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CPLR 6214(e): Time Extension After Expiration of Ninety-Day Period Granted Subject to the Rights of Intervening Lienors

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As one authority indicated at the time of the lower-court holding, the fear that excluding a section 59 designation will hinder the valid application of *Seider* is unfounded.[160] If the basis for a *Seider* attachment exists — if the insurer is doing business in New York — it is likely that he will maintain an office in-state and service could be effected there.[161] In *Saggese*, the record failed to show that the insurer *did* business in New York; he was merely authorized (under section 59) to *do* business. This alone was not sufficient presence "to justify this particular levy in the circumstances of this particular action"[162] and the attachment was properly vacated.

CPLR 6214(e): Time extension after expiration of ninety-day period permitted subject to the rights of intervening lienors.

The problems inherent in the holding of *Seider v. Roth*[163] are manifold.[164] One illustration is the difficulty involved in perfecting the levy made pursuant to an order of attachment. For, under CPLR 6214(e), a levy is only effective for a period of ninety days after service of process unless: the sheriff has taken actual custody of the property; a special proceeding to take custody has been commenced; or, the court extends the ninety-day period. Where, as in *Seider*, the attached property consists of the defendant's interest in an insurance policy, the plaintiff is placed in the unenviable position of attempting to secure custody of an intangible.[165]

Postulating that an extension of the ninety-day period is the only real remedy available in this situation, the court in *Cenkner v. Shafer*[166] recently denied a motion to vacate an attachment upon the condition that plaintiff move for said extension within[167] twenty days.

Since ninety days had already elapsed, the *Cenkner* court qualified its order by adding that the extension would not prejudice the rights of an intervening creditor.[168] Thus, the lien of a second attaching creditor would move into first position on the ninety-first day, and the

160 7B McKINNEY'S CPLR 5201, supp. commentary at 30-31 (1969).

161 *See, e.g.*, Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), *reargument denied*, 21 N.Y.2d 990, 238 N.E.2d 317, 290 N.Y.S.2d 914 (1968).

162 33 App. Div. 2d at 901, 307 N.Y.S.2d at 120.

163 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

164 *See, e.g.*, Siegel, *Simpson Upholds Seider — Problems for Both Sides*, 159 N.Y.L.J. 16, Jan. 23, 1968, at 1, col. 3.

165 *See* 7B McKINNEY'S CPLR 6214, supp. commentary at 34 (1967).

166 61 Misc. 2d 807, 306 N.Y.S.2d 634 (Sup. Ct. Herkimer County 1970).

167 CPLR 6223.

168 *See* Seider v. Roth, 28 App. Div. 2d 698, 280 N.Y.S.2d 1005 (2d Dep't 1967). Presumably, the plaintiff must continue to move for a time extension for the duration of the action. *See* 7B McKINNEY'S CPLR 6214, supp. commentary at 34 (1967).

subsequent time extension would not restore the initial order of priority.[169]

CPLR 6511(b): Absolute conformity with statutory content provisions not required.

CPLR 6501 effectuates the policy that an action should not be defeated (and justice thereby evaded) by the alienation of a defendant's property during the pendency of an action.[170] Under this section, the filing of a notice of pendency constitutes constructive notice that an action affecting the title, possession, use, or enjoyment of real property has been commenced. Thus, any subsequent purchaser from, or encumbrancer against, a defendant in the action is bound by the outcome as if he were himself a party.

In *Mechanics Exchange Bank v. Chesterfield*,[171] the sufficiency of a notice of pendency was challenged by the successful bidder at a foreclosure sale. The filed notice declared that the action was brought for the "foreclosure of a mortgage" for the sum of $13,500, while actually this sum was the total of two mortgages which had been combined; the second mortgage reciting that "they shall constitute in law but one first mortgage . . . for $13,500.00."[172] Both mortgages were recorded.

The defect was derived from the Real Property Actions and Proceedings Law, which requires that the notice contain the date of the mortgage, the names of the parties, and the time and place of recording.[173] The notice fulfilled these requirements only as to the second mortgage.

The court, in determining the adequacy of the notice of pendency, reasoned that the policy considerations underlying such notice[174] only require that the statutory provisions be followed to the extent "that a purchaser or encumbrancer will be informed of the statutory items, *or given such information as to be put on inquiry as to them. . . .*"[175] Since a prospective purchaser or encumbrancer could have ascertained that there were two mortgages involved by an examination of the mortgage properly described in the notice of pendency, the court held that the notice was sufficient and that the sale should be completed.

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169 *See* 7B McKINNEY'S CPLR 6214, supp. commentary (1968).

170 Hailey v. Ano, 136 N.Y. 569, 576, 32 N.E. 1068, 1070 (1893); Lamont v. Cheshire, 65 N.Y. 30, 36 (1875).

171 34 App. Div. 2d 111, 309 N.Y.S.2d 548 (3d Dep't 1970).

172 *Id.* at 113, 309 N.Y.S.2d at 549.

173 RPAPL § 1331.

174 *See* 7 WK&M ¶ 6511.06.

175 34 App. Div. 2d at 114, 309 N.Y.S.2d at 550 (emphasis added).