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OCT 3 1991
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By
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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

MURRAY H. GOODMAN,

Appellant,

vs. CASE NO. 78,246

BRASSERIA LA CAPANNINA, INC.
AND VITA MURPHY,

Appellees.

ANSWER BRIEF OF APPELLEES

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CITATIONS OF AUTHORITY

PREFACE

Appellant, MURRAY H. GOODMAN, was the Plaintiff in the trial court and the Appellee in the Fourth District Court of Appeal; he will be referred to as "the Landlord." Appellees, BRASSERIA LA CAPANNINA, INC. and VITA MURPHY, were the Defendants in the trial court and the Appellants in the Fourth District; they will be referred to as "the Tenants".

All emphasis in this Brief is supplied by the Tenants, unless otherwise indicated. The following symbols will be used:

"LB"	Landlord's Brief in this Court;
"TA"	Appendix filed by the Tenants in the Fourth District;
"LA"	Appendix filed by the Landlord in the Fourth District.

There are three hearing transcripts in this case. The first hearing took place on the morning of May 18, 1990, the second hearing took place near the end of that same day, and the third hearing took place on June 28, 1990. The transcripts will be referenced by the symbols "T1", "T2", and "T3", respectively, along with the pagination which appears in the transcripts.

STATEMENT OF THE CASE AND FACTS

The Tenants accept the Landlord's Statement of the Case and of the Facts to the extent that it presents an accurate, non-argumentative recitation of proceedings below, with the following additions and/or clarifications:

The distress writ was issued on May 16, 1990 in the form provided by the Landlord. The writ stated that it applied to all property liable to distress for rent and other charges under the lease, including goods, fixtures, furniture, supplies, stock, inventory, and personal property. The concluding paragraph of the writ read as follows:

> Defendants and all others are enjoined from damaging, disposing of, secreting, selling, removing or transferring any property liable for distress from the rental real property and premises thereof, described above, after the time of the service of this writ until the SHERIFF levies on the property or this writ is vacated or the court orders otherwise. If the Defendants do not move for dissolution of the writ, the Court may order the SHERIFF to levy on the property liable for distress forthwith after twenty (20) days from he time the Complaint in this action is served. A VIOLATION OF THE COMMAND OF THIS WRIT MAY BE PUNISHED AS A CONTEMPT OF COURT. (TA54).

Tenants filed their Amended Answer, Affirmative Defenses and Counterclaim (TA55-63). Most pertinently to this appeal, the first count of the counterclaim (TA 57) alleged that the Sheriff notified the Tenants that they were forbidden to enter the premises of the restaurant for the purpose of conducting business.[1] The Tenants

[1] There is some squabble about whether the Sheriff said that the Tenants could not enter the premises to conduct business, or whether he said simply that they could not conduct business.

further alleged that the Landlord sought the distress writ in order to cause the failure of the Tenants' business so that the Landlord could re-lease the restaurant premises to another business in which he had a substantial pecuniary interest. The other two counts of the counterclaim alleged breach of lease and business defamation.

The Motion for Dissolution of Writ which the Tenants filed (TA64-66) charged that the writ was overbroad in that it facially attempted to close the business by preventing the sale of property, which includes meals and foodstuffs, without due process of law, and amounted to a confiscatory ruination of the business. The motion also stated that, while the writ enjoined the removal of fixtures, furniture and the like from the premises, it went even further and effectively closed the restaurant without a hearing. Thus, the Tenants were deprived of their property rights without first having a hearing. Finally, the motion also alleged that the Landlord had an <u>ex parte</u> hearing before the court on the issuance of the writ, even though he knew that the Tenants had long been represented by counsel regarding their alleged violations of the lease.

The Tenants filed a memorandum of law in support of their motion for dissolution (A67-72), along with the affidavit of Vita Murphy (A73-76). The affidavit recited most of the allegations of the motion, including that since the writ was served by the Sheriff on May 16, 1990, the Sheriff, pursuant to instructions from the

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Either way, the effect is the same--the Tenants were forbidden to carry on their business after the writ was served.

