

CPLR 7102: Court Upholds Constitutionality of Replevin Provision

St. John's Law Review

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While the content requirements of CPLR 6511(b) were met,¹⁷⁶ if a notice of pendency fails to completely conform to that section, but does give such information as to put a potential purchaser or encumbrancer on inquiry notice concerning the items omitted, a court, utilizing the rationale of the Third Department, should find the notice sufficient.

CPLR 7102: Court upholds constitutionality of replevin provision.

In *Sniadach v. Family Finance Corp.*,¹⁷⁷ the Supreme Court declared unconstitutional a Wisconsin statute¹⁷⁸ which authorized wage garnishment without first affording the debtor an opportunity for a hearing.¹⁷⁹ Reasoning that wages are a "specialized type of property,"¹⁸⁰ the Court held that prejudgment garnishment violated the due process clause. Recently, in *Lawson v. Mantell*,¹⁸¹ New York's replevin provision — CPLR 7102 — was attacked on the grounds that it denied due process and equal protection of the laws.

In holding that CPLR 7102 was not violative of due process, the *Lawson* court cited the essential safeguards contained in article 71: (1) an action to recover the chattel must be commenced, and defendant must be served personally;¹⁸² (2) the replevied chattel is not immediately awarded to the plaintiff;¹⁸³ and, (3) the defendant may challenge the adequacy of plaintiff's surety, or move to impound the chattel during the pendency of the action.¹⁸⁴

Under the guidelines set by the Supreme Court in *Sniadach*, this phase of *Lawson* is justified. For, the New York statute provides substantial opportunity for a hearing, and it should be emphasized that the Wisconsin statute dealt with wages: a special kind of property which requires stricter vigilance.

The plaintiff in *Lawson* also asserted that compelling an undertaking by a poor person in order to secure the return of the chattel¹⁸⁵

¹⁷⁶ CPLR 6511(b) requires that the notice of pendency contain:

(a) the names of the parties to the action;

(b) the object of the action; and

(c) a description of the property affected.

¹⁷⁷ 395 U.S. 337 (1969), *rev'g* 37 Wis. 2d 163, 154 N.W.2d 259 (1967).

¹⁷⁸ WIS. STAT. ANN. § 267.07(1) (1963).

¹⁷⁹ The statute provided for wage garnishment merely by service on the debtor's employer and notice to the debtor within ten days thereafter. *Id.*

¹⁸⁰ "A prejudgment wage garnishment . . . is a taking which may impose tremendous hardship on wage earners and their families." 395 U.S. at 340. *See also* Comment, *Wage Garnishment as a Collector's Device*, 1967 Wis. L. Rev. 759, 767.

¹⁸¹ 62 Misc. 2d 307, 306 N.Y.S.2d 317 (Sup. Ct. Albany County 1969).

¹⁸² CPLR 7102(a) & (b).

¹⁸³ Under CPLR 7102(f) the chattel is held for a period of three days, during which time the defendant has an opportunity to reclaim it.

¹⁸⁴ CPLR 7102(f); CPLR 7103(a) & (b).

¹⁸⁵ CPLR 7103(a).

violated the equal protection clause. The court, however, rejected this argument by maintaining that in civil matters, the "[state] is not required . . . to give to some whatever others can afford."¹⁸⁶ And, the court added that it found nothing "unequal in a statute that requires one party to do nothing more than the other."¹⁸⁷

Article 71 does afford a party whose chattel has been replevied a number of alternatives.¹⁸⁸ Nevertheless, the only viable method of regaining the chattel is through the process of reclaiming,¹⁸⁹ which requires an undertaking identical to that originally executed.¹⁹⁰ Those that are not poor can afford to execute an undertaking and do without some money for a while; the poor haven't the money to invest thusly. Indeed, similar considerations have recently motivated one court to allow a motion to vacate the replevin even though such a motion is not authorized by the CPLR.¹⁹¹

Inasmuch as the requirement that the defendant execute an undertaking is an obligation that is imposed by the state, a strong argument can be advanced that the section violates the equal protection clause.¹⁹² Yet, civil cases dealing with discrimination between rich and poor have primarily focused on statutes which denied the indigent access to the courts and ultimately affected a determination of his rights.¹⁹³ In contrast, CPLR 7102 does not preclude a hearing if the defendant is unable to produce an undertaking; it merely regulates the possession of the chattel during the pendency of the action.¹⁹⁴ Hence, until more progress in the equal protection area is made, CPLR 7102 should continue to withstand constitutional attack.

¹⁸⁶ 62 Misc. 2d at 309, 306 N.Y.S.2d at 320, *citing* Douglas v. California, 372 U.S. 353, 360 (1963) (Harlan, J., dissenting).

¹⁸⁷ 62 Misc. 2d at 309, 306 N.Y.S.2d at 320.

¹⁸⁸ CPLR 7102(f) (exception to sureties); CPLR 7103(a) (reclamation); CPLR 7103(b) (motion to impound).

¹⁸⁹ CPLR 7103(a). The exception to plaintiff's sureties merely forces the plaintiff to prove its adequacy. If the plaintiff is successful, the action proceeds as before. 7A WK&M ¶ 7102.01. If the surety is inadequate, the chattel is returned but the plaintiff may order another replevin, this time with a more substantial undertaking.

The motion to impound requires a \$250 undertaking, is grantable only if the chattel is of a special nature, and does not provide for return of the chattel during the pendency of the action. CPLR 7103(b). *See* 7A WK&M ¶ 7102.24.

¹⁹⁰ CPLR 7103(a). And, the surety must be at least twice the value of the chattel. CPLR 7102(e).

¹⁹¹ *Sears Roebuck & Co. v. Austin*, 60 Misc. 2d 908, 304 N.Y.S.2d 131 (N.Y.C. Civ. Ct. N.Y. County 1969). *But see* *Tamburro v. Trama*, 59 Misc. 2d 488, 299 N.Y.S.2d 528 (Westchester County Ct. 1969).

¹⁹² *Cf.* *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

¹⁹³ *See, e.g.,* *Jeffreys v. Jeffreys*, 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. Kings County 1968).

¹⁹⁴ *See* Note, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942, 964 (1970).