REPLEVIN (SEIZURE OF UTILITY METERS)

New York's Utility Project Law Manual
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REPLEVIN OR SEIZURE OF UTILITY METERS

1. Introduction

Replevin is an ancient procedure[1] which permits a court to determine which of the parties to a legal action has a superior right to possession of the personal property in dispute. In New York State, replevin is codified in Article 71 of the Civil Practice Law and Rules (CPLR) and entitled *Recovery of Chattel*. Chattel is generally defined as any personal property which has a monetary value.

Utilities use replevin to remove an electric or gas meter resulting in the termination of the electric or gas service previously provided through the meter. Because electricity and gas have become necessities,[2] protecting a customer's right to possession of the utility meter is as important as protecting the utility customer's right to utility service. They are, in reality, the same thing. At its "best", replevin will permit seizure of a utility meter after notice and a full hearing. At its "worst," the customer's first notice of the action will be when the marshal or sheriff appears to remove the meter. Replevin is an effective and efficient pre-trial process by which a utility achieves termination of service.

2. Procedure

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[1] The Statutes of Marlborough, 52 Hun. III, c.21(1267).

[2] "[Utilities are] necessary to sustain life in today's world ... and the discontinuance of gas and electric work tremendous hardships on the users of these essentials..." *Consolidated Edison of New York, Inc. v. Powell*, 77 Misc.2d 475, 354 N.Y.S.2d 311, 315 (Sup. Ct. N.Y. Co. 1974).

Replevin is set apart from an ordinary action to recover a debt (the customer owes the utility for service delivered and billed) because it allows a utility to obtain an Order from the Court permitting it to direct a marshal or sheriff to seize the meter before the underlying action has been resolved. Thus, the earlier an advocate intervenes on behalf of a client in the replevin process the better the chances of success. There are two points at which an advocate is likely to come into contact with the process. The first is at the beginning of the process when the utility makes an application to the proper court for an order permitting it to replevy or seize the meter. The second is after the Order of Seizure has been issued and a Notice of Impending Seizure is served upon the customer advising that the meter is about to be removed.

There is a third possible intervention point. Under certain extraordinary circumstances, a utility may secure an *ex parte* order of seizure that will commence the action by authorizing a sheriff or marshal to seize the meter and serve the Summons and Complain (bearing the index number and the date of filing with the clerk of the court), at the same time.[3] Obviously, intervention at this point will be necessary in order to restore utility service. However, the primary damage already will have occurred. Because the burden of proof, placed on the utility, is to demonstrate that the customer is going to remove or destroy the meter, this is an unusual scenario.

3. Application For An Order

[3] CPLR §7102(c)(7). "if the plaintiff seeks an order of seizure without notice, [the supporting affidavit shall state] facts sufficient to establish that unless such order is granted without notice, it is probable the chattel will become unavailable for seizure by reason of being transferred, concealed, disposed of, or removed from the state, or will become substantially impaired in value."

In order to replevy or seize a meter, a utility must apply for an order of seizure from the court.[4] However, the statute is silent regarding notice to the person whose meter is to be seized and regarding the timing of the application. The statute is very clear, however, that the application for the order of seizure be supported by an affidavit from an individual with personal knowledge of the facts that "shall clearly identify the chattel to be seized" and shall further state

- that the plaintiff is entitled to possession of the meter by virtue of the facts set forth,
- that the named defendant no longer has a legal right to continue in possession of the meter,
- that an action has or has not been commenced to recover the meter and, if an action has been commenced, state full details as to the status of the action,
- the value of the meter or meters sought to be recovered,
- the location of the meter and facts sufficient to establish its presence at that location, in the event a breaking and entering may be necessary to recover the meter,
- that there is no defense to the seizure known to plaintiff and
- if the order of seizure is sought without notice, facts sufficient to show that the meter will be lost to the jurisdiction due to the giving of notice.[5]

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[4] CPLR §7102(c).

[5] Given the realities of utility service, it is unlikely that facts could be alleged to meet the burden of proof mandated by this requirement. Nevertheless, it should not be taken for granted that such an order will never be issued.
CPLR § 7102(c).

Ordinarily, it is at this point that a defendant is notified of the utility's intention to seize the meter. A copy of the application and the affidavit usually is mailed to the customer whose meter is to be seized.[6] As a rule, this notification is often ignored by the customer because it does not appear to be an official court document and, in most cases, is mailed by the utility and not by an attorney.

