St. John's Law Review

Volume 60
Number 1 *Volume 60, Fall 1985, Number 1*

Article 10

CPLR 321: Remedy of Recission Available to Party Who Violates Statute by Negotiating Settlement Pro Se Without Effectively Discharging an Attorney of Record

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CPL that authorize the issuance of eavesdropping warrants for a period of interception no longer than thirty days. Stressing the importance of strictly construing eavesdropping statutes, the court held that the thirty days begins to run on the day the warrant is issued unless the issuing court specifies another date of commencement in the warrant. The members of Volume 60 hope that the cases considered in *The Survey* will be of help and interest to the New York bench and bar.

CIVIL PRACTICE LAW AND RULES

CPLR 321: Remedy of rescission available to party who violates statute by negotiating settlement pro se without effectively discharging an attorney of record

CPLR 321[1] provides that a party to a civil action who appears[2] by counsel is prohibited from acting for himself in the action except by permission of the court.[3] Further, if a party wishes to ap-

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[1] *See* CPLR 321 (Supp. 1986). Section 321(a) of the CPLR provides:

> (a) A party, other than one specified in section 1201, may prosecute or defend a civil action in person or by attorney, except that a corporation . . . shall appear by attorney, except as otherwise provided in section 1809 of the New York city civil court act, the uniform district court act, the uniform city court act and the uniform justice court act. If a party appears by attorney he may not act in person in the action except by consent of the court.

Id.; WK&M ¶ 321.01 (1985).

Courts generally have stated that the purpose of § 321 is to avoid confusion regarding the identity of the individual who has authority to act in an ongoing litigation. *See infra* note 28 and accompanying text.

Section 321(a) of the CPLR was adopted substantially unchanged from CPA 236. *See* FOURTH REP. 190; FINAL REP. 281; SIXTH REP. 119; CPLR 321, commentary at 411 (1972). Several older cases construing CPA 236 are treated in this survey to aid in an analysis of the corresponding CPLR section.

[2] *See* CPLR 320(a). A formal appearance is made when a party either "serve[s] an answer or a notice of appearance," or "mak[es] a motion which has the effect of extending the time to answer." *Id.*

[3] *See* CPLR 321(a); H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 66-67 (5th ed. 1976); *accord* Carlisle v. County of Nassau, 64 App. Div. 2d 15, 19, 408 N.Y.S.2d 114, 117 (2d Dep't 1978) (although party represented by counsel at trial may not act, he may help plan trial strategy). *Compare* Chase Manhattan Bank (N.A.) v. O'Flynn, N.Y.L.J., June 22, 1984, at 12, col. 5 (Sup. Ct. N.Y. County June 21, 1984) (despite contention that such was delay tactic, defendant who properly discharged his attorney could act on his own behalf) *with* Cann v. Cann, 204 Misc. 1069, 1071, 127 N.Y.S.2d 55, 58 (Sup. Ct. N.Y. County 1954) (once defendant represented by counsel, counsel can be served on defendant's behalf).

The rule against pro se representation by a party represented by counsel predates the codification of civil procedure in New York. *See* Webb v. Dill, 18 Abb. Pr. 264, 264 (Sup. Ct. 1st Dist. 1865). This principle is closely related to the premise permitting a party to retain only one attorney of record in a particular action. *Cf.* Dobbins v. County of Erie, 58 App.

pear pro se, but already has an attorney of record, he may do so only by discharging the attorney in the manner prescribed by section 321.[4] Accordingly, the general rule in New York is that absent a proper discharge of a party's attorney of record, a party's subsequent acts in a judicial proceeding will be deemed ineffective.[5] Re-

