St. John's Law Review

Volume 46, May 1972, Number 4 Article 26

CPLR 7102: Equipment Utilized in Business Deemed "Specialized Property"

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> tral judge between the plaintiff and defendant, and eliminates the ancient right which the plaintiff had to direct the sheriff to seize a chattel from the defendant.[161]

The court also rejected the defendant's reliance on *Laprease* on the ground that specialized property was involved there. The heavy duty equipment, which was the basis of the contract, was not considered "necessary for day to day living, the taking of which will impose tremendous hardship on the defendant. . . ."[162] The court found that there was probable cause for the order of seizure and ordered the defendant's president to appear for an examination as to the location of the goods.

The amended statute will probably continue to withstand constitutional challenges, despite its faults. It is, for example, overbroad on its face since there are no suggested guidelines regarding issuance of orders of seizure. The only consideration which the statute mentions is that the order should not violate the debtor's right to due process. The Legislature has permitted the courts to decide, on a case-by-case basis, (1) what types of property are specialized and (2) when a proper situation for issuing an order of seizure exists. Dean McLaughlin eloquently summarized this problem by stating that

> [t]he cardinal flaw of the new legislation is its Olympian generality, for it says little other than that a judge may sign an order permitting the seizure of a chattel whenever it would be constitutional to do so.[163]

CPLR 7102: Equipment utilized in business deemed "specialized property."

As a consequence of the tremendous increase in consumer credit, the remedies of replevin and attachment have been the subject of frequent judicial concern. The decisional vanguard of this movement is *Sniadach v. Family Finance Corp.*[164] Therein, the United States Supreme Court declared unconstitutional a Wisconsin statute[165] which

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161 7B McKINNEY'S CPLR 7102, supp. commentary at 114 (1971). For a further discussion of the New York replevin statute, see *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 379 (1971).

162 68 Misc. 2d at 479, 326 N.Y.S.2d at 902. *But see* Cedar Rapids Engineering Co. v. Haenelt, 68 Misc. 2d 206, 326 N.Y.S.2d 653 (Sup. Ct. Sullivan County 1971), where it was held that the seizure of tools and equipment used by the debtor to earn money was the specialized type of property contemplated by *Laprease* and its progenitor, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

163 7B McKINNEY'S CPLR 7102, supp. commentary at 114 (1971).

164 395 U.S. 337 (1969).

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

permitted the prejudgment attachment of a debtor's wages without notice or a hearing. Since wages were deemed "a specialized type of property"[166] the taking of which may cause great personal hardship, the summary procedure was held violative of due process. The Court noted, however, that "[s]uch . . . procedure may well meet the requirements of due process in extraordinary situations."[167]

The question now arising is what type of property is specialized and therefore requires an extraordinary situation before it can be replevied?[168] *Sniadach* did not answer this question. The trend in New York, as in other jurisdictions, has been to liberally construe the phrase, "specialized property."[169]

The most recent New York case to deal with this question is *Cedar Rapids Engineering Co. v. Haenelt.*[170] The defendant purchased certain machinery, tools, and equipment from the plaintiff for use in his business. As security for two promissory notes, the defendant entered into a conditional sales contract which provided that in the event of default the plaintiff could repossess the chattels without notice.

Subsequently alleging that the defendant had defaulted, the plaintiff obtained an order of seizure without notice under CPLR 7102. After the sheriff seized the goods, the defendant sought to have the New York replevin statute, article 71 of the CPLR, declared unconstitutional. The court held that the statute is not unconstitutional on its face, citing *Laprease v. Raymours Furniture Co.*,[171] which held portions of the former New York replevin statute unconstitutional. The court therein deemed the specialized property concept enunciated in

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166 395 U.S. at 340.

167 *Id.* at 339. For example, in Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950), the Court allowed multiple seizures of a misbranded vitamin product based on public health considerations. Also, in Fahey v. Mallonee, 332 U.S. 245 (1947), the Court decided that an appointment of a conservator to take possession of a savings and loan association without notice was not violative of due process. The Court declared that

> the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner.

Id. at 253.

There are other situations which would conceivably warrant seizure without notice, for example, "a serious risk of damage to or removal of the property from the state. . . ." 7B McKINNEY'S CPLR 7102, supp. commentary at 115 (1971).

168 *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); Note, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 117 (1969).

169 *See, e.g.*, Randone v. Appellate Dep't of the Superior Ct. of Sacramento County, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971); *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 379 (1971).

170 68 Misc. 2d 206, 326 N.Y.S.2d 653 (Sup. Ct. Sullivan County 1971).

171 315 F. Supp. 716 (N.D.N.Y. 1971).

