

MORITT HOCK & HAMROFF LLP

Strength In Partnership

ATTACHMENT, SEIZURE & RECEIVERSHIP IN FEDERAL & NEW YORK STATE COURTS

A presentation for: The Nassau Academy of Law & Nassau County Bar Association

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Introduction

- A. Topics:
 1. Attachment,
 2. Prejudgment Seizure; and
 3. Receivership.
- B. Goal: Provide practitioners with an overview of the substantive and procedural requirements for seeking the foregoing provisional remedies in federal and New York State courts.

Attachment

A. Overview

1. All U.S. and many non-U.S. jurisdictions allow some form of pre-judgment attachment of assets at the outset of a lawsuit.
2. Attachment is a mechanism used by a plaintiff to affect a seizure of a defendant's property.
3. Attachment operates as security mechanism for payment of plaintiff's money judgment, depriving defendant of free use of property. Edmonson v. Artus, 2006 U.S. Dist. LEXIS 98216 (E.D.N.Y. 2006).

Attachment

A. Overview

4. The requirements for attachment generally are governed by state law. See Fed. R. Civ. P. 64.
5. Federal courts apply law of the state in which they sit, regardless of the basis for the federal court's jurisdiction (i.e. even in non-diversity cases). See Fed. R. Civ. P. 69(a).

Attachment

A. Overview

6. Federal Courts have no independent “federal” attachment device or procedure.
7. Statutory factors for attachment are construed strictly in favor of the party against which attachment is sought. See DLJ Mortgage Capital, Inc. v. Kontogiannis, 594 F. Supp. 2d 308 (E.D.N.Y. 2008).

Attachment

B. Elements

1. That there is a cause of action;
2. That it is probable that the plaintiff will succeed on the merits;
3. That one or more grounds for attachment provided in CPLR § 6201 exist; and
4. That the amount demanded from the defendant exceeds all counterclaims known to plaintiff. See Ally Bank v. Reimer, 2010 U.S. Dist. LEXIS 7887, *7 (E.D.N.Y. Jan. 29, 2010)

Attachment

C. NY CPLR Article 62

1. Governs whether a party can seek an order (writ) of attachment in a New York federal court. See Worldwide Carriers, Ltd. v. Aris S.S. Co., 312 F. Supp. 172 (S.D.N.Y. 1970).
2. CPLR §6201: Grounds necessary for issuance of an order of attachment:
 - i. May be granted in any action except matrimonial action.
 - ii. Plaintiff must be seeking a money judgment.

Attachment

C. NY CPLR Article 62

- iii. Plaintiff must satisfy one of the following:
 - a. Defendant must be nondomicillary residing out of state or a foreign corporation not qualified to do business in New York. See, e.g., Capital Ventures Int'l v. Republic of Argentina, 443 F.2d 214 (2d Cir. 2006); Armada (Sing) Pte Ltd. v. N. China Shipping Co., 633 F. Supp. 2d 168 (S.D.N.Y. 2009).

Attachment

C. NY CPLR Article 62

- b. Defendant resides in state but cannot be personally served.
- c. Defendant with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, is about to or has assigned, disposed of, encumbered, or secreted property, or removed it from the state or is about to do any of these acts. See, e.g., Allstate Ins. Co. v. Levy, 2012 U.S. App. LEXIS 7885 (2d Cir. Apr. 19, 2012).

Attachment

C. NY CPLR Article 62

- d. Action is by a crime victim suing perpetrator for damages caused by crime.
- e. Action based on judgment, decree or order of the Court of U.S. or any other court entitled to full faith and credit.

Attachment

C. Procedure for Order (Writ) of Attachment – CPLR § 6211

1. Motion on Notice or Without Notice
2. Supported by:
 - i. Affidavit
 - ii. Undertaking
 - iii. Filing (Confirmation)
 - a) Only done when attachment is sought ex parte
 - b) Plaintiff must file within 5 days after the granting of an order of attachment, the order of attachment and affidavit together with the summons and complaint unless time to file was extended.

