

NEW YORK COURT OF APPEALS TO DECIDE BREADTH OF “SEPARATE ENTITY” RULE

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By: Jay S. Auslander
Julie Cilia
Natalie Shkolnik

Under New York’s “separate entity” rule, each branch of a bank is treated as a separate legal entity for purposes of attachment and garnishment. Where a judgment creditor serves a restraining notice or turnover order on a bank’s New York branch, directing the bank to restrain or turn over assets held by the bank that belong to a judgment debtor, does the separate entity rule dictate that the bank need not restrain or turn over assets that it holds in branches *outside* of New York? New York state and federal courts have grappled with this question, but the state’s highest court has never addressed it.

That may change soon, however. In a decision issued on January 14, 2014, *Tire Engineering and Distribution L.L.C. v. Bank of China Limited*, — F.3d —, 2014 WL 114285 (2d Cir. Jan. 14, 2014), the United States Court of Appeals, Second Circuit (the “Second Circuit”) certified the following two questions to the New York Court of Appeals: (i) “whether the separate entity rule precludes a judgment creditor from ordering a garnishee bank operating branches in New York to turn over a debtor’s assets held in foreign branches of the bank” and (ii) “whether the separate entity rule precludes a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor’s assets held in foreign branches of the bank.”

The Second Circuit’s opinion was the result of appeals from two Southern District of New York district court decisions entered in two different judgment enforcement actions. In *Tire Engineering and Distribution, L.L.C. v. Bank of China Ltd.*, judgment creditor Tire Engineering and Distribution, L.L.C. (“Tire Engineering”) sought, as part of its effort to enforce a \$26 million damages award, a turnover order against Bank of China (“BOC”), which it alleged had assets belonging to at least one the judgment debtors. Tire Engineering wanted the turnover order to require BOC to turn over any of the judgment debtors’ money or other personal property in BOC’s possession, regardless of where that property was located. Tire Engineering also served a restraining notice on BOC, prohibiting BOC from selling, assigning, or transferring any of the judgment debtors’ property. BOC confirmed that its New York branches held no accounts or property of the judgment debtors and made a motion to dismiss. The district court ultimately granted BOC’s motion due to the separate entity rule, which the court held precluded Tire Engineering’s request for relief. The district court also granted a stay pending appeal, however, thus allowing Tire Engineering’s restraining notice to remain in place until the appeal was decided.

The second judgment enforcement action, *Motorola Credit Corp. v. Standard Charter Bank*, arose from a judgment totaling over \$3 billion. Judgment creditor Motorola Credit Corp. (“Motorola”) served a restraining order on Standard Charter Bank (“SCB”), which found no judgment debtor property in its New York branch but did identify relevant assets connected with SCB branches located in the United Arab Emirates (the “U.A.E.”). Motorola requested that SCB seize the assets, but there was intervention by regulatory authorities in Jordan and the U.A.E. SCB subsequently moved for relief from the restraining order, and the district court

held that the separate entity rule precludes Motorola from restraining assets that are held by SCB's foreign branches. The district court stayed the release of the restraint pending appeal, however.

On appeal from both district court decisions, the Second Circuit determined that certification to the New York Court of Appeals was appropriate for three reasons. First, it concluded that "these appeals turn on unsettled and important questions of New York law." As the Second Circuit pointed out, "[t]he New York Court of Appeals has never addressed whether the separate entity rule applies to post-judgment enforcement proceedings," and, indeed, "has never unequivocally approved or disapproved of" the rule in any context. Although the New York Court of Appeals held in *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009) that a court sitting in New York may order a bank over which it has personal jurisdiction to deliver a judgment debtor's stock certificates to a judgment creditor even though those stock certificates are located outside New York, the court did not address the separate entity rule in its decision. "In light of the longstanding application of the separate entity rule in New York," the Second Circuit "doubt[ed] that the Court of Appeals intended to silently overrule the doctrine." Citing cases such as *Global Tech, Inc. v. Royal Bank of Canada*, 34 Misc.3d 1209(A), 943 N.Y.S.2d 791, 2012 WL 89823 (Sup. Ct. N.Y. Cnty. Jan. 11, 2012), in which Wilk Auslander LLP represented the prevailing party, the Second Circuit also noted that New York courts considering application of the separate entity rule to post-judgment enforcement orders have agreed. Given that only the New York Court of Appeals "can tell us definitively the significance—if any—of its decision not to address the question, whether it intended to silently overrule the doctrine, and whether the rule applies to post-judgment enforcement orders," the Second Circuit held that "there is no 'controlling precedent' in New York that governs this case."

Second, the Second Circuit held that the questions presented on appeal involved "important issues of New York state law and policy that are likely to recur and may have important effects on a highly regulated industry." On the one hand, as defendants argued, an international bank is subject to competing laws of multiple jurisdictions, such a bank faces practical constraints and costs in determining whether the judgment debtor's property is located in any of its branches throughout the world, and the separate entity rule's applicability or lack thereof to post-judgment enforcement orders may have unintended consequences for New York's banking industry and courts. On the other hand, as plaintiffs argued, over time the original basis for the separate entity rule may have weakened or disappeared, and applying the rule could facilitate judgment debtors' efforts to frustrate and evade judgment collection as well as allow banks with New York branches to avoid the consequences of choosing to do business in New York and give foreign banks a competitive advantage.

Third, the Second Circuit held that the New York Court of Appeals' response to the certified questions would likely determine the outcome of the underlying appeals in that it would determine whether or not the district courts' orders would be vacated.

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Wilk Auslander actively follows nationwide legal developments concerning issues relating to judgment enforcement, and is available to provide a consultation to prospective clients concerning every aspect of judgment enforcement remedies and asset recovery. For more information, or if you have any questions concerning our firm's practice in the area of judgment enforcement litigation, please contact Jay S. Auslander at jauslander@wilkauslander.com or Natalie Shkolnik at nshkolnik@wilkauslander.com.