S T A T E O F N E W Y O R K

351

2009-2010 Regular Sessions

I N S E N A T E

(PREFILED)

January 7, 2009

Introduced by Sen. KRUGER -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the debtor and creditor law, in relation to an assignment for the benefit of creditors

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 13 of the debtor and creditor law, as amended by chapter 758 of the laws of 1950, is amended to read as follows:

S 13. Debts which may be [proved] ALLOWED against the estate. Debts of the assignor may be [proved and] allowed against his OR HER estate [which are (a) a fixed liability, as evidenced by a judgment absolutely owing at the time of the assignment, or (b) a claim for taxable costs incurred before the assignment, in good faith, in an action to recover a provable debt; (c) or founded upon an open account, or upon a contract, express or implied whether due or not due; or (d) claims for anticipatory breach of contracts, executory in whole or in part, including unexpired leases of real or personal property; provided, however, that the claim of a landlord for damages for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease without acceleration, for the year next succeeding the date of the surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the assignment, plus an amount equal to the unpaid rent accrued, without acceleration up to such date.] EXCEPT TO THE EXTENT THAT:

1. A DEBT IS UNENFORCEABLE AGAINST THE ASSIGNOR, AND UNENFORCEABLE AGAINST PROPERTY OF THE ASSIGNOR, UNDER ANY AGREEMENT OR APPLICABLE LAW FOR A REASON OTHER THAN BECAUSE THE DEBT IS CONTINGENT OR UNMATURED;

2. THE DEBT IS FOR UNMATURED INTEREST;

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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3. IF THE DEBT IS FOR A TAX ASSESSED AGAINST PROPERTY ASSIGNED, THE DEBT EXCEEDS THE VALUE OF THE INTEREST OF THE ASSIGNEE IN SUCH PROPERTY;

4. IF THE DEBT IS FOR SERVICES OF AN INSIDER OR ATTORNEY OF THE ASSIGNOR, THE DEBT EXCEEDS THE REASONABLE VALUE OF SUCH SERVICES;

5. IF THE DEBT IS OWED TO A LESSOR FOR DAMAGES RESULTING FROM THE TERMINATION OF A LEASE OF REAL PROPERTY, SUCH DEBT EXCEEDS:

(A) THE RENT RESERVED BY SUCH LEASE, WITHOUT ACCELERATION, FOR THE GREATER OF ONE YEAR, OR FIFTEEN PERCENT, NOT TO EXCEED THREE YEARS, OF THE REMAINING TERM OF SUCH LEASE, FOLLOWING THE EARLIER OF (1) THE DATE OF THE ASSIGNMENT; AND (2) THE DATE ON WHICH THE LESSOR REPOSSESSED, OR THE LESSEE SURRENDERED, THE LEASED PREMISES; PLUS

(B) ANY UNPAID RENT DUE UNDER THE LEASE, WITHOUT ACCELERATION, ON THE EARLIER OF SUCH DATES;

6. IF THE DEBT IS FOR DAMAGES RESULTING FROM THE TERMINATION OF AN EMPLOYMENT CONTRACT, SUCH DEBT EXCEEDS:

(A) THE COMPENSATION PROVIDED BY THE CONTRACT, WITHOUT ACCELERATION, FOR ONE YEAR FOLLOWING THE EARLIER OF (1) THE DATE OF THE ASSIGNMENT; AND (2) THE DATE ON WHICH THE EMPLOYER DIRECTED THE EMPLOYEE TO TERMINATE, OR SUCH EMPLOYEE TERMINATED, PERFORMANCE UNDER THE CONTRACT; PLUS

(B) THE UNPAID COMPENSATION DUE UNDER THE CONTRACT WITHOUT ACCELERATION, ON THE EARLIER OF SUCH DATES. THERE SHALL BE ESTIMATED FOR PURPOSES OF ALLOWANCE UNDER THIS SECTION:

(1) ANY CONTINGENT OR UNLIQUIDATED CLAIM, FIXING OR LIQUIDATION OF WHICH, AS THE CASE MAY BE, WOULD UNDULY DELAY THE CLOSING OF THE CASE; OR

(2) ANY RIGHT TO AN EQUITABLE REMEDY FOR BREACH OF PERFORMANCE IF SUCH BREACH GIVES RISE TO A RIGHT TO PAYMENT.

In allowing the claims against the estate, in all cases of mutual debts or credits between the estate of the assignor and a creditor the amount shall be stated and one debt shall be set off against the other, and the balance only shall be allowed.

