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CPLR 7102: Due Process Reconsidered

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conclusion. Hopefully, the court, at some future date, will have an opportunity to remedy this deficiency.

ARTICLE 71 — RECOVERY OF CHATTEL

CPLR 7102: Due process reconsidered.

Prejudgment seizure of property without notice and an opportunity for a hearing came under judicial review in *Sniadach v. Family Finance Corp.*[131] The United States Supreme Court held therein that summary wage garnishment, absent these basic procedural safeguards, violated the due process clause of the fourteenth amendment.[132] Although such protection was at first afforded only "specialized" property,[133] such as wages, the Court later, in *Fuentes v. Shevin*,[134] extended the prophylactic shield to all types of personalty.[135]

New York was forced to respond to the judicial mandates of *Sniadach* and *Fuentes* in *Laprease v. Raymours Furniture Co.*,[136]

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131 395 U.S. 337 (1969), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 379 (1971).

132 Wisconsin, whose wage garnishment procedure was invalidated in *Sniadach*, responded by passing a far-reaching consumer protection law indicating specifically what procedures afford due process. WIS. STAT. ANN. §§ 421.101-427.105 (1974), *discussed in* Note, *Self-Help Repossession: The Constitutional Attack, The Legislative Response, And The Economic Implications*, 62 GEO. L.J. 273, 305-09 (1973). Notice and opportunity for a hearing were deemed indispensable prior to the repossession of chattels from consumers. WIS. STAT. ANN. § 425.205 (1974). This provision is far more specific than the amended CPLR 7102. L. 1971, ch. 1051, § 1, eff. July 2, 1971. *See* note 140 and accompanying text *infra*.

133 The ill-defined concept of "specialized property" has been formulated through subsequent judicial construction. Commencing with wages in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), it soon extended to include household necessities, Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970). The concept was later expanded to include tools and equipment used in one's occupation. Cedar Rapids Engineering Co. v. Haenelt, 68 Misc. 2d 206, 326 N.Y.S.2d 653 (Sup. Ct. Sullivan County 1971), *aff'd*, 39 App. Div. 2d 275, 333 N.Y.S.2d 953 (3d Dep't 1972).

Until recently, it appeared that prior discussion attempting to define what constituted "specialized property" had been mooted by Fuentes v. Shevin, 407 U.S. 67 (1972). The Court therein extended constitutional protection to "any significant property interest," without classification. *Id.* at 87. However, in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), wherein *Fuentes* was limited to require a hearing only before a *final* deprivation of property, the Supreme Court retreated from its prior position. In distinguishing *Sniadach* from *Mitchell* on the basis of wages, the Court seems to have revitalized the "specialized property" concept. *See* text accompanying notes 152-168 *infra*.

134 407 U.S. 67 (1972). The *Fuentes* Court suggested some "extraordinary situations" might arise in which summary seizures might be allowed, all of them involving governmental or particularly imperative actions. Private replevin actions, however, were not included. *See* 22 BUFFALO L. REV. 17 (1972).

135 New York courts further extended the protection to include the right to use gas and electric utilities, prohibiting the seizure of meters and discontinuance of service in the absence of necessary constitutional safeguards. Consolidated Edison Co. v. Powell, 77 Misc. 2d 475, 354 N.Y.S.2d 311 (Civ. Ct. Bronx County 1974).

136 315 F. Supp. 716 (N.D.N.Y. 1970), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 379 (1971).

wherein the United States District Court for the Northern District of New York declared the state's replevin statute[137] unconstitutional. The *Laprease* court, however, did not go so far as to necessitate notice and an opportunity for a hearing before seizure could be constitutionally effectuated. Instead, the court suggested that the "order of a judge or of a court of competent jurisdiction"[138] would satisfy due process requirements.[139] In responding to *Laprease*, the New York Legislature enacted a broadly worded amendment to its replevin statute simply requiring conformity with due process.[140] As a result, judicial resolution of the precise procedure necessary to achieve the intended result was inevitable.[141]

Three years after the amendment, defendants in *Long Island Trust Co. v. Porta Aluminum Corp.*[142] argued that CPLR 7102 remained unconstitutional. There, a disinterested third-party debtor, Gilbalson, Inc., had procured a loan from the plaintiff, offering certain tractors and trailers as collateral. Gilbalson subsequently sold the chattels in question, one tractor and six trailers, to the defendants, representing them to be free from liens, excluding a tax levy. These items, with the exception of one trailer, had been specifically enumerated in the security agreement between the plaintiff and the debtor. Upon the debtor's default, the plaintiff sought recovery of the security from the defendant-purchasers. Relief was granted by the Supreme Court, Nassau County, pursuant to CPLR 7102.[143]

On defendants' appeal, plaintiff contended that the CPLR as amended,[144] and viewed in light of *Laprease*, did not necessitate notice and an opportunity for a hearing, as specifically required by *Fuentes*. The Appellate Division, Second Department, in explaining that all of the provisions of CPLR 7102 must be weighed together and recon-

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137 CPLR 7102.