Landlord's counsel, had denied her access to the premises for the purpose of running it as a restaurant business.[2] She further asserted that the Sheriff forbade her from removing perishable food, and that she had been engaged in negotiations for the sale of the restaurant to a third party, which sale was jeopardized by issuance of the writ.

Murphy also asserted that by obtaining the writ, the Landlord was attempting to drive the Tenants out of business, forcing them to surrender the premises to him, and thereby allowing him to re-lease it to another restaurant business in which he had a substantial pecuniary interest. Finally, Murphy stated that she had not been able to secure a bond to stay enforcement of the writ due to insufficient funds, and that the enforcement of the writ itself contributed to her inability to obtain a bond by denying her the restaurant's daily business receipts.

At the first hearing held on the morning of May 18, 1990, the Tenants' counsel stated without contradiction that on the night the writ was served two days before, the Sheriff returned to the restaurant and told the maitre d' that the Tenants could not conduct any business at the restaurant whatsoever, and that they were not to sell any food or serve any patrons. Counsel asserted that the writ was either overbroad or being applied overbroadly, because since the restaurant had been effectively enjoined from doing any business, the writ was operating as an injunction without prior hearing. (T1/4,5,8).

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[2] See footnote 1.

The Tenants' counsel contended that the language of the writ itself did not go as far as the instructions given by the Sheriff (T1/14), and he argued that the statute was never intended to provide a way to enjoin a business from operating. (T1/6). He also stated that the reputation of the restaurant was "fast going to go down the tubes" if the writ was not modified to permit it to continue to do business in the interim before a hearing on the motion to dissolve the writ. (T1/9). Counsel was not contending that the writ did not apply to the furniture and fixtures, but that as applied the writ was unconstitutionally violative of due process by failing to permit the restaurant to conduct business. (T1/10). Counsel argued as follows:

> [Tenants' counsel]: I think you have every right under this Statute, particularly under constitutional mandates, to modify your writ to the extent necessary just to conduct business. And obviously, the writ is still in place. If we start selling fixtures out of there, then we're going to end up in jail because we're subject to contempt of court which is a further matter that can be addressed. But to stop us from conducting business in advance of a full-blown evidentiary hearing, I think that is outweighed by your right as the court to modify your writ in one small aspect. (T1/18).

The court eventually ruled that the Tenants were enjoined from doing any business in their restaurant until they posted a bond. (T1/21). At the second hearing on that same day, the issue was the amount of the bond, and the amount of the arrearage (in different classifications) was set at $50,775.61, which would be the amount to be secured by any bond. (T2/21).

The record does not indicate why the hearing on the motion to dissolve the writ did not occur until June 28, 1990, except that the Tenants were represented at the first hearings by an associate of their regular attorney who stepped in to cover for him while he was in trial (T1-3; T2-24). Regardless, at the June 28 hearing, the Tenants argued that the statute must be read to require some showing of exigent circumstances in order to constitutionally justify the extraordinary remedy that was issued in this case (T3/3). They argued that while the new version of the statute (unlike the old) provided for a prompt post-seizure hearing, that remedy was illusory because all that the statute required was that if the Landlord - Tenant relationship was pled, and if the fact that the rent was due (not past due, but simply due) was pled, then the court "shall" issue the writ. Thus, the statute did not provide for an exercise of discretion by a judicial officer, but rather merely changed the face of the person who makes what is essentially a ministerial decision and issues the writ. (T3/5-9, 11-12).

The Tenants also argued that the writ could have been worded in a manner which would have allowed them to continue to conduct business by allowing sales, the proceeds of which could be escrowed, subject to the contempt power of the court. However, to shut down the business was an unconstitutional application of the statute, which effectively destroyed the Tenants' ability to pay the money owed. (T3/15-17). When the Landlord argued that the Tenants' remedy was to post a bond, the Tenants responded that the bond remedy was illusory because, since the business had been shut down, there was no bonding company that would write a bond for it. Also, since the business had been shut down, it could not generate any cash in order to post a cash bond. (T3/17, 19-20).

