St. John's Law Review

Volume 50, Spring 1976, Number 3 Article 21

Judiciary Law Art. 19: Postjudgment Enforcement Procedures Held Violative of Due Process

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation

St. John's Law Review (1976) "Judiciary Law Art. 19: Postjudgment Enforcement Procedures Held Violative of Due Process," *St. John's Law Review*: Vol. 50 : No. 3 , Article 21.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol50/iss3/21

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

resolution of the threshold issue seems a far more preferable solution than postponement until full trial.

Pleas for legislative[174] and judicial[175] action to develop no-fault procedure have been made. Regardless of the solution finally adopted — disposition by motion, postponement, or perhaps a procedural system peculiar to no-fault — it is suggested that *Cole* illustrates the potential for procedural frustration of no-fault insurance objectives and the need for clarification of no-fault procedure.

JUDICIARY LAW

Judiciary Law art. 19: Postjudgment enforcement procedures held violative of due process.

Article nineteen of the New York Judiciary Law[176] established postjudgment procedures whereby a judgment debtor could be held in civil contempt, fined, and imprisoned without a hearing.[177] A debtor who failed to comply with a judgment creditor's subpoena to appear for deposition concerning his ability to satisfy the judgment[178] could be subject to an ex parte order of the court to show cause why he should not be held in contempt.[179] Failure to appear in response to this order could result in a determination that the debtor was in contempt of court,[180] whereupon a final order could issue directing that he be fined and/or imprisoned.[181] If a fine had been imposed and affidavits of the attorney for the judgment creditor satisfied the court that the order imposing the fine had been served on the judgment debtor and that he had failed to comply therewith, the court could issue an ex parte commitment

provide moderate savings and that this feature was not stressed as a major benefit of the statute.

[174] *See* 7B McKINNEY'S CPLR 3211, commentary at 8, 11 (Supp. 1975).

[175] Schwartz, *supra* note 146, at 58.

[176] N.Y. JUDICIARY LAW §§ 750 *et seq.* (McKinney 1975).

[177] *Id.* §§ 756, 757, 770, 772-74.

[178] CPLR 5223 permits a judgment creditor to compel disclosure of any information pertinent to the satisfaction of the judgment by serving the debtor with a subpoena. The judgment creditor may serve any or all of the following subpoenas: a subpoena requiring the debtor's attendance for deposition; a subpoena duces tecum requiring the production of books and papers; an information subpoena accompanied by written questions which require the debtor's written answers under oath. CPLR 5224.

[179] CPLR 5251 makes "refusal or willful neglect" to obey a subpoena punishable as a contempt of court. If the court was satisfied by creditor's affidavit that the judgment debtor had failed to comply with the subpoena, it could issue an order directing the accused to show cause why he should not be punished for contempt. N.Y. JUDICIARY LAW § 757(1) (McKinney 1975). For a more detailed discussion of this procedure see 7B McKINNEY'S CPLR 5251, commentary at 199 (Supp. 1975).

[180] N.Y. JUDICIARY LAW § 750(A)(3) (McKinney 1975).

[181] *Id.* §§ 770, 772.

order for the judgment debtor's arrest and imprisonment without further proceedings.[182] In *Vail v. Quinlan*,[183] a three-judge federal district court[184] found these procedures substantially devoid of necessary due process protections. Accordingly, the court declared the applicable sections[185] invalid and enjoined their further enforcement.[186]

The *Vail* plaintiffs raised four objections to the existing statu-

---

[182] Section 756 of the Judiciary Law provides:

> Where the offense consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected; it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sums of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law.

Id. § 756.

[183] 406 F. Supp. 951 (S.D.N.Y. 1976) (three-judge court). Plaintiffs, all judgment debtors, were certified as a class by a single district court judge pursuant to 28 U.S.C. § 2284(5) (1970). The action was brought under 42 *id.* § 1983 and 28 *id.* § 1343(3) (1970). Plaintiffs challenged the constitutionality of N.Y. JUDICIARY LAW §§ 756, 757, 765, 767, 769-75 (McKinney 1975), seeking money damages and declaratory and injunctive relief.

Plaintiff, Vail, had been the subject of a default judgment in the amount of $534.63. Morrow, the judgment creditor's attorney, served him with a subpoena ordering his appearance for the purpose of disclosing information concerning his ability to satisfy the judgment. On the basis of Morrow's affidavits that Vail had been duly served but had not appeared, and that such nonappearance had prejudiced the judgment creditor's rights and remedies, the Dutchess County Court issued an order directing Vail to show cause why he should not be punished for contempt. When Vail failed to appear, the court held him in contempt and imposed a fine of $270 as well as sheriff's fees and costs to be paid to the judgment creditor. On the basis of Morrow's affidavits that Vail had been served with the order imposing the fine and failed to comply, the court issued an ex parte commitment order directing the sheriff to arrest Vail and commit him to the county jail until the fine and other fees were paid. 406 F. Supp. at 956-57.

