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The Reach of Restraining Notices

Unresolved issues over bank accounts located outside of New York state.

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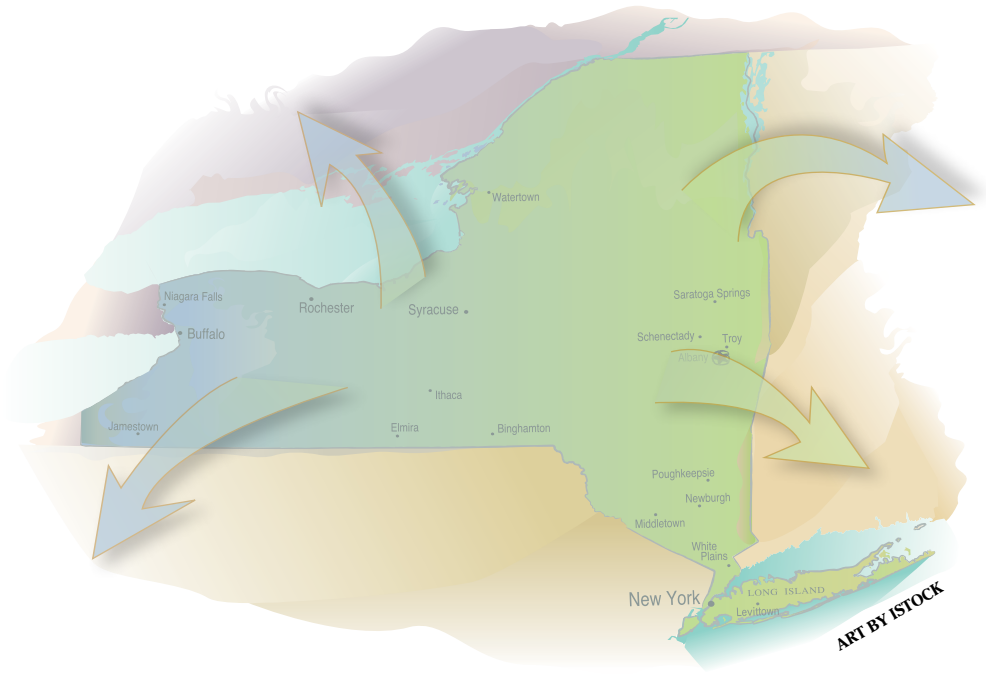
NEW YORK CPLR 5222(b) empowers a judgment creditor to serve a restraining notice on any person whom the creditor has "reason to believe" possesses property in which a judgment debtor has an interest. The party served with the restraining notice—a "garnishee"—is prohibited by statute from assigning, selling and transferring such property or allowing the judgment debtor to do the same, except by court order.[1] A judgment creditor typically serves restraining notices on banks where judgment debtors are believed to have accounts, thereby freezing the accounts pending satisfaction of the judgment.

Obstacles can arise when a judgment creditor serves a CPLR 5222(b) restraining notice on a bank if the accounts to be restrained are located outside of New York. Judgment debtors who live in states other than New York frequently have bank accounts opened at local branches of national banks, as opposed to accounts at a New York branch. If a judgment creditor serves a restraining notice on a New York branch of a national bank, must that bank honor the notice by restraining the judgment debtors' accounts located outside of New York? The case law provides no definitive answer to the issue.



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Sources of Conflict

Tensions regarding the jurisdictional scope of CPLR 5222(b) may be attributed to two sources: (1) New York laws governing attachment and the related "separate entity rule," whereby each branch of a bank is considered a separate business entity for certain purposes; and (2) New York's liberal approach to injunctions, which enable courts to restrict transfers of property, including property located outside the state.

Attachment, as set forth in Article 62 of the CPLR, is a prejudgment mechanism whereby a party can attach an opposing

party's assets under limited circumstances, such as: (a) where the defendant is a nondomiciliary residing without the state or is a foreign corporation not qualified to do business in the state; (b) the defendant resides or is domiciled in New York but cannot be personally served; or (c) if the defendant is fraudulently conveying assets to frustrate the enforcement of a judgment that might be rendered in plaintiff's favor.[2]

If property is not within a New York court's jurisdiction, then it is out of reach for purposes of attachment.[3] Service of a notice of attachment upon a New York bank branch does not enable a creditor to attach assets located outside of New York. Thus, New York courts routinely deny motions for attachment if the funds to be attached are outside of their jurisdiction. For example, in *McCloskey v. Chase Manhattan Bank*, the New York State Court of Appeals affirmed that funds in a branch of Chase Manhattan Bank located in Frankfurt, Germany, were immune from attachment in New York.[4]

