

BILL TEXT:

STATE OF NEW YORK

3166--E

Cal. No. 1234

2007-2008 Regular Sessions

IN SENATE

February 27, 2007

Introduced by Sen. VOLKER -- read twice and ordered printed, and when printed to be committed to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading -- again amended and ordered reprinted, retaining its place in the order of third reading -- substituted by Assembly No. 8647-A, substitution reconsidered, restored to third reading, committed to the Committee on Rules -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the civil practice law and rules, in relation to orders of attachment

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

- 1 Section 1. Section 6201 of the civil practice law and rules, as
2 amended by chapter 860 of the laws of 1977, subdivision 4 as added and
3 subdivision 5 as renumbered by chapter 618 of the laws of 1992, is
4 amended to read as follows:
5 § 6201. Grounds for attachment. [~~Am~~] (a) Pre-judgment order of
6 attachment. A pre-judgment order of attachment may be granted in any
7 action, except a matrimonial action, where the plaintiff has demanded
8 and would be entitled, in whole or in part, or in the alternative, to a
9 money judgment against one or more defendants, when:
10 1. the defendant is a nondomiciliary residing without the state, or is
11 a foreign corporation not qualified to do business in the state; or
12 2. the defendant resides or is domiciled in the state and cannot be
13 personally served despite diligent efforts to do so; or

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

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1 3. the defendant, with intent to defraud his creditors or frustrate
2 the enforcement of a judgment that might be rendered in plaintiff's
3 favor, has assigned, disposed of, encumbered or secreted property, or
4 removed it from the state or is about to do any of these acts; or

5 4. the action is brought by the victim or the representative of the
6 victim of a crime, as defined in subdivision six of section six hundred
7 twenty-one of the executive law, against the person or the legal repre-
8 sentative or assignee of the person convicted of committing such crime
9 and seeks to recover damages sustained as a result of such crime pursu-
10 ant to section six hundred thirty-two-a of the executive law; or

11 5. the cause of action is based on a judgment, decree or order of a
12 court of the United States or of any other court which is entitled to
13 full faith and credit in this state, or on a judgment which qualifies
14 for recognition under the provisions of article 53 of this chapter.

15 (b) Post-judgment order of attachment. A post-judgment order of
16 attachment may be granted upon a showing by the judgment creditor that a
17 reasonable basis exists for delaying the issuance of an execution with
18 respect to specific identifiable property of, or debt owed to, the judg-
19 ment debtor. Such attachment shall remain in place subject to further
20 order of the court or issuance of an execution.

21 § 2. This act shall take effect immediately.

SPONSORS MEMO:

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S3166E

SPONSOR: VOLKER

TITLE OF BILL:

An act to amend the civil practice law and rules, in relation to orders of attachment

PURPOSE:

This bill will amend the New York Civil Practice Law and Rules ("CPLR") in order to provide judgment creditors who demonstrate to the court that a reasonable basis exists for delaying the issuance of execution with respect to specific identifiable property of, or debt owed to, the judgment debtor, with a post-judgment order of attachment that has the same priority rights afforded to pre-judgment orders of attachment and executions. This amendment fills in a gap in existing priority rules which presently allow creditors who secure pre-judgment 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:

SECTION 1 - Section 6201 of the Civil Practice Law and Rules is amended by adding a new provision allowing, under certain circumstances, a court to order a post-judgment attachment. The amendment would give a post-judgment creditor who has reason to delay issuance of an execution the chance to obtain in a post-judgment attachment the same priority rights as existing attachments and executions.

SECTION 2 - 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 by authorizing the court to issue post-judgment attachments.

Even apart from foreign sovereign debt litigation, there are many reasons why a judgment creditor may need to get a restraint 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 § 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 issue a post-judgment attachment while the judgment creditor conducts due diligence before issuing an execution.

LEGISLATIVE HISTORY:

New bill.

FISCAL IMPLICATIONS:

None.

EFFECTIVE DATE:

Immediately.
