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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Broad Judgment Enforcement In New York Federal Courts

As anyone who has tried to enforce a judgment against a recalcitrant judgment debtor well knows, obtaining a judgment—no matter how long and hard fought—is often only the beginning of the battle. The confluence of New York's generous judgment enforcement statutes and the large number of domestic and foreign financial institutions located in New York makes the U.S. District Court for the Southern District of New York a particularly attractive venue for enforcing judgments, even where the judgment is obtained elsewhere.

A recent Southern District decision, *JW Oilfield Equip., LLC v. Commerzbank AG*,¹ illustrates why some have described New York as a "mecca" for judgment creditors and why the Southern District of New York is a favorable forum for registering federal judgments from other districts.² We discuss that decision below, along with two other recent Southern District decisions highlighting the broad jurisdictional reach of New York's judgment enforcement provisions, especially when compared with judgments subject to the Foreign Sovereign Immunities Act (FSIA) governing enforcement of judgments against foreign states.³

Statutory Background

28 U.S.C. §1963 provides that by registering a federal judgment in any other federal district, that judgment may be enforced as if it had been obtained in that district.⁴ Registration is a simple process, requiring only that a certified copy of the judgment be filed. Federal Rule of Civil Procedure

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69(a)(1), in turn, provides that absent a federal law to the contrary, execution of a judgment is governed by the law of the state in which the judgment is located. Thus, execution of a judgment registered in New York will ordinarily be governed by Article 52 of the New York Civil Practice Law and Rules.

CPLR §5225 provides different procedures for satisfying a judgment depending on whether the property at issue is in the possession of the

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judgment debtor or a third party. Where the judgment debtor is in possession of property, a judgment creditor may make a motion, on notice, for a "turnover order" directing the debtor to relinquish property in satisfaction of the judgment.⁵ Where the judgment debtor's property is in the possession of a third party, the judgment creditor proceeds by way of special proceeding (in state court) or through a separate action (in federal court)⁶ to obtain a turnover order directing payment of the judgment debtor's property to the judgment creditor. To prevail, the judgment creditor must demonstrate that the judgment debtor is entitled to possession of the property, or that the judgment

creditor's rights to the property are superior to those of the person in possession.⁷

Location—Does It Matter?

In contrast to the rules for pre-judgment attachment, which require that the property to be attached be located within the jurisdiction, New York's judgment enforcement rules allow a judgment creditor to satisfy a judgment against property located both within New York and outside the state, so long as the court has personal jurisdiction over the individual or entity in possession of the property. This holds true not just for judgment enforcement actions brought against the judgment debtor itself, but also for actions brought against financial institutions and other garnishees that are subject to personal jurisdiction in New York and hold assets of a judgment debtor—no matter where those assets are located.

In *JW Oilfield Equip., LLC v. Commerzbank AG*, the garnishee respondent, a German bank, sought to avoid this rule, resisting, unsuccessfully, an application under §5225(b) directing it to turn over funds held in a judgment debtor's name in a bank account in Germany. In granting the turnover order, Judge P. Kevin Castel held that the 2009 New York Court of Appeals decision in *Koehler v. Bank of Bermuda Ltd.*,⁸ controlled, requiring that Commerzbank, which admitted that it was subject to personal jurisdiction in New York, turn over the judgment debtor's funds whether or not those funds were held in Germany or New York.

Answering a question certified to it by the U.S. Court of Appeals for the Second Circuit,⁹ the New York Court of Appeals in *Koehler* held that "a New York court with personal jurisdiction over a defendant may order [that defendant] to turn over out-of-state property regardless of whether the defendant is a judgment debtor or a garnishee."¹⁰ The *Koehler* majority rejected the garnishee bank's

argument that where the judgment debtor is not within the court's jurisdiction, the court's authority over the debtor's property be based on in rem jurisdiction over the property rather than simply on personal jurisdiction over the garnishee.