Responding to the claim that the Tenants should have approached the court earlier for dissolution, their counsel responded that they appeared in court promptly after the writ issued to challenge it, raised many of the same issues that were raised at the dissolution hearing, and the Court agreed. (T3/21). Finally, the Tenants challenged the need for the issuance of the writ in the first place, since they had installed over $300,000 worth of improvements in the premises (including ovens, furniture, etc.), which secured the $50,000 indebtedness. While the Landlord asserted that it was uncontested that the improvements belonged to the Landlord pursuant to the lease, the court itself pointed out that nonetheless it was the Tenants who had made the improvements and "put a lot of money into it." (T3/23-24).

At the conclusion of the hearing, the trial judge stated that the constitutional question was "a really good argument," but that he was not comfortable with finding the law unconstitutional in light of the requirement that statutes be upheld if possible. Further, he pointed out that under the new scheme of the statutes, the distress proceeding does not apply to residential tenancies, only to commercial tenancies. (T3/26). Thus, he reserved ruling (T/27-28), and later denied the motion to dissolve the writ. (TA/106).

POINTS ON APPEAL

POINT ONE

THE FOURTH DISTRICT CORRECTLY HELD THAT THE DISTRESS FOR RENT STATUTE, SEC. 83.12, FLA. STAT. (1989), IS FACIALLY UNCONSTITUTIONAL. (Appellant's Points I and II combined and restated.)

POINT TWO

THE DISTRESS STATUTES, SECS. 83.11 AND 83.12, FLA. STAT. (1989), WERE UNCONSTITUTIONALLY APPLIED IN THIS CASE, WHERE THE WRIT WAS USED, NOT SIMPLY TO ENJOIN THE REMOVAL OR DESTRUCTION OF PROPERTY, BUT TO ENJOIN THE CONDUCT OF BUSINESS, THEREBY SHUTTING DOWN AND DESTROYING THE TENANTS' BUSINESS ITSELF.

SUMMARY OF ARGUMENT

POINT ONE: The distress statutes, Secs. 83.11 and 83.12, are facially unconstitutional because, once the complaint is filed, the judge is required to issue the writ, with no meaningful discretion to permit an impartial factual determination of the need for the writ. This is especially so in a case such as this, which closed the debtor's business.

POINT TWO: The distress statutes were applied unconstitutionally in this case because the writ was used, not simply to enjoin the removal or destruction of property, but to shut down and destroy the business itself. Where the remedy sought by the creditor is not simply to maintain the status quo pending further action, but to actually close the business, the distress statutes cannot be applied constitutionally unless they require sworn allegations that exigent circumstances call for the most drastic remedy. Further, since the corporation's ability to generate revenue parallels a worker's interest in his wages, the drastic remedy of shutting down a business cannot be constitutionally justified unless there is a pre-seizure hearing either in addition to or as an alternative to the allegation of exigent circumstances in the complaint.

ARGUMENT

POINT ONE

THE FOURTH DISTRICT CORRECTLY HELD THAT THE DISTRESS FOR RENT STATUTE, SEC. 83.12, FLA. STAT. (1989), IS FACIALLY UNCONSTITUTIONAL. (Appellant's Points I and II combined and restated.)

In G.W. THOMPSON, Commentaries on the Modern Law of Real Property, Vol. 3A (1981) Sec. 1305 at 496, the author described a distress warrant as "the sole surviving relic in modern statutory law of the absolutism incident to the ancient feudal doctrine governing land tenures." That description aptly fits this case. While the distress statutes were amended in Florida following the constitutional scrutiny by this Court in PHILLIPS v. GUIN & HUNT, INC., 344 So.2d 568 (Fla. 1977), the Fourth District correctly held that the amendments did not cure the constitutional infirmity. BRASSERIA LA CAPANNINA, INC. v. GOODMAN, 579 So.2d 193 (Fla. 4th DCA 1991).