[184] 28 U.S.C. § 2281 (1970) requires that a federal district court issuing "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute" on the ground of unconstitutionality must consist of three judges.

[185] N.Y. JUDICIARY LAW §§ 756, 757, 770, 772-75 (McKinney 1975).

[186] 406 F. Supp. at 960. The defendants contended that the federal court should properly abstain from ruling on the merits of the case. The abstention doctrine permits a federal district court "to decline to exercise or to postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law." Harman v. Forrsenius, 380 U.S. 528, 534 (1965). It is generally invoked when the state statute in question has not yet been interpreted by the state courts and where such interpretation might avoid the necessity of reaching federal issues. *See* Kusper v. Pontikes, 414 U.S. 51, 54 (1973). The *Vail* court found that there was no reason to invoke the doctrine since the statutes in question were not subject to an interpretation that might avoid the constitutional issues, and there was no question of how the state courts might implement them. 406 F. Supp. at 957-59.

Another reason for utilization of the abstention doctrine is to prevent federal courts from staying or enjoining pending state criminal proceedings in all but exceptional circumstances, *i.e.* where expressly authorized by Congress, where it is necessary in aid of the federal court's jurisdiction, to protect or effectuate the federal court's judgments, or where a person will suffer irreparable damage if the state proceeding is not enjoined. *See* Younger v. Harris, 401 U.S. 37, 41, 43 (1971); 28 U.S.C. § 2283 (1970). The *Vail* court found the *Younger* doctrine, even as expanded to encompass pending civil proceedings which are intimately connected with the enforcement of the state's penal laws, *see* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Anonymous v. Association of the Bar, 515 F.2d 427 (2d Cir.), *cert. denied*, 96 S. Ct. 122 (1975), no bar to its entertaining the present action. 406 F. Supp. at 958.

tory scheme: (1) it allowed a finding of contempt and subsequent imprisonment on the basis of an ex parte proceeding;[187] (2) it did not require the show cause order to clearly indicate the purpose of the hearing and the consequences of failure to comply;[188] (3) the statute failed to mandate that the debtor be informed of his right to counsel;[189] and (4) the sanctions imposed by the statutory scheme were punitive in nature.[190]

The court found all four objections to be well taken. A finding of contempt, the court initially noted, "can be properly made only upon a hearing with both parties present."[191] The statutory scheme in question provided an opportunity for a hearing upon the return of the show cause order. If the debtor failed to appear, however, he would be adjudged in contempt and subject to an order of commitment. The court observed that where so serious an interest as liberty is involved, due process requires more.[192] Providing a hearing within 90 days of imprisonment[193] is insufficient; a hearing is required before the debtor can be deprived of his liberty.[194] With respect to the plaintiffs' second contention, the court determined that to properly serve its purpose a hearing must be preceded by "complete and clear" notice.[195] The court therefore instructed that the show cause order should not only clearly specify the nature of the hearing, but also give "a stark warning" concerning the consequences of failure to appear.[196] In upholding the plaintiffs' third contention, the court noted that since the debtor could not be

---

[187] Plaintiffs challenged, *inter alia*, N.Y. JUDICIARY LAW § 756 (McKinney 1975) (issue of warrant without notice); *id.* § 757 (order to show cause); *id.* § 770 (final order directing punishment); *id.* § 773 (amount of fine); *id.* § 774 (length of imprisonment and periodic review of proceedings). 406 F. Supp. at 956.

[188] In this regard, plaintiffs cited N.Y. JUDICIARY LAW § 757(1) (McKinney 1975), which contains no directives as to what the show cause order shall contain. 406 F. Supp. at 956.

[189] Plaintiffs challenged N.Y. JUDICIARY LAW §§ 756, 770, 772, 774 (McKinney 1975), which subject the debtor to imprisonment yet contain no provisions whereby he may be informed of his right to counsel. 406 F. Supp. at 956.

[190] Plaintiffs challenged the nature of the fines and imprisonment permitted under N.Y. JUDICIARY LAW §§ 756, 770, 773, 774 (McKinney 1975). 406 F. Supp. at 959.

[191] 406 F. Supp. at 959 (footnote omitted).

[192] *Id.*

[193] N.Y. JUDICIARY LAW § 774(2) (McKinney 1975) provides in pertinent part:

> In all instances where any offender shall have been imprisoned pursuant to article nineteen of the judiciary law and where the term of such imprisonment is specified to be an indeterminate period of time or for a term of more than three months, such offender, if not then discharged by law from imprisonment, shall within ninety days after the commencement of such imprisonment be brought, by the sheriff, or other officer, as a matter of course personally before the court imposing such imprisonment and a review of the proceedings shall then be held to determine whether such offender shall be discharged from imprisonment.