138 315 F. Supp. at 725.

139 Some commentators have failed to distinguish between notice and the opportunity to be heard, and judicial or court intervention as the requirements for due process. *See* 35 ALBANY L. REV. 370 (1971); 71 COLUM L. REV. 889 (1971). The common practice in New York today is to provide notice before seizure. McLaughlin, *New York Trial Practice*, 171 N.Y.L.J. 4, June 14, 1974, at 4, col. 2.

140 L. 1971, ch. 1051, § 1, eff. July 2, 1971. Under the amended statute a court may issue an order of seizure "[u]pon presentation of [an] affidavit and undertaking and upon such terms as may be required to conform to the due process of law requirements of the fourteenth amendment . . . ." CPLR 7102(d)(1).

141 *See* 2 N.Y. SESS. LAWS [1974] 2641 (McKinney) (Governor's criticism of statute's ambiguity); 7B MCKINNEY'S CPLR 7102, supp. commentary at 133 (1971); 7A WK&M ¶ 7102.14.

142 44 App. Div. 2d 118, 354 N.Y.S.2d 134 (2d Dep't 1974).

143 *Id.* at 120, 354 N.Y.S.2d at 137.

144 *See* note 140 *supra*.

ciled,[145] apparently adopted the plaintiff's argument and the *Laprease* criteria of due process. The court noted:

> Clearly, such procedure [used in replevin actions] would not give a defendant, as was said in *Laprease*, "an opportunity to be heard . . . before his property is seized," but it would compel the plaintiff to "present to a judicial officer the circumstances allegedly justifying summary action," which would satisfy "procedural due process" requirements.[146]

Nevertheless, the court yielded to *Fuentes* by recognizing its obligation "to construe statutes so as to avoid constitutional doubts."[147] Consequently, the constitutionality of CPLR 7102 could only be preserved by interpreting its due process provision as including whatever the Supreme Court said such requirements should entail. Thus, the Appellate Division, though seemingly displeased with the *Fuentes* requirements, felt constrained to comply with the mandate of the Supreme Court.

Subsequent to the resolution of the question of constitutionality, the court summarily disposed of the ancillary issue of whether these particular defendants had received due process in the absence of open court testimony. *Fuentes* had allowed for variations in the form of the requisite notice and hearing procedures.[148] The court, in the instant case, was satisfied that the defendants, who "were permitted to submit lengthy affidavits in opposition to the plaintiff's motion and were heard in oral argument by the Special Term,"[149] had not been denied due process.[150] However, factual questions regarding the plaintiff's actions and the application of the Uniform Commercial Code required the court to conclude that the granting of the order of seizure had been improper and could not stand.[151]

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145 44 App. Div. 2d at 122-23, 354 N.Y.S.2d at 139, *quoting* 1 N.Y. CONSOL. LAWS § 97 (McKinney 1971).

146 *Id.* at 122, 354 N.Y.S.2d at 138, *quoting* Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 724 (N.D.N.Y. 1970).

147 *Id.* at 123, 354 N.Y.S.2d at 139, *quoting* People v. LoCicero, 14 N.Y.2d 374, 378, 200 N.E.2d 622, 624, 251 N.Y.S.2d 953, 956 (1964).

148 The Court in *Fuentes* stated that "[t]he nature and form of such prior hearings . . . are legitimately open to many potential variations . . . ." Fuentes v. Shevin, 407 U.S. 67, 96 (1972).

149 44 App. Div. 2d at 124, 354 N.Y.S.2d at 140.

150 *See* Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973), *discussed in The Survey* 48 ST. JOHN'S L. REV. 611, 662-64 (1974), wherein the Court of Appeals, in following *Fuentes* where summary seizure under the Lien Law was involved, held that notice and opportunity for a hearing were required, but failed to specify any particular procedure. *Id.* at 22, 300 N.E.2d at 715, 347 N.Y.S.2d at 177.