The jurisdictional limitation upon attachment is based upon the "separate entity rule." The rule, as enunciated by the New York Supreme Court in *Cronan v. Schilling*, provides that "for purposes of attachment, among others, each branch of a bank is a separate entity, in no way concerned with accounts maintained by depositors in other branches or at the home office."[5] Accordingly, the court in *Cronan* explained that "[t]he law seems well established that a warrant of attachment served upon a branch bank does not reach assets held for, or accounts maintained by, the defendant in other branches or in the home office."[6]

The sharp limitations upon the jurisdictional reach of attachment contrasts with New York law governing injunctions against transfers of property. Provided that a New York court has jurisdiction over the transferor, the court is empowered to issue injunctions prohibiting transfers of assets, even if the assets are located outside the state. For example, in *Abuhamda v. Abuhamda*, the Appellate Division, First Department, affirmed a preliminary injunction that prohibited a bank, which was subject to jurisdiction in New York, from transferring assets located in Jordan to which both plaintiff and defendant claimed to hold rights.[7] The *Abuhamda* court expressly found that a preliminary injunction against a transferor is not the same as an attachment under Article 62 and is valid regardless of where the property is located, so long as the court has jurisdiction over the transferor.

Traditional and Modern

For years, New York courts held that restraining notices and notices of attachment were subject to the "separate entity rule." Thus, New York courts found that CPLR 5222(b) required the judgment creditor to serve the restraining notice on the specific branch where the accounts to be restrained were located.[8] David D. Siegel, in his 1978 practice commentary on CPLR 5222(b), stated that "[i]f the property pursued by the judgment creditor is a bank account maintained by the judgment debtor, the creditor must be sure to serve the restraint on the branch in which the account is kept."[9]

> If a judgment creditor serves a restraining notice on a New York branch of a national bank, must that bank honor the notice by restraining the judgment debtors' accounts located outside of New York?

Departing from the traditional rule, the Southern District of New York in *Digitrex Inc. v. Johnson* held that service of a restraining order on a bank's main branch is adequate.[10] The court emphasized that the separate entity rule was established at a time prior to the widespread use of high-speed computers by banks. Explaining that advances in technology allowed for quick communication between different bank branches, the court asserted, "we do not believe that the New York courts would today perpetuate an obsolete interpretation of the attachment statute." Consequently, the court in *Digitrex* found that it was "sensible" to hold that service of a restraining notice on a bank's main branch is sufficient. The *Digitrex* decision, however, did not address the situation where a bank's main branch and the branch holding the accounts to be restrained were in different jurisdictions.

Attachment Versus Restraint

New York courts have not always been entirely clear in distinguishing between the rules governing Article 62 attachment and the rules governing restraint pursuant to Article 52. In *Matter of Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Advanced Employment Concepts*, the Appellate Division, First Department, affirmed the trial court's decision to vacate a restraining order and an order of attachment against two bank accounts in Florida.[11] Citing *Digitrex* and *Limonium Mar. v. Mizushima Marinera*,[12] the court held that although service of an order of attachment against a main branch of a bank is effective as against accounts at branches in the same jurisdiction, the order of attachment could not reach accounts located in Florida.[13] Although the scope of the order appealed from apparently also concerned a restraining notice, the court did not discuss whether a restraining notice, unlike an order of attachment, may reach accounts located in other states.

In a more recent decision, *Gryphon Domestic VI, LLC v. APP Intern. Finance Co., B.V.*, the Appellate Division, First Department, addressed more explicitly the distinction between attachment and restraint. Judgment creditors in New York served 5222(b) restraining notices on each judgment debtor stating that to the extent "you are in possession or in custody of property in which any or all of the judgment debtors…have an interest…YOU ARE FORBIDDEN to make or suffer any sale, assignment or transfer of, or interfere with, any such property or pay over or otherwise dispose of any such debt except as therein provided." The judgment creditors also sought "turnover notices" pursuant to CPLR 5225(a), compelling debtors to release bank accounts and stock certificates in satisfaction of the judgment owed by the debtors.[14]

Citing *ABCKO* and *National Union*, the trial court in *Gryphon* found that the

restraining notices were invalid because the "property is located outside of New York, and restraining notices issued by the Court do not reach property in other jurisdictions." On the other hand, the trial court held that stock certificates belonging to the judgment debtors were properly subject to the turnover notices and also issued an injunction prohibiting judgment debtors from transferring property into Indonesia.[15] However, the trial court granted a motion to stay this injunction because, pursuant to *ABCKO* and *National Union*, "New York courts cannot restrain transfers of property located outside of the state."[16]

