

EXPERT ANALYSIS

Considerations in N.Y. CPLR Section 5225(b) Turnover Actions Involving Out-of-State Property

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Article 5225(b) of New York’s Civil Practice Law and Rules allows a judgment creditor to enforce a judgment against a third party (such as a bank) that has “possession or custody” of the judgment debtor’s property. This provision frequently affects financial institutions that are subject to personal jurisdiction in New York and are holding cash or other property belonging to a judgment debtor. While the financial institution’s obligations are relatively straightforward when the property is held in New York, they are less clear when the financial institution holds the property outside New York or when the property is held by a subsidiary that is not subject to New York jurisdiction. The New York Court of Appeals has provided some guidance on these issues in the past several years, including recently. This guidance allows financial institutions and other garnishees to better understand their obligations.

IN FOCUS: CPLR SECTION 5225(B)

Article 52 of the CPLR authorizes a judgment creditor to file a motion against a judgment debtor to compel the turnover of assets. It also provides that if the property sought is not in the judgment debtor’s possession, the judgment creditor may commence a special proceeding against a garnishee who holds the assets. CPLR Section 5225(b) allows New York courts to issue a judgment ordering a party to deliver the property in which the judgment debtor has an interest or to convert it to money for payment of the debt. That section provides, in relevant part, that:

Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody or money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor’s rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff.

WHAT IF THE PROPERTY IS OUTSIDE NEW YORK?

In *Koehler v. Bank of Bermuda Ltd.*,¹ the New York Court of Appeals considered whether CPLR Section 5225(b) authorized a court to order a bank that was subject to jurisdiction in New York to deliver stock certificates that belonged to the judgment debtor but were located outside the state. In 1993 the U.S. District Court for the District of Maryland awarded Lee N. Koehler a \$2.1 million default

judgment in against A. David Dodwell, his former business partner. Koehler registered the judgment in the U.S. District Court for the Southern District of New York. At that time, Dodwell, a Bermuda resident, owned stock in a Bermuda corporation. Dodwell's stock certificates were held by Bank of Bermuda Ltd., or BBL, in Bermuda.

Koehler filed a petition against BBL in the Southern District of New York, seeking delivery of the stock certificates. He served his petition on an officer of the Bank of Bermuda (New York) Ltd. For nearly 10 years, the parties litigated the issue of whether BBL was subject to personal jurisdiction in New York. In 2003 BBL consented to the District Court's personal jurisdiction as of 1993. But in 2004, it revealed that it had transferred the certificates to another Bermuda company in 1994. The District Court dismissed Koehler's petition in 2005, concluding that a New York court could not attach property that was not located within the state.

Koehler appealed to the 2nd U.S. Circuit Court of Appeals, which certified to the New York Court of Appeals the question of whether CPLR Section 5225(b) authorizes a New York court to order a defendant — other than the judgment debtor himself — to deliver assets into New York when the court has personal jurisdiction over the defendant but the debtor's assets are located outside the state.

The New York Court of Appeals noted that "[i]t is well established that, where personal jurisdiction is lacking, a New York court cannot attach property not within its jurisdiction."² The court further noted, however, that it "is equally well established that 'having acquired jurisdiction of the person, the court can compel observance of its decrees by proceedings *in personam* against the owner within the jurisdiction."³

The court stated that "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."⁴

Moreover, it continued, a New York court can order a garnishee to deliver property into the state — even if the judgment debtor is not subject to personal jurisdiction — so long as the garnishee is subject to personal jurisdiction in New York. Based on this principle, the court concluded that New York courts have the authority under CPLR Section 5225(b) to order a bank subject to personal jurisdiction in New York to deliver stock certificates that belong to the judgment debtor and are located in Bermuda.

WHAT ABOUT FOREIGN SUBSIDIARIES?

If property is held outside New York by a foreign subsidiary, can a New York court order a corporation that is subject to personal jurisdiction to deliver the judgment debtor's property? The New York Court of Appeals recently considered this issue in *Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce*.⁵ In that case, the government of the Northern Mariana Islands obtained two separate tax judgments against William and Patricia Millard in the U.S. District Court for the Northern Mariana Islands. The judgments were for unpaid taxes, and they each exceeded \$18 million. The Millards had previously resided in the commonwealth, but they relocated before the authorities obtained the judgments.

In 2011 the commonwealth registered the judgments in the U.S. District Court for the Southern District of New York. It also commenced proceedings in that court under Federal Rule of Civil Procedure 69(a) (1) and CPLR Section 5225(b), seeking a turnover order against garnishees holding the Millards' assets. The commonwealth named as a defendant Canadian Imperial Bank of Commerce, a Canadian bank with headquarters in Toronto and a branch in New York. The commonwealth claimed that the Millards maintained accounts in CIBC's subsidiary, CIBC FirstCaribbean International Bank Ltd., or its affiliates in the Cayman Islands.

Before the District Court, the commonwealth sought a turnover order against CIBC. It also sought a preliminary injunction, arguing that CIBC "has the control, power, authority and practical ability to order [FirstCaribbean] to turn over funds on deposit in the name of the Millards and entities controlled by the Millards pursuant to an order from this court."⁶

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The commonwealth relied on, among other things, CIBC's 92 percent ownership of FirstCaribbean, CIBC's imposition of a governance structure that gave it "full oversight of the risk and control framework of all [of FirstCaribbean's] operations,"⁷ the overlap between the companies' personnel, and CIBC's oversight of FirstCaribbean's compliance with various legal requirements.

