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CPLR 3025(a): Amendment of Counterclaim Permitted Within 20 Days After Last Responsive Pleading in Multiparty Litigation

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the "multiplicity and circuity of actions" that impleader was designed to prevent[93] by eliminating the necessity for a defendant to commence an independent action for his own damages, only to have it later consolidated for trial with the main claim.[94] It is suggested, however, that where the affirmative third-party claim does not possess a factual or legal nexus with the main claim, the affirmative claim should be dismissed or severed in the court's discretion, to avoid unnecessary prejudice to the plaintiff's action.[95]

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ARTICLE 30—REMEDIES AND PLEADING

CPLR 3025(a): Amendment of counterclaim permitted within 20 days after last responsive pleading in multiparty litigation

CPLR 3025(a) grants a party the right to amend his pleading

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against an adverse party").

[93] Krause v. American Guar. & Liab. Ins. Co., 22 N.Y.2d 147, 153, 239 N.E.2d 175, 187, 292 N.Y.S.2d 67, 71 (1968) (quoting ELEVENTH ANN. REP. N.Y. JUD. COUNCIL 58 (1945)); Lazarow, Rettig & Sundel v. Castle Capital Corp., 63 App. Div. 2d 277, 287, 407 N.Y.S.2d 490, 496 (1st Dep't 1978); Morey v. Sealright Co., 41 Misc. 2d 1068, 1070, 247 N.Y.S.2d 306, 309 (Sup. Ct. Oneondaga County 1964); ELEVENTH ANN. REP. N.Y. JUD. COUNCIL 370 (1945); SIEGEL § 155; 2 WK&M ¶ 1007.01.

[94] *See generally* CPLR 602 (1976). In *George Cohen Agency,* Perlman contended that it was entitled to bring a separate action which could be consolidated for trial with the main action if its third-party action were dismissed. 69 App. Div. 2d at 727, 419 N.Y.S.2d at 585. The question of consolidation became academic when the third-party claim was permitted. *Id.* at 737, 419 N.Y.S.2d at 591. In Ellenberg v. Sydharv Realty Corp., 41 Misc. 2d 1078, 247 N.Y.S.2d 226 (Sup. Ct. Kings County 1964), the common questions of law and fact between the primary and third-party actions were held sufficient to warrant consolidation but not impleader, since there was no "liability over from the third-party defendants to the third-party plaintiff." *Id.* at 1081, 247 N.Y.S.2d at 229. More recently, however, in Mallis v. Kates, 56 App. Div. 2d 818, 393 N.Y.S.2d 18 (1st Dep't 1977), the court refused to dismiss the third-party action on the pleading, stating that where the transactions in the primary and impleader complaints were so entangled that they would require consolidation if brought as independent actions, it would be preferable and more economical to adjudicate the rights of all parties in one trial. *Id.* at 818, 393 N.Y.S.2d at 19-20. It is submitted that as long as there is also a viable claim for indemnification or contribution, *see* note 90 *supra,* third-party actions for affirmative relief should be permitted where questions that would be subject to consolidation under CPLR 602 if sued upon separately are involved. *See* Norman Co. v. County of Nassau, 63 Misc. 2d 965, 970, 314 N.Y.S.2d 44, 50-51 (Sup. Ct. Nassau County 1970).

[95] Dismissal or severance of the impleader under CPLR 1010 will occur when the relationship of the primary claim and the impleader are so "remote" that the original action is hampered by delay or prejudice to a party. *See* Norman Co. v. County of Nassau, 63 Misc. 2d 965, 969-70, 314 N.Y.S.2d 44, 50 (Sup. Ct. Nassau County 1970); SIEGEL § 161.

once without court permission "within [20] days after service of a pleading responding to it."[96] The provision is intended to allow a party to correct his pleading after a defect has been exposed by the responsive pleading.[97] In a case of first impression, the Appellate Division, Fourth Department, in *Citibank, N.A. v. Suthers,*[98] liberally construed the time period prescribed in CPLR 3025(a) and held that a counterclaim against multiple parties may be amended as of right within 20 days after the reply by any party is served.[99]

In *Suthers,* Citibank instituted an action to recover the balance due on a loan guaranteed by the defendants Suthers.[100] The

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[96] CPLR 3025(a)(1974). CPLR 3025(a) provides:

> A party may amend his pleadings once without leave of the court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