151 The financing statement covering the loan from Long Island Trust to Gilbalson included the items covered and the term "(X) Proceeds." The appellants argued that the inclusion of a reference to proceeds in the statement constituted consent to the sale. Thus,

The Second Department's desire to adhere to the more limited *Laprease* standard of due process found support in the subsequent United States Supreme Court decision in *Mitchell v. W. T. Grant Co.*[152] The Court, in retreating from its *Fuentes* requirement of notice and an opportunity to be heard before the deprivation of possession of property,[153] permitted summary seizure provided certain protective measures were maintained. A vigorous dissent, claiming no distinction existed between *Mitchell* and *Fuentes,* mourned the loss of stare decisis.[154] Although Justice White, writing for the majority, sought to distinguish the two decisions,[155] Justice Powell, in his concurring opinion, freely admitted that the Court had disregarded stare decisis,[156] but felt that it was justified in so doing.[157]

In *Mitchell,* the essential issue centered on whether the Louisiana procedure of granting *ex parte* orders of sequestration was violative of due process. Had the Court followed its precedent in *Fuentes,* the outcome would have been predictable. However, the Court chose to impart a narrower definition of due process. It sought to balance the rights of the parties, giving the creditor, here the seller of goods, more protection than had heretofore been granted. Concern was voiced that "the seller's interest in the property as security"[158] would deteriorate with continued use by the buyer, and that the seller should, therefore, be protected by

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it was urged that plaintiff should have looked to the proceeds, as permitted under the U.C.C., instead of the items. *See* N.Y.U.C.C. § 9-306(2) (McKinney 1964). Special Term held that inclusion of the word "Proceeds" did not imply consent to sale. 44 App. Div. 2d at 120, 354 N.Y.S.2d at 137. The Appellate Division, however, relied upon Hempstead Bank v. Andy's Car Rental Sys., 35 App. Div. 2d 35, 39-40, 312 N.Y.S.2d 317, 321 (1970), *quoting* N.Y.U.C.C. § 9-306, Comment 3 (McKinney 1964), which reads:

> [A] claim to proceeds in a filed financing statement might be considered as impliedly authorizing sale or other disposition of the collateral, depending upon the circumstances of the parties, the nature of the collateral, the course of dealing of the parties and the usage of trade . . . .

44 App. Div. 2d at 125, 354 N.Y.S.2d at 142. Lacking information to render such a determination, and considering the possibility of serious economic harm to the appellants, the court held the order of seizure should not have been issued. *Id.* at 125-26, 354 N.Y.S.2d at 142.

152 416 U.S. 600 (1974).

153 The Court noted that temporary deprivation of possession before final adjudication was accepted practice. *Id.* at 609. *See* Bell v. Burson, 402 U.S. 535 (1971); Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950). The Court in *Fuentes,* however, had objected to *any* deprivation absent notice and the opportunity to be heard. 407 U.S. at 84-86.

154 416 U.S. 629, 634-35 (Stewart, Douglas and Marshall, JJ., dissenting).

155 The lack of judicial participation in *Fuentes* was stressed by Justice White. *Id.* at 615. *See* notes 165-168 and accompanying text *infra.*

156 416 U.S. at 623, 627-29 (Powell, J., concurring). This approach avoided the necessity to reconcile *Fuentes* and *Mitchell.*

157 *Id. See* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 93 (1936) (Stone & Cardozo, JJ., concurring). "The doctrine of *stare decisis,* however appropriate and even necessary at times, has only limited application in the field of constitutional law." *Id.* at 94.

158 416 U.S. at 608.

sequestration of the property.[159] The buyer, on the other hand, received protection against a wrongful seizure through a bond posted by the seller from which damages could be paid.[160] Additionally, the buyer could have reacquired possession of the property by posting his own bond as protection for the seller's interests.[161] Finally, the Court found that provision for a complete hearing concerning possession, immediately following sequestration, protected the debtor against a lengthy loss.[162] As a result, the opinion expressed satisfaction that the procedure, in its entirety, protected the parties' respective interests.[163]