A set-off or counterclaim shall not be allowed in favor of any debtor of the assignor which (a) is not [provable] ALLOWABLE against the estate; or (b) was purchased by or transferred to him OR HER after the filing of the general assignment or with intent to such use and with knowledge or notice, or if he OR SHE had reasonable cause to believe, that such assignor was insolvent. A person shall be deemed insolvent whenever the aggregate of his OR HER property, exclusive of any property which he OR SHE may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his OR HER creditors, shall not, at a fair valuation, be sufficient in amount to pay his OR HER debts.

EXCEPT WITH RESPECT TO A SET-OFF OF A KIND DESCRIBED IN PARAGRAPHS SIX AND SEVEN OF SUBDIVISION (B) OF SECTION THREE HUNDRED SIXTY-TWO AND IN PARAGRAPHS TWO OF SUBDIVISIONS (H) AND (I) OF SECTION THREE HUNDRED SIXTY-FIVE OF TITLE ELEVEN OF THE UNITED STATES CODE, IF A CREDITOR OFFSETS A MUTUAL DEBT OWING TO THE ASSIGNOR AGAINST A CLAIM AGAINST THE ASSIGNOR ON OR WITHIN NINETY DAYS BEFORE THE DATE OF THE ASSIGNMENT, THEN THE ASSIGNEE MAY RECOVER FROM SUCH CREDITOR THE AMOUNT SO OFFSET TO THE EXTENT THAT ANY INSUFFICIENCY ON THE DATE OF SUCH SET-OFF IS LESS THAN THE INSUFFICIENCY ON THE LATER OF:

(A) NINETY DAYS BEFORE THE DATE OF THE ASSIGNMENT; AND

(B) THE FIRST DAY DURING THE NINETY DAYS IMMEDIATELY PRECEDING THE DATE OF THE ASSIGNMENT ON WHICH THERE IS AN INSUFFICIENCY.

"INSUFFICIENCY" MEANS THE AMOUNT, IF ANY, BY WHICH A CLAIM AGAINST THE ASSIGNOR EXCEEDS A MUTUAL DEBT OWING TO THE ASSIGNOR BY THE CREDITOR.

S 2. Section 14 of the debtor and creditor law, as amended by chapter 758 of the laws of 1950, is amended to read as follows:

S 14. Duties of assignee. It shall be the duty of the assignee to collect and reduce to money the property of the estate, under the direction of the court; report promptly to the court any claims presented to him OR HER which are not [provable] ALLOWABLE, or are incorrect or false and shall also report promptly for allowance all claims presented to him OR HER which are not disputed; close up the estate as expeditiously as possible; furnish such information concerning the estate as may be requested by parties in interest; keep regular accounts; pay dividends as often as is compatible with the best interests of the estate; make appraisals or in his OR HER discretion employ an appraiser or appraisers; designate and employ auctioneers; file an interim report within six months of assuming his [duites] OR HER DUTIES unless excused by the court or unless the estate has been sooner distributed; file a final report and account at least fifteen days before the final hearing to consider the judicial settlement of the account.

S 3. Section 15 of the debtor and creditor law, as amended by chapter 758 of the laws of 1950, subdivision 6 as amended by chapter 552 of the laws of 1962, is amended to read as follows:

S 15. Power of court. The court shall have power:

1. To allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against the estate.

2. To authorize the business of assignor to be conducted for limited periods by assignee, if necessary in the best interests of the estate, and allow additional compensation for such services.

3. To bring in and substitute additional persons or parties in the proceeding when necessary for the complete determination of a matter in controversy, by issuing a citation directed to such persons or parties and to be served as ordered by the court.

4. To reopen estates whenever it appears they were closed before being fully administered.

5. To determine all claims of assignors to their exemptions.

6. To authorize an assignee to bring an action or special proceeding, which he OR SHE is hereby empowered to maintain, against any person who has RECEIVED A TRANSFER OF THE ASSIGNOR'S PROPERTY OR AN OBLIGATION OF THE ASSIGNOR THAT IS AVOIDABLE BY AN ACTUAL UNSECURED CREDITOR OF THE ASSIGNOR, OR HAS received, taken or in any manner interfered with the estate, property or effects of the debtor in fraud of his OR HER creditors and which might have been avoided by a creditor of the assignor and the assignee may recover the property so transferred or its value.

