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Caught in the Web of Florida's Statutory Proceedings Supplementary: Procedural and Constitutional Problems Facing Impleaded Third Parties

by Benjamin H. Brodsky

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Consisting of a mere 11 provisions, and designed to provide judgment creditors a "swift, summary"¹ means to execute on the judgments that they have received, Florida's proceedings supplementary statute, F.S. §56.29, creates an extremely powerful but profoundly flawed collections procedure. The most important, yet fraught, aspect of that collections procedure is the right of a judgment creditor to implead third parties into the already open and pending matter in which the judgment was entered. The rights of a judgment creditor against impleaded defendants in proceedings supplementary are plenary. Based on the statute's broad grant of authority to enter "any orders required" to marshal assets to satisfy the outstanding judgment, a judgment creditor in proceedings supplementary is entitled to the panoply of remedies available to any civil litigant, including injunctive relief, piercing the corporate veil, and money damages. However, inherent within the abbreviated, expedited, and creditor-friendly nature of proceedings supplementary is a conflict with the constitutional and procedural rights of the third-party impleaded defendants who find themselves unwittingly roped into post-judgment collections

proceedings in which their own property rights may be at stake. This constitutional and procedural tension is reflected by splits in the case law covering the proper interpretation and application of the statute.

This article identifies and discusses the various divisions in the case law with respect to three of the statute's primary procedural and constitutional infirmities: 1) the inconsistencies and omissions in the statute regarding the proper procedure for bringing claims against impleaded defendants, which makes prosecuting or defending against such claims an exercise in guesswork and frustration; 2) the imperfectly defined statutory "examination" procedure, and its failure to afford basic procedural protections — including, among others, the right to a jury trial — to impleaded defendants; and 3) the undefined scope of judgment creditor remedies under the statute. After diagnosing the statute's procedural and constitutional problems, the article makes some suggestions to Florida's legislature to resolve the issues so that the statute can provide a truly workable mechanism to assist creditors in collecting on their judgments without unduly infringing on the rights of others. The statute, first enacted nearly 100 years ago, is ripe for reevaluation.

Florida's Proceedings Supplementary Statute

Proceedings supplementary in Florida are creatures of statute and did not exist at common law. The

common law procedure for discovering and executing on a judgment debtor's assets was through a creditor's bill in chancery, through which a creditor suing a debtor at law could institute a parallel equitable proceeding to enjoin the fraudulent disposition of the debtor's property prior to the debt being reduced to judgment.² The Florida Legislature passed the proceeding supplementary statute in order to provide "a more expeditious and appropriate remedy to reach the concealed assets of the debtor."³ The statutory procedure was designed to avoid a step required by a creditor's bill, that the judgment creditor initiate an entirely separate action. As explained by the Florida Supreme Court, "[t]hese statutes intended to empower the court to follow through with the enforcement of its judgment, so that there would be no necessity for an independent suit to reach property which legally should be applied to the satisfaction of the judgment."⁴

Since its inception, the proceedings supplementary statute has given circuit courts "broad discretionary powers" to "subject any and all property, or property rights of any defendant in execution, however fraudulently conveyed, covered up, or concealed the same might be, whether in the name or possession of third parties or not, to the satisfaction of an execution outstanding against him."⁵ The broad powers granted to circuit courts in proceedings supplementary are entirely consistent with and necessary to effectuate the intent of the statute: to enable a judgment creditor, frustrated in its efforts to satisfy an outstanding judgment, to discover assets that the judgment debtor may be concealing, and to reach equitable interests not subject to levy of execution.⁶ Because proceedings supplementary are "equitable in nature," Florida courts have indicated that the statute authorizing their existence should be "liberally construed."⁷ However, that liberality of construction — coupled with crucial gaps in the statute, examined below — has resulted in a statutory procedure riddled with inconsistencies and problems.

The Statute's Procedural and Constitutional Infirmities

- *The Murky Procedure for Impleading and Stating Claims Against Third Parties in Proceedings Supplementary* — Logically, most proceedings supplementary will involve actions against an impleaded third party, because if the judgment debtor held the assets in his or her own name, then the judgment creditor would simply proceed with levy.⁸ By the very nature of the proceedings, then, a third party impleaded into a proceeding supplementary faces the prospect of liability for all or at least part of an existing money judgment. It would seem both necessary and fair that the third party be afforded basic procedural and substantive due process. After all, the impleaded defendant is, at least in name, a stranger to the underlying case. The proceeding supplementary, while brought in the original action, is essentially a new lawsuit against a new party, the impleaded defendant.

