St. John's Law Review

Volume 46
Number 2 *Volume 46, December 1971, Number 2*
Article 24

CPLR 7102: Contractual Waiver of the Right to Notice and a Hearing Deemed Ineffective for the Ex Parte Seizure of Certain Types of Property

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An order was entered to cancel the sale and to prohibit the execution of the judgment except by leave of the court.

The court order in *Gilchrist* is the furthest extension of the authority conferred by CPLR 5240 to fashion the enforcement remedies according to the circumstances in each case.[163] The judgment has not been abolished; rather, in the name of justice its execution has been frozen.[164] Nevertheless, it should be noted that this decision approaches the point of divestiture of the creditor's substantive rights.

ARTICLE 71—RECOVERY OF CHATTEL

CPLR 7102: Contractual waiver of the right to notice and a hearing deemed ineffective for the ex parte *seizure of certain types of property.*

The "blessing of age"[165] has failed to obstruct recent salutary changes in the procedural requirement of the ancient writ of replevin.

The tension between pretrial seizures of personal property and the constitutional requirements of due process had previously caused the courts little difficulty. Traditionally, the rationale for the constitutionality of pretrial seizures was as follows: although a person can not be deprived of his property absent a judicial hearing, the legislature may determine at what stage of the proceedings a hearing is required, provided that the person is not unreasonably inconvenienced.[166]

Prior to its recent amendment,[167] article 71 of New York's CPLR[168]

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163 *See* 7B MCKINNEY'S CPLR 5236, supp. commentary at 145 (1969): "[CPLR 5240] is *designed* to protect judgment debtors from abuses accruing from the *apparently lawful* application of article 52 devices." (Emphasis in original.) However, the Court of Appeals has not yet passed on the scope of CPLR 5240.

164 [T]he court can, with no more than an application of CPLR 5240, postpone the sale for any specified time or, upon any reasonable conditions, cancel it out entirely and give the judgment debtor a brand new chance to pay.

Nevertheless, CPLR 5240 has not been generally used.

It just seems to be a matter either of the lawyers not pressing for that section's application, or the judges not taking it as the broad source of authority it was intended to be.

Id.

165 Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 723 (N.D.N.Y. 1970).

166 *See* Flournoy v. City of Jeffersonville, 17 Ind. 169, 174 (1861).

167 L. 1971, ch. 1051, at 1806-10, eff. July 2, 1971.

168 The former CPLR 7101-7112 read, in part, as follows:

7102(a) Seizure of chattel. The sheriff shall seize a chattel without delay when the plaintiff delivers to him an affidavit, requisition and undertaking and, if an action to recover the chattel has not been commenced, a summons and complaint.

7102(c) Affidavit. The affidavit shall clearly identify the chattel to be seized and shall state: 1. that the plaintiff is entitled to possession by virtue of facts set forth; 2. that the chattel is wrongfully held by the defendant named; 3. whether an action to recover the chattel has been commenced, the defendants served. . .

7102(d) Requisition. The requisition shall be deemed the mandate of the court and shall direct the sheriff of any county where the chattel is found to seize the chattel described in the affidavit.

was typical of most replevin statutes. It provided for the seizure of a chattel by the sheriff when a plaintiff in replevin delivered an affidavit, requisition, and undertaking to him.[169] If the plaintiff had not yet commenced an action to recover the chattel, he also had to deliver a summons and complaint to the sheriff.[170] The sheriff of any county where the chattel was found was authorized to break open a building or enclosure in order to seize the chattel.[171] While the requisition was "deemed the mandate of the court,"[172] in reality, it was issued without any intervening examination by the court; in effect, it was the mandate of the plaintiff's attorney.[173] "No prior notice to the persons holding the chattel was necessary, and the seizure was deemed to be merely a preliminary step in the replevin action."[174]

The constitutional adequacy of such a statute had never really been questioned, perhaps in part because of its ancient tradition. However, with the rise of the consumer-credit industry, it became apparent that such statutes could be overly lender-oriented. The initial congressional and legislative reactions to the developing inequity focused, primarily, on requiring the lender to make full disclosures to the consumer. Little attempt was made to protect the consumer once the debtor-creditor relationship had been established.[175]

7110. If a chattel is secured or concealed in a building or enclosure and it is not delivered pursuant to his demand, the sheriff shall cause the building or enclosure to be broken open and shall take the chattel into his possession.

