

State of New Jersey

N J L R C
New Jersey Law Revision Commission

FINAL REPORT

**RELATING TO CIVIL ARREST
CAPIAS AD RESPONDENDUM ET SATISFACIENDUM**

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Introduction

The two capias writs, capias ad respondendum and capias ad satisfaciendum, are closely related. Both allow the court to jail a person against whom a civil action has been brought. A capias ad respondendum is a writ used to hold the defendant in a civil action in jail while the action is pending. The writ orders a

"proper officer 'to take defendant into custody, and keep him until discharged according to law.' [citation omitted] Its operative effect goes much beyond that of an ordinary summons. 'The aim or purpose of a capias is to compel the appearance of defendant in court to answer the action, by actual arrest of his person.' [citation omitted]

After the seizure of the defendant upon the capias he is entitled to be brought before the court for the purpose of securing his release on bail. Defendant may then be released from custody upon his depositing with the sheriff a cash amount equivalent to the bail set [citations omitted] or ... by entering into a recognizance of bail to plaintiff, with surety...."

Iaria v. Public Service Mutual Insurance Co 31 N.J. 386, 389 (1960).

Capias ad satisfaciendum "is a body execution enabling a judgment creditor in specified types of actions to cause the arrest of the judgment debtor and his retention in custody until he either pays the judgment or secures his discharge as an insolvent debtor." Perlmutter v. DeRowe, 58 N.J. 5, 13 (1971). Therefore, at least hypothetically, a debtor can remain in jail indefinitely. Capias ad respondendum functions "to compel defendant's personal availability, if judgment goes against him in the action, for subjection to a subsequent ca.sa. [capias ad satisfaciendum]." Perlmutter, supra, at 14. The relationship between the two writs is noted in Doe v. Uhler, 220 N.J. Super. 522, 526 (Law Div. 1987): "If judgment is obtained against a defendant who has secured his release the capias ad respondendum turns into a "capias ad satisfaciendum"

Historically, the writs were widely used in England when imprisonment for debt was common. The practice continued in early New Jersey. The State Constitution of 1844 prohibited such imprisonment "in any action, or on any judgment founded upon contract, unless in cases of fraud;" Art. I, par. 17. The present Constitution continues this prohibition. Const. 1947, Art. I, par. 13. Statutes determine what constitutes fraud in a contract case, and the Supreme Court has determined that a capias ad satisfaciendum writ may be used in any case involving a tort judgment without violating the constitutional prohibition against imprisonment for debt. Duro v. Wishnevsky, 126 N.J.L. 7, 8 (Sup. Ct. 1940).

In Perlmutter v. DeRowe, the defendant challenged the constitutional validity of capias ad respondendum, arguing that imprisonment prior to a judicial determination of fraud violates the state prohibition against imprisonment for debt and the federal right to due process of law. The Supreme Court disagreed, finding that the legislature has the

constitutional authority to provide for civil arrest in cases of fraud. By analogy to criminal law, the court found that, upon a demonstration of fraud, the incarceration of the defendant does not violate the state or federal constitutions. The court equated the civil arrest to pre-trial detention in a criminal case, where bail is set to compel the defendant to appear at trial.

The court in Perlmutter recognized that the procedures followed in civil arrest must give the defendant the same protections applying in a criminal arrest. Perlmutter v. DeRowe, 58 N.J. 5, 17-18, fn6 (1971) established that "civil arrest under a [capias ad respondendum] is substantially analogous to arrest under a criminal complaint and a defendant should have all the same procedural rights and protections as if he were arrested on a criminal charge for the same fraud upon which the civil action and the capias ad respondendum are based." The Court detailed the procedure to be followed: Upon arrest, after the writ has issued on ex parte affidavits, the defendant is brought before a judge who advises defendant of twin rights: 1) to be released on bond and 2) to bring a motion attacking the basis for issuance of the writ, for which plaintiff bears the burden of proof to establish the sufficiency of the evidence underlying the writ. The judge, at the initial appearance, will set the bail amount in accordance with R. 4:51-2(a) and (b). The Court approved two deviations from statutory requirements. First, "The judge may fix bail in an amount less than which plaintiff claims to be due, despite the provision of N.J.S.A. 2A:15-42." The Court reasoned "that the amount of bail falls within the judicial rather than the legislative realm as a matter of practice and procedure, pursuant to Const. 1947, Art. VI, sec. II, par. 3." The Court proceeded by analogy to cite two bonds (for stay of judgment on appeal, and for release of attached property) which formerly were prescribed by statute and now are dictated by the Rules of Court. The Court concluded that, as in criminal cases, a weighing of all circumstances should determine the amount of bail. Second, "the bond furnished need not be in the now anachronistic sum of double the amount of the bail fixed, again despite the provision of N.J.S.A. 2A:15:43."

As a result of the Perlmutter decision, the Supreme Court revised R. 4:51. The rule provides procedural protections for capias ad respondendum and applies where capias ad satisfaciendum follows from an earlier capias ad respondendum. While Perlmutter concerned capias ad respondendum, and the rule does not apply to an independent capias ad satisfaciendum, the same protections should apply in all capias cases. Although the capias ad satisfaciendum remedy itself does not violate the state constitutional prohibition against imprisonment for debt, all civil arrest procedures must conform to state and federal due process protections. Consequently, both of the capias statutes contain provisions that would need to be reformed to comply with constitutional safeguards.

The Commission has reviewed the statutes and has concluded that they serve no appropriate modern purpose. The current statutes consist of archaic terms of art, are poorly drafted and present due process problems. However, even if the statutes were modernized and protections for the due process rights of debtors were added, more basic problems remain. The Commission recommends that the statutes establishing both capias ad respondendum and capias ad satisfaciendum be repealed.

The writ of capias ad satisfaciendum unnecessarily duplicates the power of courts to enforce judgments through proceedings in aid of litigants rights. Court Rules provide that a judgment debtor may be compelled to disclose his assets and that a court may order use of those assets to pay the judgment. R. 4:59-1(e). A court may use the contempt power to compel compliance with these court orders. See, R. 1:10. Capias ad satisfaciendum adds nothing to these powers. To the extent that it is construed to allow incarceration for mere failure to pay a judgment, it can amount to imprisonment for debt. See, Const. Art. I, par. 13.

The writ of capias ad respondendum, in appropriate circumstances allows a court to imprison the defendant in a civil action before the trial of a claim. Again, the writ is related to a more general power of the courts to issue temporary restraints and interlocutory injunctions. See R. 4:51-1 and 4:52-2. The standard for granting relief before judgment is set out in Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982). Relief will be granted only if it is necessary to prevent irreparable harm, the legal basis of plaintiff's claim is settled, all material facts are uncontraverted, and the balance of hardship to the parties supports the relief.

While some of these conditions will be met in most circumstances where a capias writ could be granted, others will not. Courts emphasize that preliminary relief is an extraordinary remedy that "must be administered with sound discretion and always upon consideration of justice, equity and morality in a given case." Coskey's TV & Radio Sales v. Foti, 253 N.J.Super. 626, 639 (App. Div. 1992). Cases show caution in granting relief before judgment, avoiding relief that places too great a restriction on the defendant's freedom. No reported case has imposed any restraint that approaches the severity of incarceration. As a result, the power to incarcerate through capias ad respondendum goes far beyond the power of a court to issue preliminary restraints. That additional power is the problem with the writ. Capias ad respondendum allows the jailing of a person who is not charged with a crime and who has not violated a court order. A court may take other action under its general powers to attempt to assure that the defendant's assets will be available to pay a judgment if one is obtained. But it is not proper to jail a person for such a purpose.