Yet, from procedural "square one," the statute is chronically ambiguous or outright silent regarding the most basic steps for impleading and summoning previously unnamed third parties in proceedings supplementary. For example, the statute sets forth the minimal requirements for initiating proceedings supplementary: The judgment creditor must file an affidavit showing that the sheriff holds an unsatisfied writ of execution on a money judgment and that the unsatisfied execution is valid and outstanding.⁹ Notably, the statute is silent as to whether third parties can be impleaded through this process, or whether an additional showing by the judgment creditor is required. In the end, it took the Florida Supreme Court to sort out conflicting appellate decisions on the requirements for impleading third parties into proceedings supplementary.¹⁰ In *Exceletech, Inc. v. Williams*, 597 So. 2d 275 (Fla. 1992), the Florida Supreme Court agreed with the Fifth District and held that there was no requirement that the judgment creditor be examined orally under oath as a condition precedent to impleading a third party, and that simply filing an affidavit showing the existence of a valid, outstanding, and unsatisfied writ of execution was sufficient.

- *The Order to Show Cause and Due Process Considerations* — Once this requisite showing is made, the next step to implead a third-party defendant is similarly obscure. It turns out that, after the judgment creditor initiates proceedings supplementary, the court is to issue an order to show cause to the impleaded defendants. The statute references an order to *the* defendant-in-execution to appear for an examination, but is again silent regarding what sort of pleading must be served on an impleaded defendant.¹¹ Cases and authorities have read into the statute that an order to show cause is the appropriate method for

formally impleading a third party into proceedings supplementary.¹² Such impleading, however, “does not in and of itself imply liability for the underlying judgment on the part of the impleaded third parties.”¹³ Instead, it provides impleaded defendants with an opportunity to raise their defenses and protect their interests consistent with the fundamental principles of due process.¹⁴

However, what level of notice must the order to show cause contain to satisfy due process, and what sort of defenses to the sufficiency of that pleading are permitted? The statute is completely silent, while the cases reflect diverging views.

The minority position is exemplified by a decision from the Fourth District Court of Appeal in *Sverdahl v. Farmers & Merchants Sav. Bank*, 582 So. 2d 738, 740 (Fla. 4th DCA 1991), which envisions pleadings and a procedure similar to that governing original actions, and holds that:

[I]f the nature of the creditor’s third party claim is not apparent from the order to show cause, that can be elicited with a response seeking a more definite statement, or the like. And, of course, once the parties’ positions have been sufficiently stated in written filings, the court can later hold a trial on the issues created and only then determine the rights and liabilities of the parties to the subject property.¹⁵

On the other hand, exemplified by a line of cases from the Fifth District Court of Appeal, is the majority view that rejects the notion that impleaded defendants are allowed to challenge the legal sufficiency of the order to show cause. As explained by the Fifth District, in the context of a procedural challenge by impleaded defendants:

The third-party defendants next argue that the trial court’s order is procedurally invalid because “there was no pending motion, complaint or other request for relief at the time it was entered.” We disagree. The filing of a motion for impleader is a sufficient pleading in order to assert a valid claim against third-party defendants in a supplementary proceeding.¹⁶

The rationale behind these decisions is that the impleaded defendant is entitled to “fair notice” of the claims against it to be adjudicated at a hearing, and nothing more.¹⁷ Federal district courts necessarily applying Florida’s proceedings supplementary statute¹⁸ have similarly held that a “well-plead” complaint (or order to show cause) is unnecessary in proceedings supplementary against an impleaded defendant.¹⁹

The minority position — providing for pleadings and a procedure similar to that governing original actions — is surely the correct one. This conclusion is mandated by the Florida Rules of Civil Procedure, which, by their terms, “apply to *all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts.*”²⁰ Following this logic, the claims against the impleaded defendant(s) contained in the order to show cause should contain “a short and plain statement of the ultimate facts” showing that the judgment creditor is entitled to relief against the impleaded defendants, and the impleaded defendant should have the opportunity to present an answer or move to dismiss on grounds of legal insufficiency.²¹

