

How Pandemic Is Affecting NY Court Receiver Appointments

By **Gary Fellner**

In litigation, especially when the adversary has committed a fraud or has simply not paid a judgment even after a court has awarded it, the question often arises: Can the client get a court-appointed receiver to protect and enforce the client's rights?

The appointment of a receiver is generally deemed to be a drastic remedy because a third person is installed to effectively take over another's private business operations.[1] The application may be granted, however, where the facts warrant it.

The application is governed by different standards, depending on the jurisdiction and the factual circumstances involved. For example, Delaware addresses receivership rather frequently in the context of winding down and liquidating a corporation to ensure the corporation's assets are properly distributed.[2]

The federal courts can also appoint a receiver when assets extend beyond state lines, and will consider such factors as the probability that fraudulent conduct has occurred or will occur; the validity of the claim by the party seeking the appointment; whether there is an imminent danger that property will be concealed, lost or diminished in value; the inadequacy of alternative legal remedies; the lack of a less drastic equitable remedy; and the likelihood that appointing the receiver will do more good than harm.[3]

Further, it is well known that a receiver is often appointed when a bank loan is in default and the lender forecloses on real property, and needs to ensure rents are collected and paid to the lender while the action is pending. Each state and jurisdiction's rules and case law differ and must be consulted.

The discussion below concerns New York state, and in particular, two recent state court opinions dealing with the receivership application in aid of enforcing a money judgment decided during the COVID-19 crisis.

There are a variety of factual settings when a receiver may be appropriate, ranging from carrying out a judicial mandate or judgment, helping a trust beneficiary preserve trust assets, helping secured creditors protect collateral, and overseeing an ailing business. In New York, four statutes generally govern the appointment of a receiver.

Section 5106 of the Civil Practice Law and Rules allows a court to appoint a receiver of property that is the subject of an action to dispose of it according to the court's direction. For instance, in *Studio #54 Disco Inc. v. Pee Dee Jay Amusement Corp.*, an action for specific performance to compel the sale of a restaurant business, a state appellate court in 1981 granted the plaintiff's motion to appoint a receiver to consummate the sale.[4]

A temporary receiver may also be sought under Article 64 of the Civil Practice Law and Rules when there's danger that the property at issue will be removed from the state, lost, materially injured or destroyed. Real Property Law 254(10) also authorizes appointment of a receiver when a bank forecloses on a mortgage containing a provision authorizing the receiver's appointment.



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And a receiver is authorized under Civil Practice Law and Rules Section 5228 after a judgment creditor gets a money judgment awarded and the judgment debtor doesn't pay up. A receiver may be appointed to help the judgment creditor collect the judgment. By statute, the receiver can administer, collect, improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest.

In deciding an application to appoint a receiver under Section 5228, New York state and federal courts consider the (1) alternative remedies available to the creditor; (2) the degree to which receivership will increase the likelihood of satisfaction; and (3) the risk of fraud or insolvency if a receiver is not appointed.[5] A receivership has been held especially appropriate when the property interest involved is intangible, lacks a ready market, and presents nothing that a sheriff can work with at an auction, such as a judgment debtor's interest in a business.[6]

Thus, in a decision in *Herman v. Herman* affirmed earlier this year, a state court appointed a receiver in aid of enforcement of a multimillion-dollar judgment where it was shown the judgment debtor hid assets, had taken various steps to frustrate the plaintiffs' ability to enforce the judgment, including encumbering his real property, and filed a frivolous bankruptcy action.[7]

The court there granted the petition to appoint a receiver to allow him to execute a deed transferring an interest held by the judgment debtor in valuable real estate to a trust and to collect from the judgment debtor the New York City and New York state transfer taxes owed.

Two Recent Cases: Motion for Receiver Denied

With this backdrop in mind, two recent cases decided by the New York Supreme Court for New York County are noteworthy.