The Tenants argued in their memorandum (T69-72) and at the hearing (T81-85) that the distress statute is unconstitutional on its face because it does not provide for a discretionary decision by the Court in issuing the writ, but instead requires that the writ be issued when the minimal requirements specified in Sec. 83.11 are met. The statute requires the creditor to verify the complaint, allege the name and relationship of the defendant to the plaintiff, allege how the obligation for rent arose, allege the amount of the rent due and how it is payable. Once the complaint is filed, Sec. 83.12 states that a "distress writ _shall_ be issued by a judge of the court which has jurisdiction of the amount claimed."

The predecessor statute was declared unconstitutional by this Court in PHILLIPS v. GUIN & HUNT, INC., 344 So.2d 568 (Fla. 1977). At that time, the statute provided for issuance of the writ by the clerk of the court without a judicial order, and there was no provision for a prompt hearing following issuance of the writ. Applying the analysis developed by the United States Supreme Court beginning with SNIADACH v. FAMILY FINANCE CORP., 395 U.S. 337 (1969), this Court concluded the following:

> Finally, it is constitutionally imperative that a writ issue _only after an impartial factual determination_ is made concerning the existence of the essential elements necessary for issuance of the writ. Consequently, a writ must be issued by a judicial officer based upon a prima facie showing rather than pro forma by the clerk of the court, unless the initial pleading is made under oath to a clerk who makes an _independent factual determination_ that the requirements of the statute have been complied with. Only then can the individual have his use and enjoyment of property protected from arbitrary encroachment.

_Id_. at 574.

In the instant case, the Tenants maintained below that the statute still suffered from the same facial infirmity. As counsel argued at the hearing in the trial court, the statute only changed the face of the person who makes a purely ministerial decision (T3/12). That is, while the writ is now issued by a judge rather than by a clerk, the court is _required_ to issue the writ if the complaint satisfies the bare-bones requirements of Sec. 83.11, which amount to nothing more than the allegation of a breach of contract. The statute does not provide for the kind of impartial factual determination required by the court in PHILLIPS.

The Tenants argued below that similar statutes have been stricken elsewhere, and the Fourth District relied on those authorities in its opinion.[3] In WYATT v. COLE, 710 F.Supp. 180 (S.D. MISS. 1989), the federal district court determined that Mississippi's replevin statute was unconstitutional because it provided that the judge "shall" grant the requested relief whenever presented with a complaint in the statutory form. The court stated the following:

> The Court finds as a matter of law that Section 11-37-101 of the Mississippi Code, which states, "if any person...shall file a declaration.....and shall present such pleadings to a judge...such judge shall issue an order directing the clerk of such court to issue a writ of replevin for the seizure of the property described in said declaration....", does not provide such safeguards of procedure as are required by the Due Process Clause of the Fourteenth Amendment. The Court therefore finds that the taking of property of the Plaintiff, pursuant to a writ issued under this statute, was a taking of property without due process of law.

Id. at 183.

Similarly, in JOHNSON v. AMERICAN CREDIT CO. OF GEORGIA, 581 F.2d 527 (5th Cir. 1978), the Fifth Circuit held that the Georgia

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[3] In his brief, the Landlord takes pains to argue that federal decisions are not binding on Florida state courts (LB 15-16). Indeed, the Tenants never argued that they were, only that they were persuasive authority in this case, and the Fourth District agreed.

prejudgment attachment statute was unconstitutional. That statute required that the creditor apply for attachment before a judge, but then stated that when presented with a creditor's affidavit and bond, the judge had "'the duty...to issue an attachment against the defendant'". Id. at 534 (emphasis in original). The court explained its holding as follows:

> It seems clear, then, that due process requires that a prejudgment seizure be authorized by a judge who has discretion to deny issuance of the appropriate writ. Because the Georgia prejudgment attachment scheme does not provide this procedural guaranty, we hold that it is facially unconstitutional.

Id. (footnote omitted).