[194] 406 F. Supp. at 959.

[195] *Id.*

[196] *Id.* at 959-60.

expected to understand, much less assert, the defenses that might be raised, the right to a hearing would be ineffective without the aid of counsel.[197] Finally, the court determined that the sanctions imposed were neither remedial[198] nor coercive[199] and are therefore improper in a civil contempt proceeding.

The holding of the *Vail* court is unassailable. The requirements of due process are flexible, depending upon the extent to which an individual will be "condemned to suffer grievous loss."[200] The deprivation of an individual's liberty is a particularly onerous sanction and calls for scrupulous safeguards.[201] The fact that imprisonment occurs within the context of a civil proceeding does not alleviate the necessity for constitutional protection.[202] Fundamental to the notion of due process is an opportunity for a fair hearing prior to the imposition of any sanction.[203] The statutory scheme under scrutiny in *Vail,* however, permitted imprisonment to result from an ex parte determination.[204] Its defects in this regard were not remedied by the provision for an opportunity to be heard after the commencement of incarceration since by that time the individual has already suffered a grievous loss.[205] Furthermore, a fair

---

[197] *Id.* at 960. The court reasoned that "a debtor who is deprived of his liberty is as much entitled to due process as is a defendant charged with a crime." *Id.* (footnote omitted).

[198] The court noted that even when the alleged contempt does not cause any injury to the creditor N.Y. JUDICIARY LAW § 773 (McKinney 1975) requires the imposition of a fine of up to $250 plus costs. 406 F. Supp. at 960.

[199] The court explained that a coercive sanction cannot be justified if the person is unable to comply. Yet, N.Y. JUDICIARY LAW § 756 (McKinney 1975) authorizes the arrest and incarceration of a debtor even if he is unable to pay the fine required by the order. 406 F. Supp. at 960.

[200] Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970), *quoting* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

[201] *See, e.g.,* Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (revocation of parole); Abbit v. Bernier, 387 F. Supp. 57, 63 n.12 (D. Conn. 1974) (three-judge court) (state body execution statutes unconstitutional absent provision for a preincarceration hearing).

[202] In *In re* Harris, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968) (en banc) (Traynor, C.J.), the court held a mesne process of civil arrest which did not provide an adequate opportunity to be heard with assistance of counsel to be a violation of due process. The court noted: "A defendant who is deprived of his liberty by civil process is as much entitled to due process of law as a defendant who is deprived of his liberty because he is charged with a crime." *Id.* at 491, 446 P.2d at 152, 72 Cal. Rptr. at 344.

[203] *See, e.g.,* Harris v. United States, 382 U.S. 162, 166-67 (1965) (finding of criminal contempt requires notice and hearing). Although the *Harris* case dealt with criminal contempt proceedings, much of the reasoning behind requiring such measures is equally applicable to civil proceedings that may result in loss of liberty. *See* Abbit v. Bernier, 387 F. Supp. 57, 63 n.12 (D. Conn. 1974) (three-judge court).

[204] *See* note 187 and accompanying text *supra.*

[205] N.Y. JUDICIARY LAW § 774(2) (McKinney 1975) provides that the offender must be brought before the court within 90 days of the commencement of his incarceration for a review to determine whether he should be released. Section 775 permits the court in its discretion to discharge the defendant when he is unable to endure imprisonment or comply with the order. *Id.* § 775.

In Fuentes v. Shevin, 407 U.S. 67 (1972), the Court was asked to determine the

hearing requires adequate notice to the accused[206] and access to representation by counsel.[207] Lacking these basic safeguards, the enforcement procedures in question fell short of the minimal demands of due process.

The objection on the ground that sanctions imposed were punitive in nature is also valid. It is well established that while the court in a civil contempt proceeding may impose either remedial or coercive sanctions on a noncomplying party, punitive measures must be avoided.[208] The theory behind this rule is that a civil defendant is not being punished for a public wrong, but rather is being compelled to indemnify the aggrieved party.[209] Nevertheless, the statutory scheme under consideration permitted the imposition of a maximum fine of $250 plus costs notwithstanding the absence

---

constitutionality of prejudgment replevin statutes which allowed a private party to obtain an ex parte writ of replevin without a hearing simply by posting a bond for double the value of the property. The writ directed the sheriff to seize the property in question. The Court held that due process required a hearing on the question of the right of repossession prior to seizure of the property. In subsequent decisions, however, the Court retreated somewhat from this position, essentially holding that the sequestration of property is not in violation of due process so long as a judicial officer participates in issuing the order, and adequate opportunity is given for ultimate judicial determination of liability. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). This appears to be the minimum standard applicable where the court seeks to protect one's interest in property rights. It would seem that the deprivation of personal liberty demands a more exacting measure of due process. *See* Desmond v. Hachey, 315 F. Supp. 328 (D. Me. 1970), wherein a three-judge court held the Maine Debtor Disclosure Law unconstitutional since it permitted incarceration on the basis of an ex parte application without a prior hearing.

