jurisdiction. *Id.*

Turnover Proceeding

A turnover proceeding is a post-judgment special proceeding, under CPLR Article 52, in which the judgment creditor may obtain an order from the court forcing a third party garnishee in possession of property belonging to the judgment debtor to turn the property over to the judgment creditor. The analysis performed in *Koehler* resulted in a determination that "a New York court with personal jurisdiction over a defendant may order him to turn over out-of-state property regardless of whether the defendant is a judgment debtor or garnishee."

In *Gryphon*, the plaintiff, through a turnover proceeding, sought to have assets of the defendant turned over to the plaintiff to satisfy the judgment issued against the defendant based upon its non-payment of guaranteed notes. *Gryphon Dom. VI, LLC v. APP Int'l. Fin. Co.*, 41 A.D.3d 25 (N.Y. App. Div. 1st Dep't 2007). The court held that New York had jurisdiction over the defendant based upon the language of the notes and that on the basis of the court's jurisdiction over the defendant it could order the turnover of assets held outside of New York. *Id.*

Although the Court of Appeals in *Koehler* appeared to give broad discretion to a judgment creditor in terms of its ability to enforce its judgment, in 2013 the Court narrowed the holding in *Koehler* in the case of Commonwealth of Northern Mariana Islands. *Commonwealth of Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55 (2013).

In *Commonwealth of Northern Mariana Islands*, the issue became one of not just possession and custody, but of control over the judgment debtor's assets. *Id.* The Court held that the bank's parent company in Toronto maintained possession and custody over the judgment debtor's assets, not the subsidiary, and the fact that the holder of the assets controls the subsidiary was not suf-

ficient to “compel another entity, which is not subject to this state’s personal jurisdiction, to deliver assets held in a foreign jurisdiction.” *Id.*

Restraining Notices/Execution

A restraining notice or execution does not necessarily require court assistance or intervention. Once the court has issued a judgment, the judgment creditor may pursue collection of that judgment pursuant to the rules laid out in CPLR Article 52, including issuance of an income execution, a restraining notice upon a bank, or an execution issued to the Sheriff to levy upon property owned by the judgment debtor.

In *Global Tech.*, a restraining notice relative to a judgment was served upon a defendant, Royal Bank of Canada, on its New York branch. The court in *Global Tech.* discussed that “a party that seeks a restraining notice need only engage an attorney, who is authorized to issue a restraining notice as an officer of the Court. The court has no involvement with the issue of whether service of the restraining notice upon the garnishee comports with due process until the garnishee challenges the restraining notice...when serving a restraining notice of assets held outside the state, the restraining notice must be served upon the individual bank branches holding the assets of the judgment debtor, rather than the home office or a branch within the State of New York.” *Global Tech., Inc. v. Royal Bank of Can.*, 34 Misc. 3d 1209(A) (N.Y. Sup. Ct. 2012).

The holding in *Global Tech.* has support in *Koehler* as well. In the court’s analysis of CPLR 5225(a)-(b) (Consol. 1964), the court took special note of the how the authority is invoked; in CPLR 5225(a) the judgment creditor must file a motion to order the judgment debtor to turn over property in his possession, while CPLR 5225(b) requires a special proceeding by the judgment debtor over a garnishee who is not a party to the main action. See *Koehler*, 12 N.Y.3d at 541.

In *Motorola*, the issue with Standard Chartered Bank began when Motorola served a restraining order

on the New York branch of the defendant, a foreign bank from the United Kingdom. Motorola argued that based upon *Koehler*, the separate entity rule was no longer valid law. Standard Chartered Bank disagreed, asserting the separate entity rule is essential in the realm of international banking. The Court of Appeals determination affirmed Standard Chartered Bank’s position that “abolition of the separate entity rule would result in serious consequences in the realm of international banking.” *Motorola v. Standard Chartered Bank* at *13.

In determining whether enforcement of a judgment against a judgment debtor against assets held outside of New York, a determination of the type of enforcement action must first be ascertained. If the judgment creditor prefers collection by a restraining notice, the “separate entity” rule applies, and the judgment should then be domesticated in the foreign jurisdiction in order to assert jurisdiction over the assets. Should the judgment creditor instead prefer to enforce its judgment by a turnover proceeding, the court can assert its authority over assets held outside of the state so long as the court has exercised its jurisdiction over the holder of the assets.

Endnote

1. “Notably absent from our decision in *Koehler* was any discussion of the separate entity rule.” *Motorola Credit v. Standard Chartered Bank*, No. 162, NYLJ 1202674400477 at *9 [Oct. 23, 2014].

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