The Landlord's main challenge to the Fourth District's holding is that it misconstrued the meaning of the word "shall" in Sec. 83.12, interpreting it to be mandatory rather than directory. The Landlord's most prominent reliance is on this Court's opinion in RICH v. RYALS, 212 So.2d 641, 643 (Fla. 1968), and its quotation to the earlier case of FAGAN v. ROBBINS, 96 Fla. 91, 117 So. 863 (1928). He correctly points out the similarity between RICH and the instant case, to the extent that in RICH the Fourth District struck down a state statute because it construed the word "shall" to be mandatory rather than directory.

However, the statement by the Court in FAGAN, quoted in RICH, that the word "shall" when used to describe the action of a court is usually a grant of authority and means "may," is not dispositive in this case. There are numerous other cases in which the word "shall," when applied to the action of a court, was found to mean exactly what it said. For example, in WHITE v. MEANS, 280 So.2d 20 (Fla. 1st DCA 1973), the court explained that the interpretation of the word "shall" in statutes depends upon the context in which it is found and upon the intention of the legislature as expressed in the statute. The First District held that the word "shall" in an attorney fee statute applicable in paternity cases was mandatory, and absolutely required the court to award attorney's fees to the mother. Id. at 21.

In WILLIAMSON v. STATE, 510 So.2d 1052 (Fla. 3rd DCA 1987), the Third District construed the statute which governs the sealing of criminal records, and held that if that the statutory criteria for sealing were satisfied, the trial court was required to grant a petition to seal, even though the statute read "[t]he court may order the sealing or expunction...." Id. at 1054. Thus, contrary to the Landlord's argument based on RICH and FAGAN, more recent cases show that even where a statute deals with the action of a court, "shall" can mean shall, and even "may" can mean shall.

Since the meaning of the word "shall" depends on the context in which it is found and the intention of the legislature as expressed in the statute, the Tenants appreciate the side-by-side layout of the former and amended distress statutes in the Landlord's brief (LB 19), which graphically illustrates the similarity of the context in which the word "shall" is used in both statutes. Despite the Landlord's earnest parsing of words and phrases in his brief (LB 20-22), the side-by-side comparison of the old and new versions of the statute will show an almost identical flow of words, extremely similar syntax, and, from almost the very beginning of Sec. 83.11 (both old and new) through the latter part of Sec. 83.12 (old and new), an unbroken string of "shalls." Except for the "shall" in the new version of Sec. 83.12 at issue here, all of the other "shalls" manifestly mean just that --shall. The Landlord assumes too much in trusting that the reader (either judge or lawyer) will read the suspect "shall" with the RICH and FAGAN cases in mind, instead of WHITE and WILLIAMSON, and thereby know that that "shall" is different than the others appearing in Secs. 83.11 and 83.12. The Tenants submit that the only thing that visibly differs between the old and new versions of the statute is the displacement of the word "clerk" by the word "judge."

The Landlord also relies on the legislative report and staff analysis of the 1980 amendments to the statute which he includes in his appendix in this Court, but which were not presented in the Fourth District until rehearing. His reliance on those documents is misplaced, because legislative reports are irrelevant where the plain meaning of the statute is clear, according to the most recent pronouncement on this aspect of statutory construction by this Court in SHELBY MUTUAL INS. CO. OF SHELBY, OHIO v. SMITH, 556 So.2d 393 (Fla. 1990). In SHELBY MUTUAL, this Court held that even though the legislative staff analysis regarding the statutory amendment at issue in that case clearly indicated the intent of the authors of the legislation, that demonstration of intent was not to be followed because the plain meaning of the statutory language read otherwise. Id. at 395. Thus, even in the face of a clear demonstration of legislative intent through legislative staff analysis and reports, if unambiguous, the plain meaning of a statute controls. The word "shall," according to its normal usage in a statute, has a mandatory connotation, see FLORIDA TALLOW CORP. v. BRYAN, 237 So.2d 308, 309 (Fla. 4th DCA 1970), and there is nothing in the context of the instant statute to indicate otherwise.