Sniadach to include "[b]eds, stoves, mattresses, dishes, tables and other necessaries for ordinary day-to-day living . . . ."[172] As a result, the statute was defective as overbroad in that it did not limit the confiscation of special property to extreme situations. Since *Laprease*, the situation has been remedied by amendment. Based on these amendments, the court in *Cedar Rapids* found the statute to be constitutional. Turning to the question whether the statute was unconstitutionally applied, the court acknowledged that "the pivotal determination is whether the property seized by the plaintiff was special property within the meaning of *Sniadach* and *Laprease*."[173] It then decided that "[t]here is no appreciable difference, if any, among the seizure of the tools and equipment whereby a party earns money, the seizure of wages, or the seizure of household necessities."[174] Finding no extreme circumstances, the court declared that the statute was unconstitutionally applied, and it vacated the order of replevin.

Another New York case which the court relied on was *Finkenberg Furniture Corp. v. Vasquez*,[175] which held that a television, a five-piece bedroom set, and a mattress and spring were specialized property within the meaning of *Sniadach* and *Laprease*.

In *Cedar Rapids*, it is noteworthy that the court struck down the plaintiff's actions even though they were in accordance with the terms of the written contract of sale. Apparently, the overriding consideration was the fact that specialized property was involved. This can be illustrated by a comparison between the *Cedar Rapids* case and *Fuentes v. Faircloth*,[176] which also involved a conditional sales contract which included a provision authorizing the creditor to repossess the goods sold upon a default in payment. Mrs. Fuentes fell behind in her payments, and the defendants, under Florida's replevin statute,[177] repossessed the property without notice. Denying relief, the court stated "that . . . there are still situations in which prejudgment seizures of goods without a prior hearing is [*sic*] valid. . . ,"[178] one being where the seller repossesses "pursuant to a contract which authorizes a conditional

172 *Id.* at 722.

173 68 Misc. 2d at 210, 326 N.Y.S.2d at 657.

174 *Id.*

175 67 Misc. 2d 154, 324 N.Y.S.2d 840 (N.Y.C. Civ. Ct. N.Y. County 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 383 (1971).

176 317 F. Supp. 954 (S.D. Fla. 1970), *prob. juris. noted*, 401 U.S. 906 (1971). For a discussion of *Fuentes*, see Comment, Laprease *and* Fuentes: *Replevin Reconsidered*, 71 COLUM. L. REV. 886, 892 (1971).

177 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.

178 317 F. Supp. at 958.

seller to repossess in order to protect his security interest. . . ."[179] This decision, however, was premised upon the fact that specialized property was not involved. The court deemed *Sniadach* "a unique case involving, 'a specialized type of property presenting distinct problems in our economic system. . . ,'" and reasoned that it was in no way comparable to a case involving enforcement of a security interest.[180]

It appears that New York courts have in effect treated as special property much of the property specifically exempted from money judgments under CPLR 5205.[181] This trend is praiseworthy since exempt property is the type of property deprivation of which would cause the most serious hardship. Some critics have claimed that the type of property is immaterial and that "[a]ny deprivation of property without notice and the chance to be heard is a denial of procedural due process."[182] Judicial acceptance of this view is doubtful as indicated by the fact that some courts have refused to apply the philosophy of *Sniadach* to commercial situations.[183]

CPLR 7102: Contract provision giving creditor the right to seize "specialized property" deemed unconscionable.

Since the Supreme Court's decision in *Sniadach v. Family Finance Corp.*,[184] there has been a plethora of decisions concerning the right of a creditor to take possession of a debtor's property by means of a prejudgment order of replevin without notice and an opportunity to be heard. Whether this procedure is constitutional depends in large part upon the type of property that is seized.[185] If sequestering the property

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[179] *Id.* Other courts have questioned whether such a contractual provision constitutes a competent waiver of constitutional rights. *See, e.g.*, Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

[180] *Id.* at 957, *citing* Brunswick Corp. v. J&P, Inc., 424 F.2d 100, 105 (10th Cir. 1970).

[181] The exempt personal property under CPLR 5205 includes household goods and furniture, stoves, and necessary working tools and instruments below statutory values.

[182] Note, *Forcible Prejudgment Seizures*, 25 Sw. L.J. 331, 338 (1971).

[183] *See, e.g.*, Brunswick Corp. v. J&P, Inc., 424 F.2d 100 (10th Cir. 1970), where the court upheld an order of seizure based on the fact that it was a commercial contract and that the property repossessed was not special. But, is it not possible that the taking of one's means of earning a living, even pursuant to a commercial contract, would cause just as much hardship as the garnishment of wages? *See* Cedar Rapids Engineering Co. v. Haenelt, 68 Misc. 2d 206, 326 N.Y.S.2d 653 (Sup. Ct. Sullivan County 1971).

[184] 395 U.S. 337 (1969).

[185] The statute must be narrowly drawn so that the prejudgment taking of necessaries without notice and a hearing is limited to extreme situations. *See* Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 723 (N.D.N.Y. 1970).

Overbreadth has recently caused sections 9503 and 9504 of the California Commercial Code (sections 9-503 and 9-504 of the Uniform Commercial Code) to be declared unconstitutional as a taking of property without due process of law. Adams v. Egley, 40 U.S.L.W.