

#39.70

2/28/72

Memorandum 72-18

Subject: Study 39.70 - Prejudgment Attachment (Determination of Probable Validity of Claim and That Grounds for Attachment Exist)

Background

The staff has tentatively adopted the following basic scheme for obtaining a writ of attachment. The plaintiff applies for and obtains an "order authorizing issuance of a writ of attachment." Such an order is granted if a judicial officer finds at a noticed hearing that the plaintiff's claim is probably valid and that grounds for attachment (type of action in which attachment permitted) exist. This portion of the scheme is considered in this memorandum.

When the plaintiff has obtained an order authorizing issuance of a writ of attachment, he will then apply for the writ to an appropriate officer. The writ will be issued for specific nonexempt property upon the plaintiff providing the required undertaking. We do not deal with this portion of the scheme in this memorandum. It would be possible, for example, if Mr. Stanton's suggestion were adopted, to revise the procedure for obtaining the order authorizing issuance of a writ of attachment (set out in Exhibit I attached) to provide that the procedure results in the issuance of a writ of attachment which is then given the same effect as such writs were formerly given. However, we do not want to discuss that problem at this time. We will deal with that problem in Memorandum 72-20.

Attached Statutory Provisions

Attached as Exhibit I are statutory provisions dealing with the order authorizing issuance of a writ of attachment.

It should be noted that we plan to permit the hearing (if one is required) on whether property is exempt and whether the bond is proper to be combined with the hearing provided in the attached provisions at the option of the plaintiff. But that matter is considered in Memorandum 72-20. At this point, we hope that our discussion can be limited to the attached provisions.

In drafting the provisions, we have adopted the suggestion of several Commissioners that the parties be required to submit affidavits containing the facts that support their positions. We have drawn on the summary judgment procedure (Code Civ. Proc. § 437c) and the temporary injunction procedure in drafting the suggested provisions.

At the meeting, we expect to go through the attached provisions section by section. We hope that you will examine them carefully prior to the meeting.

There are some significant matters to be noted:

(1) Section 540.080 requires that the defendant file a notice of opposition if he opposes the issuance of the order. Even if such a notice is not filed, the judicial officer must examine the documents submitted by the plaintiff to determine that they set forth facts upon which the judicial officer can find that grounds exist for attachment (proper type of case) and that the plaintiff will probably obtain a judgment against the defendant on his claim. (See Section 540.110.)

(2) Section 540.100 is the key section. This section presents the most difficult policy question. First, the defendant is required to produce counter-affidavits and to make known the basis of his opposition. Second, the judicial officer examines the documents produced by the defendant to determine whether they are sufficient to present a triable issue of fact whether the plaintiff is entitled to the order. Such an issue may be presented by defendant's

affidavits which show facts contrary to those contained in plaintiff's affidavits (creating issue as to whether plaintiff has a prima facie case) or by defendant's affidavits which show facts sufficient to constitute a defense to plaintiff's action. In such a case, how is the judicial officer to determine whether the plaintiff will probably obtain a judgment? The decision often will depend on the credibility of witnesses. Also, how can the credibility of the witnesses be tested if they are not brought before the judicial officer and subject to cross-examination by the parties? And, if this is necessary, will we not be creating the kind of a situation that obtains in preliminary injunction cases, some of which require considerable time to determine and often as a practical matter are the end of the litigation? We have tried to deal with this matter by requiring the judicial officer to determine the matter on the basis of the documents supplied and, if this is not possible, in the most expeditious manner possible.

It should be noted that the difficult problem is created by a standard that requires an evaluation of the relative strength of each party's case--whether it is more probable than not that the plaintiff will recover a judgment. At the last meeting, the Commission considered and rejected the possible standard that attachment not be permitted if the defendant produces affidavits that are sufficient to present a triable issue of fact whether the plaintiff is entitled to the order.