Two significant considerations entered into the Court's reasoning. First, support of the creditor was particularly appealing since Louisiana law caused a vendor's lien to expire immediately upon the buyer's transfer of possession to a third party.[164] Apparently, the Court desired to provide the creditor with a viable opportunity to offset this threat of eventual loss of security. Secondly, the Court expressed a desire for flexibility of procedure.[165] Yet, the extent to which such flexibility is available remains uncertain. In *Mitchell*, the sequestration was authorized by a judge; however, as the dissent indicated, outside Orleans Parish, the court clerk performs the same function.[166] Clearly, the lack of judicial participation in the Florida and Pennsylvania replevin procedures was a major reason for their being declared unconstitutional in *Fuentes*.[167] Thus, it is questionable whether the Court would have maintained flexibility to the extent of upholding a sequestration authorization issued by someone other than a judge.[168]

As a result of *Mitchell*, New York courts will now be able to align themselves more closely with the due process requirements as set forth in *Laprease*. The generality of CPLR 7102 should facilitate conformity with any necessities newly defined by *Mitchell*. The statute, under its present construction, provides for the protection of the debtor in the

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* at 610.

163 *Id.*

164 *Id.*; LA. CIV. CODE ANN. art. 312, subd. 7 (West 1974).

165 416 U.S. at 610. *See, e.g.*, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Inland Empire Dist. Council v. Millis, 325 U.S. 697, 710 (1945).

166 416 U.S. at 632.

167 *See* Fuentes v. Shevin, 407 U.S. 67, 73-78 (1972).

168 The Court stated, however, that "[c]onsidering the Louisiana procedure as a whole, we are convinced that the *State* has reached a constitutional accommodation of the respective interests of buyer and seller." 416 U.S. at 610 (emphasis added). Thus, the Court seemingly defeated one of its own arguments in *Fuentes*. In parishes other than Orleans, judicial participation would appear unnecessary for the procedure to satisfy due process requirements.

form of an undertaking by the plaintiff,[169] similar to the plaintiff's bond in Louisiana; the defendant may reclaim possession of the chattel;[170] the statute may be read to require the plaintiff to show that the chattel is in danger of being destroyed or removed; it may be construed to require that only a judge may grant an order of seizure; and the requirement of an immediate post-seizure hearing may be inferred. In short, the vagueness of the statute permits interpretation in accordance with *Mitchell*, thereby satisfying the flexibility espoused by the Supreme Court therein. However, it must be noted that New York courts may continue to require that the debtor receive notice and an opportunity to be heard prior to sequestration. In light of the *Porta* decision, this would appear unlikely.

General Obligations Law

General Obligations Law § 15-108: Amendment allows plaintiff to settle with one tortfeasor without affecting his rights against remaining tortfeasors.

A new subdivision (a) of section 15-108 of the General Obligations Law[171] provides that a release given to one of two or more joint tortfeasors, unless specified to the contrary, releases that tortfeasor only. Prior to its amendment, section 15-108 stipulated that a release reduced any eventual recovery of the releasor by the amount indicated in the release or by the consideration paid for it, whichever was greater.[172] As amended, section 15-108 provides that a release reduces the plaintiff's recovery by the amount of damages attributable to the released tortfeasor, if that amount is greater than the amount stipulated in the release or the consideration paid for it.[173] Additionally, subdivision (b)

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169 CPLR 7102(e).

170 Prior to revision, CPLR 7103 required that a defendant post a bond before he could regain possession of a chattel. N.Y. Sess. Laws [1962], ch. 308, § 7103 (McKinney). The plaintiffs in *Laprease* contended that such a requirement was violative of the equal protection clause of the fourteenth amendment since it was discriminatory against the poor. While the court found it unnecessary to consider that contention, the legislature eliminated the possibility of a recurrence of that argument with the removal of the bond requirement. 7B McKinney's CPLR 7103, supp. commentary at 139 (1971). *Mitchell*, however, approved the requirement for such a bond for the protection of the creditor. As a result, an issue arises as to whether the New York provision may be viewed as a violation of the creditor's rights.

171 N.Y. Sess. Laws [1974], ch. 742, § 3 (McKinney).

172 N.Y. Gen. Oblig. Law § 15-108 (McKinney 1970).

173 This amendment is intended to encourage settlements and simultaneously assure that no non-settling tortfeasor will be liable for more of the damages than his equitable share. *See* Twelfth Annual Report of the Judicial Conference to the Legislature on the CPLR, *as appearing in* 2 N.Y. Sess. Laws [1974] 1817 (McKinney). Another purpose of this subsection is to allow injured parties to settle their claims against one defendant