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CPLR 7102: Court Vacates Replevin Since Summons and Complaint Was Not Promptly Served upon Defendant in Possession

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ARTICLE 41—TRIAL BY JURY

CPLR 4111(c): Case arising under CPA illustrates utility of CPLR provision.

In *Kennard v. Welded Tank & Construction Co.*,[159] an action was commenced against the manufacturer of a water tank, Welded Tank & Construction Co. (Welded), and a component part manufacturer, Colorado Fuel & Iron Co. (C.F. & I.), for injuries resulting from the explosion of Welded's water tank. Welded thereupon cross-claimed against C.F. & I. alleging breach of warranty. Subsequently, the jury returned a general verdict against both defendants on plaintiff's negligence claim, but returned special findings on the cross-claim that C.F. & I. was not negligent.[160] In response to motions by the plaintiff and Welded to resubmit the case to the jury, or, in the alternative, to order a new trial, the court, acceding to the mandatory language of CPA 459,[161] resolved the inconsistencies in favor of the special findings, and dismissed the plaintiff's claim as well as Welded's cross-claim against C.F. & I. On appeal, a divided court held that the refusal of the lower court to resubmit the case to the jury or order a new trial was not reversible error.

In drafting CPLR 4111(c), the legislature vested the trial court with the discretion to direct the jury to further consider its answers or order a new trial in lieu of directing a judgment in accordance with the special findings.[162] Hence, as noted by the Court of Appeals,[163] the problems presented by the *Kennard* facts should not recur under the CPLR.

ARTICLE 71—RECOVERY OF CHATTEL

CPLR 7102: Court vacates replevin since summons and complaint was not promptly served upon defendant in possession.

Ancillary to an action for the recovery of a chattel, CPLR 7102 authorizes seizure of the chattel by a sheriff on behalf of the plaintiff

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159 26 Misc. 2d 1000, 209 N.Y.S.2d 479 (Sup. Ct. Nassau County 1961), *aff'd*, 27 App. Div. 2d 578, 277 N.Y.S.2d 817 (2d Dep't 1966), *aff'd*, 25 N.Y.2d 324, 253 N.E.2d 197, 305 N.Y.S.2d 477 (1969).

160 The interrogatories were submitted to the jury in order to facilitate the trial court's determination of third-party actions instituted by Welded against C.F. & I. Statutory authorization for such interrogatories was provided by CPA 193-a(5), and is now covered by CPLR 4111.

161 CPA 459 directed that "where a special finding is inconsistent with a general verdict, the former controls the latter and the court must render judgment accordingly."

162 CPLR 4111(c). *See* SECOND REPORT 235.

163 Kennard v. Welded Tank & Constr. Co., 25 N.Y.2d 324, 328, 253 N.E.2d 197, 199, 305 N.Y.S.2d 477, 480 (1969).

without requiring a court order.[164] However, if an action is not then pending, a summons and complaint must be served upon the defendant in possession, before, after, or together with the writ of replevin.[165] The failure to strictly comply with this provision does not affect the validity of the replevin if the defendant thereafter becomes a party to the action, *i.e.*, makes a motion to reclaim or impound the chattel, or gives notice of exception to the surety.[166] Moreover, an untimely return of proof of service by the sheriff may be cured by an order *nunc pro tunc*.[167]

In *Sears Roebuck & Co. v. Austin*,[168] the defendant moved to quash a requisition on the ground that a summons and complaint had not been served. In opposition the plaintiff contended that the motion was improper since it was not expressly authorized under the CPLR. However, the court rejected this argument, holding that a practitioner may always move to nullify a step illegally taken by his adversary. Furthermore, the court reasoned that limiting the defendant to the relief prescribed under the CPLR could pose a constitutional dilemma in view of his financial position.[169]