The Court based this conclusion in part on the language of the statute, which does not require that the judgment debtor's property be located in New York, and in part on what it viewed as "fundamental differences" between attachment and judgment enforcement proceedings. Specifically, it observed that an attachment proceeds against property alone—and merely "keeps the debtor away from his property or, at least, the free use thereof"—in contrast to an enforcement order which transfers the property to one particular creditor. The Court observed that judgment enforcement proceedings, because they proceed against an individual, permit a garnishee to assert its own rights in the property, making personal jurisdiction over the garnishee paramount.

Although *Koehler* appeared to control the outcome in *JW Oilfield*, and to require Commerzbank to turn over funds it held in the judgment debtor's German account, Commerzbank tried several avenues to avoid that result. First, picking up on a concern expressed by the *Koehler* dissent, it argued that because the court lacked jurisdiction over the property in question as well as the judgment debtor, forcing the bank to bring the debtor's assets into New York would violate the debtor's due process rights.¹¹

Judge Castel found that Commerzbank lacked standing to raise the due process rights of the judgment debtor. He rejected Commerzbank's bid for third-party standing, noting that the bank's interests were not closely aligned with those of the judgment debtor—a fact borne out by the fact that the debtor and Commerzbank were in litigation in Germany over Commerzbank's decision to freeze the debtor's accounts in response to U.S. freeze orders.¹²

Commerzbank also asserted that the funds held in the German bank account were not available in New York under the "separate entity rule," which requires each branch of a bank to be treated as a separate entity for attachment purposes,¹³ arguing that the judgment creditor should have no greater rights in the property than the judgment debtor, who would not have been permitted to withdraw the funds from the bank's New York branch.

Seizing on *Koehler's* recognition of the fundamental distinction between attachment and judgment enforcement proceedings, Judge Castel held that the separate entity rule, which treats branches as separate entities for attachment purposes, would not apply in post-judgment enforcement proceedings. He found that the

pertinent question was not whether the debtor could withdraw funds from the New York branch, but "whether [the debtor], if it were in New York, could direct the *entity*, Commerzbank, to pay over the money it holds on deposit in [the debtor's] name in Germany, to an account in New York."¹⁴ Finding no evidence that the debtor lacked such authority, the court stressed that the turnover order was issued against the entity Commerzbank, rather than the individual New York branch.

Commerzbank next argued that the court should decline to exercise jurisdiction for reasons of comity. It claimed to be in an untenable position because German law would not permit it to turn over funds absent an order from a German court. Judge Castel rejected that argument, finding that the German court's denial of the debtor's petition to unfreeze its German assets was an indication that the German court did not believe its laws outweighed the United States' interest in enforcing its own judgments. He concluded that the U.S. interest was particularly strong where, as here, the judgment debtor (which commenced the U.S. litigation resulting in the judgment against it) had availed itself of a U.S. court, and then "flouted" its lawful orders.¹⁵

The expansive reach of New York's judgment enforcement rules is not simply geographic, but extends to the nature of the property that can be used to satisfy a judgment. Such property may be not only intangible (as in the case of securities), but contingent and unliquidated.

Finally, Commerzbank urged dismissal under the doctrine of forum non conveniens, an approach suggested by New York civil practice commentator David Siegel as one possible mechanism to avoid forum shopping likely to result from broad application of the *Koehler* decision. Judge Castel found the doctrine inappropriate on the facts of this case, noting that the judgment debtor had initiated the action in which the judgment creditor obtained the judgment in the United States, and subsequently sought to frustrate the enforcement of that judgment by "retreat[ing] to a foreign country." He concluded that even assuming Germany was an adequate alternative forum, the balancing of public and private interests favored a U.S. court.¹⁶

Different Rules Under the FSIA

Interestingly, the rules for enforcing a judgment against a foreign state, governed by the FSIA rather

than Article 52, erase the distinction between attachment and enforcement proceedings so critical in *Koehler*. Under the FSIA, all property belonging to a foreign state is immune from either pre-judgment attachment or post-judgment execution unless it is both located and used for commercial purposes within the United States.¹⁷

