

CPLR 3218(d): Execution of Confession of Judgment by an Agent Held To Be Binding Against Personal Assets of Indebted Partners

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residence after being abandoned during a temporary sojourn in New York seemingly can successfully sue for support and invoke in personam jurisdiction pursuant to CPLR 302(b). In contrast, a party who was married in New York and resided here for several years before establishing a matrimonial domicile elsewhere cannot, without more, obtain personal jurisdiction in this State under the statute.

A suggested solution to this anomalous situation is judicial or legislative construction of a formula, based on the length of time the parties maintained their matrimonial domicile in New York, to decide whether sufficient fundamental contacts with this State exist to justify the exercise of personal jurisdiction over nonresident defendants. In the absence of such a formula, decisions based on the *Lieb* interpretation may serve to promote injustice rather than prevent it.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3218(d): Execution of confession of judgment by an agent held to be binding against personal assets of indebted partners.

CPLR 3218(d) permits one or more joint debtors to confess judgment on a joint debt.⁶³ Although such a judgment may be entered and enforced solely against the personal assets of the confessing debtor,⁶⁴ execution of a judgment against less than all

⁶³ CPLR 3218(d) provides:

One or more joint debtors may confess a judgment for a joint debt due or to become due. Where all the joint debtors do not unite in the confession, the judgment shall be entered and enforced against only those who confessed it and it is not a bar to an action against the other joint debtors upon the same demand.

CPLR 3218 permits a debtor to confess judgment for a present or future monetary debt. Such confessions have two primary purposes: First, they act as a "short cut to judgment where the defendant concedes liability," and wishes to avoid the time and expense of a civil action, 7B MCKINNEY'S CPLR 3218, commentary at 1036 (1970); and, second, they serve as a security device for the protection of creditors' claims, even before a debt is due. *See id.*; 10 CARMODY-WAIT 2d § 68:1, at 214-15 (1966); 4 WK&M ¶ 3218.01. If the entire debt is not due at the time of confession, the judgment is enforceable against only that portion of the obligation which has matured. The judgment, however, remains in effect and acts as security for the monies due subsequent to the initial entry and execution of the judgment. CPLR 3218(c); *see* 7B MCKINNEY'S CPLR 3218, commentary at 1036 (1970).

Procedurally, to confess judgment, the debtor must execute an affidavit stating the amount due, authorizing the entry of judgment, and describing the factual situation in which the debt arose. CPLR 3218(a)(1)-(2). The affidavit must also state "the county where the [defendant-debtor] resides, or if he is a nonresident, the county in which entry [of judgment] is authorized." CPLR 3218(a)(1). Once the affidavit is executed, the creditor has 3 years to enter judgment. The 3-year period may, however, be shortened by the death of the defendant-debtor. CPLR 3218(b). For a detailed discussion of the confession of judgment procedure, *see* 7B MCKINNEY'S CPLR 3218, commentary at 1039-45 (1970).

⁶⁴ *See, e.g.,* Schenson v. I. Shainin & Co., 243 App. Div. 638, 276 N.Y.S. 881 (2d Dep't) (per curiam), *aff'd mem.*, 268 N.Y. 567, 198 N.E. 407 (1935) (judgment against nonexecuting

joint obligors does not preclude a creditor from instituting a subsequent action against the remainder.⁶⁵ Courts normally require strict compliance with the statutory requirements for filing a confession of judgment,⁶⁶ resolving all ambiguities in favor of the debtor.⁶⁷