This position is also sensible from the perspective of orderly judicial administration. After all, just as a complaint is required to advise the court and the defendant of the nature of a cause of action asserted by the plaintiff,²² so should the order to show cause (or other offensive pleading by the judgment creditor) similarly satisfy that basic requirement. “[O]nce the parties’ positions have been sufficiently stated in written filings, the court can later hold a trial on the issues created and only then determine the rights and liabilities of the parties to the subject property.”²³ Indeed, impleaded defendants are permitted to conduct discovery on the claims brought against them.²⁴ It is completely incongruous that an impleaded defendant is allowed discovery on the claims brought against him or her, yet he or she is not entitled to a properly framed pleading to ascertain the nature and limits of those claims.

While a judgment creditor may view a more formalized pleading procedure as just another opportunity for a recalcitrant judgment debtor to stall the collections process, it is ultimately in the best interest of all parties to a proceedings supplementary to have well-drawn pleadings before the court. For example, imagine a scenario in which a judgment creditor in a proceedings supplementary is seeking to avoid

hundreds of transfers of personal property made by a judgment debtor to his business partner over the course of a number of years. Without a properly framed pleading before the court, it may be impossible for the court and the parties to keep track of which of the transfers are subject to the shifting burden of proof provided for in the statute, discussed below, which could end up harming the judgment creditor as easily as the impleaded defendant business partner.

Finally, and most importantly, requiring ultimate fact pleading and allowing for the interposition of legal defenses are mandated by the requirements of due process. While the Florida Supreme Court has indicated that an order to show cause in a proceedings supplementary violates due process if it fails to notify an impleaded defendant that his or her own property is at risk of being taken,²⁵ it is apparent that something more than mere notice that property rights are at stake is necessary to satisfy due process. As stated recently by the Third District Court of Appeal: "It goes virtually without saying that the purpose of a pleading is to notify a defendant that he is being sued and for what he is being sued. Due process demands nothing less."²⁶

- *Constitutional and Procedural Uncertainties Inherent in the Statutory "Examination"* — The uncertainty of an impleaded defendant's rights and obligations in proceedings supplementary extends to the "examination" provided by statute. The statute provides for examination of the defendant before the circuit court concerning his or her property,²⁷ but is conspicuously silent regarding whether the right to examination extends to impleaded third-party defendants. At least one court has indicated in dicta that it does not.²⁸ While that dicta is questionable — it would make no sense that a procedure used to discover the assets of judgment debtor would prohibit examination of persons to whom the assets were transferred, and there are countless cases noting without objection the examination of third parties in proceedings supplementary²⁹ — it illustrates the problems inherent in a statute that creates a powerful procedure, but insufficiently defines its limits.³⁰

Is the examination a trial on the merits — or just a discovery mechanism? That is, at the end of a statutory examination, during which the circuit court has taken testimony on the location of the judgment debtor's assets, may the circuit court then enter a judgment against an impleaded defendant who is found to hold some of those assets? Again, the statute only obliquely addresses such a crucial question, providing that, "[t]estimony shall be under oath, shall be comprehensive and cover all matters and things pertaining to the business and financial interests of defendant which may tend to show what property he or she has and its location," and that "[e]xamination of witnesses shall be as at trial and any party may call other witnesses."³¹ The Florida Legislature may have intentionally left the contours of the examination procedure vague in order to provide judgment creditors maximum flexibility in dealing with a judgment debtor who attempts to hide assets. Regardless, under the current formulation of the statute, circuit courts and lawyers are faced with the unenviable task of improvising the procedure for adjudicating the fundamental rights of impleaded defendants.

