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POST JUDGMENT REMEDIES: TIPS FOR LITIGATORS FROM A CREDITORS' RIGHTS ATTORNEY

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Post Judgment Remedies: Tips for Litigators from a Creditors' Rights Attorney

I. INTRODUCTION

Creditors' rights attorneys often file multiple suits in any given week. These suits are largely a special breed of suits, often resulting in default judgments with the real action not starting until after the judgment is signed. The problem of collecting judgments, however, is not limited to collection suits. The purpose of this article is to provide collection tips to general litigators.

II. ANALYSIS OF COLLECTIBILITY

The analysis of the collectibility of a claim should begin at the inception of the case. This will avoid the problem of the disappointed client who spends precious legal dollars only to discover that the judgment provides an empty victory. The collectibility analysis is three-fold: (1) are all potentially liable parties joined in the suit?; (2) what assets are available to satisfy the judgment?; and (3) how will one tap those assets for satisfaction of the judgment?

III. ASSET SEARCHES AND PRE-JUDGMENT DISCOVERY

A basic pre-suit asset search provides a good start to the collection analysis. This search begins with the property owned by the potential party, which can often be identified through appraisal district records, many of which are accessible on the internet. But the search should not stop there. If the claim is against an entity, one may want to check Secretary of State records <https://direct.sos.state.tx.us> for documents on file related to the debtor entity as well as any additional entities with which the officers of the company are associated. Perhaps a related entity is a proper party. Further, a review of the Texas Comptroller of Public Accounts records at <http://ecpa.cpa.tx.us> may reflect a forfeiture of corporate privileges which can result in personal liability for the officers and directors of the company under Texas Tax Code Section 171.255. Many real property records are now available on the net, thus affording the opportunity to detect fraudulent transfers of real property. A simple grantor/grantee search can detect transfers and may also tell you if the potential party is a judgment creditor or debtor in other cases if abstracts of judgment are in the search results. One may consider bringing a fraudulent transfer action in the primary suit since transfers can be fraudulent as to creditors with contingent claims. See Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code

§24.001 et seq. Searches on internet search engines such as Google at www.google.com are also useful in locating debtors, their assets, and news that may assist in the collection of the debt. As each potential party is added to the suit, so are their assets added to the collection pool.

In addition to basic searches that can be performed online or at the local courthouse, one may want to consider obtaining an asset search by a qualified investigator if the amount of the claim justifies the expense. Again, this should be done at the onset of the claim analysis. These searches often reveal information on potentially liable parties and provide a snapshot of the available assets for satisfaction of the judgment. A periodic update of the search may also provide a red flag if assets are moved during the course of the litigation. If pre-judgment remedies are warranted, the initial search and follow up searches may prove useful. An analysis of pre-judgment remedies is beyond the scope of this article, but remedies such as attachment require discovery of property subject to attachment. See Civ. Prac. & Rem. Code Chapter 61.

Net worth is discoverable by statute to prove up exemplary damages for cases governed by Chapter 41 of the Civil Practices and Remedies Code. Prior to recent amendments to §41.011 the ability to discover the potential debtor's assets and liabilities at the early stages of the case provided a great opportunity to determine collectability of the claim very early on. For cases filed on or after September 1, 2015, discovery of the defendant's net worth is only allowed on motion after notice and hearing by "written order that the claimant has demonstrated a substantial likelihood of success on the merits of a claim for exemplary damages." S.B.No. 735.

IV. REMEDIES

Assuming one has joined all potentially liable parties and becomes a judgment creditor, the post judgment remedies for collecting the judgment include: (1) post judgment discovery, (2) judgment liens, (3) writs of execution, (4) garnishment, and (5) turnover. A consideration of those remedies provides the balance of this article.

A. Post Judgment Discovery

Texas Rules of Civil Procedure, Rule 621a, provides the authority for conducting post judgment discovery and provides that the successful party may initiate discovery in the same suit in which the judgment was rendered and use any discovery proceedings authorized by the rules for pre-trial matters. However, pre-trial discovery limitations do

not apply. Tex. R.C.P. Rule 190.6 provides that limitations on discovery do not apply to discovery conducted under Rule 621a. The use of contempt to enforce post judgment discovery under Tex. R. C. P. 215.2(b)(6) is a common practice. This discovery is available when the judgment is final as to all parties and issues. In re Edward B. Elmer, M.D. P.A., 158 S.W. 3d 603 (Tex. App. – San Antonio 2005, orig. proceeding). “Final” does not mean unappealable or even that the case has not been appealed. One may proceed with post judgment discovery as long as a supersedeas bond is not on file. Tex. R.C.P. Rule 621a. Pressing forward with post judgment discovery can encourage the posting of a supersedeas bond. The collectibility of a judgment is greatly enhanced by the posting of the bond or cash in lieu of bond.

