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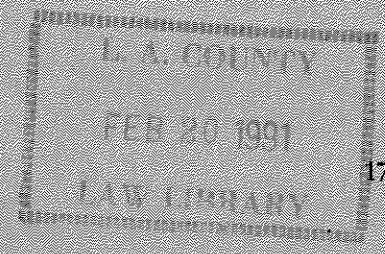
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Collecting from Judgment Debtors: The Third Party Examination



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Plaintiff obtains a monetary judgment from defendant in court. However, plaintiff is unable to locate and does not know how to contact defendant. Thus, it proceeds with a judgment debtor examination, much less collect on the debt. Nevertheless, plaintiff suspects that the judgment debtor's son has information concerning the debtor's whereabouts. Furthermore, plaintiff has gleaned some circumstantial evidence that the son may himself be indebted to the judgment debtor, his father—not an unlikely occurrence. Accordingly, counsel for the plaintiff petitions the court to examine this third party, the judgment debtor's son, to learn the debtor's *whereabouts*, and ultimately help lead to collection of the money judgment. Counsel for the third party (perhaps secretly employed by the debtor) objects to this examination on the grounds that such exam must be limited to questions concerning the debtor's property or the debt owed. How would a court likely rule?

The Statutes

Section 708.110(a), Section 708.120(a), and Section 708.130(a) of the California Code of Civil Procedure operative in 1983, dealing with Enforcement of Judgments, state:

“§708.110. Order for examination; service; contents.

- (a) The judgment creditor may apply to the proper court for an order requiring the judgment debtor to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to furnish information to aid in enforcement of the money judgment.

§708.120. Orders where property in possession or control of third party.

- (a) Upon ex parte application by a judgment creditor who has a money judgment and proof by the judgment creditor by affidavit or otherwise to the satisfaction of the proper court that a third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor in an amount exceeding two hundred fifty dollars (\$250), the court shall make an order directing the third person to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to answer concerning such property or debt. The affidavit in support of the judgment creditor's application may be based on the affiant's information and belief.

§708.130. Witnesses; privilege.

- (a) Witnesses may be required to appear and testify before the court or referee in an examination proceeding under this article in the same manner as upon the trial of an issue.”

The statutes are mute on the subject of the permissibility and extent of the examination of a third person beyond matters tied to the judgment debtor's property or to the debt owed by that third person to the judgment debtor.

Statutory Issues

A broad interpretation of §708.120 would lead one to conclude that any questioning that could be construed to lead to securing payment of the money judgment is allowable. This interpretation would expansively read the phrase “to answer concerning such property or debt”, and would see it in light of §708.110(a), which defines the scope of the exam to be “to furnish information to aid in enforcement of the money judgment.” The broad interpretation sees §708.110 and §708.120 being read together, in conjunction with §708.130(a)—“Witnesses may be required to appear and testify before the court or referee. . . in the same manner as upon the trial of an issue.” Under this view, §708.120(a) would merely be the procedural “trigger” or “threshold” for noticing the examination.

The statutory amendments in 1983 made one noteworthy change in new §708.110(a). According to the Law Revision Commission Comment:

"Subdivision (a) of Section 708.110 supersedes the first sentences of former Sections 714 and 715. The former language requiring the judgment debtor to answer concerning his property has been revised to require the judgment debtor to furnish information to aid in enforcement of the judgment. This might include, for example, information concerning future employment prospects."¹

Thus at least as to the judgment debtor specifically, the scope of the examination appears to have been broadened. Interestingly though, no similar change was made to the new §708.120(a) dealing with third party examinations.

A contrary view however, focuses on the fact that §708.110(a) refers to *judgment debtor* exams, while §708.120(a) refers to third parties in control of a judgment debtor's property. This distinction may be a limitation on the broad interpretation; since the third party is not himself the object of the judgment, the scope of the exam arguably should be narrowed. An equally cogent argument can be made for interpreting §708.120(a) strictly, and thus confining the inquiry to the property and the debt, and not the whereabouts of the judgment debtor.