Questions regarding the role of judge and jury at examinations in proceedings supplementary are similarly obscured by the statute. The statute vests in the circuit court the right to refer the proceedings to a general or special magistrate for reports of factual and legal findings.³² But this is in conflict with the Florida Rules of Civil Procedure, which prohibit the reference of any matter to a magistrate without the consent of *the parties*.³³

As to the right of an impleaded defendant to have a jury decide whether a judgment creditor can levy on his or her property to satisfy the judgment of another, the statute is silent. The Florida Supreme Court, the district courts of appeal, and federal courts have held that an impleaded defendant does not have the right to a jury trial in a proceedings supplementary, even when the judgment creditors are suing for monetary damages.³⁴ The holdings of these courts are consistent with the underlying purpose of this special statutory procedure, to provide judgment creditors with an abbreviated and expedited means of discovering and marshaling an uncooperative judgment debtor's assets. But the remarkable constitutional implications of these decisions seem difficult to square with the inviolable right to a jury trial in actions at

law.³⁵

Constitutional concerns also underlie the shifting burden of proof for fraudulent transfer claims adjudicated at the statutory examination/hearing in proceedings supplementary. In one of the more troubling provisions of the proceedings supplementary statute, the burden of proving the fraudulent intent behind a transfer is shifted from the judgment creditor to the judgment debtor/transferor and impleaded defendant/transferee. More specifically, the statute provides that:

When, within [one] year before the service of process on him or her, defendant has had title to, or paid the purchase price of, any personal property to which the defendant's spouse, any relative, or any person on confidential terms with defendant claims title and right of possession at the time of examination, the defendant³⁶ has the burden of proof to establish that such transfer or gift from him or her was not made to delay, hinder, or defraud creditors.³⁷

By this provision, the proceedings supplementary statute "turns on its head" the general rule that a creditor bears the burden of proving the elements of its fraudulent transfer claim.³⁸ It also puts the impleaded defendant in the unlucky and unfair position of proving the absence of fraudulent intent.³⁹ While a judgment creditor may be justifiably entitled to certain evidentiary presumptions given that it may be facing a wily judgment debtor intent on evading satisfaction of a valid and outstanding judgment, it is a fair question whether this seemingly unequal treatment of impleaded defendants within proceedings supplementary runs afoul of the federal and state constitutional requirements of equal protection.⁴⁰

- *The Undefined Scope of Judgment Creditor Remedies Under the Statute* — The fog surrounding proceedings supplementary does not clear once a judgment debtor's property is discovered in the possession of an impleaded defendant. On the one hand, the statute is clear enough regarding the circuit court's authority, as it grants broad remedial power to the circuit courts with respect to executing on property of the judgment debtor.⁴¹ The statute further entitles the circuit court to "enter any orders required to carry out the purpose of this section to subject property or property rights of any defendant to execution."⁴² To that end, subsection (6) of the statute provides for avoidance of actually fraudulent transfers.⁴³

However, on the other hand, the statute is completely silent regarding whether a judgment creditor may obtain a money judgment against an impleaded defendant. Not surprisingly, the cases are conflicting. Some federal courts applying the proceedings supplementary statute have held that it "does not create substantive rights of recovery nor provide a basis for entry of a money judgment."⁴⁴ Under those cases, "proceedings supplementary through §56.29 are a procedural mechanism that provide a judgment creditor with means to investigate assets of the judgment debtor that might be used to satisfy a judgment."⁴⁵

The Florida district courts of appeal, however, have taken a far more expansive view regarding the scope of available remedies under the statute. For example, in *Pollizzi v. Paulshock*, 52 So. 3d 786 (Fla. 5th DCA 2010), the Fifth District held that the liberal construction to be afforded the statute enabled the circuit court to enter money judgments against the impleaded defendants.⁴⁶ Scholarly authorities have similarly concluded that when supplementary proceedings are "carried to their proper conclusion, they can result in a judgment against third persons who hold property belong[ing] to the debtor."⁴⁷ Given the broad mandate to the court to enter any orders necessary to marshal assets to satisfy the outstanding judgment, this view makes sense.⁴⁸ After all, Florida courts have authorized many other forms of relief not otherwise explicitly provided for in the statute. For example, it is by now settled that proceedings supplementary can be used to collect against choses in action, including the judgment debtor's interest in the proceeds of an insurance policy.⁴⁹ Additionally, the Florida courts have held that trial courts may enter injunctive relief against impleaded defendants in proceedings supplementary⁵⁰ and pierce the corporate veil between judgment debtors and impleaded defendants.⁵¹

