Introduction

On June 4, 2009, the New York Court of Appeals issued its ruling in Koehler v. Bank of Bermuda Ltd., a judgment enforcement case that squarely posed a question concerning the limits of a judgment creditor’s ability to seize assets located outside of New York. The Court of Appeals, which ruled in response to a certified question from the U.S. Court of Appeals for the Second Circuit, held in a 4-3 decision authored by Judge Eugene Pigott that under Section 5225 of the Civil Practice Law and Rules (“CPLR”), a New York court may order a third-party garnishee over which it has personal jurisdiction to turn over to the judgment creditor property that is located outside of New York. The court’s decision constitutes a major victory for judgment creditors in New York, which, by virtue of its status as the financial center of the United States, is a key enforcement venue.

Background

The case arose out of a commercial dispute between former business partners. In June 1993, the plaintiff, Lee Koehler, obtained a $2.09 million default judgment against his former partner in the U.S. District Court for the District of Maryland. Koehler registered the judgment in the Southern District of New York. The defendant, a Bermuda resident, owned shares of stock in a Bermuda corporation, but had pledged those shares as collateral for a loan he received from Bank of Bermuda. The defendant did not pay the Maryland judgment. Thus, Koehler filed a petition against Bank of Bermuda in the New York court pursuant to Article 52 of the CPLR (which governs judgment enforcement proceedings in New York) for an order directing Bank of Bermuda to turn over the shares of stock or monies sufficient to pay the judgment, to Koehler. The New York court granted Koehler’s petition on October 29, 1993. Bank of Bermuda contested the validity of the order by claiming that Koehler’s service of the petition was insufficient to subject it to personal jurisdiction; this claim resulted in almost ten years of litigation concerning the jurisdictional issue. In October 2003, however, Bank of Bermuda consented to the New York court’s jurisdiction, resolving that threshold issue.

Once the jurisdictional issue was resolved, Bank of Bermuda informed the New York court that it was no longer in possession of the stock certificates that were the subject of the petition; the loan for which the shares had been pledged had been satisfied, and the shares had been transferred in 1994 to a Bermuda company that existed for the defendant’s benefit. As a result, the New York court dismissed Koehler’s petition on several grounds, including that it had no jurisdiction over the shares of stock because they were no longer located in the state.
Koehler appealed the New York court’s ruling to the Second Circuit, which concluded that New York law was unclear concerning the authority of a court acting pursuant to Section 5225(b) of the CPLR (which governs enforcement proceedings brought against garnishees other than the judgment debtor) to order a party, other than the judgment debtor itself, to deliver assets located outside of New York into the state for purposes of turning them over to the judgment creditor. Finding certification to the Court of Appeals, New York’s highest court, warranted, the Second Circuit stated that:

It seems clear that a court sitting in New York, that has personal jurisdiction over a judgment debtor, may order the judgment debtor himself to deliver property into New York. It is less clear that courts have the authority to order a person or entity other than the judgment debtor to deliver assets into New York, when that person or entity is located in a foreign jurisdiction.

* * *

If the personal jurisdiction that a court has over a judgment debtor is the key to its ability to force him to facilitate judgment enforcement by bringing his own property into New York, then we see no principled reason why a court in New York should not be able to order a garnishee that has submitted to its personal jurisdiction to deliver property within its control. Although a writ of execution, which is issuable to a New York sheriff, cannot be levied outside New York, we perceive nothing in the text of N.Y. C.P.L.R. 5225 that would limit the power of a court to order a party within its personal jurisdiction to deliver property to New York. However, we acknowledge that the issue is unsettled in New York, and that it must be resolved by the New York State Court of Appeals, before we can determine whether the district court correctly vacated the turnover order.

* * *

These unresolved issues regarding the reach of courts in New York over extraterritorial assets lie at the intersection of New York State civil practice and New York State policy. It is our understanding that the highest court in New York has yet to resolve them. Moreover, these issues appear to be dispositive of the district court’s conclusion that the stock certificates Koehler is seeking, which have always been located in Bermuda, are not subject to judgment enforcement in New York.

We therefore certify to the New York State Court of Appeals the question whether a court sitting in New York may, pursuant to N.Y. C.P.L.R. 5225(b), order a bank over which it has personal jurisdiction to deliver stock certificates owned by a judgment debtor (or cash equal to their value) to a judgment creditor, pursuant to N.Y. C.P.L.R. Article 52, when those stock certificates are located outside New York. The New York State Court of Appeals may, of course, reformulate or expand this question as it wishes.

**The Court’s Decision**

The Court of Appeals, through a bare four-judge majority, held that Section 5225(b) authorizes a court to order a garnishee over which it has in personam jurisdiction to turn over property that is in its possession, but located outside of New York. In reaching this conclusion, the court distinguished the pre-judgment attachment procedures set forth in Article 62 of the CPLR from the judgment enforcement procedures set forth in Article 52. Specifically, the Court of Appeals found that while the pre-judgment devices available under Article 62 operate against property – and thus constitute an assertion by the court of its in rem jurisdiction – Article 52 (and specifically Section 5225(b)) authorizes the commencement of an in personam proceeding against a third-party garnishee who is in possession of property that
may be used to satisfy a judgment. Specifically, the Court of Appeals stated:

In short, article 52 post-judgment enforcement involves a proceeding against a person – its purpose is to demand that a person convert money for payment to a creditor – whereas article 62 attachment operates solely on property, keeping it out of a debtor’s hands for a time. We approach the certified question with these differences in mind.6

At the outset of its analysis, the court then distilled and distinguished the source of its authority to act pursuant to Article 52:

It is well established that, where personal jurisdiction is lacking, a New York court cannot attach property not within its jurisdiction. “It is a fundamental rule that in attachment proceedings the res must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction. Significantly, “attachment suits partake of the nature of suits in rem, and are distinctly such when they proceed without jurisdiction having been acquired of the person of the debtor in the attachment.” But it is equally well established that “having acquired jurisdiction of the person, the courts can compel observance of its decrees by proceedings in personam against the owner within the jurisdiction.” The certified question concerns the latter process.7

Having made this distinction between in rem and in personam proceedings, and thus having found, at least implicitly, that there is no constitutional impediment to compelling a party over whom it has personal jurisdiction to deliver property in its possession into the forum, the Court of Appeals considered the specific grant of authority set forth in Section 5225(b). The court observed:

CPLR article 52 contains no express territorial limitation barring the entry of a turnover order that requires a garnishee to transfer money or property into New York from another state or country. It would have been an easy matter for the Legislature to have added such a restriction to the reach of article 52 and there is no basis for us to infer it from the broad language presently in the statute.8

The court noted further that the New York Legislature had recently amended CPLR § 5224 to permit a judgment creditor issue a subpoena duces tecum requiring disclosure of any relevant property in the subpoenaed party’s possession that was “within or without the state,” inferring from this statutory provision that the Legislature must have intended courts to have the power to direct turnover of property outside the state. Further, the Court of Appeals reiterated that because a garnishee subject to Section 5225(b) must necessarily be subject to the court’s personal jurisdiction, a court possesses sufficient authority to direct that party to deliver property into New York for purposes of effectuating a turnover to the judgment creditor.

The Court of Appeals concluded its decision by rejecting Bank of Bermuda’s argument that even if it, as the garnishee, was subject to the court’s personal jurisdiction, any order directing turnover of the judgment debtor’s property was required to be supported by in rem jurisdiction when the judgment debtor was not subject to the court’s personal jurisdiction. The Court of Appeals rejected this argument, finding that it had no support in Section 5225(b) and again distinguishing between the devices available under Article 62 (attachment in rem) and 52 (directing turnover based on in personam jurisdiction).9

Judge Robert Smith wrote a dissent that was joined by Judges Susan Read and Theodore Jones. The dissenters noted that they would not read New York’s enforcement statutes as expansively as the majority, and added that the majority ruling’s “policy implications are
troubling, and it may well be unconstitutional in many of its applications.” The dissent continued:

The majority’s holding opens a forum-shopping opportunity for any judgment creditor trying to reach an asset of any judgment debtor held by a bank (or other garnishee) anywhere in the world. If the bank has a New York branch – either one that is not separately incorporated, or a subsidiary with which the parent’s relationship is close enough to subject the parent to New York jurisdiction – the judgment creditor, having registered the judgment in New York, can obtain an order requiring the asset to be delivered here....

It would not matter, of course, whether the majority’s rule were wise or unwise if our Legislature had enacted it, or if our precedents required us to follow it. But neither is true. The relevant statutes, CPLR 5201(b) (defining “property”) and 5225(b) (relating to payment or delivery of property not in the possession of the judgment debtor), say nothing about the extraterritorial effects of garnishment proceedings.10

The dissent also expressed its view that “[t]he majority’s broad view of New York’s garnishment remedy may cause it to exceed the limits placed on New York’s jurisdiction by the Due Process Clause of the Federal Constitution.” While noting that the U.S. Supreme Court, in Shaffer v. Heitner,11 had held that federal due process standards permitted the maintenance of an action against to realize on a judgment debt in a forum where the judgment debtor has property, the dissent observed that “[i]t is by no means equally clear that the novel in personam approach to judgment enforcement that the majority adopts today can meet the International Shoe standard.”12

Conclusion

The Court of Appeals’ decision in Koehler is extremely significant. Judgment creditors seeking to enforce a judgment in New York will no longer be required to prove that executable assets are located in the state. To the contrary, judgment creditors will be able to commence garnishment proceedings against parties located in New York (or even those non-resident parties over which the New York courts can permissibly exercise personal jurisdiction) and, assuming those parties are in possession of property in which the judgment debtor has an executable interest, New York courts will have authority to compel the garnishee to deliver that property to New York for turnover to the judgment creditor. The ruling is likely to have its greatest impact in the area of international dispute resolution, and particularly in cases subject to international arbitration, where arbitral awards are frequently required to be reduced to judgment and enforced through compulsory state law procedures.13

Given the dissent’s articulation of federal constitutional concerns, further appellate practice in the case seems likely, and the issue may ultimately land before the U.S. Supreme Court.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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2 _Id._ slip op. at *1-2.
4 The slip opinion states that “BBL appealed to the Second Circuit,” though this appears to have been an error.
6 Koehler, slip. op. at 6.
7 _Id._ at 6-7.
8 _Id._ at 7.
9 _Id._ at 9-10.
10 _Id._ dissent slip. op. at 1-2 (Smith, J., dissenting).
12 The U.S. Supreme Court’s decision in International Shoe v. Washington, 326 U.S. 310 (1945), and its progeny set forth the constitutional due process limitations on a state or federal court’s ability to exercise in personam jurisdiction over non-resident parties.
13 See Fed. R. Civ. P. 69(a) (providing that money judgments (including those entered as a result of a court’s confirmation of an arbitral award) are to be enforced in federal court through a writ of execution entered in conformity with the law of the state in which the federal court sits, and that discovery in aid of enforcement may be obtained in accordance with the Federal Rules of Civil Procedure or the procedure of the state in which the federal court sits).