It should be recognized that the procedure proposed does not necessarily mean that there will be a great number of extended hearings on whether an order authorizing a writ of attachment should be granted. First of all, the burden on the plaintiff (application and supporting affidavits) may reduce the number of requests for such orders. Second, the burden on the defendant

(notice of opposition and supporting affidavits) may make it impossible for the defendant to oppose the request (as where he can get no affidavit in support of his opposition because he has no defense and is unwilling to make a false affidavit) or may discourage the defendant from going to the trouble of opposing the request in cases where the levy procedure will not be greatly detrimental to him. In this connection, it should be noted that the defendant is encouraged not to oppose the application by Sections 540.140 and 540.150 which are intended to assure that the defendant's defense of the main action will not be adversely affected by the decisions made by the judicial officer or by the defendant's failure to rebut the evidence produced by the plaintiff in the attachment proceedings.

We believe that we have provided no more than is required by due process. We doubt that a procedure that provides less rights to the defendant than the one proposed would satisfy due process requirements. (We exclude consideration of cases involving "exceptional circumstances"; these present different due process problems and permit us to develop an ex parte procedure to deal with those cases.)

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

Article 4. Order Authorizing Issuance of Writ of Attachment

§ 540.010. Definitions

540.010. Unless the provision or context otherwise requires, as used in this chapter:

(a) "Application" means an application for an order under this article authorizing the issuance of a writ of attachment.

(b) "Order" means an order under this article authorizing the issuance of a writ of attachment.

§ 540.020. Article governs orders authorizing issuance of writ of attachment

540.020. An order authorizing the issuance of a writ of attachment may be granted as provided in this article by a judicial officer of the court in which the action is brought.

§ 540.030. Application for order

540.030. At any time after he has filed his complaint, the plaintiff may apply for an order authorizing the issuance of a writ of attachment by filing an application with the court in which the action is brought.

§ 540.040. Contents of application

540.040. The application shall be executed under oath and shall include all of the following:

(a) A statement showing that one or more of the grounds specified in Article 3 (commencing with Section 539.010) exist for issuance of a writ of attachment.

(b) A statement that the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant.

(c) A statement that the applicant has no information or belief that the indebtedness for the recovery of which an attachment is sought has been discharged in a proceeding under the National Bankruptcy Act or that the prosecution of an action for its recovery has been stayed in a proceeding under the National Bankruptcy Act.

(d) A statement that an attachment is not sought for a purpose other than the recovery of the indebtedness for which the action is brought.

Comment. We have taken subdivisions (b), (c), and (d) from Professor Riesenfeld's draft. Are subdivisions (b) and (d) both desirable?

§ 540.050. Affidavits in support of application

540.050. The application shall be supported by affidavit of the plaintiff or any other person or persons having knowledge of the facts. The affidavit or affidavits in support of the application must contain facts sufficient to entitle the plaintiff to a judgment in the action. The affidavits shall conform to the standards prescribed for affidavits filed pursuant to Section 437c.

§ 540.060. Notice to defendant

540.060. No order shall be granted unless the plaintiff has served on the defendant at least 10 days prior to the hearing:

- (a) A Notice of Application and Hearing."
- (b) A copy of the application and of the affidavits in support of the application.
- (c) A copy of the summons and of the complaint.

§ 540.070. Contents of Notice of Application and Hearing

540.070. The "Notice of Application and Hearing" shall inform the defendant of all of the following:

(a) The plaintiff has applied for an order authorizing the issuance of a writ of attachment and, if such order is granted, any nonexempt property of the defendant may be subject to attachment.

(b) A hearing will be held at a place and at a time, both to be specified in the notice, to determine whether the plaintiff is entitled to the order, and the order will be granted if the court finds that the plaintiff's claim is probably valid and the other requirements for granting the order are established.

(c) The defendant may be present at the hearing in person or represented by attorney.

(d) If the defendant desires to oppose the granting of the order, he must file a notice of opposition and supporting affidavits as required by Section 540.080.

(e) The hearing is not held for the purpose of determining whether the plaintiff's claim is actually valid. The determination of that matter at the trial of the action brought by the plaintiff will not be affected by the decision of the judicial officer at the hearing on the application for the order.

§ 540.080. Notice of opposition by defendant; defendant's affidavits

540.080. If the defendant desires to oppose the granting of the order, he shall file a notice of opposition to issuance of the order. Subject to subdivision (b) of Section 540.090, the notice shall be filed not later than the time the matter is set for hearing. The notice shall be under oath, shall state the ground or grounds on which the defendant opposes the granting of the order, and shall be accompanied by affidavit of the defendant or any other person or persons having knowledge of the facts. The affidavit or affidavits in opposition to the issuance of the order together must state facts sufficient to defeat the plaintiff's right to the order. The affidavits shall conform to the standards prescribed for affidavits filed pursuant to Section 437c by a party resisting a motion for a summary judgment.