Conclusion

It is obvious that, at a minimum, Florida's proceedings supplementary statute suffers from lack of clarity, and omits crucial procedural direction to courts and litigants.⁵² The process for impleading defendants into proceedings supplementary needs to be set forth more explicitly in the statute, the nature of the statutory examination needs to be explained in more detail, and the remedies available to judgment creditors must be elucidated further. The constitutional concerns permeating the statute also need to be resolved: 1) impleaded defendants should be provided the same protections of fair notice and other forms of procedural due process afforded defendants in original actions; 2) the right of an impleaded defendant to a jury trial on claims for money damages brought in proceedings supplementary needs to be spelled out in the statute; 3) reference to magistrates must be done only upon the parties' consent; and 4) the burden shifting provision of the statute should be removed.

Judgment creditors facing a recalcitrant judgment debtor should enjoy an expedited procedure for discovering and marshaling assets to satisfy their judgments, but they should do so within the confines of a well-defined statutory procedure that adequately protects the rights of third-party impleaded defendants that find themselves a target of the judgment creditors' efforts.

¹ See *381651 Alberta, Ltd. v. 279298 Alberta, Ltd.*, 675 So. 2d 1385, 1388 (Fla. 4th DCA 1996) (quoting *Allied Industries International, Inc. v. AGFA-Gevaert, Inc.*, 688 F. Supp. 1516 (S.D. Fla. 1988), *aff'd*, 900 F.2d 264 (11th Cir. 1990)).

² See, e.g., *Stewart v. Manget*, 181 So. 370 (Fla. 1938). The procedure of a creditor's bill still exists by statute, Fla. Stat. §68.05, although it has been almost completely replaced by proceedings supplementary. See The Florida Bar, Basic Creditors' & Debtors' Rights in Florida §11.26 (2007).

³ *George E. Sebring Co. v. O'Rourke*, 134 So. 556, 561 (Fla. 1931).

⁴ *Virginia-Carolina Chemical Corp. v. Smith*, 164 So. 717, 719 (1935) (quoting *Florida Guaranteed Sec. v. McAllister*, 47 F.2d 762, 765 (S.D. Fla. 1931)); see also *Regent Bank v. Woodcox*, 636 So. 2d 885, 886 (Fla. 4th DCA 1994).

⁵ *State v. Viney*, 120 Fla. 657, 663, 163 So. 57, 60 (1935).

⁶ *Gantz v. First Nat. Bank of Miami*, 138 So. 2d 367, 368-69 (Fla. 3d DCA 1962).

⁷ *Zureikat v. Shaibani*, 944 So. 2d 1019, 1023 (Fla. 5th DCA 2006) (quoting *Ferguson v. State Exchange Bank*, 264 So. 2d 867, 868 (Fla. 1st DCA 1972)). It is an open question — and one perhaps too broad to address in this article — whether this judicial admonition to "liberally" construe the proceedings supplementary statute is at odds with the rule of statutory construction that a statute in derogation of the common law must be strictly construed. See *Ady v. Am. Honda Fin. Corp.*, 675 So. 2d 577, 581 (Fla. 1996).

⁸ See The Florida Bar, Basic Creditors' & Debtors' Rights in Florida §11.17 (2007).

⁹ Fla. Stat. §56.29(1). See also *Regent Bank*, 636 So. 2d at 886.

¹⁰ The decisions in conflict were *Exceletech, Inc. v. Williams*, 579 So. 2d 850 (Fla. 5th DCA 1991), and *Robert B. Ehmman, Inc. v. Bergh*, 363 So. 2d 613 (Fla. 1st DCA 1978).

¹¹ This problem has long been acknowledged. As one commentary noted over 50 years ago, "the statutes are silent on the procedure for bringing in third parties in order to protect their interest." The Florida Bar Continuing Legal Education Division, Florida Civil Practice After Trial §3.30 (1966).

¹² See, e.g., *Ryan's Furniture Exchange, Inc. v. McNair*, 162 So. 483, 487-88 (1935); *Patterson v. Venne*, 594 So. 2d 331, 332 (Fla. 3d DCA 1992); *Standard Prop. Inv. Trust, Inc. v. Luskin*, 585 So. 2d 1099, 1100 (Fla. 4th DCA 1991).