The pertinent parts of the amendment read as follows:

7102(a) Seizure of chattel. When the plaintiff delivers to a sheriff an affidavit, order of seizure and undertaking and, if an action to recover a chattel has not been commenced, a summons and complaint, he shall seize the chattel in accordance with the provisions of the order and without delay.

7102(c) Affidavit. The affidavit . . . shall state: 5. if the plaintiff seeks the inclusion in the order of seizure of a provision authorizing the sheriff to break open, enter and search for the chattel in the place where the chattel may be, facts sufficient under the due process of law requirements of the fourteenth amendment to the constitution of the United States to authorize the inclusion in the order of such a provision.

7102(d) Order of seizure. 1. Upon presentation of the affidavit and undertaking and upon such terms as may be required to conform to the due process of law requirements of the fourteenth amendment to the constitution of the United States, the court shall grant an order directing the sheriff of any county where the chattel is found to seize the chattel described in the affidavit and including, if the court so directs, a provision that, if the chattel is not delivered to the sheriff, he may break open, enter and search for the chattel in the place where the chattel may be.

2. If the order of seizure does not include the [above] provision . . . , the court shall grant a restraining order that the chattel shall not be removed . . . or otherwise disposed of . . . until further order of the court.

169 Former CPLR 7102(a).

170 *Id.*

171 *Id.* 7110.

172 *Id.* 7102(d).

173 Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 722 (N.D.N.Y. 1970).

174 Finkenberg Furniture Corp. v. Vasquez, 166 N.Y.L.J. 28, Aug. 10, 1971, at 10, col. 1 (N.Y.C. Civ. Ct. N.Y. County).

175 *See* Note, *Provisional Remedies in New York Reapprised under* Sniadach v. Family

The major breakthrough came in *Sniadach v. Family Finance Corp.*[176] There the Supreme Court dealt with a Wisconsin statute[177] which allowed prejudgment garnishment of wages without notice or a hearing. The Court pointed out:

> We deal here with wages — a specialized type of property presenting distinct problems in our economic system. . . .
>
> A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support.[178]

Absent notice and a prior hearing, the deprivation of property was "so obvious" that no extended argument was deemed necessary in order to conclude that "this prejudgment garnishment procedure violate[d] the fundamental principles of due process."[179]

While some courts have construed *Sniadach* to be applicable only to wages as a specialized type of property,[180] the more realistic approach is exemplified by the holding in *Laprease v. Raymours Furniture Co.*[181] In *Laprease*, the defendant-creditor, pursuant to the New York statute, attempted to seize various items of household furnishings purchased by the plaintiff, a welfare mother with an ill husband and ten children, who was unable to make the necessary payments. A three-judge district court, noting that

> [b]eds, stoves, mattresses, dishes, tables and other necessaries for ordinary day-to-day living are, like wages in *Sniadach*, a 'specialized type of property . . . ,' the taking of which on the unilateral command of an adverse party 'may impose tremendous hardships' on purchasers of these essentials,[182]

held that the prejudgment seizure of chattel without notice and a

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Finance Corp.: *A Constitutional Fly in the Creditor's Ointment*, 34 ALBANY L. REV. 426 (1970).

176 395 U.S. 337 (1969). For an 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 (1970); Note, *Some Implications of* Sniadach, 70 COLUM. L. REV. 942 (1970); Note, *Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The* Sniadach *Case and Its Implications for Related Areas of Law*, 68 MICH. L. REV. 986 (1970).

