

BILL TEXT:

STATE OF NEW YORK

8647--A

R.R. 164

2007-2008 Regular Sessions

IN ASSEMBLY

May 23, 2007

Introduced by M. of A. WEINSTEIN, O'DONNELL -- read once and referred to the Committee on Judiciary -- again amended on special order of third reading, ordered reprinted, retaining its place on the special order of third reading

AN ACT to amend the civil practice law and rules, in relation to restraining notices

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 5222 of the civil practice law and rules is
2 amended by adding a new subdivision (h) to read as follows:

3 (h) Restraining notice as restraining order. A restraining notice
4 issued pursuant to this section which has been made an order by endorse-
5 ment of a court with jurisdiction to enforce the underlying judgment
6 will be a restraining order and, upon delivery to the sheriff or other
7 enforcement officer, will be entitled to priority as set forth in
8 sections fifty-two hundred thirty-four and sixty-two hundred twenty-six
9 of this chapter as though it were an execution or order of attachment. A
10 court shall issue such a restraining order upon a showing by the judg-
11 ment creditor that a reasonable basis exists for delaying the issuance
12 of execution with respect to specific identifiable property of, or debt
13 owed to the judgment debtor. The priority afforded by this section shall
14 be lost unless (1) the sheriff or other enforcement officer serves such
15 restraining order in the manner provided in subdivision (a) of this
16 section within thirty days of its delivery to such sheriff or other
17 enforcement officer, and (2) the judgment creditor commences a proceed-
18 ing under section fifty-two hundred twenty-five or fifty-two hundred
19 twenty-seven of this article within one hundred eighty days after
20 service of such restraining order or such further time as the court upon
21 motion of the judgment creditor shall provide.

22 § 2. Section 5229 of the civil practice law and rules, as amended by
23 chapter 279 of the laws of 1964, is amended to read as follows:

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 § 5229. Enforcement before judgment entered. In any court, before a
2 judgment is entered, upon motion of the party in whose favor a verdict
3 or decision has been rendered, the trial judge may order examination of
4 the adverse party and order him restrained with the same effect as if a
5 restraining notice had been served upon him after judgment. A restrain-
6 ing order issued pursuant to this section will be entitled to the same
7 priority as a restraining order issued pursuant to subdivision (h) of
8 section fifty-two hundred twenty-two of this article, and will be
9 subject to the same terms and conditions to maintain priority as
10 provided in such subdivision.

11 § 3. Subdivision (b) of section 5234 of the civil practice law and
12 rules, as amended by chapter 84 of the laws of 2001, is amended to read
13 as follows:

14 (b) Priority among execution creditors. Where two or more executions,
15 restraining orders or orders of attachment are issued against the same
16 judgment debtor or obligor and delivered to the same enforcement officer
17 or issued by the support collection unit designated by the appropriate
18 social services district, they shall be satisfied out of the proceeds of
19 personal property or debt levied upon by the officer or by the support
20 collection unit in the order in which they were delivered, such
21 executions for child support shall have priority over any other assign-
22 ment, restraining order, levy or process. Where two or more executions,
23 restraining orders or orders of attachment are issued against the same
24 judgment debtor or obligor and delivered to different enforcement offi-
25 cers, and personal property or debt is levied upon within the jurisdic-
26 tion of all of the officers, the proceeds shall be first applied in
27 satisfaction of the execution, restraining order or order of attachment
28 delivered to the officer who levied, and thereafter shall be applied in
29 satisfaction of the executions, restraining orders or orders of attach-
30 ment delivered to those of the other officers who, before the proceeds
31 are distributed, make a demand upon the officer who levied, in the order
32 of such demands, except that such executions for child support shall
33 have priority over any other assignment, order, levy or process. Where
34 there is more than one past-due child support order, the proceeds shall
35 be applied to the orders in proportion to the amount each order's claim
36 bears to the combined total. Nothing herein shall be deemed to defeat or
37 impair the rights of any secured party as such term is defined in para-
38 graph seventy-two of subsection (a) of section 9--102 of the uniform
39 commercial code. An execution, restraining order or order of attachment
40 returned by an officer before a levy or delivered to him after the
41 proceeds of the levy have been distributed shall not be satisfied out of
42 those proceeds.

43 § 4. Section 6226 of the civil practice law and rules, as amended by
44 chapter 532 of the laws of 1963, is amended to read as follows:

45 § 6226. Disposition of attached property after execution issued;
46 priority of orders of attachment. Where an execution or restraining
47 order is issued upon a judgment entered against the defendant, the sher-
48 iff's duty with respect to custody and disposition of property or debt
49 levied upon pursuant to an order of attachment is the same as if he had
50 levied upon it pursuant to the execution. The priority among two or more
51 orders of attachment against the same defendant shall be in the order in
52 which they were delivered to the officer who levied upon the property or
53 debt. The priority between an order of attachment and an execution,
54 restraining order or a payment, delivery or receivership order, is set
55 forth in section [~~5234~~] fifty-two hundred thirty-four of this chapter.

56 § 5. This act shall take effect immediately.

