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CCA 1908: Absence of Express Statutory Authority Is Not a Bar to Recovery of Necessary Litigation Expenses

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be dismissed. And, without the underlying action, the replevin action was no longer ancillary, and must therefore be vacated.

Although the defendant in possession of a chattel is protected to a degree by his statutory right to reclaim[173] or to move for an order impounding the chattel,[174] and by the plaintiff's undertaking,[175] it nonetheless is clear that sufficient notice must be afforded the defendant.[176] Thus, the refusal of the court in *Sears* to follow the *Kurzweil* holding, which previously had been emasculated[177] and questioned,[178] serves as a reminder to the practitioner to commence an action promptly when seeking to avail himself of the ancillary remedy of replevin.

New York City Civil Court Act

CCA 1908: Absence of express statutory authority is not a bar to recovery of necessary litigation expenses.

It can hardly be denied that an examination before trial of an adverse party has become a necessary procedure in the prosecution of a lawsuit. Likewise, when circumstances so dictate, an interpreter at the examination is equally as important.[179] However, the question arises whether a victorious litigant in the New York City Civil Court can recover disbursements for such expenses from his opponent.

In *Santiago v. Johnson*[180] the plaintiff sought an order disallowing expenditures of this nature as taxable costs on the ground that CCA 1908[181] did not grant the authority for the assessments. Nevertheless, recovery was permitted pursuant to the preamble of CCA 1908 which limits the allowable disbursements as provided therein "[e]xcept where the contrary is specifically provided by law. . . ." And, the court held that CPLR 8301(a)(9) was the specific provision allowing the recovery of expenses of an examination before trial.

While the utilization of 8301(a)(9) is undoubtedly proper,[182] its adoption through the *preamble* of CCA 1908 is somewhat tenuous. In-

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173 CPLR 7103(a).

174 CPLR 7103(b).

175 CPLR 7102(e).

176 *Cf.* Sniadick v. Family Fin. Corp., 395 U.S. 337 (1969).

177 Devonia Discount Corp. v. Bianchi, 241 App. Div. 838, 271 N.Y.S. 413 (2d Dep't 1934) (per curiam). *See also* Florence Trading Corp. v. Rosenberg, 128 F.2d 557 (2d Cir. 1942).

178 *See* 7A W. K. & M. ¶ 7102.02.

179 *Cf.* People *ex rel* Levy v. Grant, 37 Misc. 430, 75 N.Y.S. 290 (Sup. Ct. N.Y. County 1902).

180 61 Misc. 2d 746, 305 N.Y.S.2d 717 (N.Y.C. Civ. Ct. Kings County 1969).

181 CCA 1908 is the New York City Civil Court provision governing the allowance of costs to a party in an action or appeal.

182 *See* 8 W. K. & M. ¶ 8301.27.

deed, the language of the preamble would seem to indicate a means whereby those disbursements permitted under CCA 1908 can be restricted, not supplemented, if a specific law so provides. Rather, any expansion of the permissible disbursements should utilize as its sole basis the "omnibus" provisions of CCA 1908(f).[183] Caution, however, should be utilized when interpreting this subsection. Prior to *Santiago*, it had not been construed,[184] and earlier and more restrictive cases[185] were decided under previous statutes and theories. Thus, although substantial portions of the earlier laws were retained,[186] the precedental value of cases decided under the CPA as an aid in construing CCA 1908(f) is questionable in view of the liberal construction demanded of the CPLR provisions which this CCA subsection incorporates.

A second alternative suggested by the *Santiago* rationale would be to view CCA 1908(f) as adopting CPLR 8301(a)(12),[187] thereby avoiding the $250 limitation contained in CPLR 8301(a)(9). This approach allows an attorney to "exercise his ingenuity in bringing items of cost within [CPLR 8301(a)(12)'s] scope in order to shift the finanical burden of the lawsuit to his adversary."[188]

In short, the logical interaction of CPLR 8301(a) and CCA 1908(f) provide an attorney with the vehicle by which he can secure payment of expenses justly incurred in the prosecution of his client's action.

BUSINESS CORPORATION LAW

BCL 304(a): Court will not vacate default judgment where corporate defendant had not received notice due to its own neglect.

An action against a corporation may be commenced by service of process upon an officer, director, managing agent or cashier of the corporation,[189] by service upon its registered agent,[190] or by service upon the Secretary of State.[191] In the latter instance, service is completed

183 CCA 1908(f) permits the taxation of disbursements for all "reasonable and necessary expenses as are prescribed by law or taxable by express provision of law."

184 Affidavit in Opposition to Plaintiff's Motion at 1, Santiago v. Johnson, 61 Misc. 2d 746, 305 N.Y.S.2d 717 (N.Y.C. Civ. Ct. Kings County 1969).

185 *See, e.g.*, Landstrom Realty Corp. v. Lamborn, 144 Misc. 701, 259 N.Y.S. 495 (App. T. 2d Dep't 1932) (error to allow the cost of the minutes of an examination before trial as a taxable disbursement).

186 *See, e.g.*, FOURTH REP. 326. *Compare* CPLR 8301(a) *with* CPA 1518.

187 CPLR 8301(a)(12) is another "omnibus clause," perhaps even broader than CCA 1908(f). It permits disbursements for "reasonable and necessary expenses as are taxable according to the course and practice of the court, by express provision of law or by order of the court." 8 W. K. & M. ¶ 8301.24, at 83-36.1.

188 8 W. K. & M. ¶ 8301.01, at 83-86.

189 CPLR 311(1).

190 N.Y. BUS. CORP. LAW § 305 (McKinney 1963) [hereinafter BCL].

191 BCL 304(a). This section, as well as the two previously cited, is applicable to both domestic and foreign corporations.