SPLIT IN AUTHORITY AMONG THE SDNY JUDGES RELATING TO SERVICE OF A RESTRAINING NOTICE ON A FOREIGN JUDGMENT DEBTOR'S COUNSEL IN NEW YORK

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In late 2012, a split in authority within the United States District Court for the Southern District of New York ("SDNY") arose relating to service of a restraining notice pursuant to § 5222 of the New York Civil Practice Law and Rules ("CPLR") on a foreign judgment debtor by service on the debtor's attorney in New York.

In *Sonera*[1], on December 21, 2012, Judge Cote, after having confirmed the award and entered a money judgment against a Turkish-based judgment debtor, denied, among other things, judgment creditor's motion to confirm service of a restraining notice on the debtor by service on its counsel in New York. Judgment creditor argued that a restraining notice is a discovery instrument and therefore, pursuant to Rule 5(b) of the Federal Rules of Civil Procedure — which provides that unless the court orders otherwise, a "discovery paper" *must* be served on the party's attorney if a party is represented — the restraining notice *must* be served on judgment debtor's counsel. Relying on Rule 26 of the Federal Rules of Civil Procedure, which specifies the scope of "discovery" under the Federal Rules of Civil Procedure, and does not include any instrument resembling a restraining notice, the Court declined to characterize a CPLR § 5222 restraining notice as "discovery."

In reaching her conclusion, Judge Cote rejected the authority cited by judgment creditor in support of its argument, including an October 2012 SDNY decision that Judge Cote admitted supports the judgment debtors' position that, pursuant to Rule 5(b) of the Federal Rules of Civil Procedure, a restraining notice may be served on a foreign judgment debtor's counsel in New York. *Amaprop Ltd. v. Indiabulls Financial Services Ltd.*, 2012 WL 4801452 (S.D.N.Y. Oct. 5, 2012).

In *Amaprop*[2], judgment creditor sought, among other things, a declaration that service of a subpoena and a restraining notice on an India-based judgment debtor's counsel in New York was proper and effective. Finding in favor of judgment creditor, Magistrate Judge James C. Francis IV stated that "it has been held that

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[1] *Sonera Holding B.V. v. Cukurova Holding A.S.*, 2012 WL 6644636 (S.D.N.Y. Dec. 21, 2012) ("*Sonera*")

[2] *Amaprop Ltd.* v. *Indiabulls Financial Services Ltd.*, 2012 WL 4801452 (S.D.N.Y. Oct. 5, 2012) ("*Amaprop*")

'when Rule 69 discovery [*including a subpoena and retraining notice*] is sought from a party represented by an attorney, service may proceed under Rule 5(b) of the Federal Rules of Civil Procedure.'" (Emphasis added) (*quoting First-City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250 (S.D.N.Y. 2000), where Judge Rakoff held that Rule 5(b) authorizes service of a subpoena and restraining notice on a judgment debtor's attorney who had made a general appearance in the case, but vacated the restraining notice on other grounds).

In *Sonera*, the judgment creditor did not appeal Judge Cote's decision. And, although the judgment debtor in *Amaprop* has filed an objection to Magistrate Judge Francis' order, including, without limitation, the part of the order validating the service of the restraining notice on the foreign judgment debtor's counsel in New York, that issue will not be ripe for appeal until the objection is adjudicated by Judge Gardephe (the presiding district judge in *Amaprop*). Accordingly, the split in authority remains for now.

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