

## COMMERCIAL LITIGATION

## Attachment Premised Upon Intent to Defraud

By: Leo K. Barnes Jr.



Leo K. Barnes Jr.

This column has previously addressed the basis for an Article 62 attachment<sup>1</sup> in the context of a foreign confession of judgment pursuant to CPLR 6201(5). In this scenario, by the time New York counsel is engaged, the hard work has already been done by virtue of securing the foreign judgment; with the judgment in hand, local counsel will simply need to convince the New York Court that the same is entitled to recognition. It is generally a seamless process.

A much heavier burden is required to pursue successfully an attachment premised upon 6201(3). Specifically, CPLR 6201(3) provides:

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in

plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts;

The requirements of CPLR 6201(3) are twofold. Plaintiff must show: (a) that the defendant has hidden or transferred his assets in one of the ways described in the statute or is about to do so, and (b) that defendant's intent in so acting is to defraud his creditors or frustrate the enforcement of a judgment in plaintiff's favor. The necessary showing must be made with factual details in the plaintiff's moving affidavits.<sup>2</sup>

Assume for this purpose that counsel has confirmed that a party defendant, after commencement of the action, has in fact transferred a significant asset, thereby satisfying the first prong.<sup>3</sup> Instinctively, transfer after commencement of litigation may seem to constitute a sufficient basis for inferring fraudulent intent. But there is much more work to be done.

The most difficult part of plaintiff's burden is showing the defendant's state of

(Continued on page 28)

mind, knowing that a mere "suspicion" of the intent to defraud is not enough; there must be a showing that the intent "really existed in the mind of the defendant," and is not merely a matter of speculation.<sup>4</sup> In this regard, it is imperative for plaintiff's counsel to reconcile the defendant's liquidation or transfer of asset with the rules that mere disposition is not enough to raise an inference of fraud.<sup>5</sup> Inasmuch as direct evidence of the necessary intent is rare, in most cases, movant must rely on circumstantial evidence.<sup>6</sup>

There are relatively few reported cases wherein courts have upheld the right to pursue an attachment premised upon CPLR 6201(3); even fewer confirm the criteria for founding such a claim premised upon circumstantial evidence of intent to defraud.

## JSC Foreign Economic Ass'n

In determining whether sufficient circumstantial evidence exists to infer a fraudulent intent to frustrate a potential judgment, Southern District Judge Koeltl's decision in *JSC Foreign Economic Ass'n v. International Development and Trade Services, Inc.*<sup>7</sup> is squarely on point. In *JSC*, after finding a likelihood of success on an alter ego basis, the court found that sufficient indicia of a fraudulent intent existed regarding the defendants' attempts to frustrate the enforcement of a potential judgment, including the following facts: defendants sold real property totaling \$1,300,000; the sale closed after the action

had been filed and served; counsel for defendants "could not explain where all the proceeds went and why;" and the sale left the defendants without any assets.

## Mineola Ford Sales v. Rapp

The Second Department affirmed a CPLR 6201(3) attachment in *Mineola Ford Sales Ltd. v. Rapp*<sup>8</sup> when the defendant there, a former employee: falsified business records and accounting ledgers; diverted plaintiffs' funds for her own personal use, including payments to credit card companies, and the purchase of jewelry, clothing and furniture; and defendant offered no explanation as to what happened to hundreds of thousands of dollars belonging to the plaintiff while the funds were under her control.

## Arzu v. Arzu

While the movant's burden is substantial, no crystal ball is required for the court to conclude that a fraudulent intent to avoid enforcement of the judgment exists. Rather, the First Department's *Arzu v. Arzu*<sup>9</sup> rationale is compelling:

In light of the father's patently incredible and almost entirely undocumented explanation as to what happened to hundreds of thousands of dollars belonging to plaintiff and exclusively within his control as a fiduciary, it is reasonable to infer that defendants disposed of or secreted at least some of plaintiff's property. Their failure to provide plaintiff with an ongoing accounting or, at the very least, come forward with a contemporaneous record of

the disposition of plaintiff's funds entitles us to conclude that they acted with an intent to defraud plaintiff, their creditor. (See, CPLR 6201[3].) "[I]t is not always practicable to establish by proof the existence of a fraudulent intent on the part of the debtor even when in reality it exists. Direct proof of the fact can rarely be obtained, and when it is established it must ordinarily be inferred from circumstances." [emphasis added].

## Professor Alexander's Commentaries

In summarizing some of the relevant factors which courts rely upon to analyze circumstantial evidence sufficient to infer fraudulent intent so to trigger an attachment premised upon 6201(3), Professor Alexander teaches that:

Potential additional factors include the timing of transfers in proximity to litigation threats made known to the defendant, the extent of such transfers and defendant's financial status thereafter, the relationship between the defendant and transferees, misrepresentations and misleading statements made by the defendant about his assets and intentions, and other furtive conduct, such as refusing to respond to phone or mail inquiries [emphasis added].<sup>10</sup>

To the extent that Professor Alexander confirms that a debtor's refusal to respond to inquiries constitutes "furtive" conduct reflecting on a debtor's fraudulent intent, it

is likewise wise for movant's attorney to make an initial investigation, and then to monitor a defendant's assets; evasive and misleading efforts by the defendant may be a sufficient factor in the analysis.

As the foregoing authority confirms, there are few bright-line rules that courts rely upon to determine whether sufficient circumstantial evidence of fraudulent intent exists. Counsel will bear the burden of establishing that the only objective inference to be drawn from a defendant's conduct is the manifestation of intent to defraud and that there is no other reasonable, benign explanation for a transfer.

Note: Mr. Barnes, a member of BARNES & BARNES, P.C. in Melville, practices commercial litigation. He can be reached at LKB@BARNESPC.COM

<sup>1</sup> Attachment Premised Upon a Foreign Confession of Judgment, SUFFOLK LAWYER.

<sup>2</sup> *Eaton Factors Co. v. Double Eagle Corp.*, 17 A.D.2d 135, 136, 232 N.Y.S.2d 901, 903 (1st Dep't 1962).

<sup>3</sup> In the alternative, if the transfer is anticipated but has not yet occurred, the movant must satisfy the Court that a sufficient basis exists to warrant court intervention in advance of the forthcoming disposition.

<sup>4</sup> *Supra*, note 2, at 136, 903.

<sup>5</sup> *Computer Strategies, Inc. v. Commodore Business Machines, Inc.*, 105 A.D.2d 167, 173, 483 N.Y.S.2d 716, 721 (2nd Dep't 1984).

<sup>6</sup> *Arzu v. Arzu*, 1993, 190 A.D.2d 87, 92, 597 N.Y.S.2d 322, 325 (1st Dep't 1993).

<sup>7</sup> 306 F.Supp.2d 482 (S.D.N.Y. 2004).

<sup>8</sup> 242 A.D.2d 371, 661 N.Y.S.2d 281 (2nd Dep't 1997).

<sup>9</sup> 190 A.D.2d 87, 597 N.Y.S.2d 322 (1st Dep't 1993)

## Attachment Premised Upon Intent to Defraud (Continued from page 11)