The District Court conceded the plausibility of the argument that CIBC "controlled" FirstCaribbean. However, it noted that CPLR Section 5225(b) did not include the word "control." It concluded that the section applied only if the property was in the garnishee's "possession or custody." The court thus denied the commonwealth's request for a turnover order, although it did maintain a previously issued restraining order that precluded CIBC from engaging in certain activity related to the Millards' accounts.

On appeal, the 2nd Circuit certified to the New York Court of Appeals the question of whether a court could "issue a turnover order pursuant to N.Y. CPLR 5225(b) to an entity that does not have actual possession or custody of a debtor's assets, but whose subsidiary might have possession or custody of such assets."⁸ The New York Court of Appeals noted that "[u]nder CPLR Article 52, a special proceeding for a turnover order is a procedural mechanism devised by the Legislature to enforce a judgment against an asset of a judgment debtor, held in the 'possession or custody' of a third party."⁹

The commonwealth argued that the phrase "possession or custody" included "the concept of control." Therefore, it claimed, Section 5225(b) is applicable to garnishees with constructive possession of a judgment debtor's assets.¹⁰

The New York Court of Appeals rejected this argument. It began with an analysis of CPLR Section 5225(b)'s language, which referred only to "possession or custody" and excluded any reference to "control." The court noted that "we have previously observed that the failure of the Legislature to include a term in a statute is a significant indication that its exclusion was intended."¹¹

Two additional factors indicated that the Legislature had intentionally left out the notion of control. First, prior to the 1963 amendments enacting the CPLR, the relevant turnover statute had referred to "possession" and "control," without mentioning "custody." CPLR Section 5225(b) and its related provisions, by contrast, were enacted with the "possession or custody" language included. The commonwealth argued that the New York Legislature "simply substituted 'custody' as the functional equivalent of 'control.'"¹² The court rejected this argument, noting that "we read the statute both based on its plain meaning and in context, and it is clear that the Legislature did not pen one word anticipating that another would be 'read into' the CPLR."¹³

Additionally, and more significantly, the New York Legislature used the notion of "control" in several other sections, indicating that it had made the conscious decision not to include that term in CPLR Section 5225(b). These sections, such as CPLR Section 3111, typically address discovery-related issues, indicating that the Legislature decided to employ a broader "possession, custody or control" standard when dealing with discovery. The more narrow "possession or custody" standard, by contrast, was used in sections relating to the disposition of property, such as in CPLR Sections 1320, 6214 and 6215 — indicating that the Legislature applied a higher standard to the disposition of property. Based on this distinction, the Court of Appeals reasoned that the term "possession, custody or control" contemplated constructive possession, whereas "possession or custody" referred only to actual possession. The court thus concluded that a "Section 5225(b) turnover order cannot be issued against a garnishee lacking actual possession or custody of a judgment debtor's assets or property."

In reaching this conclusion, the Court of Appeals distinguished its holding in *Koehler*. The *Koehler* decision, the court noted, simply held that a party holding the judgment debtor's property could be ordered to turn that property over to the judgment creditor, even where the property was located outside New York. *Koehler* did not interpret the term "possession or custody" and it did not address whether a bank could be ordered to turn over property that it possessed only constructively. As the court concluded, no case required "that a garnishee be compelled to direct another entity, which is not subject to this state's personal jurisdiction, to deliver assets held in a foreign jurisdiction."¹⁴

The New York Court of Appeals considered whether CPLR Section 5225(b) authorized a court to order a bank that was subject to jurisdiction in New York to deliver stock certificates that belonged to the judgment debtor but were located outside the state.

IMPORTANT CONSIDERATIONS

When faced with a turnover action under CPLR Section 5225(b), and assuming the garnishee does not consent to providing the property, the garnishee should consider whether it is subject to jurisdiction in New York and whether it has actual possession of the judgment debtor's property. If it is not subject to personal jurisdiction in New York, then the court cannot enter an order requiring it to turn over property. If, however, the court has jurisdiction, *Koehler* demonstrates that holding the debtor's property outside of New York does not affect the court's ability to issue a turnover order.

If the property is located outside New York, the next step is to determine who has possession. If the garnishee does not have actual possession, then under *Commonwealth* the court cannot order the garnishee to obtain possession for delivery to the judgment creditor. In such an instance, a judgment creditor could still attempt to proceed directly against the judgment debtor or against a foreign corporation holding the property in a location where it is subject to jurisdiction, but a turnover action under CPLR Section 5225(b) is not available. **WJ**

NOTES

¹ 12 N.Y.3d 533 (N.Y. 2009).

² *Id.* at 538.

³ *Id.* at 539.

⁴ *Id.*

⁵ 21 N.Y.3d 55 (N.Y. 2013).

⁶ *Commonwealth of N. Mariana Islands v. Millard*, 287 F.R.D. 204, 206 (S.D.N.Y. 2012).

⁷ *Id.* at 207.

⁸ *Commonwealth of N. Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d at 58.

⁹ *Id.* at 59.

¹⁰ *Id.* at 60.

¹¹ *Id.*

¹² *Id.* at 62.

¹³ *Id.*

¹⁴ *Id.* at 64.



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