Amendments as of right may include the addition or deletion of causes of action, *see, e.g.,* Mendoza v. Mendoza, 4 Misc. 2d 1060, 1061, 77 N.Y.S.2d 169, 170 (Sup. Ct. N.Y. County 1947); *aff'd mem.,* 273 App. Div. 877, 77 N.Y.S.2d 264 (1st Dep't), *appeal dismissed,* 297 N.Y. 950, 78 N.Y.S.2d 561 (1948); R.J. Marshall, Inc. v. Turner Constr. Co., 207 Misc. 490, 493, 137 N.Y.S.2d 541, 544 (Sup. Ct. Dutchess County 1954), *aff'd mem.,* 285 App. Div. 1164, 141 N.Y.S.2d 824 (2d Dep't 1955), requests for a provisional remedy, *see, e.g.,* Richards v. Chuba, 195 Misc. 732, 734, 91 N.Y.S.2d 197, 199 (Sup. Ct. Rensselaer County 1949)(dictum), change of venue, *see, e.g.,* Ross v. City of Rochester, 8 App. Div. 2d 925, 925, 187 N.Y.S.2d 929, 930 (3d Dep't 1959), *aff'd mem.,* 8 N.Y.2d 1067, 170 N.E.2d 413, 207 N.Y.S.2d 282 (1960), and the interposition of a new defense, *see* Brown v. Leigh, 49 N.Y. 78, 80-81 (1872). The addition or deletion of parties, however, has not been permitted in an amended complaint without leave of the court. *See* Catanese v. Lipschitz, 44 App. Div. 2d 579, 580, 353 N.Y.S.2d 250, 252 (2d Dep't 1974); Pittman v. March Serv. Co., 141 N.Y.S.2d 74, 76 (Sup. Ct. Kings County 1955); CPLR 1003 (1976). Although many of the cases that liberally applied the right to amend pleadings interpreted the predecessor to CPLR 3025(a), CPA § 244 (repealed 1962), the case law remains viable. *See* Covino v. Alside Aluminum Supply Co., 42 App. Div. 2d 77, 81, 345 N.Y.S.2d 721, 726 (4th Dep't 1973); 3 WK&M ¶ 3025.03. The change in the language of section 244 of the CPA was only intended to clarify its meaning without altering its substance. FIRST REP., at 77; *see* 3 WK&M ¶ 3025.03.

A plaintiff may also amend his complaint as of right to assert a claim against a third-party defendant within 20 days after the plaintiff has been served with the third-party complaint. CPLR 1009 (1976); *see* Johnson v. Equitable Life Assurance Soc'y, 22 App. Div. 2d 141, 142, 254 N.Y.S.2d 261, 263 (1st Dep't 1964) (per curiam), *aff'd,* 18 N.Y.2d 933, 223 N.E.2d 562, 277 N.Y.S.2d 136 (1966). If the plaintiff exercises his discretion to amend, he may assert any claim he has against the third-party defendant, provided it arose out of the same transaction or series of transactions in the complaint. *See* Knorr v. City of Albany, 58 App. Div. 2d 904, 396 N.Y.S.2d 507 (3d Dep't 1977); Trybus v. Nipark Realty Corp., 26 App. Div. 2d 563, 271 N.Y.S.2d 5 (2d Dep't 1966); CPLR 1009, commentary at 129-30 (1976). *But see* 2 WK&M ¶ 1009.01. Likewise, he may not use the time provided by the statute to change allegations against the original defendant. 3 WK&M ¶ 3025.04.

[97] SIEGEL § 236, at 286; *see* H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 140 (2d ed. 1966).

[98] 68 App. Div. 2d 790, 418 N.Y.S.2d 679 (4th Dep't 1979).

[99] *Id.* at 794-95, 418 N.Y.S.2d at 681.

[100] *Id.* at 792, 418 N.Y.S.2d at 680. In negotiating to buy and lease back real property,

Suthers asserted a counterclaim in their answer against a bank officer, Jewett, and the bank-selected attorney, Estoff, alleging that their guarantee had been fraudulently induced.[101] Estoff timely served his reply to the counterclaim on January 9, 1978.[102] Upon request, the Suthers extended the time period for Jewett to reply until February 15, 1978.[103] Nineteen days after receiving Jewett's reply, the Suthers served an amended counterclaim as of right upon Estoff, who promptly returned it as untimely.[104] Agreeing that service was not timely under CPLR 3025(a), the Supreme Court, Erie County, rejected the Suthers' amended counterclaim.[105]

On appeal, the Appellate Division, Fourth Department, unanimously reversed,[106] construing the pertinent language of CPLR

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the Suthers guaranteed a loan granted to Coe-Fisher Lumber, Inc. *Id.*

[101] *Id.* at 793, 418 N.Y.S.2d at 681. The Suthers alleged in their counterclaim that Jewett's agent had informed them that their mortgage loan application would be granted if Estoff was permitted to handle the legal work. *Id.* at 793, 418 N.Y.S.2d at 680. The Suthers further alleged that, since Estoff referred to the guarantee at the signing as "unimportant papers," they were unaware of signing the guarantee until the bank informed them that it intended to hold them liable. *Id.*

[102] *Id.* at 793, 418 N.Y.S.2d at 681.

