St. John's Law Review

Volume 49, Fall 1974, Number 1 Article 16

CPLR 6220: Disclosure Order Obtained Where the Assets of a Defendant Held by a Factoring Agent Were Attached

St. John's Law Review

sion, it may nevertheless have a beneficial result by encouraging "the judgment creditor to take affirmative steps to satisfy his judgment...."[117] Yet, the potential advantages of the present application do not render the *International* decision less harsh or inequitable. Since the Appellate Division has correctly applied the law as it currently exists, a legislative reevaluation would seem appropriate.

ARTICLE 62 — ATTACHMENT

CPLR 6220: Disclosure order obtained where the assets of a defendant held by a factoring agent were attached.

Following the procurement of an order of attachment, CPLR 6220 allows a plaintiff to request that the court issue an order of disclosure requiring the defendant, or the holder of the defendant's assets, to reveal the nature and extent of the property subject to attachment.[118] Every order of attachment need not be accompanied by an order of disclosure since the requirement of disclosure rests within the discretion of the court.[119] However, when a disclosure order is obtained, its validity rests upon the validity of the underlying order of attachment.[120]

In *Buy Fabrics, Inc. v. ADA Co.*,[121] the plaintiff brought an action to recover the balance due on goods sold and delivered to the defendant. In order to secure any available assets of the defendant, the plaintiff, pursuant to CPLR 6202,[122] attached the defendant's accounts receivable held by a Georgia bank under a factoring agreement[123] between it and

---

117 6 WK&M ¶ 5222.21.

118 CPLR 6220 provides:

> Upon motion of any interested person, at any time after the granting of an order of attachment and prior to final judgment in the action, upon such notice as the court may direct, the court may order disclosure by any person of information regarding any property in which the defendant has an interest, or any debts owing to the defendant.

119 The use of the word "may" in CPLR 6220 suggests the discretionary nature of the disclosure order. *See* 7A WK&M ¶ 6220.02.

120 *See* Fisher v. Nash, 47 App. Div. 234, 62 N.Y.S. 646 (4th Dep't 1900); Cronan v. Schilling, 100 N.Y.S.2d 474 (Sup. Ct. N.Y. County 1950); Clinton Trust Co. v. Compania Azucarera Central Mabay S.A., 172 Misc. 148, 14 N.Y.S.2d 743 (Sup. Ct. N.Y. County), *aff'd*, 258 App. Div. 782, 15 N.Y.S.2d 721 (1st Dep't 1939) (mem.).

121 76 Misc. 2d 607, 351 N.Y.S.2d 522 (Sup. Ct. N.Y. County 1973).

122 CPLR 6202 allows the attachment of any debt or property against which a money judgment may be enforced pursuant to CPLR 5201. CPLR 5201(b) provides that a money judgment may be enforced against any debt "whether it was incurred within or without the state, to or from a resident or non-resident...."

123 A factor is a financing organization which engages in the purchase of trade receivables. The function of a factor is to advance credit for its client. In the typical factoring arrangement, the client, immediately after a sale, sends the invoice of sale to the factor. Upon receipt of the invoice, the factor transfers cash, equivalent to the invoice price less an appropriate discount, to the client. Thereafter, the factor collects the amount due from the client's sale. *See* G. WELSCH, C. ZLATKOVICH & J. WHITE, INTERMEDIATE ACCOUNTING 431 (1968). Statutory provisions concerning factoring are contained in N.Y. PERS.

the defendant. Although the garnishee-bank was not authorized to do business in New York, its factoring department maintained a New York office. No routine banking transactions, however, were carried on from this office. After the order of attachment was issued, the plaintiff obtained a disclosure order and served it upon the New York factoring office of the garnishee.

In seeking to vacate the disclosure order, the garnishee relied upon the well-established principle that service of attachment on a branch bank will not serve to secure the assets of a debtor maintained either in another branch or in the main office of a foreign bank.[124] New York courts have traditionally considered each branch to be a separate entity for the purposes of attachment in the belief that to permit service upon one branch to secure assets located in another branch would result in a "substantial interference with routine banking business."[125] In *Buy*

PROP. LAW §§ 3-43 to 3-45 (McKinney 1962). These provisions, however, apply only to transactions which arose prior to the effective date of the Uniform Commercial Code, September 27, 1964. *See* CONSOL. LAW SERVS., APPENDIX TO UCC, pt. 2, at 5-17 (1967).

