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C

United States District Court,
D. New Hampshire.
TRAPPER BROWN CONSTRUCTION CO., INC.,
Plaintiff,
v.
ELECTROMECH, INC., et al., Defendants.
Civ. A. No. 73-21.

May 14, 1973.

Action for declaratory judgment as to constitutionality of New Hampshire statute, which provided for trustee judgments, and for injunctive relief and damages. The Three Judge Federal District Court, Levin H. Campbell, Circuit Judge, held that such statute, which exempted wages in most instances and which permitted a defendant, after "an excessive or unreasonable attachment of any kind, by trustee process or otherwise, has been made," to apply to Superior Court for its reduction or discharge, with burden of proof on party making attachments, denied due process insofar as it permitted litigants to make prejudgment attachments by way of trustee process without first giving owner of property reasonable notice and opportunity to be heard.

Judgment accordingly.

West Headnotes

[1] Constitutional Law 92  **3927**

92 Constitutional Law
92XXVII Due Process
92XXVII(C) Persons and Entities Protected
92k3927 k. Business Organizations; Corporations. **Most Cited Cases**
(Formerly 92k252)
Corporation may claim protection of Fourteenth Amendment. **U.S.C.A.Const. Amend. 14.**

[2] Civil Rights 78  **1329**

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1329 k. In General. **Most Cited Cases**
(Formerly 78k199.1, 78k199, 78k13.6)
Corporation is a "person" within protection of Civil Rights Act. **42 U.S.C.A. § 1983.**

[3] Courts 106  **508(2.1)**

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k508 Injunction by United States Court Against Proceedings in State Court
106k508(2) Restraining Particular Proceedings
106k508(2.1) k. In General. **Most Cited Cases**

(Formerly 106k508(2))
Federal anti-injunction statute did not bar injunctive relief in action brought under Civil Rights Act of 1870 for damages, injunctive relief and declaratory judgment that trustee attachment made under New Hampshire statute without prior opportunity for hearing violated due process clause of Fourteenth Amendment. **U.S.C.A.Const. Amend. 14;** RSA N.H. 512:1 et seq.; **28 U.S.C.A. § 1343(3); 42 U.S.C.A. § 1983.**

[4] Constitutional Law 92  **4070**

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4070 k. In General. **Most Cited Cases**
(Formerly 92k278(1))
Private personal property may not be withheld even temporarily from its possessor, absent important

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governmental or general public interest, without possessor first having been afforded notice and opportunity to be heard. [U.S.C.A.Const. Amend. 14](#).

[5] Constitutional Law 92  **3874(1)**

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3868 Rights, Interests, Benefits, or Privileges Involved in General

92k3874 Property Rights and Interests

92k3874(1) k. In General. [Most](#)

[Cited Cases](#)

(Formerly 92k277(1))

All forms of property are entitled to due process protection. [U.S.C.A.Const. Amend. 14](#).

[6] Constitutional Law 92  **4481**

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)25 Other Particular Issues and Applications

92k4479 Special, Summary, or Provisional Remedies and Proceedings

92k4481 k. Attachment. [Most Cited](#)

[Cases](#)

(Formerly 92k312(4), 92k312)

Garnishment 189  **2**

189 Garnishment

189I Nature and Grounds

189k2 k. Constitutional and Statutory Provisions. [Most Cited Cases](#)

New Hampshire statute, which provided for trustee attachments, exempted wages in most instances, and which permitted a defendant, after “an excessive or unreasonable attachment of any kind, by trustee process or otherwise, has been made,” to apply to superior court for its reduction or discharge, with burden of proof on party making attachment,

denied due process insofar as it permitted litigants to make prejudgment attachments by way of trustee process without first giving owner of property reasonable notice and opportunity to be heard. [U.S.C.A.Const. Amend. 14](#); RSA N.H. 511:53, 512:1 et seq.

[7] Courts 106  **100(1)**

106 Courts

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

106k100 In General

106k100(1) k. In General; Retroactive

or Prospective Operation. [Most Cited Cases](#)

Declaratory judgment that New Hampshire statute denied due process insofar as it permitted litigants to make prejudgment attachments by way of trustee process without first giving owner of property reasonable notice and opportunity to be heard was not to retrospectively affect validity of other actions commenced by trustee process in New Hampshire state courts prior to effective date of judgment nor was it to apply to later state court orders in such actions charging trustees and making them pay over to plaintiff sums held on attachments made prior to effective date of judgment. [U.S.C.A.Const. Amend. 14](#); RSA N.H. 511:53, 512:1 et seq.

*106 Michael M. Lonergan, Sulloway, Hollis, Godfrey & Soden, Concord, N. H., for plaintiff.

Alvin E. Taylor, Taylor & Gray, Portsmouth, N. H., for Electromech, Inc.

Philip G. Peters, Wadleigh, Starr, Peters, Dunn & Kohls, Manchester, N. H., for Alvin E. Taylor.

Before CAMPBELL, Circuit Judge, GARRITY and BOWNES, District Judges.

OPINION

LEVIN H. CAMPBELL, Circuit Judge.

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This case presents the question whether a trustee attachment made under Chapter 512 of the New Hampshire Revised Statutes without prior opportunity for hearing violates the due process clause of the Fourteenth Amendment of the United States Constitution.

All the parties reside or have their principal places of business in New Hampshire. The plaintiff was sued in contract by defendant Electromech, Inc. in the Rockingham County Superior Court, the writ bearing a \$45,000 ad damnum and naming defendant Meredith Trust Company as trustee. The Belknap County Sheriff, at the direction of Electromech's attorney, served the writ upon Meredith Trust Company pursuant to NH RSA 512:1 et seq. Plaintiff then had \$45,000 on deposit at the trustee bank which was "caught" by the attachment. After service of the writ, the bank, in conformity with New Hampshire law, refused to permit the plaintiff to use the deposited funds. The trustee attachment was made without prior notice to plaintiff and without prior opportunity for hearing, neither being required under the New Hampshire statutes.