Attachment

D. Judicial Confirmation of Ex Parte Order of Attachment-CPLR 6211(b)

1. In order to confirm an attachment, the plaintiff bears the burden of establishing that (i) the attachment is based upon proper grounds; (ii) there is a continuing need for the levy; and (iii) that there is a probability that plaintiff will succeed on the merits of the underlying claim. N.Y. C.P.L.R. 6211(b), 6223(b); Marschalk Co. v. Iran Nat'l Airlines Corp., 518 F. Supp. 69 (S.D.N.Y. 1981); See Mishcon De Reya N.Y. LLP v. Grail Semiconductor, Inc., No. 11-Civ-04971, 2011 U.S. Dist. LEXIS 150998 (S.D.N.Y. Jan. 6, 2012).

Attachment

D. Judicial Confirmation of Ex Parte Order of Attachment-CPLR 6211(b)

2. Where a plaintiff failed to timely move for the confirmation of the ex parte order of attachment on notice within five (5) days, the court will invalidate the ex parte order of attachment. See, e.g., Nemetsky v. Banque de Developpement de la Republique du Niger, 64 A.D.2d 694, 695 (2d Dept. 1978) (requiring a prompt hearing must follow the ex parte order); Eisenberg v. Citation-Langley Corp., 115 Misc. 2d 650 (Sup. Ct., New York County 1982).

Attachment

E. Levy of Attachment – CPLR § 6214

1. Sheriff levies upon any interest of the defendant in personal property or debt owed to the defendant. Sheriff may take actual or constructive possession of the property levied upon.
2. Levy prohibits the transfer of the property levied upon by the defendant.
3. If the plaintiff fails to proceed with the action the levy will be void after 90 days.

Attachment

F. Advantage

Maximize likelihood that plaintiff will be able to recover property sufficient to satisfy a judgment, or a portion thereof, upon ultimate disposition in that plaintiff's favor.

Prejudgment Seizure

A. Overview

1. Seizure - Provisional remedy to determine the right to possession of a chattel and deliver possession of that chattel to the party lawfully entitled to have possession.

Prejudgment Seizure

A. Overview

2. Prejudgment Seizure must comport with the requirements of the Fourth Amendment of the US Constitution as applicable to the States under the Fourteenth Amendment. See Krimstock v. Kelly, 306 F.3d 40 (2d Cir. 2002); see also Laprease v. Raymour Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970); Fuentes v. Shevin, 407 U.S. 67 (1972) (holding that "notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner" in replevin actions); Time Warner Entm't Co. v. Does, 876 F. Supp. 407, 412 (E.D.N.Y. 1994) (seizures in civil actions subject to Fourth Amendment scrutiny).

Prejudgment Seizure

A. Overview

3. NY CPLR Article 71 governs seizure of collateral prejudgment. See, e.g., Christie's Inc. v. Davis, 247 F. Supp. 2d 414 (S.D.N.Y. 2002); All Points Capital Corp. v Parkside Recycling, 2012 N.Y. Misc. LEXIS 778 (Sup. Ct., Nassau County Feb. 2, 2012).

Prejudgment Seizure

B. Procedure for Order of Seizure-CPLR 7102

1. Motion on notice or ex parte.
2. CPLR § 7102(c) provides that the application for an order of seizure shall be supported by an affidavit which shall clearly identify the chattel to be seized and shall state:
 - i. that the plaintiff is entitled to possession by virtue of facts set forth;
 - ii. that the chattel is wrongfully held by the defendant named;

Prejudgment Seizure

B. Procedure for Order of Seizure-CPLR 7102

- iii. whether an action to recover the chattel has been commenced, the defendants served, whether they are in default, and, if they have appeared, where papers may be served upon them;
- iv. the value of each chattel or class of chattels claimed, or the aggregate value of all chattels claimed;
- v. if the plaintiff seeks the inclusion in the order of seizure of a provision authorizing the sheriff to break open, enter and search for the chattel, the place where the chattel is located and facts sufficient to establish probable cause to believe that the chattel is located at that place;