Reversing the trial court, the Appellate Division in *Gryphon* found that the court's reliance on *ABCKO* and *National Union* to vacate the injunction was improper because although the New York court may be without authority to attach assets outside of New York, courts may restrain transfers as long as they have jurisdiction over the transferors. Citing *Abuhamda*, the court found that there was no question that it was entitled to enjoin transfers of property, even if the transfers were being made extraterritorially. Moreover, the court held that pursuant to CPLR 5225(a), the court was empowered to direct judgment debtors to transfer overseas stock certificates and bank accounts to the judgment creditors in satisfaction of the judgment. The court ruled that because it had jurisdiction over the debtors, the location of the assets to be turned over was irrelevant.

The *Gryphon* court decision supports the proposition that a 5222(b) restraining notice served upon a judgment debtor requires the debtor to refrain from interfering with assets, including bank accounts, located outside of New York, because the debtor is subject to the jurisdiction of New York's courts. *Gryphon* did not, however, address whether a 5222(b) restraining notice served on the New York office of a garnishee bank is effective if the property to be restrained is located outside the state. On the one hand, an argument can be made pursuant to *Gryphon* that so long as a bank is subject to a New York court's jurisdiction, the bank must honor a restraining notice by freezing all of a debtor's accounts regardless of their location. On the other hand, an argument could be raised that the *Gryphon* decision does not alter the traditional view that creditors cannot attach bank accounts extraterritorially through service on banks in New York and that restraining notices should be similarly limited.

Thus, both judgment creditors and judgment debtors can find support for their positions regarding the jurisdictional scope of CPLR 5222(b) in existing case law. Judgment debtors, relying upon *ABCKO* and *National Union* may contend that Article 52 restraining notices should be viewed similarly to Article 62 attachment notices and thus they are valid only to the extent that the property to be restrained is within the jurisdiction of New York courts. On the other hand, judgment creditors, relying on the more recent decisions such as *Gryphon* and *Abuhamda*, may argue that a restraining notice is altogether different from attachment and should be viewed as virtually identical to a court-ordered injunction against the transfer of property. Pursuant to this approach, banks subject to jurisdiction in New York should be compelled to freeze accounts regardless of where the accounts are located. Until the courts provide further guidance on the issue, the reach of CPLR 5222(b) restraining notices will remain subject to question.

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1. CPLR 5222(b).

2. CPLR 6201. A plaintiff must also show there is a cause of action, the likelihood of success on the merits, and that the damages sought exceed all known counterclaims. CPLR 6212(a).

3. See *ABCKO Industries Inc. v. Apple Films Ltd.*, 39 NY2d 670 (1976) (holding that a licensing agreement between an English corporation and a New York company constituted intangible property located in New York and thus was subject to attachment).

4. *McCloskey v. Chase Manhattan Bank*, 11 NY2d 936 (1962).

5. *Cronan v. Schilling*, 100 NYS2d 474, 476 (Sup. Ct., New York County, 1950).

6. Id.

7. *Abuhamda v. Abuhamda*, 236 AD2d 290 (1st Dept. 1997).

8. See *Buy Fabrics Inc. v. Ada Company Inc.,* 76 Misc.2d 607, 608 (Sup. Ct., New York County, 1973).

9. See *Digitrex Inc. v. Johnson*, 491 F.Supp. 66, 68-69 (SDNY 1980), quoting David D. Siegel, Practice Commentary, CPLR 5222:5 (McKinney 1978); compare "[i]f the property pursued by the judgment creditor is a bank account maintained by the judgment debtor, the creditor is best off by serving the restraint at the branch in which the account is kept," Siegel, Practice Commentary, CPLR 5222:5 (McKinney 1997).

10. *Digitrex Inc. v. Johnson*, 491 F.Supp. 66, 68 (SDNY 1980).

11. *Matter of Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Advanced Employment Concepts*, 269 AD2d 101 (1st Dept. 2000).

12. *Limonium Mar. v. Mizushima Marinera*, 961 F.Supp. 600 (SDNY 1997).

13. *Matter of Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, supra, n.12, 269 AD2d at 101.

14. *Gryphon Domestic VI, LLC v. APP Intern. Finance Co., B.V.*, 41 AD3d 25, 29 (1st Dept. 2007).

15. The court held that the bank accounts were not subject to turnover for unrelated reasons.

16. *Gryphon Domestic VI, LLC*, supra n.14, 41 AD3d at 30. The trial court also based its decision on the plaintiff's failure to apply for broad injunctive relief.

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