St. John's Law Review

Volume 46
Number 3 *Volume 46, March 1972, Number 3*

Article 42

CPLR Art. 62: Is the New York Attachment Procedure Constitutional?

St. John's Law Review

judgment without consideration on a contingent basis to a professional collection agency, a transaction perhaps violative of public policy embodied in section 489 of the Judiciary Law,[90] the court probably would have declined to hold so broadly.

Consequently, the impact of *Lee* is not readily discernible. It would appear, from the wording of section 5240, that the court has the broadest possible discretion with regard to the use of CPLR enforcement proceedings.[91] The court's reliance, however, upon section 489 of the Judiciary Law in conjunction with the assignment and its basis, leads one to a different conclusion. The issue has never been before the Court of Appeals. Significantly, Professor Siegel has concluded:

> The problem has not been that CPLR 5240 does not supply such power. 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.[92]

ARTICLE 62 — ATTACHMENT

CPLR art. 62: Is the New York attachment procedure constitutional?

We live in an era in which the special problems of the indigent and consumer have become the target of popular crusades.[93] Recognizing this, the courts have begun to remedy many of the long-neglected inequities facing this sector of the populace. A new balance in the creditor-debtor relationship is being forged. *Sniadach v. Family Finance Corp.*,[94] a decision with broad implications for the consumer in general and the poor in particular, commenced the reevaluation of this relationship.

At issue in *Sniadach* was the constitutionality of a state garnishment statute which permitted creditors to garnish wages as security for their claims without prior judicial scrutiny, notice to the defendant, or a preliminary hearing on the merits of the attachment. Defendant Sniadach attacked the procedure whereby notice was given subsequent to the garnishment, contending that it violated her right of due process

---

without consideration and on a contingent basis, of these judgments to a professional collector. This may prohibit the practice of consummating assignments of these judgments on a contingent basis. This, however, does not prevent an assignment of these judgments for a nominal consideration, which may circumvent the proscription of the import of this decision. In order to avoid a CPLR 5236 sale of real property by the professional collector, the legislature should, in effect, prohibit a CPLR 5236 sale by an assignee of such judgments.

Id. at 703, 324 N.Y.S.2d at 587.

90 *Id.* at 701, 324 N.Y.S.2d at 584-85.

91 7B McKINNEY'S CPLR 5236, supp. commentary at 155-56 (1970).

92 *Id.* at 155.

93 For a discussion of this broad area of the law, see *Symposium: Law and Poverty*, 32 ALBANY L. REV. 1 *et seq.* (1968).

94 395 U.S. 337 (1969).

since it denied her a meaningful opportunity to be heard prior to the impairment of her property. The property frozen by attachment in *Sniadach* was half of defendant's salary, *i.e.*, $31.59.[95]

Noting that wages are a specialized kind of property[96] and that their loss by garnishment "may impose tremendous hardship"[97] upon a debtor, the Court held the statute unconstitutional under the due process clause of the fourteenth amendment,[98] reversing the Wisconsin Supreme Court decision which characterized the temporary loss of defendant's wages as de minimis and outside the perimeter of the due process guarantee.[99] The simple test upon which justification for an *ex parte* garnishment could be founded was, the Court said, the presence of some compelling state or creditor interest.[100] Exactly what constitutes sufficient indication of a compelling state or creditor interest was not spelled out by the Court beyond the citation of four prior decisions,[101] which indicated that the state may show compelling interest where the public health[102] or the preservation of credit[103] is endangered.

The philosophy of the Supreme Court in *Sniadach* has recently been extended in *Randone v. Appellate Department of Superior Court of Sacramento County*.[104] Declaring the statutorily authorized pre-judgment *ex parte* attachment of defendant's checking account by a collection agency to be violative of defendant's fifth and fourteenth amendment right to due process,[105] the California court interpreted *Sniadach* as applicable to types of personal property other than wages.[106] *Blair v.*

---

95 *See id.* at 338.

96 *Id.* at 340.

97 *Id.*

98 *Id.* at 342.

99 *Id.*, *rev'g* 37 Wis. 2d 163, 154 N.W.2d 259 (1967).