Prejudgment Seizure

B. Procedure for Order of Seizure-CPLR 7102

- vi. that no defense to the claim is known to the plaintiff; and
- vii. if the plaintiff seeks an order of seizure without notice, facts sufficient to establish that unless such order is granted without notice, it is probable the chattel will become unavailable for seizure by reason of being transferred, concealed, disposed of, or removed from the state, or will become substantially impaired in value. See Nara Bank v L.I. Fine Antique Gallery, Inc., 2009 N.Y. Misc. LEXIS 4259 (N.Y. Sup. Ct. Aug. 11, 2009)

Prejudgment Seizure

B. Procedure for Order of Seizure-CPLR 7102

- viii. A court will deny an order of seizure based upon defective papers of counsel where counsel fails to submit an affidavit of the client. See, e.g., McKesson Automated Healthcare, Inc. v. Brooklyn Hospital Center, 4 Misc. 3d 491 (Sup. Ct. 2004) (averring that "CPLR 7102 (c) requires an affidavit which not only must name the chattel, but list among things, the value of the chattel claimed, and that no "defense to the claim is known to the plaintiff.").

Prejudgment Seizure

B. Procedure for Order of Seizure-CPLR 7102

3. Bond (undertaking) not less than twice value of chattel; may not be withdrawn until right of possession is resolved.
4. Summons and complaint must be filed before seizure.
5. Index number must appear on summons and complaint that one delivered to sheriff.

Prejudgment Seizure

C. Prejudgment Seizure in Federal Court Minimum Constitutional Requirements of Due Process

1. Paramount Pictures Corp. v. Doe, 821 F. Supp. 82, 87-88 (E.D.N.Y. 1993) citing Mitchell v. W.T. Grant Co., 416 U.S. 600, 616-18 (1970).
 - i. The availability of ex parte prejudgment seizure must be limited to situations where plaintiff has established that the property to be seized is of a type that can be readily concealed, disposed of, or destroyed;
 - ii. The plaintiff must allege specific facts based on actual knowledge supporting the underlying action and the right of plaintiff to seize the property;

Prejudgment Seizure

C. Prejudgment Seizure in Federal Court Minimum Constitutional Requirements of Due Process

- iii. The application for the order of seizure must be made to a judge rather than to a clerk;
- iv. The defendant has a right to a prompt, postseizure hearing to challenge the seizure; and
- v. The defendant must be able to recover damages from the plaintiff if the taking was wrongful and to regain possession of the seized items by filing a bond.

Receivership

A. Federal Court

1. FRCP 66 governs the appointment of a Receiver. See FRCP 66; Federal Home Loan Mortgage Corp. v. Spark Tarrytown, 829 F. Supp. 82 (S.D.N.Y. 1993); Owens v. Gaffken & Barriger Fund LLC, 2009 U.S. Dist. LEXIS 24487, 4 (S.D.N.Y. Mar. 23, 2009) ("A federal court has the power, in equity, to appoint a receiver to protect a party's interest in property 'where the rights over that property are in dispute.'") citing Varsames v. Palazzolo, 96 F. Supp. 2d 361, 365 (S.D.N.Y. 2000).

Receivership

A. Federal Court

2. Jurisdiction

- i. Application for receiver does not create federal jurisdiction.
 - a. Federal Court must already have subject matter jurisdiction over action on independent basis. 28 U.S.C. §§1331 and 1332; see, e.g., SEC v. Credit Bancorp, 138 F. Supp. 2d 512 (S.D.N.Y. 2001) ("While a district court has 'broad powers' and 'wide discretion' to fashion relief in an equity receivership, a court cannot expand its jurisdiction by creating a receivership. ...

Receivership

A. Federal Court

- ... Therefore, it must be ascertained whether there is an independent basis for subject matter jurisdiction over a receiver's declaratory judgment motion that does not run afoul of the jurisdictional bar.").
- b. District Court may exercise supplemental jurisdiction under 28 U.S.C. § 1367.
 - c. Receiver may bring any subsequent action under the supplemental jurisdiction of Court.