¹³ *Mejia v. Ruiz*, 985 So. 2d 1109, 1112 (Fla. 3d DCA 2008) (internal citations omitted).

¹⁴ *Id.* It is unquestionable that due process rights extend to impleaded defendants in proceedings supplementary. *Tomayko v. Thomas*, 143 So. 2d 227, 229 (Fla. 3d DCA 1962) ("In each case where such proceedings are followed, the rights of third parties may not be adjudicated unless such third parties have been first fully impleaded and as parties given an opportunity to adequately present their defenses, since these statutes must be enforced so as to afford due process."). The question this article considers is whether those due process rights are being adequately protected by the statute and the courts.

¹⁵ *Sverdahl*, 582 So. 2d at 740.

¹⁶ *Pollizzi v. Paulshock*, 52 So. 3d 786, 790 (Fla. 5th DCA 2010).

¹⁷ *Zureikat*, 944 So. 2d at 1025 ("Fair notice of [judgment creditor's] allegations in seeking to collect on his judgment was afforded to [impleaded defendant], who was given the opportunity to present her case at a hearing before an impartial decision maker; she was entitled to no more.").

¹⁸ See Fed. R. Civ. P. 69(a) (providing that state law concerning supplementary proceedings will govern to the extent that it is not preempted by federal law).

¹⁹ See *Kobarid Holdings, S.A. v. Reizen*, 2007 WL 14294 at *2 (S.D. Fla. 2007) ("[The judgment creditor] was not required...to set forth all transactions that may become part of the evidentiary hearing in the supplementary proceedings, in part because additional information may be obtained through future discovery from the Impleader Defendants."). See also *Zhejiang Shaoxing Yongli Printing & Dyeing Co., Ltd. v. Microflock Textile Group Corp.*, 06-22608-CIV, 2011 WL 2672266 at *2 (S.D. Fla. 2011) (holding that allegation in motion to implead that the judgment debtor "transferred funds or assets to [the implead third parties] with the intent to hinder the Plaintiff/Judgment Creditor's ability to satisfy its judgment and [that the implead defendants] are alter egos or mere continuations of Defendant" was sufficient to allow hearing on claims against implead defendants).

²⁰ Fla. R. Civ. P. 1.010 (emphasis added). The district courts of appeal have confirmed that the Florida Rules of Civil Procedure apply in proceedings supplementary. See, e.g., *Patterson v. Venne*, 594 So. 2d 331, 332 (Fla. 3d DCA 1992) (citing Fla. R. Civ. P. 1.010 and *Exceletech, Inc. v. Williams*, 579 So. 2d 850, 852 (Fla. 5th DCA 1991)).

²¹ See Fla. R. Civ. P. 1.110(b) ("A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, must state a cause of action and shall contain . . . a short and plain statement of the ultimate facts showing that the pleader is entitled to relief."); Fla. R. Civ. P. 1.140 (providing for interposition of legal defenses by motion).

Some courts have found that because proceedings supplementary are entirely statutory, and because there is no express provision for it in the statute, the impleaded defendant is prohibited from bringing a counterclaim against the judgment creditor, even though such a right is provided for by the rules. See *Mystique, Inc. v. 138 Intern., Inc.*, 07-22937-CIV, 2010 WL 3008809 (S.D. Fla. 2010) report and recommendation adopted sub nom. *Mystique, Inc. v. 138 Intern. Inc.*, 10-21421-CIV, 2010 WL 4316957 (S.D. Fla. 2010) (Jordan, J.). While this holding squares with the notion that a proceeding supplementary is intended to provide expedited relief to a judgment creditor, it also puts the impleaded defendant at a serious strategic disadvantage.

²² *Connolly v. Sebeco, Inc.*, 89 So. 2d 482, 484 (Fla. 1956).

²³ *Sverdahl*, 582 So. 2d at 740.

²⁴ See, e.g., *Patterson v. Venne*, 594 So. 2d 331, 332 (Fla. 3d DCA 1992).

²⁵ *Meyer v. Faust*, 83 So. 2d 847, 848 (Fla. 1955).

²⁶ *J.S.L. Const. Co. v. Levy*, 994 So. 2d 394, 399 (Fla. 3d DCA 2008) (internal citations omitted).