SPONSORS MEMO:

**NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(e)**

BILL NUMBER: A8647A

Rev. 7/9/07

SPONSOR: Weinstein

TITLE OF BILL: An act to amend the civil practice law and rules, in relation to restraining notices

PURPOSE OF BILL: This bill will amend the New York Civil Practice Law and Rules ("CPLR") in order to provide judgment creditors and parties in whose favor a decision or verdict has been rendered, and who serve restraining notices that have been judicially endorsed as restraining orders, with the same priority rights afforded to orders of attachment and executions. This amendment fills in a gap in existing priority rules which presently allows creditors who secure orders of attachment or issue executions subsequent to judgment creditors who have already restrained property or debts to take priority over the earlier restraint.

SUMMARY OF PROVISIONS OF BILL: Section 1 - Section 5222 of the Civil Practice Law and Rules is amended by adding a new paragraph (h). CPLR Section 5222 authorizes the service of restraining notices on judgment debtors and those other persons who owe or are obliged on a debt owed to the judgment debtor, or is in the possession or custody of property in which such person has reason to believe the judgment debtor has an interest (collectively "garnishee"). A judgment debtor or garnishee served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which the judgment debtor has an interest, or pay over or otherwise dispose of any such debt, to any person other than the sheriff except upon direction of the sheriff or judgment creditors for the enforcement of their judgments. New paragraph (h) would provide that restraining notices which are made restraining orders by a court, after the judgment creditor meets a reasonableness test, are entitled to the same priority rights as executions and pre-judgment attachments.

Section 2 - Section 5229 of the Civil Practice Law and Rules is amended to allow for a restraining order issued under this section to have the same priorities as a restraining notice converted into an order under CPLR Section 5222(h).

Section 3 - Paragraph (b) of Section 5234 of the Civil Practice Law and Rules is amended to conform to CPLR 5222(h).

Section 4 - Section 6226 of the Civil Practice Law and Rules is amended to conform to CPLR 5222(h).

Section 5 - Effective Date.

JUSTIFICATION: Because many loan documents or debt instruments involving foreign sovereigns designate New York as the place of payment

and the venue where the foreign sovereign waives sovereign immunity and consents to jurisdiction to be sued in the case of a default, the state and federal courts in New York are frequently the courts where actions under the Foreign Sovereign Immunities Act ("FSIA") are brought. Pursuant to Section 1610(c) of the FSIA, a judgment creditor may not issue an execution against the foreign sovereign judgment debtor "until the court has ordered such ... execution after having determined that a reasonable period of time has elapsed following the entry of judgment ...". Even when the court has determined that "a reasonable period of time has elapsed following the entry of judgment," execution may only issue against property of a foreign sovereign "used for a commercial activity in the United States." (28 U.S.C. § 1610(a)).

Years of experience have established that courts will not allow the issuance of executions against foreign sovereigns until they have made a determination that the property against which execution is sought meets the commercial activity test of the FSIA. However, it is exceedingly difficult to locate property of foreign sovereign judgment debtors in the United States because defaulting sovereigns habitually attempt to make themselves judgment-proof by removing their property from the United States. Even where diligent and costly efforts have succeeded in identifying property of the foreign sovereign, litigation with respect to whether it meets the standards for execution under the FSIA is also lengthy and costly. At most, courts are only willing to issue to judgment creditors restraining orders against the removal of such property by the sovereign or the garnishee holding the property while the underlying commercial activity question is litigated through the court system. Because restraining notices or orders do not presently afford the diligent judgment creditor priority under the CPLR, the judgment creditor who has expended the time, effort and cost of locating assets in the United States of its foreign sovereign judgment debtor may lose priority to another creditor who learns through monitoring foreign sovereign debt litigation of the existence of such property, and secures a pre-judgment attachment against it before the judgment creditor can get an order authorizing it to execute against the property. The amendment proposed by this legislation would remedy this unfair situation and secure priority for the judgment creditor whose time, efforts and expenditures have located the property in question.

Even apart from foreign sovereign debt litigation, there are many reasons why a judgment creditor may need to get a restraining order on its debtor's property before seeking to execute against it. For instance, a judgment creditor may believe, but not be sure, that the judgment debtor has an interest in specific property in the hands of a particular garnishee.

As a practical matter, if because of his uncertainty the judgment creditor issues an execution to the sheriff without describing and locating the property he suspects the judgment debtor has an interest in, the sheriff may well be reluctant to go search for and levy upon it on his own. However, if the judgment creditor issues an execution specifying such property and the sheriff levies upon it, but it turns out that the property does not belong to the judgment debtor, the judgment creditor may be liable for damages to the actual owner of the property.

However, if a judgment creditor has a reasonable belief that the debtor has an interest in property in the hands of a particular garnishee, he may cause a restraining notice pursuant to CPLR § 5222 to be issued, thereby keeping the property from being transferred, and follow up with a subpoena pursuant to CPLR R 5224 which may enable the judgment creditor to determine that he may safely proceed with execution and levy. In such a circumstance, it would be manifestly unfair to deny the judgment creditor priority if he is able to convince a court to make the restraining notice a restraining order while the judgment creditor

conducts due diligence before issuing an execution.

LEGISLATIVE HISTORY:

2007; A8647-A/S3166D Passed Assembly/S.Calendar

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS: None.

EFFECTIVE DATE: Immediately.