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Div. 2d 733, 733, 395 N.Y.S.2d 865, 866-67 (4th Dep't 1977) (mem.) (second attorney not formally substituted for attorney of record lacked standing to make motion to dismiss); Kitsch v. Riker Oil Co., 23 App. Div. 2d 502, 503, 256 N.Y.S.2d 536, 536 (2d Dep't 1965) (mem.) (second attorney prohibited from applying for relief to court when plaintiff already represented by counsel); Jackson v. Trapier, 42 Misc. 2d 139, 141, 247 N.Y.S.2d 315, 316 (Sup. Ct. Queens County 1964) (prohibiting two attorneys from representing insured party). Thus, an attorney who is not the attorney of record has no authority to represent a party in an action. *See Dobbins*, 58 App. Div. 2d at 733, 395 N.Y.S.2d at 866-67; *Kitsch*, 23 App. Div. 2d at 503, 256 N.Y.S.2d at 536; *Trapier*, 42 Misc. 2d at 141, 247 N.Y.S.2d at 316. *But see* Deacon's Bench, Inc. v. Hoffman, 88 App. Div. 2d 734, 735, 451 N.Y.S.2d 861, 862 (3d Dep't 1982) (mem.) (accepting improperly substituted attorney's appearance because of untimely objection of opposing party and absence of prejudice); Palmer v. Palmer, 62 Misc. 2d 73, 75-76, 308 N.Y.S.2d 562, 565-66 (Family Ct. Dutchess County 1969) (late filing of notice of substitution of attorneys excused because opposing party not prejudiced and denial would cause delay).

[4] CPLR 321(b); *see, e.g.*, Chase Manhattan Bank (N.A.) v. O'Flynn, N.Y.L.J., June 22, 1984, at 12, col. 5 (Sup. Ct. N.Y. County June 21, 1984) (section 321(a) not applicable "where a party pro se is substituted upon dismissal of its attorney"). *But cf.* Antoinette D. v. Christopher M., 54 App. Div. 2d 564, 564, 387 N.Y.S.2d 19, 20 (2d Dep't 1976) (mem.) (affirming family court decision which allowed petitioner to conduct own case while represented by absent attorney).

Two methods are prescribed by CPLR 321(b) for discharging an attorney:

> 1. . . . an attorney of record may be changed by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party. . . .
>
> 2. An attorney of record may withdraw or be changed by order of the court in which the action is pending. . . .

Id.; see also WK&M ¶ 321.11, at 3-399 to 3-400 (1985). Both methods of discharge require that all parties or their attorneys in the action be notified. CPLR 321(b). To obtain a court order allowing withdrawal, a motion is made for an order to show cause as to why an attorney should not be withdrawn. *See* Universal Elevator Co. v. Jordan Elevator Co., N.Y.L.J., Aug. 27, 1981, at 1, col. 4 (Sup. Ct. N.Y. County Aug. 26, 1981). Several earlier cases cited herein may refer to CPA 56, from which CPLR 321 was derived.

[5] *See, e.g.*, Johnson v. Antonopoulos, 213 App. Div. 324, 325, 210 N.Y.S. 589, 590 (2d Dep't 1925) (declaring stipulation agreement ineffective); Sterns v. Stevans, 20 Misc. 2d 417, 419, 194 N.Y.S.2d 367, 369 (Sup. Ct. Nassau County 1959) (refusing to consider telegram directed to court by defendant). The general rule is that until an attorney of record is effectively discharged, such an attorney "is authorized to act for all purposes incidental to the entry and enforcement of the judgment; as to the adverse parties his authority continues unabated." Hendry v. Hilton, 283 App. Div. 168, 172, 127 N.Y.S.2d 454, 458 (2d Dep't 1953); *see also* Ohlquist v. Nordstrom, 143 Misc. 502, 504, 257 N.Y.S. 711, 713-14 (Sup. Ct. Chatauqua County 1932) (attorney's power continues until formal dismissal), *aff'd*, 238 App. Div. 766, 261 N.Y.S. 1039 (4th Dep't), *aff'd*, 262 N.Y. 696, 188 N.E. 125 (1933). This concept is most often applied in cases in which the adverse party serves papers on the original attorney of record. *See, e.g.*, Hess v. Tyszko, 46 App. Div. 2d 980, 980, 362 N.Y.S.2d 287, 289 (3d

cently in *Moustakas v. Bouloukos*,[6] the New York Supreme Court, Appellate Division, Second Department, held that a plaintiff who improperly discharged his attorney of record and subsequently entered into a settlement agreement with the defendant, could rely on CPLR 321 as a basis to rescind the settlement.[7]