²⁷ Fla. Stat. §56.29(2).

²⁸ *Patterson*, 594 So. 2d at 332 n.1.

²⁹ See, e.g., *Meyer v. Faust*, 83 So. 2d 847, 848 (Fla. 1955); *Young v. McKenzie*, 46 So. 2d 184, 185 (Fla. 1950); *Zureikat v. Shaibani*, 944 So. 2d 1019 (Fla. 5th DCA 2006).

³⁰ Similarly troublesome, although not addressed in this article, is the provision of the statute providing that witnesses in statutory examinations are not entitled to assert their Fifth Amendment privilege against self-incrimination, although the statute purports to grant immunity to the witness. Fla. Stat. §56.29(8) ("An answer cannot be used as evidence against the person so answering in any criminal proceeding."). Several courts have held that this provision cannot restrict a witness from asserting his or her Fifth Amendment rights, see *Novak v. Snieda*, 659 So. 2d 1138, 1141 (Fla. 2d DCA 1995); *Compton v. Societe Eurosuise, S.A.*, 494 F. Supp. 836, 841 (S.D. Fla. 1980), providing further grounds for clarification of the statute.

³¹ Fla. Stat. §56.29(4).

³² Fla. Stat. §56.29(7).

³³ Fla. R. Civ. P. 1.490(c). And, of course, when a rule of civil procedure conflicts with a statute — at least on procedural matters — the rule prevails. Fla. Stat. §25.371.

³⁴ *Dezen v. Slatcoff*, 66 So. 2d 483, 485 (Fla. 1953) (holding that "this was a summary proceeding especially authorized by law and limited as above set forth, and no trial by jury was required"); *Jackson v. Ventas Realty*, 812 F. Supp. 2d 1306, 1310 (M.D. Fla. 2011) ("[B]ecause Section 56.29 codifies the formerly equitable proceeding for a creditor's bill, no jury trial right attaches in a supplemental proceeding."); *381651 Alberta, Ltd.*, 675 So. 2d at 1388 (holding that no jury trial right attaches to actions under §56.29, since "such an action is equitable in nature"); *Ferguson v. State Exchange Bank*, 264 So. 2d 867, 868 (Fla. 1st DCA 1972) ("The right asserted by appellant to a jury trial collides directly with the statutory language [in Fla. Stat. §56.29(7)] whereunder findings of fact may be made by a commissioner or master."); *Brownstone, Inc. v. Miami Nat'l Bank*, 165 So. 2d 262, 264 (Fla. 3d DCA 1964) ("[T]his was a summary proceeding ... and no trial by jury was required.") (quoting *Dezen*, 66 So. 2d at 485). As discussed below the consensus among courts is that the judgment creditor is entitled to both monetary damages and equitable relief against impleaded defendants in a proceedings supplementary.

³⁵ Actions at law clearly trigger the right to a jury trial. See *Miller v. Rolfe*, 97 So. 2d 132, 135 (Fla. 1st DCA 1957) ("Throughout the annals of our jurisprudence the right to trial by jury in actions cognizable at law, as guaranteed by the clear mandate of our Constitution, has remained sacred and inviolate"). See

also *Hobbs v. Florida First Nat. Bank of Jacksonville*, 480 So. 2d 153, 156 (Fla. 1st DCA 1985) (“even though some of the issues in the mortgage foreclosure proceeding were equitable, the issues to be tried in the deficiency proceeding against petitioners are legal ones and petitioners are entitled to a jury trial on these.”). For cases providing for a defendant’s right to a jury trial in an original proceeding on a fraudulent transfer claim see *Fox v. City of Pompano Beach*, 984 So. 2d 664, 668 (Fla. 4th DCA 2008); *Hansard Const. Corp. v. Rite Aid of Florida, Inc.*, 783 So. 2d 307, 309 (Fla. 4th DCA 2001).

³⁶ Although the statute refers to the “defendant” carrying the burden of proof, Florida courts have held that the term “defendant” includes not only the judgment debtor but any transferee who has been impleaded as a defendant. See *Morton v. Cord Realty, Inc.*, 677 So. 2d 1322, 1324 (Fla. 4th DCA 1996) (emphasis added).

