

## **RULE 4:61. Replevin**

### **4:61-1. Writ of Replevin**

- **(a) Issuance of Writ on Notice.** A writ of replevin shall issue only upon court order on motion of a party claiming the right to possession of chattels. Except as otherwise provided by paragraph (b) of this rule, the motion shall be heard on no less than three days' notice to the party in possession of the chattels, who shall file and serve any opposing affidavits or cross-motions at least one day prior to the hearing. The motion shall be granted only upon the court's finding, based on the moving papers, any opposing affidavits which may have been filed, and any testimony taken pursuant to R. 1:6-6, that there is a probability that final judgment will be rendered in favor of the movant. In lieu of ordering the issuance of the writ the court may order the party in possession of the chattels to give security for satisfaction of any judgment which may be rendered in the action, or order such other relief upon such terms as may be just in the circumstances.
- **(b) Issuance of Writ Ex Parte.** An order for issuance of the writ of replevin without notice to the party in possession of the chattels may be entered by the court only after it finds from specific facts shown by affidavit or verified complaint that the party applying for the writ is probably entitled to possession and that, before notice can be served and a hearing had thereon, that party will probably suffer immediate and irreparable damage in that the party in possession of the chattels appears about to abscond or about to destroy, secrete or otherwise dispose of the chattels. In lieu of ordering the writ, the court may enter an order to show cause why the writ should not issue, including therein such temporary restraints as may be necessary and appropriate for preserving the chattels and fixing therein a short return date for hearing thereon in accordance with paragraph (a) of this rule.
- **(c) Service and Execution of Writ.** The writ of replevin shall be signed in the name of the clerk of the court issuing the writ and shall be directed to the sheriff, or other officer authorized by law, of the county where the chattels are located and shall describe them with particularity. A copy of the writ shall be served upon the party in possession in the manner prescribed by R. 4:4-4 for the service of summons unless the court has otherwise provided in the order for issuance of the writ. Upon receipt of the writ of replevin and the delivery of a replevin bond or cash deposit pursuant to law, the sheriff or other officer shall forthwith cause the chattels to be replevied and delivered. The replevin bond shall be subject to the approval of the court in accordance with R. 1:13-3(a) and shall contain the terms set forth in R. 1:13-3(b). A cash deposit taken by the sheriff in lieu of a bond shall forthwith be transmitted to the clerk of the court which ordered the writ.
- **(d) Issuance of Summons.** A writ of replevin may be issued as initial or sole process in the action or as additional process. A summons against the same defendant and additional summonses against other defendants may issue in the same action before or after issuance of the writ. If a summons or writ of replevin is not issued within 10 days after the filing of the complaint, the action may be dismissed as provided by R. 4:37-2(a).

Note: Source-R.R. 4:78-1. Former rule deleted and new rule adopted June 29, 1973 to be effective September 10, 1973; paragraph (d) adopted July 15, 1982 to be effective September 13, 1982; paragraphs (b) and (c) amended July 13, 1994 to be effective September 1, 1994.

### **4:61-2. Allegations of Demand and Refusal; Title**

If the action is for a wrongful detainer only, the plaintiff in an action for replevin shall allege a demand and refusal of possession before commencing the action. A plaintiff in replevin who claims possession as a secured creditor shall allege both in the complaint and the motion for the issuance of the writ the existence of the debt and the existence of a security interest, perfected or unperfected, in a chattel in the possession of the debtor. If the title to the goods or chattels of

the plaintiff in replevin rests upon the title of a third person or upon a special property, those facts shall be alleged.

**Note:** Source-R.R. 4:78-2. Amended June 29, 1973 to be effective September 10, 1973; amended July 13, 1994 to be effective September 1, 1994.

#### **4:61-3. Defenses; Counterclaim**

If the defendant in an action for replevin claims title to the goods and chattels or relies upon the title of a third person or upon a special property, the answer shall set forth those facts. All claims by the defendant for a return of the goods and chattels, for their value or for damages, or for a statutory lien, shall be made by counterclaim.

**Note:** Source-R.R. 4:78-3; amended July 13, 1994 to be effective September 1, 1994.

#### **4:61-4. Judgment for Plaintiff**

- **(a) Judgment for Damages.** If the goods and chattels are delivered by the sheriff or other officer to the defendant upon the making of a claim thereto and the giving of a redelivery bond or cash deposit pursuant to law, the sheriff or other officer shall promptly make a return of the facts to the court, annexing the claim of the defendant to the writ of replevin, and return the same forthwith, and the action shall proceed as if such claim had not been made. If the plaintiff recovers, judgment shall be entered for the value of the goods and chattels and for damages sustained such as for taking and detaining them as well and may, in addition to a remedy on the redelivery bond or cash deposit, have execution against the defendant.
- **(b) Recovery of Possession by Plaintiff After Redelivery.** If the goods and chattels have been delivered by the sheriff or other officer to the defendant and the taking is not a distress for rent, the plaintiff, instead of enforcing the judgment for damages or pursuing a remedy on the redelivery bond or cash deposit, may apply to the court upon written notice to the defendant or defendant's attorney of record for an order directing the sheriff or other officer to take possession of the goods and chattels and deliver them to the plaintiff.
- **(c) Recovery of Possession Where No Writ Issued.** If judgment is entered for the plaintiff awarding the possession of the goods or chattels and any damages sustained and if plaintiff has not previously caused a writ of replevin to issue and had the goods delivered, the court may in the judgment direct the sheriff or other officer to take possession of the goods and chattels and deliver them in accordance with the judgment. The judgment shall be a justification of the officer for their delivery.
- **(d) Judgment by Default.** If the goods and chattels have been delivered to the plaintiff by the sheriff or other officer, and judgment by default is entered in favor of the plaintiff, there shall be no judgment for damages, except where the defendant has refused to deliver the goods and chattels pursuant to a written demand therefor made prior to the commencement of the action.

**Note:** Source-R.R. 4:78-4(a)(b)(c)(d); paragraphs (a), (b) and (c) amended July 13, 1994 to be effective September 1, 1994.

#### **4:61-5. Judgment for Defendant**

- **(a) Election of Remedies.** If the goods and chattels have not been redelivered to the defendant and judgment is entered in defendant's favor, defendant shall, except if the goods or chattels were taken as a distress for rent or if defendant has made a counterclaim for a statutory lien, be entitled, at defendant's election, to the return

thereof or a judgment against plaintiff for the value of the goods or chattels and damages.

- **(b) Judgment on Statutory Lien.** If a defendant has counterclaimed for a statutory lien, a judgment in defendant's favor shall fix the amount due.
- **(c) Distress for Rent; Judgment.** If the plaintiff has recovered the possession of goods or chattels taken as a distress for rent and judgment is entered for the defendant, defendant shall be entitled, at defendant's election, to the return thereof, or judgment against the plaintiff for the sum in arrears for such rent at the time the distress was taken, or for the value of the goods and chattels if such value is less than the arrearages.
- **(d) Costs; Execution.** Upon the entry of a judgment for the defendant, defendant may, in addition to a remedy on the replevin bond or cash deposit, have execution against the plaintiff.

**Note: Source-R.R. 4:78-5(a)(b)(c)(d); paragraphs (a), (b), (c) and (d) amended July 13, 1994 to be effective September 1, 1994.**