Application of this rule—in the context of a foreign state's assets held by a bank with both New York and international presences—poses interesting questions, many of which Southern District Judge Thomas P. Griesa considered in his decision last year in *Aurelius Capital Partners, LP v. Republic of Argentina*.¹⁸ His resolution of those questions led Judge Griesa to vacate several pre-judgment attachment and post-judgment execution orders that he had previously issued with respect to custodial securities accounts belonging to the Republic of Argentina and held at an Argentinean branch of Citibank.

Because the orders in that case involved the assets of a foreign state subject to the FSIA, Judge Griesa's inquiry focused entirely on determining whether the custodial securities accounts were located in the United States and whether the property was used for commercial activity in the United States. He considered authority under New York law as well as the FSIA, holding that the location of intangible property, such as securities, is ordinarily the location of the garnishee.¹⁹ He questioned how this general proposition would be applied in the context of an entity such as Citibank which is headquartered in the United States but has branches in many countries, noting that the separate entities rule might require that each branch be considered a separate location.²⁰ He also considered the parties' arguments based on the Uniform Commercial Code section providing that a debtor's interest in a security entitlement may be reached only by legal process upon the "securities intermediary"—a term without clear definition in the context of an international bank with a New York home office and branches abroad.²¹

Ultimately, Judge Griesa concluded that while instructive, none of these inquiries was dispositive, and that the locations of the accounts could be determined based on "rudimentary facts." Although a substantial amount of service for the accounts occurred in the United States, and legal responsibility for handling those accounts rested with Citibank in the United States, all contact between the customer and the bank occurred in Argentina. Because all "actual live transactions regarding [the] property... have taken place, and are taking place, in Argentina," Judge Griesa concluded that the property in question was neither located in the United States, nor used

for commercial activity in the United States, and the assets were thus immune from enforcement or restraint.

Contingent Interests

The expansive reach of New York's judgment enforcement rules is not simply geographic, but extends to the nature of the property that can be used to satisfy a judgment. Such property may be not only intangible (as in the case of securities), but contingent and unliquidated.²² Thus, a judgment creditor may obtain a turnover order covering an interest that has only potential economic value—such as future profits, or in the recent case of *Motorola Credit Corp. v. Uzan*,²³ a potential recovery in pending litigation.

In that case, Southern District Judge Jed S. Rakoff issued a turnover order against a corporation determined to be the alter ego of a judgment debtor for all assets including, specifically, any future award issued in a pending arbitration against the Government of Turkey. He relied, in part, on the New York Court of Appeals decision in *ABKCO Indus. Inc. v. Apple Films Inc.*,²⁴ which held that a judgment debtor's rights in a licensing agreement for the future promotion of a Beatles film, had "potential economic value to the creditor," notwithstanding uncertainties that may affect its actual ultimate value.²⁵

Applying that standard, Judge Rakoff found that the alter ego corporation's claim to recover \$10 billion from the Turkish government in the arbitration was of significant economic value to the plaintiffs and was thus subject to execution. Further, because the judgment debtors had a lengthy history of avoiding judgments by transferring funds among various corporations under their control, the court also restrained the alter ego corporation and any person or entity with an interest in or debt to the company from selling, assigning, transferring, or otherwise interfering with any property of the company including the anticipated future benefits.

Conclusion

New York's liberal judgment enforcement provisions make the Southern District of New York, with its concentration of international financial institutions, the first choice for litigants seeking to enforce judgments against judgment debtors with far flung assets that would otherwise be difficult and costly to reach.

Creditors or Anti-Mecca for Garnishees?" New York Law Journal (July 28, 2009).

3. 28 U.S.C. §1602 et seq.

4. Once a judgment is registered in a district, a federal court has ancillary jurisdiction to enforce its own judgments and does not need an independent basis for subject matter jurisdiction. *Peacock v. Thomas*, 516 U.S. 349, 356-57 (1996).