6-a. To authorize an assignee to bring an action, which he OR SHE is hereby empowered to maintain, against any person, who [with reasonable cause to believe the assignor was insolvent as defined in section thirteen of this act,] has within [four months] NINETY DAYS of the assignment, OR IN THE CASE OF AN INSIDER OF THE ASSIGNOR, WITHIN ONE YEAR OF THE ASSIGNMENT received a voluntary transfer from the assignor of money or property, OR OBTAINED A JUDICIAL LIEN ON MONEY OR PROPERTY OF THE ASSIGNOR, for or on account of an antecedent debt, the effect of which transfer is to enable the creditor to obtain [a greater percentage of his debt than some other creditor of the same class] MORE THAN HE OR SHE WOULD RECEIVE IF (A) THE ASSIGNOR'S ESTATE WAS LIQUIDATED; (B) THE TRANSFER HAD NOT BEEN MADE; AND (C) THE CREDITOR RECEIVED PAYMENT OF THE DEBT TO THE EXTENT PROVIDED BY THIS ARTICLE, and the assignee may recover the property so transferred or its value. For the purpose of this section a transfer shall be deemed to have been made [when it is so

far perfected that no creditor having a judgment on a simple contract without special priority (whether or not such a creditor exists) could have obtained an interest superior to that of the transferee therein. A transfer not so perfected prior to the assignment shall be deemed to have been made immediately before the assignment.]:

(A) AT THE TIME THE TRANSFER TAKES EFFECT BETWEEN THE TRANSFEROR AND THE TRANSFEREE, IF THE TRANSFER IS PERFECTED AT, OR WITHIN TEN DAYS AFTER, THAT TIME;

(B) AT THE TIME THE TRANSFER IS PERFECTED, IF THE TRANSFER IS PERFECTED MORE THAN TEN DAYS AFTER IT TAKES EFFECT; OR

(C) IMMEDIATELY BEFORE THE DATE OF THE ASSIGNMENT, IF THE TRANSFER IS NOT PERFECTED AT THE LATER OF (I) THE ASSIGNMENT; AND (II) TEN DAYS AFTER THE TRANSFER TAKES EFFECT BETWEEN THE TRANSFEROR AND THE TRANSFEREE.

FOR THE PURPOSES OF THIS SECTION:

(A) A TRANSFER OF REAL PROPERTY OTHER THAN FIXTURES, BUT INCLUDING THE INTEREST OF A SELLER OR PURCHASER UNDER A CONTRACT FOR THE SALE OF REAL PROPERTY, IS PERFECTED WHEN A BONA FIDE PURCHASER OF SUCH PROPERTY FROM THE ASSIGNOR AGAINST WHOM APPLICABLE LAW PERMITS SUCH TRANSFER TO BE PERFECTED CANNOT ACQUIRE AN INTEREST THAT IS SUPERIOR TO THE INTEREST OF THE TRANSFEREE; AND

(B) A TRANSFER OF A FIXTURE OR PROPERTY OTHER THAN REAL PROPERTY IS PERFECTED WHEN A CREDITOR ON A SIMPLE CONTRACT CANNOT ACQUIRE A JUDICIAL LIEN THAT IS SUPERIOR TO THE INTEREST OF THE TRANSFEREE.

THE ASSIGNEE MAY NOT AVOID A TRANSFER OR JUDICIAL LIEN UNDER THIS SECTION TO THE EXTENT THAT:

(A) THE TRANSFER WAS INTENDED BY THE PARTIES TO BE A CONTEMPORANEOUS EXCHANGE FOR NEW VALUE GIVEN TO THE ASSIGNOR AND WAS IN FACT A SUBSTANTIALLY CONTEMPORANEOUS EXCHANGE;

(B) THE TRANSFER WAS IN PAYMENT OF A DEBT INCURRED IN THE ORDINARY COURSE OF BUSINESS OR FINANCIAL AFFAIRS OF THE ASSIGNOR AND THE TRANSFEREE, AND MADE IN THE ORDINARY COURSE OF BUSINESS AND FINANCIAL AFFAIRS OF THE PARTIES, ACCORDING TO ORDINARY BUSINESS TERMS.

FOR THE PURPOSES OF THIS SECTION, AN ASSIGNOR IS PRESUMED TO HAVE BEEN INSOLVENT ON AND DURING THE NINETY DAYS IMMEDIATELY PRECEDING THE DATE OF THE ASSIGNMENT.

FOR THE PURPOSES OF THIS SECTION, A JUDICIAL LIEN IS A LIEN ACQUIRED THROUGH A JUDICIAL PROCEEDING BY ATTACHMENT, LEVY OR THE LIKE AND INCLUDES A JUDGMENT LIEN OBTAINED UNDER SECTION FIFTY-TWO HUNDRED THREE OF THE CIVIL PRACTICE LAW AND RULES.

