

## NEW YORK COURT OF APPEALS LIMITS THE SCOPE OF A POST-JUDGMENT TURNOVER PROCEEDING AGAINST A THIRD PARTY GARNISHEE

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On April 30, 2013, the New York Court of Appeals, the state's highest court, held that a court's authority to issue a post-judgment turnover order pursuant to CPLR 5225(b) against a third party garnishee banking entity is limited to a turnover of only those assets in the actual possession or custody of the garnishee bank. The Court of Appeals expressly rejected the judgment creditor's argument that the garnishee's control over its subsidiary, which has actual possession or custody of the debtor's subject assets, was sufficient to warrant the entry of the turnover order under a constructive possession theory.

The case arose out of the efforts of the Commonwealth of the Northern Mariana Islands (the "Commonwealth") to enforce tax judgments against certain judgment debtors who were former residents of the Commonwealth. After having registered the tax judgments in the U.S. District Court for the Southern District of New York, the Commonwealth moved by order to show cause for a turnover order against third party garnishee, Canadian Imperial Bank of Commerce ("CIBC"), seeking the turnover of funds maintained by the debtors on deposit with a subsidiary of CIBC, First Caribbean International Bank Limited ("CFIB"). In support of its motion, the Commonwealth argued that "CIBC has the control, power, authority and practical ability to order [CFIB] to turn over funds on deposit in the name of" the debtors.

On appeal to the Second Circuit of the District Court's denial of the Commonwealth's motion, the Second Circuit asked the Court of Appeals to determine whether, under New York law, a court may issue a turnover order pursuant to 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.

Relying on what the Court of Appeals held is "clear and unambiguous" language of CPLR Section 5225(b), which refers to "possession or custody" of the debtor's assets but says nothing of "control" over such assets, the Court of Appeals concluded that by omitting the term "control" from Section 5225(b), the Legislature "has applied a higher standard to insure the proper disposition of property." The Court reasoned that, whereas the phrase "possession, custody, or control" used in various other provisions of the CPLR governing documentary discovery contemplates constructive possession, the phrase "possession or custody" used in Section 5225(b) must mean actual possession. Accordingly, the Court concluded that a turnover order pursuant to 5225(b) "cannot be issued against a garnishee lacking actual possession or custody of a judgment debtor's assets or property."

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Recognizing that some may interpret this decision to be at odds with, or limiting, the Court's holding in *Koehler v. Bank of Bermuda, Ltd.*, 12 N.Y.3d 533 (2009) — which many commentators and practitioners consider a seminal case in expanding the New York State courts' authority over judgment debtors' assets in foreign jurisdictions — the Court of Appeals explained that the two holdings are not inconsistent: In *Koehler*, the Court determined that, once a court has personal jurisdiction over a garnishee, it can order the garnishee to deliver even those assets that are located outside of New York. That determination is not at odds with the present holding given that the garnishee in *Koehler* was directed to deliver assets that were within its actual possession. The Court expressly refused to expand *Koehler* to compel a garnishee to direct another entity, albeit a subsidiary of the garnishee, that is not subject to the New York State's jurisdiction to deliver assets of the debtor that are located in a foreign jurisdiction.

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