The notice of the utility's application for an Order of Seizure should include a date and place for the customer's appearance before the court to contest the utility's application. If the customer does not appear, either in person or by affidavit (preferably both), the "hearing" could take place without the customer. The issuance of an Order of Seizure under those circumstances is greatly increased.

[6] CPLR 7102(d)(3) was added to the statute in 1978 to include "a requirement that ... a defendant must be placed on notice of a pending application for an order of seizure." *Consolidated Edison Company of New York Inc., v. Wyns*, 152 Misc.2d 360, 361, 576 N.Y.S.2d 765 (Civ. Ct. Kings Cty. 1991).

It is likely that the customer, at this time, in addition to receiving the application for the Order of Seizure, will also have been served with a Summons and Complaint which represents the underlying action to recover the utility meter.[7] A proper response would require service and filing of an affidavit in opposition to the utility's application, and a Notice of Appearance and Answer. Clearly, there will be much duplication between the two documents. However, failure to appear in the underlying action could result in a default judgment regardless of the outcome of the utility's application for an Order of Seizure.

4. Notice

An "application" is required for a utility to obtain an order of seizure. As noted above, the waters are muddied in terms of how this "application" is to be handled procedurally. This area of ambiguity, caused by this "pre-judgment remedy" not being included in Article 60 of the CPLR with other pre-judgment remedies, ultimately may be advantageous to the low-income consumer.

[7] CPLR §§7102(a) and (b).

Any application for an order to seize a meter that is not made in conformity with the requirements of traditional New York State motion practice should be treated as a motion made with no notice and subjected to the rigorous scrutiny that a court should apply to any *ex parte* application.[8] Notice to a party to an action or proceeding should contain the date and time that the application will be presented to the court and should allow the defendant sufficient time to respond to the allegations.[9] Thus, any failure of the utility to serve proper notice or to obtain personal jurisdiction over the customer should be a priority in any defense to an action to seize a meter.[10]

5. Opposition

In preparing the low-income customer's affidavit in opposition to the utility's application to seize a meter, it is important to remember that the Court is not required to issue an order of seizure merely because a utility has met the minimum

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[8] *Consolidated Edison Co. of N.Y., Inc. v. Haymer*, 139 Misc.2d 95, 96, 527 N.Y.S.2d 941 (App. Term, 1st Dept. 1988); *Consolidated Edison Co. of N.Y., Inc. v. Church of St. Cecilia*, 125 Misc.2d 744 (Civ. Ct. N.Y. Co. 1984).

[9] CPLR 2214 requires service of moving papers at least eight days before the motion is noticed to be heard.

[10] "The Constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions." *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983 (1972).

requirements of the statute. In fact, the Court's latitude is extensive when making this determination.[11]

[11] "The legislature saw fit to afford the court ... substantial discretion in determining whether to grant orders of seizures ...." *Consolidated Edison Company of New York v. Haymer*, 527 N.Y.S.2d 941, 942, 139 Misc.2d 95 (App. Term, 1st Dept. 1988). The Appellate Term was acknowledging the language change adopted by the Legislature in 1978. Until that time the statute required that the Court, upon presentation of the proper papers, "grant an order directing the sheriff ... to seize the chattel ...." The statute now reads that the Court "may grant an order ...."

This flexibility, in conjunction with the serious nature of the proceeding, creates opportunities for opposition based on equity as well as on the law and the facts. It is in this context that the utility's affidavit in support of the application should be thoroughly examined. Opposition papers that clearly set forth the utility's failure to comply with the requirements of the statute, should demonstrate the superficiality of the application, and document any failure to allege specific facts. In addition, the papers should make clear the choice which the utility is proposing. They seek to take possession of a customer's electric or gas meter which provides that family with a necessity of life.[12]

It is settled state policy "that the continued provision of gas, electric and steam service without unreasonable qualifications or lengthy delays is necessary for the preservation of the health and general welfare and is in the public interest."[13] To facilitate continuous service, the Legislature enacted Social Services Law §131-s and Public Service Law §65-b which provide assistance when a threat of termination exists. A utility should not need to use the replevin procedure as a normal adjunct of its collection procedures when less drastic means such as helping the customer access the emergency utility payment program (SSL §131-s) may exist. Since seizing a meter terminates utility service, the public interest of this state

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[12] "Replevin is a drastic remedy. When it involves breaking and entering into someone's home, especially to remove what is most likely the home's sole source of heat and cooking fuel, it is even more so." *Brooklyn Union Gas Company v. Richy, et al.*, 475 N.Y.S.2d 981, 982, 123 Misc.2d 802 (Civ. Ct. Kings Cty. 1984).