In *Moustakas*, both the plaintiff and the defendant were 50% shareholders in each of two corporations.[8] As a result of a conflict between the parties, three separate lawsuits were commenced in the Supreme Court, Nassau County.[9] The plaintiff, Moustakas, brought a shareholder's derivative action and a special proceeding seeking dissolution of one of the corporations, while the defendant appeared on behalf of himself and the other corporation.[10] At the outset of the litigation, both parties were represented by counsel.[11] However, while the actions were pending, the plaintiff sought to dismiss his attorney by means of a handwritten letter informing him of the discharge.[12] One month later, the plaintiff met pro se with the defendant, who was accompanied by counsel, at which time the parties entered into a written agreement settling the litigation.[13] Subsequently, the plaintiff brought an action to rescind the settlement.[14] The Supreme Court, Nassau County, held for the plaintiff,[15] and the Appellate Division, Second Department, af-

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Dep't 1974) (until attorney properly discharged, service upon that attorney is valid); Cann v. Cann, 204 Misc. 1069, 1071-72, 127 N.Y.S.2d 55, 58 (Sup. Ct. Kings County 1953) (service upon attorney valid until attorney properly discharged). Nevertheless, if a party intentionally serves an attorney whom he realizes has been "informally discharged" that party should be subject to discipline for a "breach of professional ethics." WK&M ¶ 321.11, at 3-400 to 3-401 (1985).

[6] 112 App. Div. 2d 981, 492 N.Y.S.2d 793 (2d Dep't 1985) (mem.)

[7] *See id.* at 984, 492 N.Y.S.2d at 795.

[8] *Id.* at 982, 492 N.Y.S.2d at 794.

[9] *Id.* The three actions leading to the settlement underlying the *Moustakas* cases were: a proceeding brought by Moustakas for the dissolution of Seacrest Diner, Inc.; a shareholder's derivative action brought by Moustakas against Bouloukos and Seacrest; and a shareholder's derivative action commenced by Bouloukos against Moustakas and Imperial Diner, Inc. *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* Moustakas executed the settlement agreement personally, and as president of Seacrest Diner, Inc. *Id.* The plaintiff's attorney was informed of the settlement in a letter from the defendant's attorney two weeks later; the court found it significant that the defendant's attorney referred to Moustakas as the "client" of the plaintiff's attorney. *Id.*

[14] *Id.*

[15] *Id.* at 982-83, 492 N.Y.S.2d at 794.

firmed the decision.[16]

In a memorandum opinion, the Second Department observed that an attorney of record in a pending action may be dismissed only in accordance with the procedure prescribed by law.[17] Therefore, the letter delivered by the plaintiff to his attorney did not effectuate a discharge because it did not meet the standards set forth in CPLR 321(b)(2).[18] The court further stated that because the plaintiff did not effectively discharge his attorney of record, he could not act pro se in the settlement of the pending suits without consent of the court.[19] The court interpreted section 321 as protecting the very party who had improperly discharged his attorney and proceeded to deal with the adverse party, who was represented by counsel.[20] In addition, the court held that section 321(a) of the CPLR prohibited the plaintiff from representing a corporation in the settlement because a corporationn may appear only by counsel.[21] Moreover, the Appellate Division noted that by communicating directly with the plaintiff, who was still legally bound by counsel, the attorney for the defendant violated the New York Code of

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[16] *Id.*

[17] *Id.* at 983, 492 N.Y.S.2d at 795; *see also* CPLR 321(b). The court noted that a client can dismiss his attorney at any time with or without cause. 112 App. Div. 2d at 983, 492 N.Y.S.2d at 795; *see* Demov, Morris, Levin & Sheen v. Glantz, 53 N.Y.2d 555, 556-57, 428 N.E.2d 387, 389, 444 N.Y.S.2d 55, 57 (1983) (dismissing plaintiff's cause of action for fraud and breach of retainer agreement against former client). The right to dismiss, however, is subject to some restrictions and qualifications. *See, e.g., In re* Weitling, 266 N.Y. 184, 186, 194 N.E. 401, 402 (1935) (attorney entitled to fair and reasonable compensation for services rendered); Local 2, Int'l Union of Police v. Davis, 27 App. Div. 2d 650, 651, 276 N.Y.S.2d 837, 838 (1st Dep't 1967) (mem.) (termination procedure of CPLR 321 applicable only to representations in action, not to retainer agreement).