124 *See, e.g.*, McCloskey v. Chase Manhattan Bank, 11 N.Y.2d 936, 183 N.E.2d 227, 228 N.Y.S.2d 825 (1962) (mem.); Newtown Jackson Co. v. Animashaun, 148 N.Y.S.2d 66 (Sup. Ct. Nassau County 1955) (attachment of deposit account is only effective when made against branch in which the account is located); Philipp v. Chase Nat'l Bank, 34 N.Y.S.2d 465 (Sup. Ct. N.Y. County 1942) (attachment of New York bank does not provide jurisdiction for debt located in a foreign branch of the bank); Walsh v. Bustos, 46 N.Y.S.2d 240 (N.Y.C. City Ct. N.Y. County 1943) (main office of foreign bank a separate entity from its New York agent); *cf.* Pan-American Bank & Trust Co. v. National City Bank, 6 F.2d 762 (2d Cir.), *cert. denied*, 269 U.S. 554 (1925); Bluebird Undergarment Corp. v. Gomez, 139 Misc. 742, 149 N.Y.S. 319 (N.Y.C. City Ct. N.Y. County 1931). *But see* Cable & Wireless, Ltd. v. Yokohama Specie Bank, Ltd., 191 Misc. 567, 79 N.Y.S.2d 597 (Sup. Ct. N.Y. County), *modified and aff'd sub nom.* Cable & Wireless, Ltd. v. Lyon, 278 App. Div. 752, 103 N.Y.S.2d 1016 (1st Dep't 1948) (mem.), *aff'd*, 304 N.Y. 574, 107 N.E.2d 75 (1952). In *Cable & Wireless*, a foreign bank drew a bill of exchange directing its New York branch to pay the plaintiff-creditor. At the time this suit was commenced, the New York office of the bank was in the process of a liquidation supervised by the New York Superintendent of Banks. In holding that the plaintiff was entitled to payment out of the assets of the branch bank, the Supreme Court, New York County, concluded that "in authorizing [the bank] to maintain an agency here, New York did not create a separate corporation; it merely allowed the Japanese . . . [bank] to do business here." 191 Misc. 2d at 578, 79 N.Y.S.2d at 608. *See also* Comment, *Attachment: Branch Bank as Separate Entity for Attachment Purposes:* McCloskey v. Chase Manhattan Bank, 48 CORNELL L.Q. 33 (1963).

125 76 Misc. 2d at 608, 351 N.Y.S.2d at 523. In considering bank branches as separate entities for attachment purposes, courts have noted that any other rule would be extremely cumbersome, particularly in international banking. If, for example, the attachment of a bank account maintained at a branch could be accomplished by service upon the parent bank, the branch would have to maintain a constant check on actions pending against each of its accounts. *See* Newtown Jackson Co. v. Animashaun, 148 N.Y.S.2d 66 (Sup. Ct. Nassau County 1955); Cronan v. Schilling, 100 N.Y.S.2d 474 (Sup. Ct. N.Y. County 1950). The validity of this argument, in light of the increasing computerization of banking services, seems open to question.

At least one court has invoked the separate entity rule for attachment purposes where a debtor ran a substantial risk of being subjected by a foreign court to liability on a debt for a second time. *See* Parker, Peebles & Knox, Inc. v. National Fire Ins. Co., 111 Conn. 383, 150 A. 313 (1930). One early New York decision held that the separate entity doctrine

Fabrics, the garnishee sought to obtain this separate entity treatment, contending that the New York factoring office's relationship to it was akin to that of one bank branch to another. Consequently, if the underlying order of attachment was deemed only to affect the New York factoring office, the disclosure order would be similarly restricted.[126] As a result, the bank would be relieved from the duty of disclosing the existence of any records located outside the state relating to assets held for the defendant.

The Supreme Court, New York County, denied the garnishee's motion to vacate the order of disclosure.[127] Without specifically identifying those elements of a factoring arrangement which distinguish a factor from a branch bank for purposes of the separate entity rule, Justice Fein rejected the garnishee's contention that the New York factoring office should be considered the equivalent of a branch. In holding that the separate entity rule was inapplicable in this instance, the court observed that the New York office was engaged in a nonbanking function, the fulfillment of a factoring contract.[128] Unfortunately, the court revealed little more of the reasoning behind its decision. Presumably, however, the court arrived at its holding in the belief that the attachment of accounts receivable[129] could not be said to result in the interference with routine banking transactions.[130]

Clearly, the *Buy Fabrics* court determined that, for purposes of obtaining a disclosure order following the attachment of a debtor's assets, a New York factor, engaged in nonbanking transactions, will not be deemed separate and distinct from its parent bank. Nevertheless, the instant decision failed to set forth the precise reasoning in support of its

---

was applicable where there existed an implied contract of deposit between a bank and a depositor to repay an instrument only at a branch bank. *See* Clinton Trust Co. v. Compania Azucarera Central Mabay S.A., 172 Misc. 148, 14 N.Y.S.2d 743 (Sup. Ct. N.Y. County), *aff'd*, 258 App. Div. 780, 15 N.Y.S.2d 721 (1st Dep't 1939).