Receivership

A. Federal Court

- ii. Title 28 U.S.C. §959(b): Substantive rights, duties and liabilities of receivers are determined by state law and a receiver must administer the receivership property according to the applicable laws of the state in which the property is located in the same way the owner would be bound.
- iii. 28 U.S.C. §960: Tax liability attaches to the receiver just the same as if defendant was managing property.

Receivership

A. Federal Court

3. Role of Receiver - Preservation or Rehabilitation of Property
 - i. Assumes control over, takes custody of, or manages property that is involved or likely to become involved in litigation. See Lankenau v. Coggeshall & Hicks, 350 F.2d 61, (2d Cir. 1965); SEC v. Credit Bancorp, 290 F. Supp. 2d 418 (S.D.N.Y. 2003).

Receivership

A. Federal Court

- ii. Conserves property until outcome and determination of action. Prudential Ins. Co. v. Liberdar Holding Corp., 74 F.2d 50 (2d Cir. 1934).
- iii. Manage in an orderly and efficient manner preserving property for all interested parties.

Receivership

A. Federal Court

- iv. Function unlike bankruptcy trustee who liquidates assets. See Federal Home Loan Mortgage Corp., supra. ("[u]nder 28 U.S.C.S. § 959(b), a trustee, receiver or manager appointed in any cause pending in any court of the United States shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the state in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.").

Receivership

A. Federal Court

- v. Take direction from the court (as officers of court)
- vi. Receiver is not an agent of the parties.
- vii. District Court can establish any mechanism to preserve or manage property.

Receivership

A. Federal Court

4. Persons Prohibited from Acting as Receivers:
 - i. Clerks or deputy clerk of court
 - ii. Military personnel
 - iii. Persons employed by judge
 - iv. Related by marriage or consanguinity to judge.

Receivership

A. Federal Court

5. Appointment of Receiver
 - i. Motion to appoint receiver
 - a. Brought by any parties having interest in property eligible for receivership (provable interest).
 - b. A claim against defendant will not allow plaintiff to seek receiver.

Receivership

A. Federal Court

- c. Sufficiently allege defendant unable to manage property appropriately or defendant's continued involvement will result in the loss or dissipation of the property. See, e.g., SEC v. American Bd. of Trade, 1988 U.S. Dist. LEXIS 1595 (S.D.N.Y. Mar. 2, 1988).

Receivership

A. Federal Court

- d. Pleading requirements differ depending on whether notice was given or not. See, e.g., People v. Oriental Bank, 124 A.D. 741, 744 (N.Y. App. Div. 1908) (notice required "unless there be some emergency requiring immediate action").
- e. Unsecured creditor is not entitled to appointment of receiver without extraordinary circumstances or statute.

Receivership

A. Federal Court

- ii. See Gasser v. Infanti Int'l, 363 F. Supp. 2d 508 (E.D.N.Y. 2005); see also U.S. v. Gov't of Guam, 2008 U.S. Dist. LEXIS 23459 (D. Guam Mar. 17, 2008).

Receivership

A. Federal Court

6. Grounds for Determining Receivership

"The following factors are considered relevant to establishing the need for a receivership: '[F]raudulent conduct on the part of defendant; the imminent danger of the property being lost, concealed, injured, diminished in value, or squandered; the inadequacy of the available legal remedies; the probability that harm to plaintiff by denial of the appointment would be greater than the injury to the parties opposing appointment; ...

Receivership

A. Federal Court

... and, in more general terms, plaintiff's probable success in the action and the possibility of irreparable injury to his interests in the property." See Tex. 1845 LLC v. Wu Air Corp., 2012 U.S. Dist. LEXIS 14979, *22 (E.D.N.Y. Feb. 3, 2012); Ross v. Thomas, 2011 U.S. Dist. LEXIS 60444, n. 20 (S.D.N.Y. June 6, 2011) citing 12 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2983 (1973); Varsames, supra, 96 F. Supp. 2d at 365 (quoting Wright & Miller § 2983).