§ 540.090. Readiness for hearing; continuances

540.090. (a) At the time set for the hearing, the plaintiff shall be ready to proceed. If the plaintiff is not ready, or if he has failed to comply with Section 540.060, the judicial officer shall deny the application for the order.

(b) The defendant is entitled as a matter of course to one continuance for a reasonable period if he desires it to enable him to meet the application for the order.

(c) If the defendant has filed and served the notice and affidavits referred to in Section 540.080 on the plaintiff at least two days prior to the hearing, the plaintiff is not entitled to any continuance on account of the defendant's opposition to the granting of the order.

§ 540.100. Hearing

540.100. At the hearing, the judicial officer shall examine the application and affidavits in support of the application. If he finds they comply with the requirements of this article, he shall grant the plaintiff an order authorizing the issuance of a writ of attachment unless the defendant has filed a notice of opposition to the issuance of the order and affidavits showing such facts as may be deemed by the judicial officer sufficient to present a triable issue of fact whether the plaintiff is entitled to the order. If such showing is made by the defendant, the issue to be determined shall be specified by the judicial officer, and he shall hear and determine such issue and the application, notice of opposition, and affidavits shall be received in evidence. The judicial officer shall continue the hearing for the production of additional evidence, oral or documentary, or the filing of other affidavits or counteraffidavits if he is unable to determine the issue on the basis of the application, notice of opposition, the affidavits, and any additional evidence produced at the hearing. In such case, the judicial officer shall hear and determine the issue at the earliest possible time, allowing sufficient time to the parties for such discovery proceedings, if any, as he deems necessary.

Comment. Cf. Code Civ. Proc. § 690.050.

§ 540.110. Issuance of order

540.110. (a) Except as provided in subdivision (b), the judicial officer shall grant an order authorizing the issuance of a writ of attachment if he finds both of the following:

(1) One or more of the grounds specified in Article 3 (commencing with Section 539.010) exist for the issuance of a writ of attachment.

(2) It is more likely than not that the plaintiff will obtain a judgment against the defendant on the claim upon which the action is brought.

(b) An order shall not be granted if the judicial officer finds any of the following:

(1) The attachment is sought, or the action is prosecuted, to hinder, delay, or defraud any creditor of the defendant.

(2) The indebtedness for the recovery of which the attachment is sought has been discharged in a proceeding under the National Bankruptcy Act or the prosecution of an action for its recovery has been stayed in a proceeding under the National Bankruptcy Act.

(3) The attachment is sought for a purpose other than the recovery of the indebtedness for which the action is brought.

§ 540.120. Effect of order

540.120. An order authorizing the issuance of a writ of attachment permits the issuance of the writ if the requirements of Article 5 (commencing with Section 541.010) or Article 6 (commencing with Section 542.010) are satisfied.

§ 540.130. Preference for hearing

540.130. On the day upon which any hearing under this article is set, the hearing shall take precedence of all other matters on the calendar of that day except older matters of the same character and matters to which special precedence may be given by law.

§ 540.140. Effect of determinations of judicial officer

540.140. The determinations of the judicial officer under this article shall have no effect on the determination of any issues in the action brought by the plaintiff against the defendant. The determinations of the judicial officer under this article shall not be given in evidence nor referred to in the trial of the action.

Comment. Section 540.140 makes clear that the determinations of the judicial officer under this article have no effect on the determination of the validity of the plaintiff's claim in the action he has brought against the defendant. The section does not, however, make inadmissible any affidavits filed under this article. The admissibility of such affidavits is determined by the rules of evidence otherwise applicable.

§ 540.150. Defendant's rights at trial of action not affected

540.150. Neither the failure of the defendant to oppose the granting of an order under this article nor the defendant's failure to rebut any evidence produced by the plaintiff in proceedings under this article shall constitute a waiver of any defense to the action or have any effect on the right of the defendant to produce or exclude evidence at the trial of the action.