177 WIS. STAT. ANN. §§ 267.01-.24 (West Supp. 1971). The sections overturned were §§ 267.04(1), 267.07(1), and 267.18(2)(a).

178 395 U.S. at 340.

179 *Id.* at 342.

180 *See, e.g.*, Brunswick Corp. v. J.&P., Inc., 424 F.2d 100 (10th Cir. 1970); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970), *prob juris, noted*, 401 U.S. 906 (1971); Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970).

181 315 F. Supp. 716 (N.D.N.Y. 1970). The limitation of *Sniadach* to wages is inconsistent with Goldberg v. Kelly, 397 U.S. 254 (1970), which held that New York's procedure for terminating welfare payments without notice or a hearing was a denial of procedural due process.

182 315 F. Supp. at 722.

hearing under article 71 was a clear violation of the procedural due process requirements of the fourteenth amendment.[183]

The *Laprease* court did not have to face a subsidiary problem posed in most of the cases which have construed *Sniadach* narrowly. The case involved debtors who, by virtue of a conditional sales contract, had authorized creditors to seize the goods sold upon their default. While the validity of a contractual waiver of fourteenth amendment rights was doubted in *Laprease*,[184] some courts have been reluctant to dispose of the contractual waiver as ineffectual or incompetent. Indeed, the contractual waiver problem may be the most significant barrier to the expansion of due process requirements in the consumer-credit area. Thus, in *Fuentes v. Faircloth*,[185] a three-judge district court held that Florida's replevin statute,[186] under which a conditional seller repossessed goods without a hearing in accordance with contract terms, did not violate the requirements of due process. The court declined to interfere with the contractual freedom of the parties.

However, since the requirements of procedural due process are predicated on a balancing of interests,[187] there is little reason to doubt that such a balance can be struck between the interests of the consumer and the business sector. This balancing of interests is exemplified by two recent New York decisions, the first decisions dealing with the amended article 71 mandated by *Laprease*—*Wellbilt Equipment Corp.*

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183 The *Laprease* court also held that CPLR 7102 and 7110 were violative of the fourth amendment's guarantee against unreasonable searches and seizures, made applicable to the states through the fourteenth amendment. For discussion of this aspect of the case, see 22 CASE W. RES. L. REV. 342 (1971); 19 KAN. L. REV. 281 (1971); 55 MINN. L. REV. 634 (1971).

184 Further, we question that the fine print in the usual consumers conditional sales contract gives rise to a competent and intelligent waiver of a constitutional right.

315 F. Supp. at 724. A contractual provision permitting repossession upon default presents at least two questions: (1) whether the provision constitutes a waiver of constitutional rights, and (2) if so, whether it is a competent waiver. *See, e.g.*, Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

185 317 F. Supp. 954 (S.D. Fla. 1970), *prob. juris. noted*, 401 U.S. 906 (1971).

186 FLA. STAT. ANN. §§ 78.01-.21 (Supp. 1971). The sections challenged were §§ 78.01, 78.04, 78.07, 78.08, 78.10, 78.11, and 78.12.

187 *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring):

> [Due process] is a delicate process of adjustment. . . .
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> . . . .
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> . . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, . . . the balance of hurt complained of and good accomplished . . . are some of the considerations that must enter into the judicial judgment.

v. La Creme Bakery[188] and *Finkenberg Furniture Corp. v. Vasquez.*[189] Basically, the decisions reflect two primary considerations: (1) the type of property sought to be repossessed and, hence, the hardship likely to be caused thereby, and (2) the comparative standing of the parties.

In *Wellbilt,* the plaintiff sought an *ex parte* order to seize an air-conditioning unit which he had bought at an auction of a restaurant. The defendant had purchased a lease of the restaurant, and, negotiating for the purchase of the air-conditioner himself, he had refused to allow the plaintiff to take possession of the unit. The court, noting that

> [t]he instant application does not present the type of hardship to the defendant which was envisioned in *Laprease v. Raymours Furniture* or in *Sniadach v. Family Finance Corp.*,[190]

consequently restrained the defendant from removing or disposing of the equipment and directed the marshal to seize the property five days after the defendant was served with a copy of the court order and the paper upon which the order was granted.

