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CPLR 7102: Contract Provision Giving Creditor the Right To Seize "Specialized Property" Deemed Unconscionable

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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.

would cause serious hardship, notice and a hearing must be given the debtor.[186] The issue then arises whether a creditor should be permitted to take chattels without notice and a judicial proceeding if repossession is expressly provided for pursuant to a conditional sales contract.

The New York City Civil Court, in *Kosches v. Nichols*[187] and *Government Employees Corp. of New York v. Raines*,[188] answered this question. The plaintiffs therein had the right, according to their contracts, to enter their respective debtor's home upon default and, without a court order, retrieve the chattels in question. In *Kosches*, any other property could also be seized at that time. The particular property involved in *Kosches* was household furniture; an automobile was the subject matter in the *Government Employees Corp.* case.

The plaintiffs did not take the property of the defendants without a court order, but applied *ex parte* for an order of seizure pursuant to CPLR 7102. In determining whether such an order should issue, the court included the household goods and, more significantly, the automobile within the meaning of the specialized property concept originally enunciated in *Sniadach*. In the absence of a showing of extraordinary circumstances, no order was issued.

The court further commented that the default clauses were unconscionable under Uniform Commercial Code section 2-302.[189] The court's belief stemmed from the unequal bargaining positions of the seller and the buyer. It should also be noted that the remedy afforded to the creditor by these sales agreements was similar to a provision in the former New York replevin law[190] which was a major reason why it was declared unconstitutional in *Laprease v. Raymours Furniture Co.*[191] The court therein stated that

2546 (S.D. Cal. Feb. 11, 1972). These sections permitted a secured creditor to peacefully take possession of collateral without a court proceeding upon the debtor's default. The court stated that

> the security interests covered by 9503 and 9504 are not confined to items of . . . a non-essential nature. The subjects of secured transactions are commonly household appliances, furniture, and automobiles, all of which may be considered necessaries for ordinary day-to-day living. Consequently . . . the statutes in issue fail to meet the test of narrowness established by Sniadach.

Id. at 2547.

186 Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

187 — Misc. 2d —, 327 N.Y.S.2d 968 (N.Y.C. Civ. Ct. N.Y. County 1971).

188 *Id.*

189 This section [was] intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable.

N.Y. UNIFORM COMMERCIAL CODE § 2-302, Comment 1 (McKinney 1964).

190 The former statute stated that

> [t]he 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.

Former CPLR 7102(a).

191 315 F. Supp. 716 (N.D.N.Y. 1970).

> the prejudgment seizure of chattels by the plaintiff in a replevin action without an order of a judge or of a court . . . [is] unconstitutional.[192]

Initially, it may seem that the court was interfering with the freedom to contract by finding the default clauses unconscionable. However, the court in *Kosches* was presented with a contract of adhesion which permitted the taking of necessaries without notice and an opportunity to be heard. The recent cases in which contractual freedom and the subsequent waiver of notice and a hearing have been upheld can be distinguished in that they did not involve "specialized property."[193]

CPLR 7102: Replevin held available to third party to contravene effect of strike.

A strike is "[t]he act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused."[194] Should a strike be permitted to unnecessarily damage or destroy the business of an innocent third party? Are there legal means by which such persons can avoid the potentially devastating effects of strikes?

In *General Electric Co. v. American Export Isbrandtsen Lines, Inc.*,[195] the plaintiff had learned that its shipment of radio speakers, to which it had title, had arrived. The defendants — the shipper and the freight agent—did not object to the plaintiff's coming and taking the goods, which were being held at the docks; they simply noted the impracticality of doing so during a longshoremen's strike. The plaintiff deemed this a refusal to turn over the speakers and applied for an *ex parte* order of seizure under CPLR 7102. A hearing ensued during which the defendants stated that they had no objection to the plaintiff's taking the goods. The hearing was then adjourned so that the plaintiff could obtain its property. However, when an attorney for the plaintiff, with a truck and a driver, went to the pier, the truck was stopped by about fifty strikers. When the hearing resumed the order of seizure was denied on the ground that neither the shipper nor the freight agent

192 *Id.* at 725.

193 *See, e.g.*, Brunswick Corp. v. J&P, Inc., 424 F.2d 100 (10th Cir. 1970); Fuentes v. Faircloth, 317 F. Supp. 934 (S.D. Fla. 1970), *prob. juris. noted*, 401 U.S. 906 (1971).

There are clear indications that the New York courts are taking a more consumer-oriented approach in this area. For example, in Finkenberg Furniture Corp. v. Vasquez, 67 Misc. 2d 154, 324 N.Y.S.2d 840 (N.Y.C. Civ. Ct. N.Y. County 1971), the court declared that "[t]he existence of such a waiver in a typical consumer contract of adhesion is without . . . effect." *Id.* at 160, 324 N.Y.S.2d at 847.

194 BLACK'S LAW DICTIONARY 1591 (4th rev. ed. 1968).

195 37 App. Div. 2d 959, 327 N.Y.S.2d 93 (2d Dep't 1971) (mem.).