[206] Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court). Notice, the *Lynch* court held, should include "the date, time, and place of the hearing; a clear statement of the purpose of the proceedings and the possible consequences to the subject thereof." *Id.* at 388; *accord,* Cooke v. United States, 267 U.S. 517, 537 (1925); Parker v. United States, 153 F.2d 66, 70 (1st Cir. 1946).

[207] *See* United States v. Sun Kung Kang, 468 F.2d 1368, 1369 (9th Cir. 1972) (per curiam) (civil contempt proceeding); Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974) (three-judge court); *In re* Harris, 69 Cal. 2d 486, 490, 446 P.2d 148, 151-52, 72 Cal. Rptr. 340, 343 (1968) (en banc) (Traynor, C.J.).

[208] *See* Maggio v. Zeitz, 333 U.S. 56, 72-73 (1948); United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441-42 (1911).

[209] The court in Parker v. United States, 153 F.2d 66 (1st Cir. 1946), summarized the theory behind the sanctions imposed in a civil contempt proceeding as follows:

> Proceedings in civil contempt are between the original parties and are instituted and tried as a part of the main cause. Though such proceedings are "nominally those of contempt" . . . the real purpose of the court order is purely remedial — to coerce obedience to a decree passed in complainant's favor, or to compensate complainant for loss caused by respondent's disobedience of such decree. If imprisonment is imposed in civil contempt proceedings, it cannot be for a definite term . . . . The respondent can only be imprisoned to compel his obedience to a decree. If he complies, or shows that compliance is impossible, he must be released, for his confinement is not as punishment for an offense of a public nature. If a compensatory fine is imposed, the purpose again is remedial, to make reparation to a complainant injured by respondent's disobedience of a court decree.

Id. at 70 (citations omitted).

of any loss to the complainant.[210] If the defendant failed to pay the fine he could be imprisoned without any inquiry into his ability to comply.[211] A fine cannot be considered remedial in the absence of loss. Nor can imprisonment be a valid method of coercion where the defendant lacks the financial ability to comply with the court order.

The procedure sought to be upheld by the State in *Vail* seriously infringed upon the rights of judgment debtors who failed to comply with show cause orders. The State's interest in rendering enforceable judgments does not outweigh an individual's constitutional right to due process. Hopefully, the legislature will act quickly upon the recommendations of the *Vail* court and incorporate into the existing statutory framework safeguards sufficient to protect the interests of all parties involved.

LANDLORD AND TENANT

Prior judgment available as defense but not counterclaim in summary proceeding for rent.

In actions by landlords for nonpayment of rent, the New York courts have exhibited an increasing awareness of the need to protect tenants' rights.[212] Recently, in *Myack v. Aruca,*[213] Judge Harbater of the New York City Civil Court, Queens County, addressed the question whether a tenant can interpose a prior New York judgment as a setoff in his landlord's action for rent. The court concluded that while the tenant could not assert the earlier judgment as a counterclaim, he was entitled to raise the earlier judgment as a defense since it could be equated with partial payment of the rent due.[214] Judge Harbater believed the interposition of the

---

[210] *See* note 198 *supra.*

[211] *See* note 199 *supra.*

[212] In New York and other jurisdictions, the rights of tenants are continually being expanded. *See, e.g.,* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970) (warranty of habitability implied in all leases by operation of law; breach thereof gives rise to normal remedies for breach of contract); Weidman v. Tomaselli, 81 Misc. 2d 328, 365 N.Y.S. 2d 681 (Rockland County Ct. 1975) (lease provision requiring tenants to pay additional sum as rent upon commencement of any proceeding by landlord, irrespective of landlord's success, held unconscionable); Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (N.Y.C. Civ. Ct. N.Y. County 1971) (tenants may raise defenses against payment where landlord has violated law so as to substantially affect habitability of premises); Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases,* 56 CORNELL L. REV. 489 (1971); Comment, *Tenant Remedies for a Denial of Essential Services and for Harassment — The New York Approach,* 1 FORDHAM URBAN L.J. 66 (1972).

[213] 174 N.Y.L.J. 105, Dec. 2, 1975, at 9, col. 3 (N.Y.C. Civ. Ct. Queens County).

[214] *Id.,* at cols. 3-4.