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CPLR 7102: Replevin Held Available to Third Party to Contravene Effect of Strike

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> 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.).

nor the union "was . . . wrongfully holding [the speakers] within the meaning of CPLR 7102."[196] General Electric had requested a "John Doe" order because it argued, "*someone* was wrongfully holding its chattels. . . ."[197]

The Appellate Division, Second Department, reversed. It determined that the plaintiff was entitled to an order of seizure as an appropriate remedy against "[t]his unlawful exercise of dominion and control over plaintiff's property,"[198] which constituted a conversion.[199] An order directing the sheriff to seize the goods from "any and all persons wrongfully holding or wrongfully preventing the taking into possession"[200] of the plaintiff's goods was issued.

Judge Martuscello dissented. He reasoned that since the longshoremen were engaged in a legal strike, the issuance of the order of seizure would have the same effect as a temporary injunction against picketing so as to prevent the plaintiff from taking its goods. Suggesting that the plaintiff should seek relief under section 807[201] of the Labor Law and not under article 71 of the CPLR, he argued that "one should not be permitted to use the remedy of replevin to avoid the rigorous requirements of section 807"[202] for injunctions in labor disputes.

The majority answered this objection with this reasoning:

> Section 807 was enacted to prevent courts from issuing sweeping injunctions which enjoin peaceful picketing and other lawful activities in labor disputes. An order of seizure directing the sheriff to seize these chattels cannot be construed as enjoining any labor organization from any of the legitimate activities which section 807 is designed to protect.[203]

Too often, an innocent third party is injured when he cannot retrieve his goods because of a strike. If the plaintiff involved in the case at bar were not General Electric but rather a small businessman, the potentially devastating effect of a similar decision by the trial court would be apparent. It is refreshing to see a court recognize this fact.

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196 *Id.*, 327 N.Y.S.2d at 95.

197 *Id.*

198 *Id.*

199 *See, e.g.*, Industrial & Gen. Trust, Ltd. v. Tod, 170 N.Y. 233, 245, 63 N.E. 285, 288 (1902); Boyce v. Brockway, 31 N.Y. 490 (1865); Suzuki v. Small, 214 App. Div. 541, 556, 212 N.Y.S. 589, 602 (1st Dep't 1925), *aff'd*, 243 N.Y. 590, 154 N.E. 618 (1926).

200 37 App. Div. 2d 959, 327 N.Y.S.2d at 94.

201 The statute protects against the issuance of unfair injunctions in labor disputes. The many safeguards include the requirements of a hearing by the issuing court and the finding of numerous facts. N.Y. LABOR LAW § 807 (McKinney 1965).

202 37 App. Div. 2d at 960, 327 N.Y.S.2d at 96 (Martuscello, J., dissenting).

203 *Id.*, 327 N.Y.S.2d at 95-96.

It should not be inferred that the trial court's opinion would not have been valid if management had sought the order of replevin. That is the type of action which would circumvent the intention of the Legislature in adopting section 807 of the Labor Law.[204] No such circumvention is accomplished by allowing a non-party to the dispute to obtain an order of seizure.

ARTICLE 75 — ARBITRATION

CPLR 7501: Arbitration clauses construed.

Because of the very nature of the arbitral process, those contractual stipulations which give rise to the arbitration cannot be overemphasized. In innumerable situations which have had profound effects upon the development of "arbitration law," the paramount question has been the meaning of the arbitration clause, with the result that the breadth of the arbitration clause is proportionate to the scope of judicial inquiry. Although New York has abandoned the "bona fide" dispute rule,[205] the anterior question remains: Is "the party seeking arbitration making a claim which on its face is governed by the contract[?]"[206]

Two recent New York decisions have dealt with this threshold question and, in the process, have underscored the significance of the arbitration clause itself.

In *Steinberg v. Steinberg*,[207] the plaintiffs submitted a demand which, *inter alia*, stated that the defendants had wrongfully instituted a prior arbitration proceeding, but the court correctly noted that

> the tortious use of the arbitral process or other tort committed in connection with the maintenance of the prior arbitration proceed-

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204 The provisions of the statute indicate that it does not encompass action by a non-party to the dispute. For example, subsection (4) states that

> [n]o injunctive relief shall be granted to any plaintiff . . . who has failed to allege and prove that he has made every reasonable effort to settle such dispute. . . .

N.Y. LABOR LAW § 807(4) (McKinney 1965). An individual who is not involved in the dispute certainly would not be expected to take such action. *Cf.* Dinny & Robbins, Inc. v. Davis, 290 N.Y. 101, 48 N.E.2d 280, *cert. denied*, 319 U.S. 774, *rehearing denied*, 320 U.S. 811 (1943); Coward Shoe, Inc. v. Retail Shoe Salemen's Union Local 1115F, 177 Misc. 708, 31 N.Y.S.2d 781 (Sup. Ct. N.Y. County 1941).

205 The *Cutler-Hammer* doctrine provided that a *judicial* determination that the dispute in question was viable was a prerequisite to compelling arbitration. Roundly criticized, this doctrine has been vitiated by the last line of CPLR 7501: "[T]he court shall not consider whether the claim with respect to which the arbitration is sought is tenable, or otherwise pass upon the merits of the dispute."

206 United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960). *See also* Dairymen's League Coop. Ass'n v. Conrad, 18 App. Div. 2d 321, 239 N.Y.S.2d 241 (4th Dep't 1963).

207 38 App. Div. 2d 57, 327 N.Y.S.2d 245 (1st Dep't 1971).