The first case, *ICICI Bank UK PLC Antwerp Branch v. Manilal* decided on May 27, involves an international enforcement action of a money judgment that shows that all i's must be dotted and t's crossed when seeking a receiver.[8]

The plaintiff, ICICI Bank, an international financial institution with a branch in Antwerp, Belgium, loaned a diamond company \$9 million. Certain assets were pledged as collateral. The company's directors diverted those assets, including \$6 million in diamonds. The diamond company filed bankruptcy, causing ICICI to sue the company's directors.

ICICI won that lawsuit in Antwerp Commercial Court, and final judgment was entered for €4.5 million against one of the directors, Salil Manilal. ICICI then sought to enforce the judgment in New York, and filed an action under Section 3213 of the Civil Practice Law and Rules, which provides for accelerated recognition of foreign country money judgments in New York.

Manilal made several arguments to defeat enforcement in New York, none of which were availing.[9] The court noted that "New York has traditionally been a generous forum in which to enforce judgments for money damages rendered in foreign courts."

After obtaining an ex parte order of attachment against various residential properties Manilal owned in Manhattan, ICICI moved for a receiver to sell the properties. The court looked to the three factors cited above — consideration of alternative remedies available to the creditor, the degree that receivership will increase the chance of satisfaction, and the

risk of fraud or insolvency if the receiver is not appointed.

ICICI argued that, even though a sheriff might be able to sell the properties, that would be more onerous than if a receiver does so, and a receiver could yield a higher price. The court wrote: "Although this is a relevant consideration, ICICI has failed to identify and address any of the other factors the Court should consider in deciding whether to appoint a receiver."

The motion for a receiver, therefore, was denied. The court apparently did not give ICICI the opportunity to supplement its brief to address the other factors, something courts often do in order to fully address the merits. The court ruled that ICICI failed to demonstrate how a receiver will increase the chances of getting paid over other means and did not address the risk of fraud or insolvency.

It is not clear from the opinion if oral argument was held aside from the filed papers to address the court's questions. Oral arguments are often excellent opportunities for lawyers to understand a court's concerns and for the court to better understand the facts.

Although oral arguments are often dispensed with during the pandemic for safety reasons, argument can be extremely beneficial even if it must be done virtually or by telephone during the crisis. It can allow lawyers to request supplemental briefing, something that, if permitted, may be dispositive if the judge is concerned about factual or legal issues not adequately addressed in the papers.[10]

The second case of interest, 856 Eighth LLC v. Pizza Pasta Etc. Corp., decided on June 24, concerns the common situation when a judgment creditor seeks to recover a money judgment based on the judgment debtor's ownership interest in a private business. That is, the judgment debtor owns part of a limited liability company or private corporation not joined in the judgment and the judgment creditor wants to levy and collect on the interest.

Selling private corporate stock or an LLC membership interest toward satisfaction of a money judgment is cumbersome and a far cry from liquidating publicly traded stock. Will the receiver angle work? In the middle of a pandemic, the trial court recently ruled "no."

The judgment debtor, Amadeus Manata, held interests in pizza restaurants, including the well-known Ray's Pizza shops in Manhattan. Judgment was entered for the landlord, which rented space to the pizza shop, against both the business and Manata for \$388,064. The landlord alleged that Manata vacated the space and opened another pizza restaurant nearby. Though Manata claimed he did not own the new pizza storefront, the documents in the record showed otherwise.

The landlord also asserted Manata lived in an expensive home and had moved assets to frustrate enforcement. It thus moved for a receiver to manage or sell the pizza restaurants. Manata argued in response that the landlord did not show the value or marketability of the restaurants, that it did not establish an increased likelihood the judgment would be satisfied by a receiver's appointment, and that receivership would likely result in closure of the shops and loss of employment for the employees.

The court denied a receiver. In so doing, it relied on the subjective notion, supported in some cases, that a motion for a receiver should only be granted when a "special reason appears to justify one." While acknowledging that a receiver has been held "especially appropriate when the property interest is intangible, lacks a ready market, and presents nothing that a sheriff can work with at auction," the court observed that during this

unprecedented period caused by the global pandemic, the value of the pizza shops is uncertain.