On the merits, the court viewed the failure to serve the summons and complaint as grounds to vacate the requisition. In the process of its decision, the court expressed its disapproval with *Kurzweil v. Story & Clark Piano Co.*,[170] which held that the seizure of a chattel gave the court in rem jurisdiction and consequently a judgment rendered thereon was not void because of failure to serve a summons and complaint. Rather, the court in *Sears* relied heavily on *Devonia Discount Corp. v. Bianchi*,[171] wherein the failure to serve a summons was viewed as a defect which divested the court of jurisdiction. Although *Devonia* is no longer considered valid as precedent in view of CPLR 7103(c),[172] the court adopted its rationale since 7103(c) was inapplicable to the facts in *Sears*. Thus, the court concluded that without proof of service upon the defendant, the underlying action to recover the chattel must

164 CPLR 7102(f) provides that upon receipt of the requisite papers the sheriff shall seize the chattel and unless within three days the sheriff is served with either a notice of exception to plaintiff's surety, a notice of motion for an impounding order or the necessary papers to reclaim the chattel, he shall deliver possession of the chattel to the plaintiff.

165 *See* 7B MCKINNEY'S CPLR 7102, commentary 390 (1963).

166 CPLR 7103(c).

167 CCA 411.

168 60 Misc. 2d 908, 304 N.Y.S.2d 131 (N.Y.C. Civ. Ct. N.Y. County 1969).

169 *Cf.* Griffin v. Illinois, 351 U.S. 12 (1956).

170 95 Misc. 484, 159 N.Y.S. 231 (N.Y.C. Ct. 1916).

171 241 App. Div. 838, 271 N.Y.S. 413 (2d Dep't 1934) (per curiam).

172 FOURTH REP. 256.

be dismissed. And, without the underlying action, the replevin action was no longer ancillary, and must therefore be vacated.

Although the defendant in possession of a chattel is protected to a degree by his statutory right to reclaim[173] or to move for an order impounding the chattel,[174] and by the plaintiff's undertaking,[175] it nonetheless is clear that sufficient notice must be afforded the defendant.[176] Thus, the refusal of the court in *Sears* to follow the *Kurzweil* holding, which previously had been emasculated[177] and questioned,[178] serves as a reminder to the practitioner to commence an action promptly when seeking to avail himself of the ancillary remedy of replevin.

New York City Civil Court Act

CCA 1908: Absence of express statutory authority is not a bar to recovery of necessary litigation expenses.

It can hardly be denied that an examination before trial of an adverse party has become a necessary procedure in the prosecution of a lawsuit. Likewise, when circumstances so dictate, an interpreter at the examination is equally as important.[179] However, the question arises whether a victorious litigant in the New York City Civil Court can recover disbursements for such expenses from his opponent.

In *Santiago v. Johnson*[180] the plaintiff sought an order disallowing expenditures of this nature as taxable costs on the ground that CCA 1908[181] did not grant the authority for the assessments. Nevertheless, recovery was permitted pursuant to the preamble of CCA 1908 which limits the allowable disbursements as provided therein "[e]xcept where the contrary is specifically provided by law. . . ." And, the court held that CPLR 8301(a)(9) was the specific provision allowing the recovery of expenses of an examination before trial.

While the utilization of 8301(a)(9) is undoubtedly proper,[182] its adoption through the *preamble* of CCA 1908 is somewhat tenuous. In-

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173 CPLR 7103(a).

174 CPLR 7103(b).

175 CPLR 7102(e).

176 *Cf.* Sniadick v. Family Fin. Corp., 395 U.S. 337 (1969).

177 Devonia Discount Corp. v. Bianchi, 241 App. Div. 838, 271 N.Y.S. 413 (2d Dep't 1934) (per curiam). *See also* Florence Trading Corp. v. Rosenberg, 128 F.2d 557 (2d Cir. 1942).

178 *See* 7A W. K. & M. ¶ 7102.02.

179 *Cf.* People *ex rel* Levy v. Grant, 37 Misc. 430, 75 N.Y.S. 290 (Sup. Ct. N.Y. County 1902).

180 61 Misc. 2d 746, 305 N.Y.S.2d 717 (N.Y.C. Civ. Ct. Kings County 1969).

181 CCA 1908 is the New York City Civil Court provision governing the allowance of costs to a party in an action or appeal.

182 *See* 8 W. K. & M. ¶ 8301.27.