³⁷ Fla. Stat. §56.29(6)(a) (emphasis added).

³⁸ The Florida Bar, *Creditors’ and Debtors’ Practice in Florida* §7.19 (2007). *Wilder v. Punta Gorda State Bank*, 129 So. 865 (Fla. 1930) (holding that party attacking transfer of note on ground transfer was made in furtherance of scheme to defraud has burden of proof); *Perlman v. Delisfort-Theodule*, 09-80480-CIV, 2010 WL 4514249 (S.D. Fla. 2010), *aff’d*, 451 Fed. Appx. 846 (11th Cir. 2012) (“Once a transfer has been proven fraudulent, the recipient of the transfer bears the burden of showing why the transfer should not be avoided.”).

³⁹ See *Palm Beach County v. Town of Palm Beach*, 426 So. 2d 1063, 1067 (Fla. 4th DCA 1983) (“Even in the simplest of transactions the burden of proving a negative can be an onerous one.”).

⁴⁰ See *Dep’t of Ins. v. Se. Volusia Hosp. Dist.*, 438 So. 2d 815, 821 (Fla. 1983) (“Under the equal protection clauses [of the Florida and Federal constitutions], governmental acts that classify persons arbitrarily may be invalid if they result in treating similar people in a dissimilar manner.”).

⁴¹ Fla. Stat. §56.29(5) (“The judge may order any property of the judgment debtor, not exempt from execution, in the hands of any person or due to the judgment debtor to be applied toward the satisfaction of the judgment debt.”).

⁴² Fla. Stat. §56.29(9).

⁴³ The burden shifting provision of the proceedings supplementary statute has its own serious due process concerns, dealt with below.

⁴⁴ *Estate of Jackson v. Ventas Realty, Ltd. P’ship*, 812 F. Supp. 2d 1306, 1309 (M.D. Fla. 2011) (quoting *In re Hill*, 332 B.R. 835, 843 (Bankr. M.D. Fla. 2005)).

⁴⁵ *In re Hill*, 332 B.R. at 843 (citing *Conrad v. McMechen*, 338 So. 2d 1306, 1307 (Fla. 4th DCA 1976)). *Accord Mystique, Inc. v. 138 Intern., Inc.*, 2010 WL 3008809 (S.D. Fla. 2010) report and recommendation adopted sub nom. *Mystique, Inc. v. 138 Intern. Inc.*, 2010 WL 4316957 (S.D. Fla. 2010) (“[p]roceedings supplementary are entirely statutory and [are] of limited purpose: to aid a judgment creditor ... to discover then effectuate the assets of a judgment debtor.”).

⁴⁶ *Pollizzi*, 52 So. 3d at 789 (citing *Allied Industries Intern., Inc.*, 688 F. Supp. 1516).

⁴⁷ Charles Kline, *Collection Pursuant to Florida’s Supplementary Proceedings in Aid of Execution*, 25 U. Miami L. Rev. 596, 608 (1971).

⁴⁸ This broad mandate is not intrinsically contradictory with the notion of this article — that impleaded defendants should receive greater constitutional and procedural protection in proceedings supplementary. After all, it is a given that circuit courts sitting in civil cases have extremely broad equitable and legal powers, yet the due process rights of parties to those proceedings remain a crucial consideration. A similar balance can easily animate proceedings supplementary.

⁴⁹ *General Guaranty Insurance Co. of Florida v. DaCosta*, 190 So. 2d 211 (Fla. 3d DCA 1966).

⁵⁰ *See, e.g., 17315 Collins Ave., LLC v. Fortune Dev. Sales Corp.*, 34 So. 3d 166, 169 (Fla. 3d DCA 2010).

⁵¹ *See, e.g., Ocala Breeders' Sales Co. v. Hialeah, Inc.*, 735 So. 2d 542, 543 (Fla. 3d DCA 1999).

⁵² It should be noted that many of the problems with the proceedings supplementary statute identified in this article were previously diagnosed over 40 years ago in Charles Kline's excellent law review article, *Collection Pursuant to Florida's Supplementary Proceedings in Aid of Execution*, 25 U. Miami Law Rev. 596 (1971). As illustrated herein, since that time, the cases interpreting the statute have only multiplied its inherent uncertainty.

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