Recently, in *Besen v. Kelley*,⁶⁸ the Supreme Court, Westchester County, held that a confession of judgment executed by an agent of a partnership was sufficient to bind the individual partners.⁶⁹ Plaintiff-debtors had moved for a preliminary injunction to stay enforcement of the judgment against their personal assets,⁷⁰ contending that since they had not personally confessed judgment,⁷¹

joint debtor vacated); *Scanlon v. Kuehn*, 225 App. Div. 256, 232 N.Y.S. 592 (2d Dep't 1929) (confession cannot be basis of personal judgment against nonsigning debtor); *Boyce Hardware Co. v. Saunders*, 119 Misc. 365, 196 N.Y.S. 259 (Sup. Ct. Allegany County 1922) (creditor cannot execute judgment against property jointly owned by confessing and non-confessing debtors). *But see* 7B MCKINNEY'S CPLR 3218, commentary at 1048-49 (1970), where Professor David Siegel states that a judgment creditor may be able to reach a confessing debtor's interest in jointly held partnership assets by use of a "charging order."⁶⁵ CPLR 3218(d). *See* *Bloom v. Kapps*, 73 N.Y.S.2d 325 (Sup. Ct. N.Y. County 1947), wherein the court expressly recognized the right of a creditor to bring suit against nonconfessing debtors.

⁶⁶ *See, e.g.*, *County Nat'l Bank v. Vogt*, 28 App. Div. 2d 793, 794, 280 N.Y.S.2d 1016, 1019 (3d Dep't 1967) (mem.); *American Cities Co. v. Stevenson*, 187 Misc. 107, 110, 60 N.Y.S.2d 685, 688 (Sup. Ct. N.Y. County 1946). Rigid conformity with the statutory requirements of the contents of the affidavit is aimed primarily at protecting third party creditors against a debtor's collusive attempt to create the appearance that he is judgment proof. *See, e.g.*, *Girylyuk v. Girylyuk*, 30 App. Div. 2d 22, 25, 289 N.Y.S.2d 458, 460 (1st Dep't 1968) (per curiam); *Granville v. Gratzler*, 200 Misc. 738, 739, 105 N.Y.S.2d 607, 609 (Sup. Ct. N.Y. County 1951), *rev'd on other grounds*, 281 App. Div. 514, 120 N.Y.S.2d 797 (1st Dep't 1953); 4 WK&M ¶ 3218.03.

⁶⁷ *See* notes 76-80 and accompanying text *infra*.

⁶⁸ 83 Misc. 2d 362, 373 N.Y.S.2d 765 (Sup. Ct. Westchester County 1975).

⁶⁹ *Id.* at 364, 373 N.Y.S.2d at 767.

⁷⁰ Plaintiffs were four doctors doing business as Cross County Hospital, a partnership. Their agent, Max Manus, was the hospital administrator delegated with responsibility for the day-to-day management of the hospital. *Id.* at 363, 373 N.Y.S.2d at 766. Manus' duties, as found by the court in a prior hearing, included all dealings with the defendant labor union. *Kelley v. Besen*, No. 09379 (Sup. Ct. Westchester County, July 16, 1975).

The confession in dispute was predicated upon a prior debt due defendants under the terms of a collective bargaining agreement. The agreement had been negotiated and signed by Manus as agent of the partnership. Holding that the defendants had the right to rely on Manus' authority to confess judgment, the court found that although Manus had not been expressly authorized to confess judgment, he possessed either apparent or implied authority to do so. *Id.* at 3. The court defined apparent authority "as that authority which the principal holds the agent out as possessing or which he permits the agent to represent that he possesses and which the principal is estopped to deny." *Id.* Implied authority was defined by the court as "actual authority circumstantially proved . . ." *Id.* at 2. It has also been defined as the power "implied or inferred from the words used, from customs and from the relation of the parties." RESTATEMENT (SECOND) OF AGENCY § 7, comment c at 29 (1957).