Further, the legislative reports presented by the Landlord do indicate the legislature's intention to comply with the holding of the PHILLIPS case. However, that stated intention does not establish that the statute as drafted accomplished that effect, which is precisely what happened in the SHELBY MUTUAL case as well. One can think of many ways by which the legislature could have expressed its intent more clearly here, but it did not. Instead, it changed the subject of the sentence, but left the verb the same. It is little wonder that the first appellate opinion to test the adequacy of the legislature's effort found it constitutionally wanting.

Finally, the Landlord proves the Tenants' case in the last paragraph of his brief (under his Point II), where he argues that the constitutional requirements of PHILLIPS v. GUIN are satisfied if a judge simply determines that all of the essential elements of the cause of action are contained in a verified complaint and then issues the writ. The Tenants submit that the gist of that argument is that if the complaint lists the statutory criteria, the writ must issue. Yet, the Landlord also maintains that the statutory scheme does not deprive the judge of discretionary authority to deny the writ. Those arguments would appear to be mutually exclusive. The Tenants submit that the Landlord has confirmed their argument that the statute mandates the issuance of the writ upon a rote recitation of the bare-bones requirements of Sec. 83.11, Fla. Stat. (1989), which do nothing more than allege a breach of a contract. The Landlord's own interpretation of the statute, as well as the use of the word "shall" in the statute, do not comport with the requirement of an independent, impartial factual determination required by PHILLIPS v. GUIN and which the Fourth District found lacking near the conclusion of the majority opinion. 579 So.2d at 194.

ARGUMENT

POINT TWO

THE DISTRESS STATUTES, SECS. 83.11 AND 83.12, FLA. STAT. (1989), WERE UNCONSTITUTIONALLY APPLIED IN THIS CASE, WHERE THE WRIT WAS USED, NOT SIMPLY TO ENJOIN THE REMOVAL OR DESTRUCTION OF PROPERTY, BUT TO ENJOIN THE CONDUCT OF BUSINESS, THEREBY SHUTTING DOWN AND DESTROYING THE TENANTS' BUSINESS ITSELF.

In its opinion, the Fourth District considered only one of the two arguments which were presented to it by the Tenants. The Tenants argued under separate points in the appeal that the distress statute was unconstitutional on its face, and separately argued that it was unconstitutional as applied. Since the Fourth District agreed on the first issue, it did not reach the second. The Tenants respectfully request that this Court consider that issue here as well. If it does not find the statute to be unconstitutional on its face, the Tenants request that the Court hold it to be unconstitutional as applied or, alternatively, to remand that issue to the Fourth District for further determination.

The distress statute is essentially a "status quo" statute. That is, by its terms it is meant to enjoin the removal or destruction of property from the premises which might otherwise serve as security for the landlord for unpaid rent. The statute maintains the status quo pending later levy by the Sheriff or further order of the court. The provision for an injunction preventing alienation or damage to property liable to distress is backed up by the threat of punishment as a contempt of court if the mandate of the writ is disobeyed. In the instant case, the writ itself accurately tracked the statute. However, the enforcement of the writ went beyond the status quo mechanism, and forbade the Tenants from conducting their business. The resulting injunction against the conduct of the business itself was not authorized by the statute or the writ, and amounted to a deprivation of property without due process.

The distress writ ordered the Sheriff to serve it and a copy of the complaint upon the corporation and on Vita Murphy, stated that it applied to "all property liable to distress for rent and other charges under the Lease, including but not limited to all goods, fixtures, furnishing, supplies, stock, inventory and personal property located on the property...," and then ordered the following:

> Defendants and all others are enjoined from damaging, disposing of, secreting, selling, removing or transferring any property liable for distress from the rental real property and premises thereof, described above, after the time of the service of this writ until the SHERIFF levies on the property or this writ is vacated or the court orders otherwise. If the Defendants do not move for dissolution of the writ, the Court may order the SHERIFF to levy on the property liable for distress forthwith after twenty (20) days from the time the complaint in this action is served. <u>A VIOLATION OF THE COMMAND OF THIS WRIT MAY BE PUNISHED AS A CONTEMPT OF COURT</u>. (T54).