FOR THE PURPOSES OF THIS SECTION "INSIDER" INCLUDES:

(A) IF THE ASSIGNOR IS AN INDIVIDUAL (I) RELATIVE OF THE ASSIGNOR OR OF A GENERAL PARTNER OF THE ASSIGNOR; (II) PARTNERSHIP IN WHICH THE ASSIGNOR IS A GENERAL PARTNER; (III) GENERAL PARTNER OF THE ASSIGNOR; OR (IV) CORPORATION OF WHICH THE ASSIGNOR IS A DIRECTOR, OFFICER, OR PERSON IN CONTROL;

(B) IF THE ASSIGNOR IS A CORPORATION (I) DIRECTOR OF THE ASSIGNOR; (II) OFFICER OF THE ASSIGNOR; (III) PERSON IN CONTROL OF THE ASSIGNOR; (IV) PARTNERSHIP IN WHICH THE ASSIGNOR IS A GENERAL PARTNER; (V) GENERAL PARTNER OF THE ASSIGNOR; OR (VI) RELATIVE OF A GENERAL PARTNER, DIRECTOR, OFFICER, OR PERSON IN CONTROL OF THE ASSIGNOR;

(C) IF THE ASSIGNOR IS A PARTNERSHIP (I) GENERAL PARTNER IN THE ASSIGNOR; (II) RELATIVE OF A GENERAL PARTNER IN, GENERAL PARTNER OF, OR PERSON IN CONTROL OF THE ASSIGNOR; (III) PARTNERSHIP IN WHICH THE ASSIGNOR IS A GENERAL PARTNER; (IV) GENERAL PARTNER OF THE ASSIGNOR; OR (V) PERSON IN CONTROL OF THE ASSIGNOR;

(D) IF THE ASSIGNOR IS A MUNICIPALITY, ELECTED OFFICIAL OF THE ASSIGNOR OR RELATIVE OF AN ELECTED OFFICIAL OF THE ASSIGNOR;

(E) AFFILIATE, OR INSIDER OF AN AFFILIATE AS IF SUCH AFFILIATE WERE THE ASSIGNOR; AND

(F) MANAGING AGENT OF THE ASSIGNOR.

7. To direct upon the final settlement of the estate that the assignee pay to the lawful creditors their proportionate dividend notwithstanding their claim has not been presented in accordance with the notice sent out by the assignee. If a final dividend is ordered and paid not less than six months after notice to creditors to present their claims, the assignee shall have no liability to creditors whose claims have not been presented prior to entry of the order directing payment of the final dividend and which were unknown to him OR HER at that time. The court shall have no power to allow claims not presented within one year from the date of the recording of the assignment.

8. To allow secured creditors such sum only as to the court seems to be owing over and above the value of their securities.

9. To examine the parties and witnesses on oath in relation to the assignment and accounting and all matters connected therewith and to compel their attendance for that purpose and their answers to questions, and the production of books and papers;

10. To require the assignee to render and file an interim account of his OR HER proceedings within six months of assuming his OR HER duties unless the estate is sooner distributed and to require the assignee to render and file a final account of his OR HER proceedings, and to enforce the same in the manner provided by law for compelling an executor or administrator to comply with a surrogate's order for an account;

11. To take and state an interim and a final account as submitted by the assignee, or, as to the final account, to appoint a referee to take and state it if demanded, within ten days after the date has been fixed for the final hearing to consider the judicial settlement of the account, by a creditor or creditors whose claim or claims represent one-fourth or more in amount of all claims scheduled or filed. The referee shall be an official referee if such a referee is available and shall have the powers enumerated in subdivision nine of this section;

12. To settle and adjudicate upon the account and the claims presented, and to decree payment of any creditor's just proportional part of the fund, or, in case of a partial accounting, so much thereof as the circumstances of the case render just and proper;

13. To discharge the assignee and his OR HER surety at any time, upon performance of the decree, from all further liability upon matters included in the accounting, to creditors appearing and to creditors not having appeared after due citation, or not having presented their claims after due advertisement;

14. On proof of a composition between the assignor and his OR HER creditors, to discharge the assignee and his OR HER sureties from all further liability to the compounding creditors appearing or duly cited, and to authorize the assignee to release the assets to the assignor; provided, however, that if there be any creditors not assenting to the composition, the court shall determine what proportion of the fund shall be paid to or reserved for creditors not assenting, which shall not be less than the sum or share to which they would be entitled if no composition had been made, and may decree distribution accordingly;

15. To adjourn the proceedings from time to time, grant further orders if necessary, and amend the petition and proceedings thereon before decree in furtherance of justice;

16. To punish as for a contempt any disobedience or violation of any order made or process issued in pursuance of this article, and to restrain by arrest and imprisonment any party or witness when it shall satisfactorily appear that such party or witness is about to leave the jurisdiction of the court, and to take bail to secure the attendance of such party or witness, to be prosecuted under the order of the court in case of forfeiture by and for the benefit of the party in whose interest such examination shall be ordered;

17. To exercise such other or further powers in respect to the proceedings and the accounting therein as a surrogate may by law exercise in reference to an accounting by an executor or administrator.