⁷¹ 83 Misc. 2d at 364, 373 N.Y.S.2d at 767. A further contention of the plaintiffs was that since they were not personally served with a summons, execution could not be had against them individually. *Id.* at 363, 373 N.Y.S.2d at 766. This argument was based upon CPLR 5201(b), which states in pertinent part:

A money judgment entered upon a joint liability of two or more persons may be

CPLR 3218(d) prohibited execution of the judgment against their individual assets. Plaintiffs also argued that inasmuch as CPLR 3218(a) requires that the affidavit confessing judgment be signed and sworn to by the debtor to be charged, the affidavit executed by an agent could not bind the individual partners.⁷² The court, however, rejected these arguments and held that the agent of the partnership was simultaneously the agent of each partner.⁷³ Therefore, the agent's signature on the affidavit became the equivalent of the individual signature of each partner,⁷⁴ rendering each partner personally liable to the defendant-creditor.

It is submitted that the *Besen* court's rationale is contrary to the weight of authority both in this jurisdiction and in others.⁷⁵ The courts have realized that confessions of judgment, predicated as they are upon private agreement, are prone to abuse since one party is typically in a disadvantageous bargaining position.⁷⁶ In

enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom judgment is entered.

The *Besen* court noted that service of summons was unnecessary since judgments by confession are predicated upon the debtor consenting in advance to the jurisdiction of the court. 83 Misc. 2d at 363, 373 N.Y.S.2d at 766, citing *Atlas Credit Corp. v. Ezrine*, 25 N.Y.2d 219, 250 N.E.2d 474, 303 N.Y.S.2d 382 (1969). See also *American Cities Co. v. Stevenson*, 187 Misc. 107, 60 N.Y.S.2d 685 (Sup. Ct. N.Y. County 1946). Some commentators believe that confessions of judgment may present due process problems. For a discussion of these fears, see 7B MCKINNEY'S CPLR 3218, commentary at 1044-45 (1970), citing *Atlas Credit Corp. v. Ezrine*, 25 N.Y.2d 219, 250 N.E.2d 474, 303 N.Y.S.2d 382 (1969).

⁷² Prior to the enactment of CPLR 3218, a verified statement executed by the defendant was required. The affidavit presently required by the CPLR is the equivalent of such statement. 7B MCKINNEY'S CPLR 3218, commentary at 1040 (1970). See FIRST REP. 107-08. Pursuant to CPLR 3218, the debtor himself must personally execute the affidavit. This requirement is designed to ensure that the debtor is aware of both "the claim he is confessing and the effect of his action." *Id.* at 108; *accord*, *P.A. Starck Piano Co. v. O'Keefe*, 211 App. Div. 700, 208 N.Y.S. 350 (1st Dep't 1925) (voiding a judgment confessed under power of attorney where attorney verified statement without consulting with his principal); *Flatbush Auto Discount Corp. v. Reich*, 190 Misc. 817, 75 N.Y.S.2d 908 (App. T. 1st Dep't 1947); *Asphalt Pavers Inc. v. Consentino*, 53 Misc. 2d 613, 279 N.Y.S.2d 630 (Nassau County Dist. Ct. 1967). Curiously, however, the *Besen* court held that the agent's signature satisfied this requirement. 83 Misc. 2d at 364, 373 N.Y.S.2d at 767.

⁷³ 83 Misc. 2d at 363, 373 N.Y.S.2d at 767, citing RESTATEMENT (SECOND) OF AGENCY § 20(e) (1957).

⁷⁴ 83 Misc. 2d at 364, 373 N.Y.S.2d at 767.

⁷⁵ Careful judicial inspection of confessions of judgment to ensure strict compliance with the statutory procedure has been the rule both in New York and in other jurisdictions. See, e.g., *Rae v. Kestenberg*, 23 App. Div. 2d 565, 256 N.Y.S.2d 737 (2d Dep't) (mem.), *aff'd mem.*, 16 N.Y.2d 1023, 213 N.E.2d 315, 265 N.Y.S.2d 904 (1965); 7B MCKINNEY'S CPLR 3218, commentary at 1038 (1970). Furthermore, 17 states have abolished confessions of judgment in the belief that the possible benefits of the procedure are outweighed by potential abuses by creditors. See H. PETERFREUND & J. McLAUGHLIN, *NEW YORK PRACTICE* 1028 n.6 (3d ed. 1973). See generally Hurshman, *The Power of a Partner to Confess Judgment Against the Partnership in Pennsylvania*, 62 U. PA. L. REV. 621 (1914).