[18] *See* 112 App. Div. 2d at 983, 492 N.Y.S.2d at 792.

[19] *Id.*

[20] *See id.* at 984, 492 N.Y.S.2d at 795.

[21] *Id.*; *accord* Lefkowitz v. Therapeutic Hypnosis, Inc., 52 App. Div. 2d 1017, 1017, 383 N.Y.S.2d 868, 869 (3d Dep't 1976) (mem.) (individual who was not attorney could not appear on behalf of corporate defendant); W.T. Grant Co. v. Payne, 64 Misc. 2d 797, 798, 315 N.Y.S.2d 910, 911-12 (Steuben County Ct. 1970) (reversing default judgment against defendant because plaintiff corporation was not represented by counsel); WK&M ¶ 321.05, at 3-394 to 3-394.1. The rationale underlying the requirement that a corporation may only appear by counsel is that "a corporation is a hydra-headed entity and its shareholders are insulated from personal responsibility. There must therefore be a designated spokesman accountable to the Court." Austrian, Lance & Stewart, P.C. v. Hastings Properties, Inc., 87 Misc. 2d 25, 26, 385 N.Y.S.2d 466, 467 (Sup. Ct. N.Y. County 1976). *But see* Employment Claim Control Serv. Corp. v. Workmen's Compensation Bd., 35 N.Y.2d 492, 498, 323 N.E.2d 689, 692, 364 N.Y.S.2d 149, 152 (1974) (cautiously allowing controlled use of non-lawyers to represent employers in workers compensation proceedings).

Professional Responsibility.[22]

As stated by the court in *Moustakas*,[23] CPLR 321 generally has been used to protect the rights of adverse parties.[24] Most significantly, the statute ensures that a party knows the identity of the opposing party's attorney, thereby facilitating the service of documents.[25] Furthermore, because an attorney of record remains servable as the agent of his client until he is discharged[26] by either a stipulation filed with the court or by a court order,[27] an adverse party is also protected from losing jurisdiction over a party during an ongoing action.[28] The awareness of the parties and the court as to whether an individual or his attorney has the authority to act at any given time is necessary to avoid chaos in judicial proceedings.[29]

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[22] *See* 112 App. Div. 2d at 983, 492 N.Y.S.2d at 795; *see also* N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(a)(1) (McKinney 1975). DR 7-104(a)(1) provides:

> (A) During the course of his representation of a client a lawyer shall not:
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
> (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interest of such person are or have a reasonable possibility of being in conflict with the interests of his client.

Id.

[23] *See* 112 App. Div. 2d at 984, 492 N.Y.S.2d at 795.

[24] *See infra* notes 25-29 and accompanying text.

[25] *See* CPLR 321(b)(1), (2) (notice of attorney change must be given to all parties in the action); Kitsch v. Riker Oil Co., 23 App. Div. 2d 502, 503, 256 N.Y.S.2d 536, 536 (2d Dep't 1965) (mem.) (CPLR 321 prohibits party from being represented by more than one attorney); Jackson v. Trapier, 42 Misc. 2d 139, 141, 247 N.Y.S.2d 315, 316 (Sup. Ct. Queens County 1964) (if more than one attorney "plaintiff would be required to serve duplicate papers"); Title Guar. & Trust Co. v. Uniform Fibrous Talc Co., 127 Misc. 183, 187, 215 N.Y.S. 437, 441 (Sup. Ct. Bronx County 1926) ("[t]his rule is designed to . . . insure to an opposing party that an attorney assuming to act for a party is authorized to do so, to the end that such party may know upon whom necessary notices or papers may be served"). *See generally* CPLR 2103(b) (Supp. 1984-1985) ("Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon his attorney").

[26] *See supra* note 5 (cases upholding validity of service upon original attorney improperly discharged).

[27] *See* CPLR 321(b); *supra* note 4 (text and dicussion of CPLR 321(b)).

[28] *See, e.g.*, Cann v. Cann, 204 Misc 1069, 1071-72, 127 N.Y.S.2d 55, 58 (Sup. Ct. N.Y. County 1954) (defendant prohibited from escaping jurisdiction of the court because his attorney of record was not properly dicharged and remained servable).

