

REPLEVIN - THE SECURED CREDITOR'S PREJUDGEMENT REMEDY

The two (2) main prejudgment remedies for creditors which involve use of the courts, as distinguished from non-judicial, self-help repossession, are replevin and attachment.

In a previous article, we discussed the remedy of attachment, the prejudgement remedy for unsecured creditors. (See, "Attachment: An Extraordinary Remedy". Issue No. 7, October, 1989)

We have also featured a two-part series on self-help, the remedy available to secured creditors when they are able to obtain their collateral without resort to the courts. (See, "Self-Help - The Peace Breached," Issue No. 20, December, 1992 and "Self-Help-Under Color of Law," Issue No. 21, February, 1992.)

We now turn our attention to replevin, which is simply a name given to repossession by a secured creditor through the courts.

There are generally two forms a replevin action may take: repossession after notice to the debtor, and repossession without notice to the debtor. This latter form is called ex parte replevin. Ex parte replevin is only available under certain extraordinary circumstances and will receive extended treatment in a future article.

In an ordinary replevin in Kentucky, the process is relatively simple and also generally expeditious. The creditor's counsel files a complaint with the court and has a summons issued by the clerk. Counsel then mails the complaint, summons, and a demand notice, along with a motion and affidavit from the creditor establishing the creditor's right to the collateral. This is mailed to the debtor by certified mail, return receipt requested, unrestricted delivery.

The demand notice advises the debtor that the enclosed complaint has been filed due to its default in payment and that the creditor is seeking repossession of its collateral. It further advises the debtor that it must either pay the amount owed or request a hearing from the court within seven (7) days to avoid having a writ of replevin issued.

Unless the debtor requests a hearing within seven (7) days of the mailing of the complaint, summons, motion and affidavit, and demand letter, the creditor can have a writ of replevin issued by the clerk of the local court upon the filing of a bond with sufficient surety in an amount equal to twice the value of the collateral. The creditor must accompany the bond with an affidavit by its counsel to the effect that the relevant statutes have been complied with, and that the writ may now be properly issued.

The writ of replevin itself is directed to the local sheriff of the county in which the collateral is located and gives him the authority to break into a private place, if necessary, to obtain the collateral. The writ, in other words, is a court order directing the sheriff to seize the collateral from the debtor.

It does not matter whether the debtor does not receive or refuses the certified demand letter with its enclosures. The writ can issue seven (7) days after mailing unless a hearing is requested. This satisfies the constitutional requirement that the debtor have "notice and an opportunity to be heard" since the certified mailing can reasonably be expected to give adequate notice.

If the debtor does request a hearing, then the creditor's counsel need only demonstrate at the hearing set by the Court that the creditor is more likely than not to prevail on the merits of the case. If creditor's counsel can so demonstrate, then the writ shall issue. If a hearing is held, it has to be conducted before a "judicial officer" - in other words, a judge or commissioner. It is this judicial officer who

then signs the writ rather than the court clerk since judicial discretion has now been called into the process. The debtor has a right to obtain re-delivery of the property held as collateral by executing a counter-bond with one or more "sufficient sureties" in an amount equal to the creditor's bond (i.e., twice the value of the collateral). The debtor may also object to the surety upon the creditor's bond, but this is a rare practice since most creditors use corporate surety.

Please note that the writ of possession is a prejudgement remedy and that the above described procedure all takes place prior to a judgement being entered. Obviously, the creditor must have actual service upon the debtor prior to obtaining a judgement, but need not have such service prior to obtaining a writ.

Because replevin is a prejudgment remedy, it is considered an extraordinary remedy and strict compliance with the relevant statutes is required. The attorney employed by the creditor for the purpose of obtaining a writ of replevin should have specialized knowledge and expertise because a creditor who does not strictly observe the legal requirements in exercising the replevin remedy may later have some heavy damages assessed against it.

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