⁷⁶ See 4 WK&M ¶ 3218.04. Professor David Siegel has noted that "there is an increasing awareness [on the part of the courts] that the debtor's position is the weaker one vis-à-vis his creditor . . ." 7B MCKINNEY'S CPLR 3218, commentary at 1045 (1970).

order to prevent possible overreaching by creditors, the courts have adopted a liberal attitude in favor of the judgment debtor, subjecting confessions of judgment to close judicial scrutiny.⁷⁷ Thus, the rule is well established that "[a]uthority to confess judgment without process must be clear and explicit . . .,"⁷⁸ for any ambiguities regarding authorization will be resolved against the creditor.⁷⁹ Through the use of these safeguards, the courts attempt to ascertain whether the debtor is aware of the fact that he is actually confessing judgment, the claim to which he is confessing, and the possible ramifications of his action.⁸⁰

In contrast to the cautious position taken by other courts, the decision in *Besen* takes an unprecedented and expansive approach by enforcing a confession of judgment against all the individual joint debtors where, as a practical matter, unanimity of execution is lacking. By holding a confession entered without clear and explicit authorization valid, the court has placed the joint debtor in an unenviable position. In effect, the *Besen* court held that apparent authority alone is a sufficient basis for enforcing a judgment against a principal confessed by his agent.⁸¹ In order to avoid such a possibility, the debtor would have to provide notice to every creditor stating the precise scope of his agent's authority. It is submitted that because judgment by confession is an unusual act, in the usual case, there is no apparent authority sufficient to sustain a confession of judgment.⁸²

⁷⁷ 7B MCKINNEY'S CPLR 3218, commentary at 1038 (1970); 4 WK&M ¶ 3218.04. See, e.g., *Rae v. Kestenberg*, 23 App. Div. 2d 565, 256 N.Y.S.2d 737 (2d Dep't) (mem.), *aff'd mem.*, 16 N.Y.2d 1023, 213 N.E.2d 315, 265 N.Y.S.2d 904 (1965).

⁷⁸ 14 S. WILLISTON, CONTRACTS § 1724, at 910 (3d ed. W. Jaeger 1972).

⁷⁹ 7B MCKINNEY'S CPLR 3218, commentary at 1038 (1970).

⁸⁰ For illustrations of these safeguards, see *Wood v. Mitchell*, 117 N.Y. 439, 22 N.E. 1125 (1889) (voiding confession of judgment where statement was indefinite); *United States Fidelity & Guar. Co. v. Schickler*, 199 App. Div. 74, 191 N.Y.S. 194 (4th Dep't 1921) (vacating confession of judgment entered by creditor's attorneys pursuant to power of attorney); *Flatbush Auto Discount Corp. v. Reich*, 190 Misc. 817, 75 N.Y.S.2d 908 (App. T. 1st Dep't 1947) (confession of judgment voided because not verified by defendant); *American Cities Co. v. Stevenson*, 187 Misc. 107, 60 N.Y.S.2d 685 (Sup. Ct. N.Y. County 1946) (denying plaintiff's application for an order directing the filing of confession of judgment because statute of limitations had run).

⁸¹ Of course, the apparent authority to confess judgment would have to be based on the conduct of the principal and not merely on the conduct of the agent. For a principal to be held liable for the acts of an agent, the principal must be responsible for the appearance of authority in the agent to engage in such conduct. *Ford v. Unity Hosp.*, 32 N.Y.2d 464, 472, 299 N.E.2d 659, 664, 346 N.Y.S.2d 238, 244 (1973). In the case at bar, it is conceivable that since the partners allowed Manus to conduct all business transactions with the defendants, see note 70 *supra*, the defendants' belief that Manus had authority to confess judgment was reasonable. *Kelley v. Besen*, No. 09379 (Sup. Ct. Westchester County, July 16, 1975).

