Using a CPLR 5222 Restraining Notice to Freeze Fraudulently Transferred Assets

By **Bernard D'Orazio** | December 14, 2018 at 03:00 PM

Many New York attorneys are at least vaguely familiar with the so-called "Restraining Notice," a judgment enforcement device under which a judgment creditor may restrain bank accounts or other personal property or debts owed to a judgment debtor. See CPLR 5222. This remarkable device, apparently unique to New York, can be invoked by a judgment creditor's attorney at any time, without a court order, and it may be simply and inexpensively served by Certified Mail. Yet it is quite powerful, having the same force and effect as a court-issued injunction, violation of which is punishable as a contempt of court. See CPLR 5251 ("[r]efusal or willful neglect of any person to obey a ... restraining notice issued ... pursuant to this title ... shall each be punishable as a contempt of court"); *Aspen Indus. v. Marine Midland Bank*, 52 N.Y.2d 575, 579 (1981) (a Restraining Notice "serves as a type of injunction").

Any attorney seeking to enforce a New York judgment should consider using this powerful tool. Restraining Notices should be served on banks and other third parties that may have property of the judgment debtor or owe a debt (e.g., accounts receivable, rent, unpaid fees). They also should be routinely served on the judgment debtor himself. Per CPLR 5222(b), a judgment debtor served with a Restraining Notice "is forbidden to make any sale, assignment, transfer or interference with any property in which he or she has an interest," subject to narrow statutory exclusions, except upon direction of the sheriff or pursuant to Court order. Unlike Restraining Notices served on third parties, which expire after one year, Restraining Notices served on judgment debtors remain in effect until the Judgment is satisfied.

The careful practitioner should familiarize himself with the mechanics and rules governing the service and use of Restraining Notices, which can be found in CPLR 5222 and CPLR 5222-a. These provisions were extensively amended in 2009, particularly with regard to the restraint of bank accounts of natural persons, so do not rely on any forms you may have obtained or used long ago.

The foregoing is generally known. What is often overlooked is that a Restraining Notice is not limited to freezing accounts or property held in the judgment debtor's own name. That's right: A judgment creditor may use a Restraining Notice to reach and restrain monies in an account that's held *in the name of another party*, provided you have evidence that the account contains assets of the judgment debtor; e.g., fraudulently transferred property or where the debtor has deposited his own monies into the account of another.

We successfully invoked this principle a few years ago against a moving company which, given the way it handled its legal affairs, was aptly named "The Padded Wagon." After this outfit lost a contested litigation, it simply refused to pay the Judgment. Preliminary Judgment enforcement efforts failed. Although its fleet of powder blue trucks were seemingly everywhere, its bank account was closed. An investigation of court records uncovered the scam that was enabling the company to

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keep operating: as suspected, The Padded Wagon was channeling revenue into bank accounts of an affiliate, Rigged Rite (also aptly named). We served the bank with a Restraining Notice and, in a cover letter, detailed the scam. The "rigged" account was frozen and a thoroughly indignant Rigged Rite moved to vacate the restraint.

The court (Cahn, J.), rejected the challenge and upheld the restraint, invoking the authority set forth in the two leading cases, *Bingham v. Zolt*, 231 A.D.2d 479 (1st Dep't 1996), and *ERA Mgt. v. Morrison Cohen Singer & Weinstein*, 199 A.D.2d 179 (1st Dep't 1993).

Justice Cahn held that these precedents allowed a judgment creditor to use a Restraining Notice to freeze an account of a third party where the judgment debtor has used that account as a "recipient" of the judgment debtor's assets or as a source for payment of the debtor's expenses. In such circumstances, the judgment debtor will be found to have an interest in the specified bank account such that it may be restrained. See *780 E. LLC v. Commerce Bank*, 2005 N.Y. Misc. LEXIS 8564 (Sup. Ct. N.Y. County 2005). Other cases so holding include *Blue Giant Equip. v. Tec-Ser*, 92 A.D.2d 630 (3d Dep't 1983), *Pensmore Invs. v. Gruppo, Levey & Co.*, 2015 N.Y. Misc. LEXIS 1403 (Sup. Ct. N.Y. County 2018) (Kornreich, J.), and *Berkshire Bank v. Tedeschi*, 2016 U.S. Dist. LEXIS 32930 (N.D.N.Y. 2016).

There is no requirement that the judgment creditor prevail in a fraudulent conveyance proceeding before using a Restraining Notice to freeze a third-party account. See *Blue Giant Equip. v. Tec-Ser*, 92 A.D.2d 630 (3d Dep't 1983) (creditor's commencement of plenary action to set aside fraudulent conveyance did not preclude use of Restraining Notices to freeze assets assigned by judgment debtor to another party); *Plaza Hotel Assocs. v. Wellington Assocs.*, 84 Misc. 2d 777 (Sup. Ct. N.Y. County 1975) (rejecting restrained party's "argument that plaintiff's sole remedy is a proceeding under the Debtor and Creditor Law" as "meritless," court held that the possibility of such a suit "in no way precludes appropriate proceedings under CPLR article 52").

However, if you are considering using a Restraining Notice to freeze monies held in the name of a non-judgment debtor party, some words of caution. You should have solid proof of a fraudulent transfer of property by the debtor to the third party or other misuse of the third-party's account. Mere suspicion is not enough and, if you're wrong, you may find yourself facing a claim for sanctions or abuse of process.

Also note that some courts have interpreted the *Bingham/ERA* doctrine narrowly. See *AXGINC v. Plaza Automall*, 2018 U.S. Dist. LEXIS 170424 (E.D.N.Y. 2018) (third-party accounts improperly restrained where judgment creditor presented no evidence they contained money of the judgment debtor; rather, only proof was that accounts were used to pay for expenses of the judgment debtor, which court held insufficient); *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs.*, 295 F. Supp. 2d 366 (S.D.N.Y. 2003) (judgment creditor may not restrain assets of third parties "in anticipation of a finding that those third parties are alter egos or hold assets of alleged alter egos of the judgment debtor").

Remember also that as a practical matter, the judgment creditor's attorney will have to persuade the bank or third party to obey a Restraining Notice and voluntarily freeze property not being held in the judgment debtor's name. You are much more likely to prevail if you serve with the Restraining Notice a letter citing *Bingham v. Zolt* and other precedents and providing the facts upon which your claim is being made. If you can persuade the bank to freeze the account, even for a few days, you may have "harpooned the whale," which of course is your recalcitrant and corrupt judgment debtor. With the account safely frozen, you can then act quickly and present your proof to the court on an ex parte application for an Order to Show Cause and TRO freezing the account while you litigate an application for a turnover of the funds, pursuant to CPLR 5225(b) and/or CPLR 5227.

The technique of serving Restraining Notices to freeze accounts held in the name of third parties provides judgment creditors with a potentially powerful Judgment enforcement tool. As with anything powerful, it should be used carefully and wisely.

Bernard D'Orazio *is principal attorney at the New York firm of Bernard D'Orazio and Associates, P.C. He is a frequent lecturer and writer on the topics of debt collection and judgment enforcement. He can be reached at bdorazio@dorazio-law.com.*

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