[29] *See* WK&M ¶ 321.07, at 3-396. It has been stated that § 321 of the CPLR was designed to "avoid the confusion which would otherwise result if other litigants and the courts were not aware of whom was in charge of the case." *Id.*; *see, e.g.*, Jackson v. Trapier, 42 Misc. 2d 139, 141, 247 N.Y.S.2d 315, 316 (Sup. Ct. Queens County 1964) (representation by more than one attorney would create "chaos in the the courts"); Webb v. Dill, 18 Abb.

It is submitted that the *Moustakas* decision is justifiable to the extent that the language of section 321[30] and case law[31] do not preclude an interpretation protecting the very party who has inappropriately discharged his attorney.[32] Furthermore, although no court has expressly construed section 321 as offering the protection afforded in *Moustakas*, several early cases have stated that parties may seek recission of settlements they improperly negotiated without informing their attorneys of record.[33]

However, while the Second Department's interpretation of section 321 may be consistent with the apparent plain meaning of the statute, it is submitted that the decision imprudently allows a party to benefit from his own violation of a statute[34]—a consequence that several courts have chosen to avoid when applying the corporate representation provision of section 321.[35] Indeed, courts

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Pr. 264, 264 (Sup. Ct. 1st Dist. 1865) (courts require proceedings to be through attorney who appears, otherwise there would be "great confusion in the Administration of Justice").

[30] *See supra* notes 1-2.

[31] *See supra* notes 4, 25, 27, 28 (cases discussing the purposes of CPLR 321); *cf.* Barles v. Johnson Elec. Corp., 44 Misc. 2d 918, 919, 255 N.Y.S.2d 350, 352 (Sup. Ct. Queens County 1964) ("one attorney of record" requirement necessary to protect client from "bearing the brunt" of disagreements among his counselors).

[32] *See* CPLR 321 (Supp. 1984-1985). The wording of CPLR 321 does not limit application of the statute to the protection of adverse parties. *See id.* In fact, § 321(b) requires that notice of an attorney change must be given to *all* parties in an action. *See supra* note 4 (discussion and text of CPLR 321(b)). It is suggested that by definition, this would include notifying fellow plaintiffs or defendants who in most cases would be friendly parties.

Section 321(a) states that "[i]f a *party* appears by attorney he may not act in person in the action except by consent of the court." CPLR 321(a) (emphasis added). It is submitted that the statute, without further qualification, unambiguously declares ineffective the acts of *any* party who already is represented by counsel. Accordingly, the court's decision is consistent with the statute if the " plain meaning" method of statutory interpretation is applied. *See In re* Estate of Kleefeld, 55 N.Y.2d 253, 259, 433 N.E.2d 521, 524, 448 N.Y.S.2d 456, 459 (1982) ("[t]his court should not ignore the words of the statute, clear on its face, to reach a different result through judicial interpretation"); 2A J. SUTHERLAND, STATUTORY CONSTRUCTION § 46.01, at 74 (Sands 4th ed.) (if language is clear, unambiguous and uncontrolled by other statutory provisions, court can not give it different meaning).

[33] *See, e.g.*, Johnson v. Antonopoulos, 213 App. Div. 324, 325, 210 N.Y.S. 589, 590 (2d Dep't 1925) (defendant not permitted to raise as defense stipulation signed by plaintiff improperly acting pro se); Anderson v. Anderson, N.Y.L.J., Dec. 15, 1964, at 16, col. 3 (Sup. Ct. Bronx County Dec. 14, 1964) (dictum) (party who improperly signs stipulation pro se may move to have such stipulation set aside).

[34] In a situation resembling *Moustakas*, one court ruled that a defendant corporation should not be permitted to benefit from the wilful disregard by its president of the rule that a court proceeding should be handled by a member of the bar of that particular jurisdiction. *See* Packer v. First Multifund of America, Inc., N.Y.L.J., July 29, 1975, at 10, col. 6 (Sup. Ct. N.Y. County July 28, 1975).