⁸² See *Everson v. Gehrman*, 1 Abb. Pr. 167 (N.Y. Sup. Ct. 1854); note 86 *infra*.

There exists, however, another and more fundamental reason for questioning the *Besen* decision. Section 20 of the New York Partnership Law provides that every partner is an agent of the partnership for the purpose of conducting the ordinary and usual course of business.⁸³ The section further states that a partner, unless authorized by the unanimous consent of his associates, has no authority, either implied or apparent, to confess judgment binding either the partnership or the nonconfessing partners.⁸⁴ Thus, the Partnership Law is consistent with CPLR 3218(d) in that the confession is enforceable solely against the confessing parties.⁸⁵ One would therefore assume that since a partner, as agent of the partnership, is incapable of confessing a judgment binding upon his copartners,⁸⁶ a person acting as a general agent of the partnership would similarly be without this power.⁸⁷ Nevertheless, the *Besen* court, which failed to take cognizance of partnership princi-

⁸³ N.Y. PARTNERSHIP LAW § 20(1) (McKinney 1948). This section also provides that the execution of any instrument in the partnership name by a partner binds the partnership if it is done in the usual course of partnership business. *Id.*; see *Caplan v. Caplan*, 268 N.Y. 445, 198 N.E. 23 (1935). The *Caplan* Court stated: "[E]ach partner acts, as to himself, as a principal having a joint interest in the partnership property, and, as to each other partner, as general agent." *Id.* at 450, 198 N.E. at 26, quoting *First Nat'l Bank v. Farson*, 226 N.Y. 218, 221, 123 N.E. 490, 492 (1919). See also *People v. Esrig*, 240 App. Div. 300, 270 N.Y.S. 372 (3d Dep't 1934); A. BROMBERG & J. CRANE, LAW OF PARTNERSHIP § 48, at 272-73 (1968).

⁸⁴ N.Y. PARTNERSHIP LAW § 20(3)(d) (McKinney 1948).

⁸⁵ *Scanlon v. Kuehn*, 225 App. Div. 256, 232 N.Y.S. 592 (2d Dep't 1929). In *Scanlon*, the plaintiff was denied recovery against a nonsigning partner although the confession was executed in the partnership name by a copartner. In *Stoutenburgh v. Vandenburg*, 7 How. Pr. 229 (N.Y. Sup. Ct. Albany County 1852), the court held that judgment by confession may only be entered against a partner who actually signs the confession. See generally A. BROMBERG & J. CRANE, LAW OF PARTNERSHIP § 52, at 299-301 (1968); 20 CARMODY-WAIT 2d § 122.14, at 785-86 (1967).

⁸⁶ It has long been established that express authority is necessary for a partner to confess a judgment binding upon his copartners since it is an unusual act not within the day-to-day business of the partnership. See *Everson v. Gehrman*, 1 Abb. Pr. 167 (N.Y. Sup. Ct. 1854) (partner's power to confess judgment against other partners must be express); A. BROMBERG & J. CRANE, LAW OF PARTNERSHIP § 52, at 296, 300-01 (1968) (confession of judgment generally held to be outside implied powers of a partner); F. MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIPS § 262, at 232 (1920); 1 S. ROWLEY, PARTNERSHIP § 9.3, at 329-30 (2d ed. R. Rowley 1960) (partner cannot bind partnership or other partners by confessing judgment without being delegated special authority to do so).

⁸⁷ A principal cannot delegate authority to an agent which he himself does not possess. *In re Estate of Peters*, 71 Misc. 2d 662, 336 N.Y.S.2d 712 (Sup. Ct. Cattaraugus County 1972). Further, as was noted by the Court of Appeals,

the mere creation of an agency for some purpose does not automatically invest the agent with "apparent authority" to bind the principal without limitation. An agent's power to bind his principal is coextensive with the principal's grant of authority. One who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority.