[13] Public Service Law §30 (the Home Energy Fair Practices Act §§30-52).

requires that a court carefully and thoughtfully exercise its authority, and permit such an action only as a last resort.[14]

[14] "[T]he courts have been careful to attempt to insure that any requested seizures comport fully with constitutional due process requirements." *Id.* at 982

One area of investigation within the confines of the utility affidavit concerns its compliance with the protections afforded residential customers of utilities in the Home Energy Fair Practices Act (HEFPA - see fn 13) and the regulations issued by the Public Service Commission pursuant to that statute.[15] HEFPA provides that no termination of utility service shall occur until certain notices have been given and procedural steps taken.[16] It is essential, therefore, that the facts set forth in the utility's affidavit contain, at a minimum, allegations setting forth facts to demonstrate that the utility has complied with the termination requirements of HEFPA.[17] The utility's affidavit should contain an allegation as to whether the meter to be seized services a residential or non-residential premises. If the premises are residential, the affidavit must allege, inter alia, that (i) a fifteen day notice of termination has been served, (ii) a deferred payment agreement was offered, (iii) more than twenty days had elapsed from the date payment was due before the fifteen day termination notice was issued.

It is not enough for the utility to re-state the requirements of the CPLR. The affidavit must be made by someone with personal knowledge of the underlying facts and must contain more than conclusory allegations.[18] It is insufficient for the utility

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[15] 16 NYCRR Part 11.

[16] *See*, HEFPA pages 1-45.

[17] *Consolidated Edison Company of New York, Inc. v. Branley*, N.Y.L.J. Jan. 25, 1989, p. 25 (Civ. Ct. N.Y. Co.).

[18] *Consolidated Edison Company v. Branley*, N.Y.L.J. Jan 25, 1989, p. 25 (Civ. Ct. N.Y. Co.).

to attempt to meet the requirements of this section of the CPLR by alleging facts "on information and belief". It is unacceptable for the utility to merely state that it has sufficient data upon which to conclude what the facts are.

The utility's failure to provide an affidavit in support of the application which affords minimal due process information renders the application defective and would require the denial of the application.[19]

[19] "[T]he Civil Court, when presented with these ex parte applications ..., must carefully scrutinize the papers to insure that all of the requirements of the Statute have been met." *Consolidated Edison Company of New York, Inc. v. Pearson*, 474 N.Y.S.2d 230, 233, 123 Misc.2d 598, (Civ. Ct. N.Y. Co. 1984) and *Brooklyn Union Gas Co. v. Richy*, 123 Misc.2d 802, (Civ. Ct. Kings Co. 1984)

No examination of the affidavit in support of the application would be complete without a review to determine its factual accuracy. Is money owed? Is the money sought for non-payment, late payment or partial payment of bills for service? Is the money sought for failure to abide by the terms of a deferred payment agreement? Is the money sought as a security deposit? Is the alleged location of the meter correct? Is the amount of money sought correct? Is there a dispute currently before the Public Service Commission (e.g., shared meter situation)? Has the current status of this dispute been alleged? Any inaccuracy in any allegation of fact should be challenged and the utility put to its proof.[20]

The purpose of the affidavit in support of the application for an Order of Seizure is to convince the court that the utility will probably succeed on the merits. Even if the affidavit is facially sufficient, however, the court is not required to grant the application but, rather, may grant the order. Therefore the advocate can challenge the affidavit procedurally, factually and equitably to convince the court not to exercise its discretion.

6. Affirmative Defenses

Affirmative defenses are available to a person whose meter the utility seeks to seize. Some of the affirmative defenses available include, but are not limited to, partial payment, overcharges, transferred arrears from another account, shared meter situations. Any of these circumstances should also be brought to the attention of the court in opposing the application for an Order of Seizure.

[20] In seeking Court permission to seize a meter, the utility has "the burden of establishing the grounds for the order." CPLR §7102(d)(1).