During the May 18 and June 28, 1990 hearings, the Tenants argued that the enforcement of the writ exceeded the scope of both the distress statute and the distress writ, since the writ was operating as an injunction without a prior hearing. The Tenants contended that the statute was never intended to enjoin a business from operating, and that it must be read to require some showing of exigent circumstances in order to constitutionally justify the extraordinary remedy that had been issued in this case, where the effect of the writ was not simply to secure the payment of rent, but to shut down an ongoing business. (T1/4-8, T3/3). The Tenants argued that the writ could have been worded in a manner which would have allowed the business to continue and secured the Landlord's interest in the property by requiring an escrow of the proceeds of the sales of food, with any violation of the terms of that arrangement punishable by contempt. (T3/15). Permitting the business to continue would not have impaired the Landlord's security, but instead would have increased the likelihood that the rent would be paid. Moreover, the remedy of posting a bond by the Tenants provided in Sec. 83.14, Fla. Stat. (1989), was essentially illusory in this case since shutting down the business destroyed their ability to post a bond (T3/20-21).

Unquestionably, the business enterprise itself and the right to conduct it represent valuable property interests of which the Tenants cannot be deprived without due process. See PALM BEACH MOBILE HOMES, INC. v. STRONG, 300 So.2d 881, 884 (Fla. 1974); STATE ex rel. FULTON v. IVES, 123 Fla. 401, 167 So. 394, 399 (Fla. 1936). Here, the writ was issued ex parte, and the Tenants argued that due process required more than simply verified allegations demonstrating a breach of contract. Among the five-part criteria for minimum due process requirements articulated in MITCHELL v.

W.T. GRANT CO., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), is the requirement that the facts alleged must show the necessity for the remedy sought. See GAZIL INC. v. SUPER FOOD SERVICES, INC., 356 So.2d 312, 313 (Fla. 1978). If Sec. 83.11 is to be constitutionally applied to justify the seizure and shutting down of a business, it should require verified allegations showing that the protection of the landlord requires such drastic relief.

The Landlord's response that distress writs often result in a tenant being unable to conduct his business (T1-10; T3-17) misses the mark. If the Landlord's interest can be secured without destruction of the business, due process requires that it be so. Nor is it enough to say that if the type of property being distrained is not exempted from the scope of the statute by Sec. 83.09, Fla. Stat. (1989), it is proper to forbid its sale even if that closes the business, as the Landlord argued (T3-18). The Tenants submit that if the Landlord's security can be protected by an escrow of proceeds (or otherwise) which will allow the business to continue to operate, that is what due process requires. The point is that the right to conduct the business enterprise itself is constitutionally protected, and must be harmonized with the rights of the Landlord.

Near the end of his brief, the Landlord argues that PHILLIPS v. GUIN and its progeny do not require that the judge have discretion to determine the need for the writ, and that in GAZIL, this Court noted that governing United States Supreme Court decisions did not limit a state's right to identify the circumstances which are appropriate for replevin. Thus, the Landlord argues that the constitutional requirement is satisfied here if the judge reviews the pleading to see if it recites a prima facie case. That analysis might be sufficient for replevin of particular property as in the GAZIL case, but it is not sufficient where (as here) a creditor's action results in an ex parte injunction against the operation of the business itself.

Here, the manner of enforcement of the writ enabled the Landlord to enjoin the operation of the restaurant without satisfying the numerous procedural and substantive requirements and safeguards which usually attend the issuance of injunctions. See generally Fla.R.Civ.P. 1.610; 29 Fla. Jur. 2d "Injunctions" Secs. 10-22 at 663-675 (1981). The requirements of Sec. 83.11 require nothing more than recitation of a prima facie case of breach of contract, and it is elementary that injunctive relief is unavailable for contractual breaches because of the adequacy of the remedy at law. See HILES v. AUTOBAHN FEDERATION, INC. 498 So.2d 997, 998 (Fla. 4th DCA 1986) (injunctive relief may not be used to enforce money damages, or to prevent any party from disposing of assets until an action at law for an alleged debt can be concluded).