In support of this contrary view, note that elsewhere the legislature consistently limits the scope of witness questioning at a judgment debtor exam to questions regarding *property or debt*.² In this regard, C.C.P. §708.150(a) provides in relevant part:

"If a corporation, partnership, association . . . is served with an order to appear for an examination, it shall designate to appear and be examined one or more officers . . . or other persons . . . familiar with its *property and debts*." [Emphasis added.],

C.C.P. §708.180 provides in pertinent part:

(a) "...if a *third person* examined pursuant to Section 708.120 claims an interest in the property adverse to the judgment debtor or denies the debt, the court may, . . . determine the interests in the *property or the existence of the debt* . . ." [Emphasis added]

And C.C.P. §780.190 states:

"The court may permit a person claiming an interest in the *property or debt* sought to be applied in an examination proceeding to intervene in the proceeding and may determine the person's rights in the *property or debt* . . ." [Emphasis added]

C.C.P. §708.205(a) provides in pertinent part:

" . . . the court may order the judgment debtor's interest in the *property* in the possession or under the control of . . . the *third person* or a *debt* owed by the *third person* to the judgment debtor to be applied toward the satisfaction of the money judgment..." [Emphasis added]

In sum, the narrow interpretation reads §708.120(a) strictly, and contends that the broader view of §708.130(a) would make §708.120(a) impotent and unnecessary. "Possession or control of property or debt" of the debtor should be the entire focus of the examination. This view is supported by the legislative requirement that the affidavit supporting the exam disclose the property or debt owed by the third party to the judgment debtor, and by the other statutes cited above.

The Cases

Case law in this area is sparse, but does support the narrow reading of the scope of third person debtor examinations.

In *Trounce v. Whittier Savings Bank*, 136 Cal App. 761, 764 (1934) plaintiff sought an order to force a third party to turn over stock in their possession, allegedly the property of defendant corporation. The lower court denied the motion for an order requiring delivery of the stock. The appellate court agreed with respondent that third party exams were "entirely statutory and that the plaintiffs did not in any respect comply with the statute" (at 763). The law at issue, then CCP §717 (predecessor of CCP §708.120)³ was described by that court as requiring proof "that respondents had property of the defendant corporation and apply for an order requiring respondents to

¹ 16 Cal. L. Rev. Comm. Reports 1496 (1982)

² In a similar statutory framework, Section 491.110(a) of the California Code of Civil Procedure operative in 1983, dealing with pre-judgment attachment, echoes this theme:

"§491.110. Application and affidavit; order for appearance; service of order; lien

(a) Upon ex parte application by the plaintiff and proof by the plaintiff by affidavit or otherwise to the satisfaction of the proper court that the plaintiff has a right to attach order and that a third person has possession or control of property in which the defendant has an interest or is indebted to the defendant in an amount exceeding two hundred fifty dollars

(§250), the court shall make an order directing the third person to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to answer concerning the property or debt. . ."

³ Former CCP §717 read in relevant part: "upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars (\$50), the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same."

appear . . . and answer *concerning such property*" (at 764, emphasis added).

The court in *Coleman v. Galvin*, 78 Cal. App. 2d 313, 318 (1947), noted that the object of the judgment debtor examination is to allow "the widest scope for inquiry concerning the property and business affairs of the judgment debtor." In accord, *McCullough v. Clark*, 41 Cal. 298 (1871). But the *Coleman* court continued—"a third person or corporation alleged to have property of a judgment debtor or to be indebted to him may be examined concerning the same" ("same" referring to the aforementioned property of the judgment debtor).

The case of *Young v. Keele*, 188 Cal. App. 3d 1090, 1092 (1987) involved an interpretation of Section 708.130(a) in a judgment debtor exam. Keele, the judgment debtor, refused to answer certain questions, claiming that those relating to settlement negotiations were prohibited by Evidence Code §1152, 1154.

The court held that §708.130(a) should not be read literally and broadly so as to mean that all aspects of testifying at trial would equally apply in a debtor exam. Thus, the case can support a narrower reading of the section in the third party exam context as well. On the other hand, by ruling that the bar against use of settlement discussions at trial did not apply to judgment debtor exams, the practical effect here was to *broaden* the scope of questioning at the judgment debtor exam.

Farmers & Merchants Bank v. Bank of Italy, 216 Cal. 452, 14 p. 2d 527 (1932) suggests that the third party questioning be limited to his debt owed to or property held for the debtor. In that case, plaintiff/appellant's lawsuit directly against a debtor to the judgment debtor was rejected for failure to properly follow procedures for enforcement of writs of execution or for creditors' bills in equity. The court noted the appropriate procedures under the statutes dealing with proceedings supplementary of execution (then CCP §714, et seq.). The court stated that:

"Under those sections an alleged debtor of the judgment debtor *may be fully examined* under oath *as to any assets of the judgment debtor under his control*, witnesses may be called, and if it appears that any such assets are in his hands, the court may order them to be turned over to the judgment creditor." (emphasis added) at 455.⁴

In *Kyne v. Eustice*, 215 Cal. App. 2d 627, 633, 30 Cal. Rptr. 391 (1963) the court discussed the obligations of third parties to answer informal inquiries concerning property owed to the debtor prior to a formal third party examination. The court stated that such proceedings can

be used, but the third party need not answer the informal inquiry. The court made no mention about having to divulge personal information on the judgment debtor, either formally or informally.