The court felt it is more useful to keep the pizza shops open without a receiver, at least for the time being, without prejudice to the landlord's ability to renew the application if and when it can show a sale of the business would be productive toward satisfying the judgment.

Conclusion

A court-appointed receiver for a business or real property can be very beneficial in many situations. The reported cases demonstrate that absent an agreement authorized by statute, as true with a mortgage, evidence must be shown to justify a receiver's appointment. In the end, what justifies the appointment is fact-dependent.

The petition should properly address each factor cited by the courts to bolster the chance of success. Courts are also more likely to appoint a receiver when a sizeable amount of money is at stake, fraud or wrongdoing warrants an intermediary to protect others' rights, or economic harm or loss of the property or interest is likely to occur without the appointment. When a money judgment is involved and the appointment will significantly help satisfy it, and other suitable alternatives are not appropriate, the appointment is more likely.

During the COVID-19 crisis, the impacts of the pandemic when appointing a receiver are also being considered by courts. Besides the factors the courts routinely weigh, litigators seeking a receiver should be mindful of the appointment's real-world effects during the pandemic.

For example, if business revenue is suffering because of the pandemic and appointing a receiver for the property or interest would put people, who would otherwise likely regain employment in ordinary times, out of work, it will be harder to get a receiver. Similarly, if there are reasons to expect that a business's value will improve once the crisis is mitigated, the appointment may be deferred to maximize recovery on a sale event even if the other factors support the receiver.

On the other hand, if it is shown that viable means to prevent fraudulent or mismanagement committed by those in control are unavailable, or if the appointment's postponement would not be beneficial and could cause more harm than good, such as when a business's or property's declining value is caused by mismanagement or pilferage rather than the pandemic's effects, the chances to get a receiver are much stronger.

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[1] The New York State Supreme Court, Appellate Division, Second Department, has held that appointment of a receiver is "a drastic remedy, and should be invoked only when the record establishes that this remedy is necessary and appropriate." [Rogers v. Rogers](#), 190 AD2d 720, 593 N.Y.S.2d 299 (2 Dept. 1993).

[2] Under 8 Del. C. §279, a creditor, stockholder, director or any other person who shows "good cause" can petition the Court of Chancery that a receiver be appointed for a dissolved corporation. The "primary purpose" of Section 279 "is to safeguard the collection and administration of still existing property interests of a dissolved corporation" and is "the statutory mechanism by which an already dissolved corporation may conclude its 'unfinished business' after its officers have been discharged and its legal existence ended."

[3] [Aviation Supply Corp. v. R.S.B.I. Aerospace Inc.](#), 999 F.2d 314, 316–17 (8th Cir. 1993).

[4] [Studio #54 Disco Inc. v. Pee Dee Jay Amusement Corp.](#), 81 A.D.2d 911 (2d Dept 1981). See also [Caponera v. Caponera](#), 165 A.D.3d 1221 (2d Dept 2018) (receiver appointed when spouse refused to transfer real property as directed by the court to the other spouse).

[5] *Id.*, citing [United States v. Zitron](#), 1990 WL 13278, (S.D.N.Y 1990).

[6] [Coscia v. Eljamal](#), 2015 NY Slip Op 25109 (New York Sup. Ct. Westch. Co. 2015).

[7] [Herman v. Herman](#), 2018 NY Slip Op. 32652(U) (Sup. Ct. New York Co. 2018), *aff'd*, 2020 NY Slip Op 00538 (1st Dep't 2020).

[8] [ICICI Bank UK PLC Antwerp Branch v. Manilal](#), 2020 Slip OP. 31606(U) (Sup. Ct. May 27, 2020).

[9] The court observed, for example, that failure to follow strict time requirements to provide timely notice of a return date on a motion for summary judgment in lieu of complaint under CPLR § 3213 was not fatal when the defendant appeared on the merits and suffered no prejudice.

[10] Courts are steadily reopening in New York as safety protocols are being implemented by court administrators. One can therefore expect arguments can resume safely in the courthouses.