126 The validity and scope of the order of disclosure is dependent upon the underlying order of attachment. *See* note 120 and accompanying text *supra*.

127 76 Misc. 2d at 607, 351 N.Y.S.2d at 523.

128 *Id.* at 608, 351 N.Y.S.2d at 524.

129 In evaluating the question of jurisdiction over the New York factoring office, the court relied upon the Court of Appeals' decision in Morris Plan Indus. Bank v. Gunning, 295 N.Y. 324, 67 N.E.2d 510 (1946). 76 Misc. 2d at 608, 351 N.Y.S.2d at 524. In essence, *Morris* held that the attachment of a factor holding the property of an attachment-debtor will be valid if jurisdiction is obtained through service upon the factor within the state. *See generally* Note, *Attachment: CPLR Section 6220 and Discovery of Out-of-State Property*, 65 COLUM. L. REV. 348 (1965).

130 The court added that it was irrelevant for the purposes of this decision that the New York factoring office was the representative of a bank, the garnishee, which may have conducted routine banking business with the defendant in another jurisdiction. 76 Misc. 2d at 610, 351 N.Y.S.2d at 525.

conclusion. Hopefully, the court, at some future date, will have an opportunity to remedy this deficiency.

ARTICLE 71 — RECOVERY OF CHATTEL

CPLR 7102: Due process reconsidered.

Prejudgment seizure of property without notice and an opportunity for a hearing came under judicial review in *Sniadach v. Family Finance Corp.*[131] The United States Supreme Court held therein that summary wage garnishment, absent these basic procedural safeguards, violated the due process clause of the fourteenth amendment.[132] Although such protection was at first afforded only "specialized" property,[133] such as wages, the Court later, in *Fuentes v. Shevin*,[134] extended the prophylactic shield to all types of personalty.[135]

New York was forced to respond to the judicial mandates of *Sniadach* and *Fuentes* in *Laprease v. Raymours Furniture Co.*,[136]

---

131 395 U.S. 337 (1969), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 379 (1971).

132 Wisconsin, whose wage garnishment procedure was invalidated in *Sniadach*, responded by passing a far-reaching consumer protection law indicating specifically what procedures afford due process. WIS. STAT. ANN. §§ 421.101-427.105 (1974), *discussed in* Note, *Self-Help Repossession: The Constitutional Attack, The Legislative Response, And The Economic Implications*, 62 GEO. L.J. 273, 305-09 (1973). Notice and opportunity for a hearing were deemed indispensable prior to the repossession of chattels from consumers. WIS. STAT. ANN. § 425.205 (1974). This provision is far more specific than the amended CPLR 7102. L. 1971, ch. 1051, § 1, eff. July 2, 1971. *See* note 140 and accompanying text *infra*.

133 The ill-defined concept of "specialized property" has been formulated through subsequent judicial construction. Commencing with wages in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), it soon extended to include household necessities, Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970). The concept was later expanded to include tools and equipment used in one's occupation. Cedar Rapids Engineering Co. v. Haenelt, 68 Misc. 2d 206, 326 N.Y.S.2d 653 (Sup. Ct. Sullivan County 1971), *aff'd*, 39 App. Div. 2d 275, 333 N.Y.S.2d 953 (3d Dep't 1972).

Until recently, it appeared that prior discussion attempting to define what constituted "specialized property" had been mooted by Fuentes v. Shevin, 407 U.S. 67 (1972). The Court therein extended constitutional protection to "any significant property interest," without classification. *Id.* at 87. However, in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), wherein *Fuentes* was limited to require a hearing only before a *final* deprivation of property, the Supreme Court retreated from its prior position. In distinguishing *Sniadach* from *Mitchell* on the basis of wages, the Court seems to have revitalized the "specialized property" concept. *See* text accompanying notes 152-168 *infra*.

134 407 U.S. 67 (1972). The *Fuentes* Court suggested some "extraordinary situations" might arise in which summary seizures might be allowed, all of them involving governmental or particularly imperative actions. Private replevin actions, however, were not included. *See* 22 BUFFALO L. REV. 17 (1972).

135 New York courts further extended the protection to include the right to use gas and electric utilities, prohibiting the seizure of meters and discontinuance of service in the absence of necessary constitutional safeguards. Consolidated Edison Co. v. Powell, 77 Misc. 2d 475, 354 N.Y.S.2d 311 (Civ. Ct. Bronx County 1974).

136 315 F. Supp. 716 (N.D.N.Y. 1970), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 379 (1971).