While the loss was not an actual taking, the Court nevertheless found the temporary impairment of defendant's wages to be substantial injury which was prohibited under the Constitution. *Id.* at 340-42.

100 *Id.* at 339.

101 *Id.*, *citing* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598-600 (1950); Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947); Coffin Bros. v. Bennett, 277 U.S. 29, 31 (1928); Ownbey v. Morgan, 256 U.S. 94, 110-12 (1921).

102 Ewing v. Mytinger & Caselberry, Inc., 339 U.S. 594 (1950).

103 Fahey v. Mallonee, 332 U.S. 245 (1947); Coffin Bros. v. Bennett, 277 U.S. 29 (1928).

104 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

The court indicated in its conclusion that it was following the principle of *Sniadach*. It is submitted, however, that the court actually extended *Sniadach*. *Compare* 395 U.S. 337 (1969) *with* 5 Cal. 3d 536, 562, 488 P.2d 13, 30-31, 96 Cal. Rptr. 709, 726-27 (1971).

105 *Id.* (*passim*).

106 Expansion of *Sniadach* has received favorable critical comment. *See, e.g.*, Note, *Some Implications of* Sniadach, 70 COLUM. L. REV. 942 (1970); Note, *Attachment and Garnishment — Constitutional Law — Due Process of Law — Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The* Sniadach *case and Its Implications for Related Areas of the Law*, 68 MICH. L. REV. 986 (1970); Comment, *Expanding Limitations on Pre-Judgment Attachment: Reverberations of* Sniadach v. Family Finance Corp., 12

Pritchess[107] was cited as authority for the decision. The issue in *Blair* was whether the remedy of an *ex parte* claim and delivery afforded by statute violated due process. The court, construing *Sniadach*, concluded that

> the seizure of property under the claim and delivery law constitutes a taking without due process of law. Although there may be extraordinary situations in which the summary remedy afforded by the claim and delivery law is justified by a sufficient state or creditor interest, that law . . . is not narrowly drawn to cover only such extraordinary situations.[108]

While a different pre-judgment remedy was attacked in *Randone*, the constitutional issues were substantially the same. The attachment statute attacked in *Randone* authorized the pre-judgment "freezing" of any property without notice. No proof of special need was required.[109] Without such a showing, the *Randone* court held that the statutory attachment procedure deprived the defendants of their right to be heard.[110] It further noted that the stautes contravened the holding of numerous California courts "that the most fundamental ingredient of due process guaranteed by [the] state constitution is a meaningful opportunity to be heard."[111]

The overbreadth of this statute was a defect similar to that of the wage garnishment statute in *Sniadach*; it permitted the attachment of any of the debtor's property, including the "necessities of life."[112] The court noted that allowing such "necessities" to be attached required a greater degree of jurisdiction when attached *ex parte*. It is possible, however, that even the use of a stricter standard in assessing the validity of the attachment of necessities prior to hearing may not comply with the defendant's right of due process. A profound question posed by *Sniadach* and the cases that have followed it is whether the pretrial hardship necessarily invalidates any *ex parte* attachment of "those assets constituting the necessities of life . . . ."[113] Indeed, this type of attachment appears even more likely to constitute overreaching in view of the fact that necessities are not likely to be fraudulently transferred by a debtor.

B.C. IND. & COM. L. REV. 700 (1971); *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 379 (1971).

107 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

108 *Id.* at 277, 486 P.2d at 1255-56, 96 Cal. Rptr. at 55-56.

109 CAL. CODE OF CIV. PRAC. §§ 537, 537-S, 538 (West Supp. 1971).

110 This constitutional right, recognized in *Sniadach*, was more recently affirmed in *Boddie v. Connecticut*, 401 U.S. 371 (1971); *see* Note, Boddie *and Beyond: The Right of the Indigent in Civil Actions*, 18 CATHOLIC LAW. No. 1 (1972).

111 5 Cal. 3d at 550, 488 P.2d at 22, 96 Cal. Rptr. at 718.

112 *Id.* at 558, 488 P.2d at 27, 96 Cal. Rptr. at 723.