Ford v. Unity Hosp., 32 N.Y.2d 464, 472, 299 N.E.2d 659, 664, 346 N.Y.S.2d 238, 244 (1973) (citations omitted). It therefore follows that since a partner cannot confess judgment against the partnership or the other partners, he likewise cannot achieve this power by authorizing an agent to act in his stead.

ples, reached the opposite conclusion. Hopefully, its holding will not be followed in the future.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201: Seider jurisdiction asserted in case involving both resident and nonresident plaintiffs.

That a nonresident's insurance policy issued by an insurer doing business in New York may be attached by a New York plaintiff for the purpose of obtaining jurisdiction in a suit based on an out-of-state accident was first recognized by the Court of Appeals in *Seider v. Roth*.⁸⁸ It is now well established as the law of New York.⁸⁹ Nevertheless, *Seider* attachment continues to receive criticism from commentators⁹⁰ and to create problems for courts

⁸⁸ 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). In *Seider*, a New York resident used CPLR 5201 and CPLR 6202 to attach an out-of-state defendant's automobile insurance policy, claiming that the insurer, who was doing business in New York, had an obligation to defend and indemnify the defendant, and that this obligation was an attachable debt.

⁸⁹ The constitutionality of *Seider* was upheld in *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), *aff'd en banc*, 410 F.2d 117, *cert. denied*, 396 U.S. 844 (1969). Much of the criticism of *Seider* stressed the lack of due process inherent in a suit which compels the defendant-insured, as well as his insurer, to litigate in a forum which was not connected with the underlying accident, thereby going beyond the jurisdictional "minimum contacts" test laid down by the Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Even though the *Seider* attachment of an insurance policy is a quasi-in-rem action, and the minimum contacts theory is normally associated with in personam jurisdiction, it is not improper to assess jurisdiction over an intangible res in terms of fairness and contacts with the state. *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957) (en banc), *cert. denied*, 357 U.S. 569 (1958) (jurisdiction over a chose in action based upon a totality of the contacts). Using such an analysis, the majorities in *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), *rehearing denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968), and *Minichiello* considered the New York residency of the injured plaintiff and the presence of the insurer within New York sufficient contacts with this State to allow quasi-in-rem jurisdiction. Furthermore, these courts reasoned that neither the insured nor the insurer are substantially prejudiced by a New York adjudication since the insurer is already present in the State, has contracted to defend the insured anywhere at anytime, and the insured will be reimbursed for expenses incurred in cooperation with the defense. *Minichiello v. Rosenberg*, 410 F.2d at 118-19; *Simpson v. Loehmann*, 21 N.Y.2d at 311, 234 N.E.2d at 672, 287 N.Y.S.2d at 637.

As long as the Supreme Court decision in *Harris v. Balk*, 198 U.S. 215 (1905), remains valid law, it is unlikely that *Seider* will be overturned on constitutional grounds. *Harris* allowed the garnishment of a debt wherever the debtor may be found. Moreover, the Supreme Court has had opportunities to declare *Seider* unconstitutional, but has declined to grant certiorari in every instance. See, e.g., *Victor v. Lyon Associates Inc.*, 21 N.Y.2d 695, 234 N.E.2d 459, 287 N.Y.S.2d 424 (1967), *appeal dismissed for want of a substantial federal question*, 393 U.S. 7 (1968). For further discussion of the constitutionality of *Seider*, see Note, *Seider v. Roth: The Constitutional Phase*, 43 ST. JOHN'S L. REV. 58 (1968).

⁹⁰ See, e.g., 7B MCKINNEY'S CPLR 5201, commentary at 16-76, (Supp. 1975); Note, *Jurisdiction in New York: A Proposed Reform*, 69 COLUM. L. REV. 1412 (1969); Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967); Note, *Attachment of Liability Insurance Policies*, 53 CORNELL L. REV. 1108