5. N.Y. C.P.L.R. §5225(a).

6. "A special proceeding is a creature of New York law with no federal analogue." *JW Oilfield*, 2011 WL 507266, at *2. Although a special proceeding is similar to a civil action which ends in a judgment, its procedure is more akin to a motion. Courts in the Southern District permit a judgment creditor seeking a turnover order against someone other than the judgment debtor to file a civil action with a petition for issuance of a writ of execution and turnover order. *Id.*

7. N.Y. C.P.L.R. §5225(b).

8. 12 N.Y.3d 533 (2009).

9. 544 F.3d 78, 88 (2d Cir. 2008).

10. 12 N.Y.3d at 541.

11. The dissent in *Koehler* opined that the majority's "novel in personam approach to judgment enforcement" would not satisfy the "traditional notions of fair play and substantial justice," as set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Although the Supreme Court has never applied *International Shoe* to a judgment enforcement proceeding, the dissent referred to a footnote from *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977), which endorses a "traditional in rem approach" for such cases.

12. Judge Castel found Commerzbank's due process argument to be a "red herring," noting the bank's true concern was the possibility that it might be forced to pay the same amount twice—once in the United States and once in Germany in the event the German court found its compliance with the U.S. orders unwarranted. 2011 WL 507266, at *5.

13. New York courts recently have "re-examine[d]" the application of the special entity rule because "modern bank computerization" has rendered obsolete the notion that multiple branches of a bank cannot communicate instantaneously. For this reason, the separate entity rule has been held not to apply where: 1) the restraining order is served on the bank's main office; 2) the bank's main office and branches are within the same jurisdiction; and 3) the bank branches are connected to the main office by high-speed computers under the centralized control of the main office. *Wiley & Sons Inc. v. Kirtsaeng*, 2009 WL 3003242, at *4 (SDNY Sept. 15, 2009) (Pogue, J., sitting by designation) (referring to the "*Digitrex* exception" as set forth in *Digitrex Inc. v. Johnson*, 491 F.Supp. 66 (SDNY 1980) (Knapp, J)).

14. 2011 WL 507266, at *6 (emphasis in original).

15. *Id.* at *8.

16. *Id.* at *9.

17. 28 U.S.C. §1610(a) (post-judgment execution on property of a foreign state); §1610(d) (pre-judgment attachment of property of a foreign state).

18. 2010 WL 768874 (SDNY March 5, 2010).

19. *Id.* at *2 (citing *AFCap Inc. v. Republic of Congo*, 383 F.3d 361 (5th Cir. 2004) (action under FSIA); *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303 (2010) (applying New York state law); *ABKCO Indus. Inc. v. Apple Films Inc.*, 39 N.Y.2d 670 (1976) (same)).

20. *Id.* at *3 (citing *Fidelity Partners Inc. v. Philippine Export and Foreign Loan Guarantee Corp.*, 921 F.Supp. 1113 (SDNY 1996); *Motorola Credit Corp. v. Uzan*, 288 F.Supp.2d 558 (SDNY 2003)).

21. *Id.* at *4.

22. N.Y. C.P.L.R. §5201(b) ("A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment").

23. 739 F.Supp.2d 636 (SDNY 2010).

24. 39 N.Y.2d 670 (1976).

25. 739 F.Supp.2d at 641 (citing *Supreme Merch. Co. v. Chemical Bank*, 70 N.Y.2d 344 (1987) (declining to extend holding in *ABKCO* to judgment debtor's interest in letter of credit for policy reasons; allowing attachment of such interest in an unrelated dispute would come "at the cost of diminution of confidence in the certainty and integrity of letters of credit in this jurisdiction")).

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1. ___F.Supp.2d___, 2011 WL 507266 (SDNY Jan. 14, 2011).

2. See David D. Siegel, "Koehler": Creating Mecca for