

IS POST-JUDGMENT DISCOVERY OF A NON-PARTY'S ASSETS ALLOWED IN NEVADA?



THE ANSWER: IT DEPENDS.

BY AARON D. LOVAAS, ESQ.

After the entry of a civil judgment, the judgment creditor may proceed to execute on and collect the judgment against the judgment debtor under the framework and procedures set forth in Chapter 21 of the Nevada Revised Statutes and Rule 69 of the Nevada Rules of Civil Procedure (NRCPP). NRCPP 69(a) provides, “In aid of the judgment or execution, the judgment creditor ... may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.” (emphasis added). The plain language of the rule, therefore, and the use of the term “any person,” rather than “any party,” presupposes that there may be non-parties to the judgment or underlying litigation from whom the judgment creditor may need to obtain discovery in order to aid in the collection of the judgment.

As stated by the U.S. District Court, “The scope of post-judgment discovery is broad; the judgment creditor is permitted to make a broad inquiry to discover any hidden or concealed assets of a judgment debtor.” *Fagan v. Lawrence Nathan Associates, Inc.*, Case No. 2:13-cv-01748-RCJ-CWH (D. Nev. Dec. 2, 2013). The statute also contemplates broad post-judgment discovery by plainly stating, “Witnesses may be required to appear and testify before the judge or master conducting any proceeding under this chapter in the same manner as upon the trial of an issue.” Nev. Rev. Stat. 21.310. Despite this breadth, it is important for counsel to understand the extent of a judgment creditor’s right to discovery as to non-parties and the appropriate subject matter of such discovery.

Assets of Judgment Debtor in Non-Party’s Possession

Likely the most common form of post-judgment discovery directed towards a non-party occurs under the circumstances where the non-party is in possession and/or control of some of the judgment debtor’s assets. Nev. Rev. Stat. 21.120 allows a judgment creditor to cause the sheriff to serve a writ of garnishment upon any third party in possession or control of the property of the judgment debtor. Further, the judgment creditor may apply to the court for an order, upon sufficient proof, allowing the judgment creditor to examine, under oath, any third party in possession or control of the property of the judgment debtor or who is himself indebted to the judgment debtor. Nev.

Rev. Stat. 21.300; accord *Greene v. Eighth Judicial Dist. Court*, 115 Nev. 391, 395, 990 P.2d 184 (1999).

This procedure has remained largely unchanged in Nevada for well over a century; “The creditor is always entitled to prosecute the inquiry to such an extent as to enable him to ascertain the true condition of the property and business affairs of the judgment debtor.” *Hagerman v. Tong Lee*, 12 Nev. 331, 334-35 (1877). Therefore, where it is undisputed that the third party has possession or control of the judgment debtor’s property or the third party admits an indebtedness to the judgment debtor, the court may order that said property be paid over and applied to satisfaction of the judgment. *See Id.* at 335; Nev. Rev. Stat. 21.320.

But what happens when the third party voices an adverse claim to the property in its possession, or simply denies that the property or indebtedness is due the judgment debtor at all? If the third party takes such a position, then the court may not automatically make an order that the property in question be applied towards satisfaction of the judgment. *See Greene*, 115 Nev. at 395. “[T]he judge or referee can only order property to be applied to the satisfaction of the judgment when the debtor’s title thereto is clear and undisputed.” *Hagerman*, 12 Nev. at 335-36. In response to the third party’s adverse claim or denial, the trial court should first conduct a hearing or order a briefing to determine whether the judgment creditor can, by “clear and indisputable evidence,” establish that the property in question belongs to or is owed to the judgment debtor. *See Mona v. Eighth Judicial Dist. Court*, 132 Nev. Adv. Op. No. 72, ___, 380 P.3d 836, 844 (2016) (citing *Hagerman*, 12 Nev. at 335). If such proof cannot be made in the context of a hearing or briefing, then the court may authorize the judgment creditor to institute a separate action against the third party for the recovery of the property and, in the meantime, may enter an order forbidding the transfer or disposition of said property until the entry of a final order or judgment in the new action. Nev. Rev. Stat 21.330.

Non-Party Assets Subject to Discovery

Making reference to consistent opinions from the federal courts,¹ the Nevada Supreme Court has stated, “obtaining post-judgment discovery from nonparties is generally limited to a judgment debtor’s assets, and a judgment creditor may not inquire into the nonparties’ own assets.” *Rock Bay, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 205, 210, 298 P.3d 441, 445 (2013).

In *Rock Bay*, the judgment creditor held a Florida judgment against an individual judgment debtor named Kirsch and several entities of which Kirsch was the principal, as a result of Kirsch’s and those entities’ default under a settlement agreement. Sometime around the execution of a settlement agreement in the Florida case, Kirsch formed Rock Bay, LLC in Delaware and registered Rock Bay to do business in Nevada. Evidence of money transfers abounded among Kirsch, Rock Bay and the judgment debtor entities. After the judgment creditor was unsuccessful executing on its judgment in Florida, it domesticated the judgment in Nevada.