When the *Wellbilt* decision is read in conjunction with *Finkenberg,* it becomes apparent that implicit in the former was the realization that there was no fundamental disparity between the parties in their respective abilities to comprehend their rights and to uphold them.[191]

In *Finkenberg,* the court denied the plaintiff-furniture company's request for an order to seize, without prior notice, a five-piece bedroom set and a television purchased by the defendants under two installment contracts authorizing repossession in the event of default. In discussing some of the factors which led to *Sniadach,* the court pointed out:

> [In the course of the development of credit installment sales] . . ., replevin was distorted into a mere collection device, with the sheriff or marshal becoming an arm of the creditor. Most debtors, under these circumstances, were either too poor, or too ignorant to enforce their rights. As a result, great hardships were all too often imposed upon persons who were the least equipped to withstand such dire circumstances.[192]

The court distinguished between property, the seizure of which

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188 166 N.Y.L.J. 24, Aug. 4, 1971, at 12, col. 2 (N.Y.C. Civ. Ct. N.Y. County).

189 *Id.* 28, Aug. 10, 1971, at 10, col. 1 (N.Y.C. Civ. Ct. N.Y. County). Both decisions were by Judge Evans.

190 *Id.* 24, at 12, col. 3.

191 *Id.*

192 *Id.* 28, at 10, col. 2.

would probably cause great personal hardship, and commercial or industrial property. The court stressed that the presence of a waiver of constitutional protections in a typical consumer contract of adhesion[193] is "without such effect."[194]

Because of the type of property and possible hardship involved and indications that the defendant might not be able to comprehend his rights, the court directed the company, contractual stipulations notwithstanding, to notify the defendant of a scheduled hearing date. The defendants were temporarily enjoined from disposing of the property and were required to account for their default.

The approach taken in these two cases is preferable to limiting *Sniadach* to wages and upholding the contractual waiver of a debtor's fourteenth amendment rights. As noted previously,[195] the view that *Sniadach* is applicable only to wages has already been undermined. Failure to acknowledge the injustice of treating all consumers as copowers with their creditors can only perpetuate the very inequities which *Sniadach* was designed to dissolve. The flexibility and fairness embodied in the *Finkenberg* and *Wellbilt* decisions deserve favorable Supreme Court consideration when that tribunal ultimately resolves these issues.

ARTICLE 75—ARBITRATION

CPLR 7501: Article 75 held applicable to advisory arbitration.

CPLR 7501 provides for the enforcement of written agreements to arbitrate future or existing controversies without regard to the justiciable nature of the controversy. In determining whether a right to arbitrate exists, the court is not authorized to consider the merits of the dispute.[196] "The only pertinent questions are (1) whether there is a dispute; (2) whether there is a contract to arbitrate; and (3) whether there is a refusal to arbitrate."[197]

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193 *See* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943):

> The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly . . . or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary [sic] to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.

Quoted in 166 N.Y.L.J. 28, at 10, col. 4.

194 166 N.Y.L.J. 28, at 10, col. 4. *See* note 184 *supra* and accompanying text.

195 *See* note 181 *supra* and accompanying text.

196 *See, e.g.*, Empire State Master Hairdressers' Ass'n, Inc. v. Journeymen Barbers Local 17-A, 18 App. Div. 2d 808, 809, 236 N.Y.S.2d 371, 372 (2d Dep't 1963).

197 Greene Steel & Wire Co. v. F.W. Hartmann & Co., 235 N.Y.S.2d 238, 240 (Sup. Ct. Kings County 1962), *aff'd*, 20 App. Div. 2d 683, 247 N.Y.S.2d 1008 (2d Dep't 1964), *appeal*