113 Note, *Some Implications of* Sniadach, 70 COLUM. L. REV. 942, 964 (1970).

Reassessment of New York's attachment statutes in light of the due process philosophy expressed in *Randone* suggests that New York's statutes are narrowly drawn as prescribed by *Sniadach* and *Randone*. By allowing an initial attachment of any type of property without affording the individual either notice of the attachment or a prior hearing to contest the attachment,[114] the California statutes failed to limit the use of this "initial" deprivaton to those "extraordinary situations" suggested in *Sniadach*. It is noteworthy that the admitted purpose of the statute was "simply to provide unsecured creditors with 'security of the satisfaction of any judgment that may be received.' "[115] It is obvious, of course, that mere security per se is not a compelling interest.

In New York the statutes are more limited and therefore less likely to be overbroad. The CPLR restricts the availability of attachment to eight situations,[116] seven of which apparently would fall within the special circumstance categorization espoused in *Sniadach*.

The provisions offering the creditor protection against fraudulent transfer or disposal of a debtor's property are clearly based on sufficient creditor need to permit garnishment or attachment without notice. In *Sniadach*, where no special creditor or state interest was found, the court mentioned that the creditor had an easily obtainable alternative remedy to attachment, viz., in personam jurisdiction.[117] This dictum would seem

---

114 5 Cal. 3d at 544, 488 P.2d at 17, 96 Cal. Rptr. at 713 (emphasis omitted).

115 *Id.* at 555, 488 P.2d at 25, 96 Cal. Rptr. at 721.

116 *See* CPLR 6201:

§ 6201. Grounds for attachment

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a foreign corporation or not a resident or domiciliary of the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or to avoid the service of summons, has departed or is about to depart from the state, or keeps himself concealed therein; or

4. the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or

5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or

6. the action is based upon the wrongful receipt, conversion or retention, or the aiding or abetting thereof, of any property held or owned by any governmental agency, including a municipal or public corporation, or officer thereof; or

7. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53; or

8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit.

117 *See* 395 U.S. at 339.

to indicate that the validity of the jurisdictional basis of garnishment and attachment may be secure when limited to nondomiciliaries or nonresidents.

The CPLR corporate attachment provision[118] is so limited, but where the individual defendant cannot be served "despite dilgent efforts to do so,"[119] a writ of attachment can be issued against a resident or domiciliary of New York. Thus, the court could issue an order of attachment "upon the mere affidavit of plaintiff's attorney that service could not be made with due diligence."[120]

It can be argued that the creditor's interest here is not so substantial as to outweigh the resultant harm to the defendant. Clearly, "an attachment deprives the defendant of the use and enjoyment of his property at an extremely embryonic stage of the litigation and long before the defendant's liability to the plaintiff is established."[121] Moreover, section 6201(2) has been interpreted as having a purely jurisdictional function.[122] Therefore, the severity of this remedy may not be justifiable since an adequate basis for jurisdiction is provided by CPLR 308, under which in personam jurisdiction over a resident may be obtained by a form of substituted service of process. The subsection is valid only insofar as it is necessary to provide a basis for jurisdiction;[123] in light of CPLR 308, the subsection seems unnecessary. Furthermore, the mere fact that the attachment will be voided if the defendant appears, does not render the deprivation of a defendant's use of his property de minimis.

The most forceful due process argument of the *Randone* court centered on the "overbreadth" of the statute. Under the California statute, any property, including necessities, was subject to attachment.[124] While certain types of property were statutorily immune, the immunizing provisions were considered an inadequate safeguard against

---

118 CPLR 6201(1).

119 CPLR 6201(2).

120 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, 440 (1970).

121 7A WK&M ¶ 6201.02.

122 "It may be noted that the first two, if not three, subdivisions of 6201 are primarly oriented in the direction of the jurisdictional function of attachment. . . ." H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 186 (3d ed. 1970).

123 The Court of Appeals held, in *Fishman v. Sanders*, that mere service by publication, made after a levy of attachment, would secure in personam jurisdiction over the temporarily absent resident. 15 N.Y.2d 298, 206 N.E.2d 326, 258 N.Y.S.2d 380 (1965).