This action for declaratory and injunctive relief and damages followed. The Chief Justice of the New Hampshire Superior Court and the Clerk of the Rockingham Superior Court have since, upon their motion, been dismissed as defendants. A temporary restraining order preventing enforcement of Chapter 512 and releasing the trustee attachment, subject to certain restrictions, has been issued and is now in effect. A three-judge court was convened as required by 28 U.S.C. § 2281.

At the hearing, the plaintiff waived any claim for damages. We are informed that the Attorney General of New Hampshire has been fully advised of these proceedings and that he does not wish to be heard.

[1][2][3] The present action is properly brought under the Civil Rights Act of 1870, 42 U.S.C. § 1983, jurisdiction being conferred under 28 U.S.C. § 1343(3).^{FNI} Plaintiff corporation may claim the

protection of the Fourteenth Amendment, and it is a person within the protection *107 of the Civil Rights Act. *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 79-80, 58 S.Ct. 436, 82 L.Ed. 673 (1938). *National Association for Advancement of Colored People v. Patty*, 159 F.Supp. 503, 519 (E.D.Va.1958), vacated and remanded on other gds. sub nom. *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152 (1959); *Mini Cinema 16 Inc. v. Habhab*, 326 F.Supp. 1162, 1164-1165 (D.C.Iowa 1970). Injunctive relief is not barred in such a proceeding by 28 U.S.C. § 2283. *Mitchum v. Foster*, 407 U.S. 225, 242-243, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972). See also *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

FNI. State action sufficient to invoke the Fourteenth Amendment and § 1983 is, of course, involved; the trustee attachment was pursuant to and under color of New Hampshire law. While the judicial defendants were dismissed as unnecessary to the relief sought, the defendant Sheriff remains a party in his official capacity. Cf. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

[4] In *Schneider v. Margossian*, 349 F.Supp. 741 (D.Mass.1972), a three-judge court held that the Massachusetts trustee process statute was unconstitutional on its face insofar as it denied defendants notice and hearing before pre-judgment attachments were made. See also *McClellan, et al. v. Commercial Credit Corp., et al.*, 350 F.Supp. 1013 (D.R.I.1972), similarly holding Rhode Island pre-judgment attachment procedures unconstitutional. Both *Schneider* and *McClellan* rest on Supreme Court decisions culminating in *Fuentes v. Shevin*, *supra*, establishing, we think unmistakably, that private personal property may not be withheld even temporarily from its possessor-absent important governmental or general public interest-without his first having been afforded notice and opportunity to

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be heard.

The New Hampshire statute, like the deficient Massachusetts and Rhode Island statutes, permits a defendant's property to be attached without affording any such advance opportunity. We therefore hold it unconstitutional.

[5][6] We find no significant distinctions between the New Hampshire trustee process statute and that considered in *Schneider*. While a 1969 amendment to the New Hampshire statute exempts wages in most instances (*see* NH RSA 512:21), *Fuentes, supra*, 407 U.S. at 88, 92 S.Ct. 1983, 32 L.Ed.2d 556, makes it clear that all forms of property are entitled to due process protection. *Cf. Sniadach v. Family Finance Corporation*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969).

The New Hampshire statute permits a defendant, after “an excessive or unreasonable attachment of any kind, by trustee process or otherwise, has been made”, to apply to the Superior Court for its reduction or discharge. NH RSA 511:53. But, as the application is after the fact, it does not meet the Constitutional requirement of a pre-attachment opportunity to contest. *See also Schneider, supra*, 349 F.Supp. at 743, footnote 2. In such a later proceeding, the New Hampshire defendant has the further benefit of a statutory provision placing the burden of proof upon the party making the attachment “to show that the attachment is not excessive or unreasonable.” NH RSA 511:53. But the fundamental infirmity remains: the property may be tied up at the discretion of the plaintiff at least until such time, perhaps many days or weeks later, as the defendant is able to obtain a judicial hearing. As the Court said in *Fuentes, supra*, 407 U.S. at 93, 92 S.Ct. at 2001,

Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim ...; and no state official evaluates the need for immediate seizure.

We accordingly declare that Chapter 512 of the New Hampshire Revised Statutes is unconstitutional insofar as it permits individual litigants to make pre-judgment attachments by way of trustee process without first giving the owner of the property reasonable notice and an opportunity to be heard.

We further declare that the purported trustee attachment in the Rockingham County Superior Court by Electromech, Inc. of funds belonging to Trapper Brown Construction Co., Inc. in the hands of Meredith Trust Company, is unconstitutional, void and unenforceable. *108 It appears that pursuant to our earlier restraining order, Electromech, Inc. has already filed in the Rockingham County Superior Court a document releasing the trustee attachment. No injunction shall therefore issue as none is now necessary to carry out our judgment. The temporary restraining order heretofore entered is dissolved.

[7] Our declaratory judgment should not be construed as retrospectively affecting the validity of other actions which were commenced by trustee process in New Hampshire state courts prior to the effective date of our judgment; nor of later New Hampshire state court orders in such actions charging trustees and making them pay over to plaintiffs sums held on attachments made prior to the effective date of our judgment. *See Schneider, supra*, 349 F.Supp. at 745.

The plaintiff shall be awarded its costs.

Judgment shall enter in accordance herewith.

D.C.N.H., 1973.
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