It is through affirmative defenses and the affidavit in opposition to the utility's motion that an appeal may be made to the court's equitable jurisdiction in refusing to grant the application to seize the utility meter. Factors such as family size, DSS responsibility to provide assistance,[21] composition, need for the utility service (i.e., gas heat in winter, etc.), causes for the non-payment, partial payment, efforts to secure public assistance, are all important in this regard. If there are pending PSC proceedings involving the customer, the court may decide to deny seizure even where the Court has concurrent jurisdiction to decide the matter.[22]

7. Undertaking

In addition to a supporting affidavit, the utility must post an undertaking before the court may issue an Order of Seizure.[23] The difficulty is establishing the value of the meter. Clearly, the value of the meter should not be measured by the utility's cost of replacing it but by the cost to the customer of surviving without the utility service that is rendered through the

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[21] *Consolidated Edison v. McClain*, 87 Misc.2d 776 (City Ct. Mt. Vernon 1976).

[22] *Castillo v. Wenk*, N.Y.L.J. June 10, 1987, p. 15 Col. 2 (App Term 9th Jud. Dist.), court should have deferred to agency proceeding. Cf. Guggenheim Museum

[23] CPLR §7102(e) requires that a utility post an undertaking or bond equal to not less than twice the value of the chattel sought to be recovered.

meter.[24] In short, it is essential to emphasize the seriousness of the result in estimating what the value of the meter should be for purposes of establishing an indemnification acceptable to the court. Once again, this issue also goes to the court's discretion in determining whether to issue the Order of Seizure.

8. Notice Of Impending Seizure

Thus far, it has been presumed that a utility properly applied for an order to seize a customer's meter. The utility will have given notice, hopefully in the form of a Notice of Motion with proper supporting papers, to the customer as to the existence of the action. As discussed above, the customer opposing replevin should file with the appropriate court clerk's office at any time prior to the date of the hearing (as set forth in the utility's papers) an affidavit and/or other papers (Notice of Appearance and Answer) in opposition to the utility's application for an order of seizure.

On the hearing date, the customer could, but is not required to, meet with a representative of the utility and attempt to resolve the dispute; *e.g.*, pay the bill, arrange a deferred payment agreement, seek public assistance. If this step does not settle the matter or if this step, for whatever reason, is not taken, the customer has a right to a hearing before a judge. At this

[24] In *Con Ed v. Powell*, *supra*, p. 316, the Court suggested that the surety "should be in an amount that would compensate [the defendant] for loss of his life supporting utility service" in the event he prevails in the action. The current practice of posting a surety of $500.00 was "found to be inadequate on its face." *Con Ed v. Church of St. Cecilia*, 125 Misc.2d 744, 749 (Civ. Ct. N.Y. Co. 1984). It was also found "clearly inadequate when considering the substantial potential liability to a person who is unlawfully deprived of utility services." *Con Ed v. Alston*, 441 N.Y.S.2d 802, 804 (Civ. Ct. Bronx Co. 1981).

judicial intervention, the utility has the burden of showing that it is probable it will be ultimately successful on the merits and that the facts are as set forth in the affidavit. The customer has a right to dispute any such presentation on the part of the utility and should raise such factual issues and legal issues as may show the affidavit in support of the application to be insufficient, legally or equitably, for the issuance of the order of seizure.

Presuming that either the customer failed to appear and contest, or that the court found in favor of the utility in its application, an Order of Seizure will be issued to a marshal or a sheriff. Current practice requires that the marshal or sheriff advise the customer, by mail, of the Order of Seizure and of the intent to execute the Order at the end of seven days. After the expiration of the seven day notice, the marshal or sheriff may break into the premises, if not given access, and seize the meter.

If a customer did not receive the application for an Order of Seizure, it is at the service of this second required notice that an customer may have an opportunity to intervene in order to prevent the seizure of the meter. The first line of defense at this point is the failure of the utility to properly serve and notify the customer concerning the initial application to the court pursuant to CPLR §7102.

Once the issue of the jurisdiction of the court over the customer (personal jurisdiction) is resolved in favor of the customer, the issues should then revert to the same issues as discussed above with reference to the application for the Order of Seizure.

9. Conclusion

Replevin, or Seizure of a Utility Meter, is a relatively complex and involved legal proceeding which entails the interrelation and interweaving of many different statutes and a substantial amount of caselaw. Advocates should always be conscious of the ultimate result of the seizure of a utility meter - termination of utility service. Thus, advocates should always be looking for defenses, both legal and equitable, that attack not only the consequence of the proceeding but also attack the

procedural, substantive, legislative and constitutional propriety of the proceeding itself.