It is submitted that this decision may be questionable. The service by publication did not seem to be the best available method of obtaining in personam jurisdiction; service by publication under CPLR 315 is designed as a last resort.

124 CAL. CODE OF CIV. PROC. § 537 (West Supp. 1971).

the unlawful taking of property since the attachment order was issued without prior judicial scrutiny. If the defendant sought to challenge the attachment thereafter, he could be forced to wait for a period of twenty-five days before his use of the property could be restored.[125] The hardship of this procedure is obvious. In New York, exemptions to the creditor's right to attach the defendant's property are provided in CPLR 5205 and 5206. Section 5205 expressly exempts most necessities from attachment and, unlike the California law, under section 6212 the New York law allows judicial discretion in issuing an order of attachment. Moreover, the property-exemption statutes operate to bar the sheriff from taking certain property ab initio.

The operation of these exemption provisions generally forecloses the severe deprivation issue presented in *Randone*. Consequently, the rationale expressed in *Sniadach* and *Randone* is less compelling in New York.[126]

The *Randone* court also relied on a federal court decision[127] which held the former New York replevin[128] statutes to be constitutionally inadequate. The New York statutes were analogous to the California attachment statute in that provision was made for the *ex parte* seizure of such everyday necessities as "[b]eds, shoes, mattresses, dishes, tables . . . ."[129] Treating these necessities specially, *i.e.*, similarly to the treatment of wages in *Sniadach*, the court found them to be "a specialized type of property presenting distinct problems in our economic system, the taking of which on the unilateral command of an adverse party 'may impose tremendous hardships' on the purchasers of these essentials."[130] Moreover, the court in *Laprease v. Raymours Furniture Co.* found the statute deficient since it was not "narrowly drawn" to meet only those "extreme situations" to which the Supreme Court alluded in *Sniadach*.[131]

---

125 5 Cal. 3d at 546, 488 P.2d at 19, 96 Cal. Rptr. at 714-15.

126 An example of this would be the argument the court made in reference to the right to be heard. The *Randone* court noted that "due process requires, at a minimum, that an individual be given a meaningful opportunity to be heard prior to being subjected by force of law to a *significant deprivation*." 5 Cal. 3d at 550, 488 P.2d at 21, 96 Cal. Rptr. at 717 (emphasis added). Under New York's procedure this "significant deprivation" would not arise and consequently the right to be heard would not be impaired.

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

128 CPLR art. 71.

129 315 F. Supp. at 722.

130 *Id.*

131 The court further found article 71 to be unconstitutional because it violated the fourth amendment. The court pointed out that under the former CPLR 7110,

> [i]f a chattel [was] secured or concealed in a building or enclosure and [was] not delivered pursuant to his demand, the sheriff [could] cause the building or enclosure to be broken open and [could] take the chattel into his possession.

Id. at 721, *quoting* former CPLR 7110.

The CPLR replevin provisions have since been amended to conform with *Laprease*.[132] This, again, is an attempt to strike a balance in the creditor-debtor relationship. Prior to these amendments, "no application to the court was [usually] necessary in order to permit a plaintiff in replevin to obtain the services of a sheriff . . . to seize chattels claimed to be owned by plaintiff."[133] The prior law also permitted the "[b]reaking into premises without notice. . ."[134] in order to seize or remove property.

In two decisions[135] subsequent to the amendments of article 71, this balancing of creditor-debtor interests became apparent. The material factors affecting this balance, noted in *Wellbilt Equipment Corp. v. La Creme Bakery*, were

> 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. . . .[136]

The new replevin statute leaves the determination of what would constitute such an "extraordinary situation" as to permit an *ex parte* seizure of property to the court's discretion. In pertinent part is provides:

> if plaintiff seeks the inclusion in the order of seizure of a provision authorizing the sheriff to break open, enter and search for the chattel [the affidavit must state] 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.[137]

The New York interpretation of an "extreme situation" remains unsettled. However, it appears that the due process clause, requiring a flexible standard by which each case may be judged on its individual merits, will foreclose the use of a single rigid rule.