See also “How to Take an Effective Post-Judgment Deposition” at dbrownlaw.com, including a deposition checklist.

B. Judgment Liens

A judgment lien is created by the proper recording and indexing of an abstract of judgment in the county real property records. It attaches to any non exempt real property in the county where filed. Tex. Prop. Code Ann. §52.001. Nothing in the statutes related to abstracts of judgment requires that the judgment be 30 days old. Tex. Prop. Code Ann. §52.002. If the judgment debtor has non exempt real property, it is vitally important to file the abstract as soon as possible after the judgment is signed. It is not uncommon for a judgment debtor to attempt some post judgment asset protection planning when the reality of the judgment sets in.

The abstract of judgment can be prepared by the judgment creditor’s attorney, unless it is a Federal Court judgment in which case it must be “on the certificate of the clerk of the court”. Tex. Prop. Code Ann. §52.002, 52.007. The contents of the abstract are governed by Texas Property Code Ann. §52.003 (Vernon Supp. 1993). While §52.003 provides that the abstract may include the mailing address for the judgment creditor, §52.0041 requires the mailing address in order to prevent a filing penalty. Strict compliance with the statute is required because it is a non-consensual lien. Rosenfield v. Alley & Stainless, Inc., 62 B.R. 515 (Bankr. N.D. Tex. 1986). If one fails to strictly comply with the requirements, no lien attaches.

The judgment lien attaches to property that was previously exempt and becomes non exempt. Walton v. Stinson, 140 S.W. 2d 497 (Tex. App. – Dallas 1940, writ ref’d); Intertex, Inc. v. Kneisley, 837

S.W. 2d 136 (Tex. App. – Houston [14th] writ denied). It also attaches to after acquired non exempt property. Tex. Prop. Code Ann. §52.001. Therefore, one should consider filing the abstract in every county in which the debtor owns property, does business, or may inherit property. The lien continues for ten years from date of recordation and indexing if the judgment does not become dormant. Tex. Prop. Code Ann. §52.006. One keeps the judgment alive by obtaining a writ of execution within ten years after the rendition of the judgment and using due diligence to obtain satisfaction of the judgment. This extends the life of the judgment for ten years from the issuance of the writ of execution. Civ. Prac. & Rem. Code §34.001; Ross v. American Radiator & Standard Sanitary Corp., 507 S.W. 2d 806 (Tex. App. – Dallas 1974, writ ref’d n.r.e.). Dormant judgments can be revived by scire facias or action of debt brought no later than the second anniversary of the date the judgment becomes dormant (Tex. Civ. Prac. & Rem. Code §31.006). A new abstract should also be filed to extend the lien beyond the original ten year period. Tex. Prop. Code Ann. §52.006.

The judgment lien is effective even if a supersedeas bond is filed. The judgment debtor can obtain relief from the judgment lien under Chapter 52 of the Property Code.

In summary, one should always perfect a judgment lien as soon as possible after the judgment is rendered, even if the case is headed for the appellate courts.

C. Execution

As a general rule, the writ of execution is not issued until 30 days after the final judgment is signed. Tex. R. Civ. P. 627. However, the writ can be issued earlier upon affidavit that the judgment debtor is about to remove non exempt property from the county or transfer or secrete it for purposes of defrauding creditors. Tex. R. Civ. P. 628.

The general contents of the writ of execution are covered by Tex. R. Civ. P. 629. Additional requirements for the writ will depend on the nature of the recovery, i.e. whether it is a money judgment, for sale of particular property, for delivery of personal property or for possession or value of personal property, and are found at Tex. R. Civ. P. 630, 631, 632 and 633. The attorney should review the writ as issued to insure that the writ correctly reflects the judgment.

Local practice varies from county to county on whether writs are handled by the sheriff’s

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