S 4. Section 17 of the debtor and creditor law, as added by chapter 360 of the laws of 1914, is amended to read as follows:

S 17. Invalid claims. Claims which for want of record or for other reasons would not have been valid as against the [claims] CLAIM of [creditors] A LIEN CREDITOR of the assignor shall not be liens against his OR HER estate, WHETHER OR NOT SUCH A LIEN CREDITOR ACTUALLY EXISTS.

CLAIMS WHICH FOR WANT OF RECORD OR FOR OTHER REASONS WOULD NOT HAVE BEEN VALID AS AGAINST THE CLAIM OF A BONA FIDE PURCHASER OF REAL PROPERTY OF THE ASSIGNOR SHALL NOT BE VALID AGAINST ANY REAL PROPERTY IN THE ASSIGNOR'S ESTATE, WHETHER OR NOT SUCH A BONA FIDE PURCHASER OF REAL PROPERTY ACTUALLY EXISTS.

S 5. The debtor and creditor law is amended by adding a new section 17-a to read as follows:

S 17-A. PRESERVATION OF AVOIDED TRANSFERS AND LIENS. ANY TRANSFER OR LIEN AVOIDED BY THE ASSIGNEE IS PRESERVED FOR THE BENEFIT OF THE ESTATE BUT ONLY WITH RESPECT TO PROPERTY OF THE ESTATE.

S 6. Section 22 of the debtor and creditor law, as amended by chapter 97 of the laws of 1963, is amended to read as follows:

S 22. Wages and commissions and preferred claims. 1. In all distribution of assets under all assignments made in pursuance of this article, the wages or salaries actually owing to the employees of the assignor or assignors at the time of the execution of the assignment for services rendered within [three months] NINETY DAYS prior to the execution of the assignment, not exceeding [one] TWO thousand dollars to each employee, and after payment of the foregoing, all claims for cash deposits not exceeding [three] NINE hundred dollars made and left with an assignor or assignors on account of purchases at retail of merchandise or services, where such deposits were made [within six months before the execution of the assignment] and such merchandise has not been delivered or the services performed, shall be preferred before any other debt except wages or salaries as aforesaid; and should the assets of the assignor or assignors not be sufficient to pay in full all the claims preferred, pursuant to this section, they shall be applied to the payment first of wages or salaries to the full amount of each such wage or salary, and thereafter pro rata to payment of such cash deposits.

2. For the purposes of this section, wages or salaries shall mean; (a) all compensation and benefits payable by an employer to or for the account of the employee for personal services rendered by such employee. These shall specifically include but not be limited to salaries, overtime, vacation, holiday and severance pay; employer contributions to or payments of insurance or welfare benefits; employer contributions to pension or annuity funds; and any other moneys properly due or payable for services rendered by such employee. CONTRIBUTIONS TO BENEFIT PLANS AND FUNDS WHICH CONTRIBUTIONS ARE NOT MADE DIRECTLY TO AN EMPLOYEE SHALL RECEIVE PRIORITY IF THEY ARE OWED FOR SERVICES RENDERED WITHIN ONE

HUNDRED EIGHTY DAYS BEFORE THE ASSIGNMENT, BUT THEY SHALL BE PAID ONLY AFTER AMOUNTS OWING DIRECTLY TO EMPLOYEES UNDER THIS SECTION HAVE BEEN PAID. THE TOTAL AMOUNT PAID UNDER THIS SECTION TO OR ON BEHALF OF EMPLOYEES OF THE ASSIGNOR SHALL NOT EXCEED TWO THOUSAND DOLLARS, TIMES THE TOTAL NUMBER OF EMPLOYEES. Vacation and severance pay due and owing at the time of the filing of an assignment, or which became due and owing after the filing of an assignment, but prior to the closing of the estate, shall be considered as wages or salaries owed for services rendered within [three months] NINETY DAYS prior to the execution of the assignment, or (b) commissions due traveling or city [salesmen] SALES-PERSONS on salaries or commission basis, whole or part-time, whether or not selling exclusively for the assignor or assignors, and for the purpose of this section, traveling or city [salesmen] SALESPERSONS, shall include all such [salesmen] SALESPERSONS whether or not they are independent contractors selling products or services of the bankrupt with or without a drawing account or formal contract.

S 7. This act shall take effect immediately.