In conclusion, it is submitted that seven of the permitted New York attachment grounds will successfully withstand a due process attack. However, in light of the availability of CPLR 308 (notice statute) in

---

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

133 Finkenberg Furniture Corp. v. Vasquez, 67 Misc. 2d 154, 155, 324 N.Y.S.2d 840, 842 (N.Y.C. Civ. Ct. N.Y. County 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 379 (1971).

134 *Id.* at 155, 324 N.Y.S.2d at 843.

135 *Id.* at 154, 324 N.Y.S.2d 840; Wellbilt Equip. Corp. v. La Creme Bakery, 166 N.Y.L.J. 24, Aug. 4, 1971, at 12, col. 2 (N.Y.C. Civ. Ct. N.Y. County), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 379 (1971).

136 166 N.Y.L.J. 24, Aug. 4, 1971, at 12, col. 3, *quoting* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (Frankfurter, J., concurring).

137 CPLR 7102(c)(5) (emphasis added).

conjunction with CPLR 301 (basis statute), CPLR 6201(2) appears to be unnecessary as a jurisdictional basis statute and therefore may be held unconstitutional. Legislative reconsideration would be salutary.

ARTICLE 81 — COSTS GENERALLY

CPLR 8101: Costs granted to defendant despite unsuccessfulness of his counterclaim.

CPLR 8101 provides that "[t]he party in whose favor a judgment is entered is entitled to costs in the action, unless otherwise provided by statutes or unless the court determines that to allow cost would not be equitable, under all of the circumstances." Where there is no counterclaim, determination of whom shall receive costs is a relatively simple matter: the party who prevails on the plaintiff's complaint is entitled to them. The matter becomes more complicated, however, when the defendant interposes a counterclaim.[138] If plaintiff prevails on his cause of action and defendant fails on his counterclaim, plaintiff is clearly entitled to costs, absent special circumstances.[139] If plaintiff loses on his complaint and defendant succeeds on his counterclaim, defendant is obviously entitled to costs. But, if the parties both succeed or both fail on their respective causes of action, who, if anyone, is entitled to costs?

In *Graybill v. Van Dyne*,[140] the Supreme Court, Monroe County, was called upon to determine who is entitled to costs when both the plaintiffs and the counterclaiming defendant failed to recover on their causes of action resulting from an automobile accident. The defendant moved to strike the plaintiff's bill of costs against her, and the motion was granted.[141] The court noted that under the Civil Practice Act and the Code of Civil Procedure, "the weight of New York authority" was in favor of granting costs to a successful defendant, even though he had failed on his counterclaim.[142] Under the CPLR, the court concluded, the test of which party is entitled to costs is who is the prevailing party, *i.e.*, "the party in whose favor a judgment is entered."[143] Where neither party succeeds on his course of action, the rule remains that only the

---

138 *See, e.g.*, Checketts v. Collings, 78 Utah 93, 95, 1 P.2d 950, 951 (1931) ("the authorities on the question are in irreconcilable conflict").

139 *See* CPLR 8102.

140 67 Misc. 2d 228, 324 N.Y.S.2d 291 (Sup. Ct. Monroe County 1971).

141 *Id.* at 232, 324 N.Y.S.2d at 294.

142 *Id.* at 229, 324 N.Y.S.2d at 292, *citing* Gibbons v. Skinner, 150 App. Div. 706, 135 N.Y.S. 820 (1st Dep't 1912); Pagano v. Giuliani, 182 Misc. 375, 43 N.Y.S.2d 945, 946 (Sup. Ct. Onondaga County 1943); Rohrs v. Rohrs, 72 Misc. 108, 130 N.Y.S. 1093 (N.Y. City Ct. 1911); Thayer v. Holland, 63 How. Pr. 179 (N.Y.C.P. 1882); Whitelegge v. DeWitt, 12 Daly 319, 323-24 (N.Y.C.P. 1884).

143 67 Misc. 2d at 230, 324 N.Y.S.2d at 293, *quoting* CPLR 8101.