In GUZMAN v. WESTERN STATE BANK OF DEVILS LAKE, 516 F.2d 125 (8th Cir. 1975), the Eighth Circuit held that North Dakota's prejudgment attachment statute was unconstitutional on its face in part because it did not require verified assertions by the creditor that he believed the property would be concealed, disposed of, or destroyed and his interest therein lost or defeated. In that case, the creditor's affidavit showed the nature and amount of the claim against the debtors, but did not aver that the summary attachment procedure was necessary to preserve the property interests of the creditor, and the North Dakota attachment law did not require such an averment. The court concluded as follows:

> Clearly, the *ex parte* attachment of property in the possession of the debtor is a drastic remedy, and the *Mitchell* opinion suggests that the remedy should be employed to protect a creditor's interest only if there is a danger that those interests will be destroyed or defeated unless such a summary step is taken. *In the absence of an assertion in the affidavit that the creditor believes that the property will be concealed, disposed of, or destroyed and the creditor's interest therein lost or defeated, we do not believe that the ex parte issuance of the warrant of attachment is justified*.

Id. at 130 (footnote omitted). Similarly here, the statute was applied unconstitutionally to permit the closing of the restaurant without any allegations of exigent circumstances justifying such a drastic remedy. The Landlord should not have been permitted to accomplish an *ex parte* shut-down of the restaurant business without showing either in the verified allegations of the complaint or in a pre-seizure hearing why it was necessary.

The Tenants had put over $300,000 worth of capital improvements into the premises, including such things as ovens and furniture, all of which were seized in order to secure an indebtedness of $50,000 (T99). The Landlord's counsel contended that the lien being enforced by the distress writ did not attach to those improvements because the improvements already belonged to the

Landlord by virtue of the lease (T99-100), but that argument only proved the Tenants' point. If the improvements already belonged to the Landlord, why did he need the writ? Of course, as the trial judge noted (T3/24) the extent of the improvements showed that the Landlord did not have much to lose. In a distress proceeding, he can recover no more than is owed him. MIDAIR, INC. v. SEBRING AIRPORT AUTHORITY, INC., 315 So.2d 214, 216 (Fla. 2d DCA 1975).

Finally, the Tenants contend that the availability of a post-seizure hearing does not provide the kind of safeguard which can withstand constitutional analysis when the writ is used to close a business (T83). In order to justify what took place in this case, the rule established in SNIADACH v. FAMILY FINANCE CORP., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), requiring a pre-seizure hearing in the case of garnishment of wages, would require a pre-seizure hearing here as well. A business' ability to generate revenue parallels a worker's ability to earn wages. In BRUNSWICK CORP. v. GALAXY COCKTAIL LOUNGE, INC., 54 Hawaii 656, 513 P.2d 1390 (1973), the court determined that for due process purposes, there is no valid distinction between wages and bank accounts, since an individual or a corporation each need such assets in order to survive. Here, the ability of a business to generate revenue parallels the ability of a worker to earn wages, and should be given the same degree of protection by requiring a pre-seizure hearing if the writ is intended to close the business. As applied in this case, the distress statute is unconstitutional, and this Court should so hold.

CONCLUSION

Based on the foregoing Argument, Appellees respectfully request that the Opinion of the Fourth District Court of Appeal be affirmed. Alternatively, Appellees request that this Court either declare the distress statute to have been unconstitutionally applied in this case, or remand that question for determination by the Fourth District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail this 30th day of September, 1991, to DAVID R. ATKINSON, JR., ESQ., 777 S. Flagler Drive, Suite 500 - East Tower, West Palm Beach, Florida 33401.

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