These statements illustrate the historic use of the judgment debtor exam to ascertain information concerning the property and debts of the judgment debtor, and that no more than this same level of scrutiny is applied to third person judgment debtor exams as well.

Analysis

There are major consistencies in these cases. Those that concern judgment debtor exams evidence a broader view of the scope of questioning. But in cases involving third person debtors, the scope of questioning is narrower. The foci of the third party exam are the property of and debts owed to the judgment debtor by the third party, and the enforcement of the money judgment. This trend from case law is consistent with the most logical reading of the statutes.

The language in the statutes, both the old §717 and the new §708.120, focuses on the *property* of the third person—the property or debts they may owe the judgment debtor. These debts are assets to the judgment debtor that the judgment creditor can obtain to satisfy the money judgment.

A powerful rule of statutory construction is that "(e)xpress authority granted by statute has, by implication, been held to deny authority to do that which is not granted." Gaylor, *An Approach to Statutory Construction*, 5 Southwestern University Law Review 349, 397 (1973). Thus, the express authority to question re property or debts owed implies no right to extend the third party exam to other area.

The proceeding is intended to be summary and factual. As such, its scope should be narrower than that of a trial, where wider latitude may be given and broader issues are in question. The parameters of this examination have remained the same through over one hundred years of case law and through a revision of the California Code of Civil Procedure. None of the cases authorize questions that seek answers that are only indirectly or peripherally related to the property and assets of the judgment debtor.

In such an atmosphere, legislative intent becomes a key ingredient. Were the 1983 statutory changes to be read together, with §708.120(a) simply being procedural, or was §708.120(a) to be read literally and to be narrowly construed in the context of third parties? The logic of the latter view seems persuasive. Combining §708.110(a) with §708.130(a) and superimposing them in full over §708.120(a) seems to

⁴ In accord, *Matteson, etc. Mfg. Co. v. Conley*, 144 Cal. 483, 485, 77 Pac. 1042 (1904).

negate the purpose and potency of the legislative intent behind the drafting of §708.120(a). If that were the proper interpretation, merely possessing "information to aid in enforcement of the money judgment" would seem to suffice to both allow the examination and to define its scope. However, this expansive view which would negate the clear meaning of §708.120(a), is contrary to a key tenet of statutory construction:

"Where the language of a statute is susceptible of two constructions, one of which . . . will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." *Warnerv. Kenny*, 27 Cal. 2d 626, 629 (1946).

Furthermore, the concept of privacy rights, (Cal. Const. Art I, §1; *Emerson v. J. F. Shea Co.*, (1978) 76 Cal. App. 3d 579) should hold greater sway in the questioning of a third person on issues not of direct concern to the property of the judgment debtor, than they would be in questioning the judgment debtor himself. The legislature and the courts are obviously interested in securing compliance by debtors when judgments have been rendered against them. But in cases where third parties are involved, such interests must be balanced against privacy rights lest these interests become intrusions.

Strategy

If your client, the third party, is asked questions beyond those dealing solely with property of or owing to the

debtor, a protective order can be sought. §708.200 provides that:

"In any proceeding under this article, the court may, on motion of the person to be examined or on its own motion, make such protective orders as justice may require."

It would appear that the procedures and case law under the Civil Discovery Act of 1986 (CCP §2016, *et seq.*) dealing with *inter alia*, protective orders may be referenced as additional authorities.⁵

Nevertheless, even if the scope of the exam is limited as described above, crafty creditor's counsel might be able to elicit information, if the examinee has any, as to the location of debtor. For example, if it was determined that the third party does owe a debt to the judgment debtor and is making payments, then inquiries as to when and where such payments are made, and seeking photocopies of cancelled checks or related agreements might shed some light on the debtor's whereabouts.

Conclusion

The scope and extent of post-judgment third party examinations has not been well defined by case law, and the statutory scheme contains some ambiguity. The recommended approach however, is to focus on the specific statute authorizing such exams, CCP §708.120(a), and to treat the emphasis on property or debt of the defendant not merely as threshold procedural tests, but as restrictions on the exam's scope.

⁵Section 708.200 is new and is comparable to the court's authority under Section 708.020 (which incorporates Section 2030) to make a protective order with respect to written interrogatories to the judgment

debtor. Under Section 708.200, the court is authorized to make the order on its own motion as well as on motion of the person to be examined." [15 Cal.L.Rev.Comm. Reports 1507 (1982)].