

## PRE-JUDGMENT ATTACHMENT LIEN MAY BE SUFFICIENT “CAUSE” TO LIFT AUTOMATIC STAY<sup>i</sup>

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11 U.S.C. 362(d)(1) empowers the Bankruptcy Court to grant relief from the automatic stay on the request of a party-in-interest “for cause, including lack of adequate protection of an interest in property of such party in interest.”<sup>ii</sup> Courts have broad discretion to lift the stay “for cause,” and typically determine whether such cause exists on a case-by-case basis using a number of factors.<sup>iii</sup> In the Second Circuit, Courts apply a twelve-factor test set forth in *Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.)*.<sup>iv</sup>

One “cause” that may justify the lifting of the automatic stay is a prejudgment attachment lien against the debtor’s property, if achieved outside of the preference period under Section 547 of the Bankruptcy Code. The Code “looks to state law to determine the effect and validity of such liens.”<sup>v</sup> Under New York law, when an order of attachment is levied on personal property of the debtor, a lien is placed on the property.<sup>vi</sup> New York law also requires that the attachment be “perfected” within ninety days of such levy.<sup>vii</sup> Perfection is then achieved upon the “unequivocal relinquishment of control and an explicit acknowledgment of the Sheriff’s right to the property.”<sup>viii</sup> Specifically, when a sheriff “acquire[s] possession.... the judicial lien securing [a] contingent judgment ... is perfected under New York law.”<sup>ix</sup>

Even after having perfected the attachment lien, however, a creditor may not proceed against property until judgment is entered in its favor.<sup>x</sup> If judgment is not ultimately entered and the action abates, the attachment will be annulled.<sup>xi</sup> Moreover, when judgment is finally entered and an execution is issued on it, priority under New York law dates back to the date on which the attachment was first levied.<sup>xii</sup> The judgment creditor who first levied its attachment order is then entitled to the property as though it “had levied it pursuant to the execution.”<sup>xiii</sup>

Thus, a New York creditor with a perfected prejudgment attachment lien could argue for the stay to be lifted to allow it proceed to judgment to protect its lien. While research has yet to uncover a case in which the argument has been successfully advanced under New York lien law, at least one other Bankruptcy Court has applied the principle to lift the automatic stay under Section 362(d,) based on comparable lien law of another jurisdiction.<sup>xiv</sup>

Similar to New York law, an attachment lien under California law is created in the creditor’s favor at the time of levying the attachment.<sup>xv</sup> Bankruptcy Courts in the Ninth Circuit have thus found that having obtained pre-judgment attachment lien against the debtor’s property under California law is a compelling factor for allowing a creditor to continue litigation in another forum. In the case of *In re Aquarius Disk Servs. Inc.*, for example, the Bankruptcy Court lifted the automatic stay so that a prepetition creditor who had levied a pre-judgment attachment could proceed to judgment on its state law claims.<sup>xvi</sup> Relying on the Ninth Circuit decision, *Wind Power v. Cannon Financial Group*, the Bankruptcy Court

explained that “while inchoate, an attachment lien differs from a mere unperfected interest in that it is not subject to a trustee’s avoidance powers.”<sup>xvii</sup> The Ninth Circuit in *Wind Power*, in turn, had relied on “a strong line of cases [] allowing pre-preference creditors to proceed to judgment.”<sup>xviii</sup>

In *In re Aquarius*, the Court recognized that, absent relief from the stay, a creditor with an attachment lien could be “relegated permanently to unsecured status” if not permitted to proceed to judgment, which in turn could “distort priorities.”<sup>xix</sup> By contrast, permitting a pre-preference, prejudgment attachment creditor to proceed to judgment would help “harmonize the interests of both the debtor and creditors.”<sup>xx</sup> Because New York lien law is similar to that of California, a New York creditor’s prejudgment attachment lien could similarly be sufficient cause to allow the creditor to proceed to final judgment on its state law claims.

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<sup>i</sup> By Jennifer Hall, Emmet, Marvin & Martin, LLP (July 14, 2021).

<sup>ii</sup> 11 U.S.C. § 362(d)(1).

<sup>iii</sup> See *In re Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.)*, 907 F.2d 1280, 1286 (2d Cir. 1990).

<sup>iv</sup> *Id.* (“(1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor’s insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant’s success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) the impact of the stay on the parties and the balance of harms”).

<sup>v</sup> *Wind Power Systems, Inc. v. Cannon Fin. Group, Inc. (In re Wind Power Systems, Inc.)*, 841 F.2d 288, 293 (9th Cir. 1988).

<sup>vi</sup> CPLR 6214.

<sup>vii</sup> *Id.*

<sup>viii</sup> *Fantasy Records, Inc. v. Travelers Indem. Co.*, 54 Misc. 2d 799, 801 (N.Y.C. Civ. Ct. 1967).

<sup>ix</sup> *In re Int’l Bank. Corp. B.S.C.*, 439 B.R. 614, 622 (Bankr. S.D.N.Y. 2010).

<sup>x</sup> CPLR 6226

<sup>xi</sup> CPLR 6224.

<sup>xii</sup> CPLR 6226.

<sup>xiii</sup> *Id.*

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<sup>xiv</sup> *FDIC v. Debtor & Trustee (In re Moscoso Villaronga)*, 111 B.R. 13, 18 (Bankr. D.P.R. 1989) (holding that recorded prejudgment attachment obtained under Puerto Rico law constituted perfected “judicial lien” and that creditor was entitled to relief from stay in order to pursue claim against debtor to judgment).

<sup>xv</sup> *In re Wind Power Systems, Inc.*, 841 F.2d at 291 (citing Cal.Civ.Proc.Code § 488.500(a)).

<sup>xvi</sup> 254 B.R. 253, 260-61 (Bankr. N.D. Cal. 2000).

<sup>xvii</sup> *Id.* at 256.

<sup>xviii</sup> *Id.* at 260.

<sup>xix</sup> *Id.* at 260-261.

<sup>xx</sup> *Id.* at 259.