Receivership

A. Federal Court

7. Bond

- i. CPLR 64 governs bonding requirement.
- ii. Upon filing of a bond, the appointed receiver's authority relates back to the time when the Order of Appointment is issued. See Gasser v. Infanti Int'l, 363 F. Supp. 2d 508 (E.D.N.Y. 2005) citing C.P.L.R. § 6403 which provides that a "temporary receiver shall give an undertaking in an amount to be fixed by the court making the appointment, that he will faithfully discharge his duties"; see also SEC v. Credit Bancorp, 290 F. Supp. 2d 418 (S.D.N.Y. 2003).

Receivership

A. Federal Court

8. Duration, Modification or Termination
 - i. Until end of principal action or court discharges receiver. See, e.g., FTC v. Consumer Health Benefits Ass'n, 2011 U.S. Dist. LEXIS 141870, 4 (E.D.N.Y. Dec. 9, 2011) (appointment lasts "for such duration as the Receiver may in good faith deem to be necessary or appropriate to operate the business profitably and lawfully, if at all.").

Receivership

A. Federal Court

- ii. Court may vacate receivership order, dismiss receiver and restore property for debtor or create temporary receivership which will terminate if plaintiff fails to pursue action in a timely fashion.
- iii. Once terminated, receiver can still be sued in an individual capacity for improper conduct "outside the scope of authority under the order of appointment."
13-66 Moore's Federal Practice - Civil § 66.12

Receivership

A. Federal Court

- iv. Once terminated, court loses jurisdiction over property but "retains personal jurisdiction over the individual receiver and may hear suits alleging a breach of authority by the receiver toward the receivership assets." 13-66 Moore's Federal Practice - Civil § 66.12.

Receivership

A. Federal Court

9. Types of Receiverships
 - i. Primary Receiver: Receiver originally appointed in an action. See 13-66 Moore's Federal Practice - Civil § 66.05.

Receivership

A. Federal Court

ii. Ancillary Receiver:

- a. Receiver subsequently appointed in an action, who is generally responsible for aiding the primary receiver in obtaining the assets in the dispute. See 13-66 Moore's Federal Practice - Civil § 66.05; See generally National Fire Ins. Co. v Wrynn, 2011 N.Y. Misc. LEXIS 6520 (N.Y. Sup. Ct. Dec. 30, 2011); Levin v. Nat'l Colonial Ins. Co., 1 N.Y.3d 350 (2004).

Receivership

A. Federal Court

- b. "An ancillary receiver is particularly helpful if assets are located outside of the appointing court's district yet inside the ancillary receiver's district." 13-66 Moore's Federal Practice - Civil § 66.05

Receivership

A. Federal Court

- iii. Consenting Receiver: Receiver appointed on consent of the parties to the action. See Citizens & Northern Bank v. Pembroke Pines Mass Media, 2012 U.S. Dist. LEXIS 47174 (W.D.N.Y. Apr. 3, 2012) (debtor consenting the appointment of a receiver; Dunhill Asset Servs. III LLC v. 175 Dixon Ave. Realty, 2012 N.Y. Misc. LEXIS 899, *14 (Sup. Ct., Suffolk County Feb. 24, 2012) (order to terminate appointment of receiver denied since mortgagor consented to the appointment of receiver in mortgage documents).

Receivership

A. Federal Court

- iv. Reorganizational Receiver: Receiver appointed to assist in the reorganization of a corporation. See In re Hudson & M. R. Co., 174 F. Supp. 148 (D.N.Y. 1959).

Receivership

A. Federal Court

- v. Equity Receiver: Receiver appointed to manage real estate or a business until the court can fully and finally resolve the underlying private rights of the individual parties to the dispute. 13-66 Moore's Federal Practice - Civil § 66.03; See SEC v. Credit Bancorp, 2000 U.S. Dist. LEXIS 17171 (S.D.N.Y. 2000); SEC v. Byers, 637 F. Supp. 2d 166 (S.D.N.Y. 2009).

