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Article 18

CPLR 7102: Due Process Protects All Types of Property

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sible appeal.[92] Failure to utilize the informal procedure is not a waiver of the right to a formal ruling.

ARTICLE 32 — ACCELERATED JUDGMENT

Collateral Estoppel: Court of Appeals affirms that prior judgment establishing freedom from negligence does not establish freedom from contributory negligence.

In *Nesbitt v. Nimmich*,[93] the Court of Appeals recently affirmed without opinion an Appellate Division, Second Department, decision which held that the doctrine of collateral estoppel does not operate to establish the plaintiff's freedom from contributory negligence where his freedom from negligence as a defendant was determined in a prior action. The case involved a personal injury action between parties who were co-defendants in the prior suit. The Second Department's refusal to grant the plaintiff's motion for summary judgment was based on the difference in the burden of proof accompanying the movant's change in status from defendant to plaintiff. The plaintiff's inability to establish the defendant's negligence in the prior action should not permit the inference that the defendant can overcome his burden of proving freedom from contributory negligence in a subsequent action in which he is the plaintiff.

ARTICLE 71 — RECOVERY OF CHATTEL

CPLR 7102: Due process protects all types of property.

Since the 1969 Supreme Court decision in *Sniadach v. Family Finance Corp.*,[94] there have been important developments in replevin law. In *Sniadach*, the Court set the direction by declaring that a hearing or an opportunity to defend a replevin action before the garnishment of one's salary was necessary to satisfy the requirements of due process. While *Sniadach* was concerned with wages, a "specialized type of property"[95] the deprivation of which may cause great personal

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92 7B MCKINNEY'S CPLR 3124, commentary at 630 (1970), *citing* Tri-State Pipe Lines Corp. v. Sinclair Ref. Co., 26 App. Div. 2d 285, 273 N.Y.S.2d 976 (1st Dep't 1966), *discussed in The Quarterly Survey*, 42 ST. JOHN'S L. REV. 128, 142 (1967).

93 30 N.Y.2d 622, 282 N.E.2d 328, 331 N.Y.S.2d 438 (1972), *aff'g mem.* 34 App. Div. 2d 958, 312 N.Y.S.2d 766 (2d Dep't 1970) (mem.), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 521 (1971).

94 395 U.S. 337 (1969). For extended discussion of *Sniadach*, see Note, *Provisional Remedies in New York Reappraised Under* Sniadach v. Family Finance Corp.: *A Constitutional Fly in the Creditor's Ointment*, 34 ALBANY L. REV. 426, 433 (1970); Note, *Some Implications of* Sniadach, 70 COLUM. L. REV. 942 (1970); *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 379 (1971).

95 395 U.S. at 340.

hardship, the constitutional protection afforded therein was soon held to extend[96] to other types of "specialized property." In *Laprease v. Raymours Furniture Co.*,[97] a three-judge federal court for New York's Northern District deemed household necessities "specialized property" and declared New York's replevin statute, article 71 of the CPLR, to be unconstitutionally broad.[98]

To meet the *Laprease* constitutional objections, CPLR 7102 was amended[99] to provide that an order of seizure may be issued by the court "[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. . . ."[100] This amendment, although enacted with reservations,[101] withstood constitutional attack in *General Electric Credit Corp. v. Fred Pistone, Jr., Inc.*[102]

The continuing difficulty in determining what constitutes "specialized property" presented itself in clear context in *Cedar Rapids Engineering Co. v. Haenelt.*[103] The defendant therein operated a business for which he had purchased certain machinery and tools from the plaintiff. As payment the defendant delivered two promissory notes to be paid in installments and signed security agreements containing acceleration clauses in case of default. Title to the chattels was to remain in the plaintiff until the balance of the debt was paid. Claiming a default, the plaintiff obtained a replevin order dispensing with notice on the basis of an affidavit that the merchandise was small and easily removable. Thereupon the sheriff seized the property. The Supreme Court, Sullivan County, applying the specialized property concept of *Sniadach* and *Laprease*, vacated the order as a violation of due process. The court reasoned that

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96 *See The Quarterly Survey*, 46 ST. JOHN'S L. REV. 768, 794 *et seq.* (1972).

97 315 F. Supp. 716 (N.D.N.Y. 1970).

98 *Id.* at 722-23. CPLR 7102 and 7110 were held unconstitutional.

99 L. 1971, ch. 1051, § 1, eff. July 2, 1971.

100 CPLR 7102(d)(1).

101 Upon signing the bill, Governor Rockefeller stated:

> I am approving this measure at this time, because failure to do would leave the State without any effective replevin procedure. I am constrained to note, nevertheless, that there are serious deficiencies in the bill in its present form that require further consideration. The most troublesome problem is the failure to establish clear and easily usable standards to guide attorneys and the courts in taking action under the statute. This is a clear invitation to unnecessary litigation.

2 MCKINNEY'S SESSION LAWS OF NEW YORK 2641 (1971). *See* 7B MCKINNEY'S CPLR 7102, supp. commentary at 125 (1971); 7A WK&M ¶ 7102.14.

102 68 Misc. 2d 475, 326 N.Y.S.2d 898 (Sup. Ct. Westchester County 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 768, 793 (1972).

103 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). The lower court decision is discussed in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 768, 794 (1972).

> [t]he deprivation of any tools and equipment tends in obvious ways to limit the party's ability to earn a living; imposes tremendous hardship on the defendant; and gives the plaintiff unwarranted leverage. The chattels seized by the plaintiff from the defendant herein were special property.[104]

Subsequent to this decision but prior to its affirmance,[105] the United States Supreme Court decided *Fuentes v. Shevin*.[106] Invalidating the prejudgment replevin statutes of Florida and Pennsylvania, the Court struck down the troublesome property classifications: "The Fourteenth Amendment speaks of 'property' generally. . . . It is not the business of a court adjudicating due process rights to . . . protect only the ones that, by its own lights, are 'necessary.' "[107] The Court recognized that "extraordinary situations" might justify outright seizure, but cautioned that these "must be truly unusual."[108] This warning was strictly adhered to in the *Cedar Rapids* affirmance, in which the Appellate Division, Third Department, held that the case did not fall within the *Fuentes* exception.

Justice Stewart stated for the majority in *Fuentes* that the *Sniadach* holding should not be read as placing a limitation on procedural due process, but rather as emphasizing the special importance of the property involved therein, *i.e.*, wages.[109] It is now clear that the type of property sought to be replevied is irrelevant, and that due process will afford the litigant an opportunity to present a defense before the seizure, in the absence of extraordinary circumstances.

ARTICLE 75 — ARBITRATION

CPLR 7501: Separability of the arbitration provision — time to reconcile New York and federal approaches.

When a party alleges fraudulent inducement of a contract containing an arbitration provision, the issue arises as to whether a court of law or the arbitrator is to pass upon the question of fraud. If the arbitration provision is viewed as separable from the underlying contract, there is no logical difficulty in permitting the arbitrator to determine whether the contract has been fraudulently induced, since the

104 68 Misc. 2d at 210, 326 N.Y.S.2d at 657-58.
105 39 App. Div. 2d 275, 333 N.Y.S.2d 953 (3d Dep't 1972).
106 407 U.S. 67 (1972) (4-3).
107 *Id.* at 90. The Court noted that summary seizure of property has been allowed to collect federal taxes, to further a national war effort, to counteract the effects of a bank failure, and to protect the public from misbranded drugs and contaminated food. *Id.* at 91-92.
108 *Id.* at 90.
109 *Id.* at 89.