About a week later, Kirsch voluntarily dissolved Rock Bay. Nevertheless, the judgment creditors issued a subpoena in Nevada to the accounting firm providing accounting services to the judgment debtors, as well as Rock Bay. The subpoena naturally sought all of the accounting records of the judgment debtors, but also

sought the accounting records of non-judgment debtor Rock Bay. Similarly, the judgment creditors issued subpoenas to U.S. Bank in Nevada, seeking all of the banking records of the judgment debtors as well as Rock Bay, a non-judgment debtor. Rock Bay objected to the subpoenas and moved to quash them. The district court refused and allowed the discovery.

In considering whether the district court’s allowance of the judgment creditor’s discovery into the assets of non-judgment debtor Rock Bay was proper, the Nevada Supreme Court considered the close relationship and the deliberate timing of events among the judgment debtors and Rock Bay. The court emphasized:

- a. The timing of the formation of Rock Bay;
- b. The fact that Kirsch was the principal of Rock Bay, as well as the judgment debtor entities;
- c. The timing of the dissolution of Rock Bay;
- d. Money transfers among the judgment debtors and Rock Bay; and
- e. That the in-house counsel of the judgment debtors had an integral role in the formation and corporate maintenance of Rock Bay.

All of these facts collectively were sufficient to raise suspicion as to whether these were arms’-length transactions. The court noted, “[b]ecause the purpose of post judgment discovery is to locate the judgment debtor’s assets, discovery of a nonparty’s assets is permissible if it will lead to discovery of ‘hidden or concealed assets of the judgment debtor.’” *Id.* (citing *Caisson*

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Corporation, 62 F.R.D. at 334). Therefore, the court ultimately concluded in *Rock Bay* that, “discovery of a nonparty’s assets is permissible in certain limited circumstances. These circumstances include, for example, a situation ‘where the relationship between the judgment debtor and the non-party is sufficient to raise a reasonable doubt about the bona fides of the transfer of assets between them,’ or where the nonparty is the alter ego of the judgment debtor.” *Id.* (citations omitted).

Considering that *Rock Bay* is cloaked in terms of “special circumstances” and acknowledges that the general rule remains that “a judgment creditor may not inquire into the nonparties’ own assets[,]” the judgment creditor would be well-advised to marshal all evidence available of the special circumstances that would allow discovery of a non-party’s assets prior to making that attempt. *Id.* at 210.

Representative Capacity of Non-Party as to Judgment Debtor

In a case where a judgment debtor is an entity, acting through individual representatives or agents, a judgment creditor must take care in making those distinctions while conducting its post-judgment discovery. In *Mona v. Eighth Judicial Dist. Court*, *supra.*, a judgment creditor obtained a judgment against Michael Mona, individually and in his capacity as trustee of the Mona Family Trust. The California court also found that Michael and the trust were alter egos of one another. Rhonda Mona, Michael’s

wife, was also a trustee of the trust, but was not a party to the California litigation resulting in the judgment. The judgment creditor domesticated the California judgment in Nevada, and subsequently sought discovery into Rhonda’s personal financial affairs and sought to execute on bank accounts held solely in Rhonda’s name individually. Rhonda objected to the discovery efforts into her individual financial affairs.

The Nevada Supreme Court recognized that Rhonda was subject to a judgment debtor examination and writs of execution directed towards the trust in her capacity as a “managing agent of a party” (i.e. trustee). NRCP 37. However, the court found that the district court erred in allowing the judgment creditor to directly pursue Rhonda’s individual assets in satisfaction of the judgment against Michael and the trust. “Rhonda in her individual capacity, is a distinct legal person and is a stranger to Rhonda in her representative capacity as a trustee of the Mona Family Trust.” *Mona*, 380 P.3d at 842. “Because Rhonda in her representative capacity is a different legal personage than Rhonda in her individual capacity, NRCP 34 and Nev. Rev. Stat. 21.270 may not be used to compel Rhonda to produce documents or answer questions concerning her personal finances and affairs because she, in her individual capacity, is a third party to the underlying action.” *Id.* at 843.

The court did not state that Rhonda’s individual assets would *never* be subject to execution in satisfaction of the judgment, but noted that the creditor must follow the procedures

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set forth in Nev. Rev. Stat. 21.320 and discussed in *Hagerman and Greene*. See *Id.* at 844. The Nevada Supreme Court's words summarize this issue best: "An individual's personal assets are not subject to discovery or execution merely because the individual also serves as the managing agent of a judgment debtor in a representative capacity." *Id.*

While post-judgment discovery is broad and designed to allow the judgment creditor to cast a long shadow over the assets potentially available to satisfy its judgment, procedure and due process remain sacrosanct. Armed with the proper evidence and knowledge of those procedures, a judgment creditor's post-judgment discovery can, indeed, be far-reaching. Considering the challenges that third parties can present when evidence is lacking or procedure not followed, the judgment creditor would be wise to spend time on the front end of the collection process getting it right and minimizing the likelihood of facing those challenges down the road. **NL**

1. *Caisson Corporation v. County West Building Corp.*, 62 F.R.D. 331 (E.D. Pa. 1974) (inquiries of nonparties under FRCP 69(a) must be kept pertinent to the goal of discovering concealed assets of the judgment debtor and not be allowed to become a means of harassment of the nonparties); *Burak v. Scott*, 29 F.Supp. 775 (D.D.C. 1939) (a judgment creditor does not have any right to require the disclosure of assets of persons other than the judgment debtor under FRCP 69).



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