WILK AUSLANDER

Wilk Auslander LLP
1515 Broadway
New York, NY 10036

T 212 981 2300
F 212 752 6380
wilkauslander.com

COURTS CLARIFY JUDGMENT FOR OUT-OF-STATE ASSETS (PART 1 OF 2)

September 5, 2012

By: Jay S. Auslander
Natalie Shkolnik

Two critical decisions in New York Court of Appeals

Recent case law in the New York Court of Appeals has made it an auspicious jurisdiction from which a litigant may reach the out-of-state assets of his adversary—both in the context of pre-judgment attachment[1] and judgment enforcement. This article discusses two decisions, issued a year apart, that significantly clarified, if not expanded, the rights of judgment creditors to reach out-of-state assets of judgment debtors.

The first decision involves the turnover by a third-party garnishee[2] of a foreign debtor's proceeds maintained in a foreign bank subject to personal jurisdiction in New York. *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009) ("*Koehler*"). The second decision, issued less than one year later, involves a *pre-judgment* seizure of a foreign defendant's interests in out-of-state limited liability companies for purposes of securing the defendant's ability to satisfy a judgment not yet entered. *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303 (2010) ("*Hotel 71*").

Koehler v. Bank of Bermuda Ltd.

Koehler arose out of a commercial dispute between former business partners. The plaintiff/judgment creditor ("JC") obtained a judgment in the U.S. District Court of Maryland against his former partner (the "JD"), a resident of Bermuda, and subsequently also registered the judgment in the U.S. District Court for the Southern District of New York ("SDNY"). Then, in an effort to enforce the judgment, JC sought an order directing the turnover of JD's shares of stock in a Bermuda corporation. The shares were in the possession of a garnishee bank located in Bermuda ("GB"). The filings for this case centered around Section 5225 of the New York Civil Practice Law and Rules ("CPLR").

---

[1] A pre-judgment attachment, pursuant to CPLR § 6201, is a provisional remedy by which a plaintiff effects the pre-judgment seizure of a debtor's property, to be held by the sheriff as security for the satisfaction of a judgment, should one be entered in plaintiff's favor.

[2] A "garnishee" is any individual or entity who has possession of property belonging to a judgment debtor or in which the judgment debtor has an interest, or who owes a debt to the judgment debtor. CPLR § 105(i).

JC was able to serve GB with process by serving its New York subsidiary and alleged agent (this issue of personal jurisdiction over GB was litigated for years until GB eventually consented to jurisdiction). The district court denied Koehler's petition for a turnover order on the grounds that a New York court cannot attach property that is located outside the state. Koehler appealed to the Second Circuit.

The Second Circuit noted that New York law does not make clear whether a court sitting in New York has the authority to order a defendant, other than the judgment debtor himself, to deliver a defendant's assets located outside the state. The Second Circuit certified this issue to the Court of Appeals of New York.

In a 4-3 decision, the Court of Appeals held that, pursuant to CPLR § 5225, a "Court sitting in New York that has personal jurisdiction over a garnishee bank can order the bank to produce stock certificates located outside New York." In other words, *as long as New York has personal jurisdiction over the garnishee, the judgment creditor may reach the judgment debtor's assets in the hands of that garnishee regardless of where those assets are located.*

The majority relied, in part, on the decision of the Supreme Court of New York, Appellate Division, First Department, in *Gryphon Domestic IV, LLC v. APP Int'l Fin. Co., B.V. et al.*, 41 A.D.3d 25, 836 N.Y.S.2d 4 (1st Dep't 2007). *Gryphon* is a seminal decision in the context of judgment enforcement. There, the First Department held that as long as the New York court has personal jurisdiction over the debtor, it can direct the debtor to turn over all of his personal property capable of delivery to the judgment creditor (represented by Wilk Auslander in the *Gryphon* matter), no matter where such property is located. In essence, the *Koehler* court simply extended to garnishees the holding in *Gryphon*, which was limited to judgment debtors.[3]

The *Koehler* court took great care to explain that, unlike in the context of a pre-judgment attachment, where the jurisdiction of the Court is premised upon the property to be attached (known as *in rem* jurisdiction), in an enforcement proceeding pursuant to Article 52 of the CPLR, the authority is conferred on the court by the presence of the defendant (whether the judgment debtor or the garnishee) in New York.

As we show below, this distinction has since been eroded by the decision in *Hotel 71*.

Hotel 71 Mezz Lender LLC v. Falor

The dispute in *Hotel 71* arose out of a loan, personally guaranteed by the defendants, for the renovation and development of a prominent hotel in Chicago. Although none of the defendants resided in New York, they had voluntarily submitted to personal jurisdiction in New York. On plaintiff's pre-judgment motion, the trial court granted and confirmed an order of attachment, pursuant to CPLR § 6201, which was served personally on one of the defendants while he was in New York, as garnishee for his ownership interests in 23 out-of-state limited liability companies.

[3] In addition to its reliance on *Gryphon*, the Court noted that the amendment to CPLR § 5224, which sets forth the procedure for post-judgment discovery, provides that a subpoena *duces tecum* issued pursuant to this section and "served on the debtor, or any individual while in the state, or on corporation, partnership limited liability company or sole proprietorship doing business, licensed, qualified, or otherwise entitled to do business in the state, shall subject the person or other entity or business served to the full disclosure... whether the materials sought are in the possession, custody or control of the subpoenaed person, business or other entity *within or without the state*." CPLR § 5224 [a-1] (emphasis added).

After a reversal by the Appellate Division on the grounds that the trial court lacked jurisdiction over the out-of-state property interests, the Court of Appeals affirmed the order of attachment and, citing to *Koehler,* held that "a court with personal jurisdiction over a nondomiciliary present in New York has jurisdiction over the individual's tangible or intangible property, *even if the situs of the property is outside of New York.*" (Emphasis added.)

The *Hotel 71* court also held that the defendant's ownership interest in out-of-state limited liability companies—an intangible property interest—was property subject to attachment pursuant to CPLR § 6201. Another significant holding by the court was that, unlike certified interests in a corporation, which are evinced by stock certificates, the *situs* of which is, therefore, their physical location, the *situs* of the defendant's intangible, uncertified, interests clings to the debtor himself, so that his interests "were attachable in New York based on his presence in this state."

* * *

Wide-Reaching Asset Capture Rules

Following *Koehler* and *Hotel 71*, the New York courts can order, based on the exercise of personal jurisdiction over the debtor or the garnishee, not only the turnover of a judgment debtors' out-of-state assets following the entry of a judgment, but also the seizure of a prospective judgment debtor's out-of-state property (both tangible and intangible) *prior to* the entry of a judgment.

The wide-reaching policy implications of these decisions have not yet crystallized. The precedent may result in forum-shopping by out-of-state creditors seeking to reach foreign debtor's out-of-state assets. On the other hand, as Professor David D. Siegel suggests in "*Koehler: Creating a Mecca for Creditors or Anti-Mecca for Garnishees,*" (N.Y.L.J., July 28, 2009), the approach adopted by the Court of Appeals may "hurt New York by promoting garnishees like banks, indulgent of their customers, either to stay out of New York entirely. Or it may cause banks to set up New York subsidiaries of such independent structure that the main bank can't be deemed the alter ego of an entity present in New York." This could inadvertently "undermine New York as a commercial center—by promoting potential debtors and their potential garnishees to stay out of New York altogether."