[35] *See, e.g.*, King Shell Serv. Station v. Robert S. Douglas Co., 106 Misc. 2d 57, 59, 430 N.Y.S.2d 484, 486 (J. Ct. Weschester County 1980) (improper appearance by one party

have asserted that CPLR 321 "is not intended to penalize the adverse party for the corporation's improper appearance."[36] Additionally, the decision is inconsistent with the policy of liberal construction officially espoused by the CPLR to "secure the just, speedy . . . determination of every civil judicial proceeding."[37]

Notwithstanding this inconsistency with public policy, by applying the plain meaning of CPLR 321, the court could not have reached any other conclusion absent a legislative amendment.

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should not penalize opposing party); Cohn v. Warschauer Sick Support Soc. Bnei Israel Sup., 19 N.Y.S.2d 742, 743 (Sup. Ct. App. T. 2d Dep't 1940) (corporation cannot move to set aside judgment on ground that corporation was not represented by counsel).

It is submitted that the facts in *Moustakas* are analogous to those in *King Shell* and *Cohn* because the plaintiff, relying on his own violation of CPLR 321, endeavored to nullify prior actions that presumably did not give rise to a desired result. In contrast to earlier cases, however, the court in *Moustakas* permitted the plaintiff to rescind the settlement agreement, *see* 112 App. Div. 2d at 982-83, 492 N.Y.S. at 795, thus failing to uphold the legal maxim prohibiting a party from benefiting from his own wrongdoing. The influence of this legal maxim is deeply rooted in many areas of the law. *See, e.g.*, Ross v. Ross, 84 App. Div. 2d 569, 570, 443 N.Y.S.2d 419, 420 (2d Dep't 1981) (mem.) (appellate court refused to grant husband divorce from wife he wrongfully abandoned), *aff'd*, 55 N.Y.2d 999, 434 N.E.2d 717, 449 N.Y.S.2d 481 (1982); People v. Velez, 124 Misc. 2d 612, 614, 477 N.Y.S.2d 78, 79 (Sup. Ct. Bronx County 1984) (no violation of speedy trial rights when computer failed to reveal prior arrests because of defendant's use of alias); Continental Metals Corp. v. Municipal Warehouse Co., 112 Misc. 2d 923, 926, 447 N.Y.S.2d 849, 851-52 (Sup. Ct. N.Y. County 1982) (in event of intentional taking of bailed property, bailee deprived of contractual benefit of shortened time to sue), *aff'd*, 92 App. Div. 2d 47, 459 N.Y.S.2d 406 (1st Dep't 1983).

Clearly, if this maxim was disregarded, the effect "would be to place premium on deceit and fraud." *Velez*, 124 Misc. 2d at 614, 477 N.Y.S.2d at 79. Similarly, "it would be a perversion of our adversary system if a litigant could be deprived of a victory because of the deriliction of his or her opponent." Cuevas v. Cuevas, 110 App. Div. 2d 873, 880, 488 N.Y.S.2d 725, 730-31 (2d Dep't 1985) (Titone, J., dissenting) (quoting Department of Social Servs. v. Toustum C.D., 97 App. Div. 2d 831, 831, 468 N.Y.S.2d 908, 908 (2d Dep't 1983) (mem.)).

[36] King Shell Serv. Station v. Robert S. Douglas Co., 106 Misc. 2d 57, 59, 430 N.Y.S.2d 484, 486 (J. Ct. Westchester County 1980) (quoting Cohn v. Warschauer Sick Support Soc. Bnei Israel Sup., 19 N.Y.S.2d 742, 743 (Sup. Ct. App. T. 2d Dep't 1940)).

[37] CPLR 104 (1972); *see* Coonradt v. Walco, 55 Misc. 2d 557, 558, 285 N.Y.S.2d 421, 424 (Sup. Ct. Albany County 1967) ("procedural rules should be primarily a means to the end of securing the just resolution of controversies on the merits and at a minimum of expense and delay"). It is submitted that the *Moustakas* decision contravenes the CPLR philosophy by creating a vehicle by which litigation between parties can be prolonged. Instead, the CPLR should be used to "expedit[e] and streamlin[e] the practice of law and the work of the courts." Burbell v. Burman, 44 Misc. 2d 749, 750, 255 N.Y.S.2d 56, 58 (Sup. Ct. Bronx County 1964).