Receivership

A. Federal Court

- vi. Bankruptcy Receiver: Receiver appointed to assist the bankruptcy trustee in collecting assets. See 11 U.S.C. § 543; Adams v. Marwil (In re Bayou Group, L.L.C.), 363 B.R. 674 (S.D.N.Y. 2007).

Receivership

A. Federal Court

10. Jurisdiction after Appointment. 28 U.S.C. 754:
Grants receiver exclusive jurisdiction and control over property.

Receivership

B. NY Receivership – CPLR 64

1. Overview
 - i. CPLR 6401 permits the appointment of a receiver to preserve specific identifiable property that is the subject of the action. (Siegel §332).
 - ii. The appointment of a receiver is a drastic remedy that will be granted only if when the applicant has made a clear showing of necessity to conserve the property and protect the interest of the litigants. Schachner v. Sikowitz, 94 A.D.2d 709 (2d Dep't 1983).

Receivership

B. NY Receivership – CPLR 64

- iii. There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established. Armienti v. Brooks, 309 A.D.2d 659, 661 (1st Dep't 2003).
- iv. A receiver will not be appointed if the relief being sought is money damages.

Receivership

B. NY Receivership – CPLR 64

- v. Article 64 receivers are not to be confused with CPLR 5206 receiver or CPLR 5228 receiver appointed to help enforce money judgment. See, e.g., Hotel 71 Mezz Lender LLC v. Falor, 14 N.Y.3d 303 (2010).
- vi. Available in only Supreme Court and County Court.
- vii. Plaintiff must also demonstrate "damages that property will be removed from state, or lost, materially injured or destroyed. (Siegel §332 citing CPLR 6401(a)).

Receivership

B. NY Receivership – CPLR 64

2. Powers of a Receiver in NY – CPLR 6401(b)
 - i. Take and hold personal or real property and to sue for, collect, and sell debts or claims "upon such conditions and such purposes as the court and shall direct."
 - ii. Sale requires court approval.
 - iii. Hiring counsel requires court approval.
 - iv. Receiver must be disinterested person, but a party is often appointed.

Receivership

B. NY Receivership – CPLR 64

3. Procedure for Obtaining Receivership in NY
 - i. Motion:
 - a. Made by person having "apparent interest" in property to be received (CPLR 6401(c)).

Receivership

B. NY Receivership – CPLR 64

- b. Supported by:
 1. Affidavits
 2. Usually made by Plaintiff who brings action
 3. May be brought by non-party which makes non-party a party and constitutes an appearance (CPLR 6401(a)).
- c. Made on Notice.

Receivership

B. NY Receivership – CPLR 64

- ii. Receivership can be extended to another action involving same. Property (RPL §254(10)).
- iii. Ex parte appointment is allowed if contract calls for its availability, i.e. a mortgage.
- iv. Appointment may be made before or after Summons.

Receivership

B. NY Receivership – CPLR 64

- v. Receivership can extend beyond judgment "where primary purpose is to preserve property during appeal." CPLR 6401(c)
- vi. Lawsuit commenced against a Receiver must be by leave of court. If the leave requirement is not met, a court can grant a pro tunc order to sue receiver.

Receivership

B. NY Receivership – CPLR 64

4. Advantages for Appointment of Receiver
 - i. Increased value of assets by receiver by continuing business or selling assets.
 - ii. Preservation of value of assets by preventing the defendant from taking or misusing.
 - iii. Receiver must make reports to Court re: performance.

Receivership

B. NY Receivership – CPLR 64

5. Disadvantages for Appointment of Receiver
 - i. Decreased funds going to creditors and stockholders due to the added expenses incurred by the appointment of a Receiver. See Mabon v. Ongley Electric Co., 156 N.Y. 196 (1898).

Receivership

B. NY Receivership – CPLR 64

- ii. Upon application of a receiver, the court may direct the parties who sought that appointment to pay necessary expenses and compensation which exceeds the money in the receiver's hands upon termination of the receivership. Flotteron v. JEL Realty, 58 A.D.3d 677, 677 (2d Dept. 2009).

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**QUESTIONS??
THANK YOU.**

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