[103] *Id.*

[104] *Id.* Estoff alleged that the service of the amended counterclaim on March 6, 1978, 46 days after he had served his responsive pleading, was untimely under CPLR 3025(a). *Id.* at 794, 418 N.Y.S.2d at 681. The proposed amendment contained additional causes of action for malpractice and breach of contract, based on Estoff's negligent advice to sign the guarantee and failure to consummate the real property purchase from Coe-Fisher. *Id.* at 793, 418 N.Y.S.2d at 681.

[105] *Id.* at 794, 418 N.Y.S.2d at 681. The Suthers subsequently sought to amend their counterclaim by leave of the court under CPLR 3025(b). *Id.* at 793, 418 N.Y.S.2d at 681; *see* note 117 *infra*. The lower court denied the motion, finding that the new causes of action set forth in the amended counterclaim did not arise out of the same transaction or series of transactions as those delineated in the original counterclaim. *Id.* Moreover, the court held that the statute of limitations barred all claims based on the signing of the guarantee. *Id.*

[106] *Id.* at 794-95, 418 N.Y.S.2d at 681-82. Additionally, the fourth department held that the lower court had improperly denied leave to amend under CPLR 3025(b). *Id.* at 795, 418 N.Y.S.2d at 682; *see* note 105 *supra*. The court observed that CPLR 3025(b) is intended "to foster liberal amendment of pleadings prior to trial," *id.*; *see* Rife v. Union College, 30 App. Div. 2d 504, 505, 294 N.Y.S.2d 460, 462 (3d Dep't 1968); SIEGEL § 237, unless the amendments are clearly "futile," 68 App. Div. 2d at 795, 418 N.Y.S.2d at 682; *see* Martens v. Mercy Hosp., 64 App. Div. 2d 604, 605, 406 N.Y.S.2d 539, 540 (2d Dep't 1978).

Addressing the supreme court's denial of the 3025(b) motion on statute of limitations grounds, the appellate division declared that "[f]rom the face of the pleading the proof could show that Estoff's representation . . . may well have been within the three year statute of limitations." 68 App. Div. 2d at 795, 418 N.Y.S.2d at 682. The *Suthers* court therefore held that the statute of limitations did not require denial of the motion. *Id.* (citing CPLR 214(6)(1972)). The limitations of time issue was not determinative, however, since the court found that the claims in the amended counterclaim arose out of the same series of transactions pleaded in the original counterclaim and were thus timely under CPLR 203(e). *Id.* at 796, 418 N.Y.S.2d at 682; *see* Bilhorn v. Farlow, 60 App. Div. 2d 755, 401 N.Y.S.2d 115 (4th

3025(a) as permitting a party to amend his pleading as of right within 20 days of service of the last responsive pleading.[107] Justice Cardamone, writing for the court,[108] reasoned that since a party may amend its pleading only once under CPLR 3025(a), a contrary decision would require the pleader in a multiparty action to amend his complaint before viewing all responsive pleadings.[109] Although the promptly responding party is subjected to time extensions granted other parties, the court noted that prejudice is rarely occasioned by allowing amendments early in the litigation.[110] Additionally, the court observed that if the time within which a party is permitted to amend his pleading as of right were limited to within 20 days of service of the first responsive pleading, parties in multiparty actions may be reluctant to grant time extensions.[111] Finally, the literal construction of the statute, in the court's view, outweighed any possible prejudice and served to achieve a uniform application of the statute in as-of-right amendments.[112]

It is submitted that the *Suthers* court properly applied CPLR 3025(a) in a pragmatic manner,[113] consistent with the liberal principles of construction that govern the CPLR.[114] The court's literal in-

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Dep't 1977); note 118 *infra*. The appellate division concluded that there was no indication that Estoff would be prejudiced if leave to amend was granted under CPLR 3025(b) because the amendment merely alleged different theories of recovery without setting forth new transactions. 68 App. Div. 2d at 796, 418 N.Y.S.2d at 682-83.

[107] 68 App. Div. 2d at 795, 418 N.Y.S.2d at 681. The court explained that the language "'*a* pleading' [in CPLR 3025(a)] translates to '*any* pleading responding to it.'" *Id.* (emphasis in original).

[108] Justice Cardamone was joined in his opinion by Justices Hancock, Schnepp, Doerr, and Witmer.

[109] 68 App. Div. 2d at 794, 418 N.Y.S.2d at 681. The *Suthers* court observed that "[n]o right exists to amend once for *each* opposing party." *Id.* (emphasis added). Consequently, the pleader "hopes that any error, deficiency for oversight in his original pleading may be picked up all at one time in the only amendment as of right to which he is entitled." *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* at 795, 418 N.Y.S.2d at 682.

[113] The *Suthers* court's interpretation is clearly in line with the legislative objective of the pleading statutes to ensure that a party is not "bound to the terms of an original pleading if mistakes or defects therein are later recognized or if additional facts are thereafter uncovered." H. WACHTELL, *supra* note 97, at 141; *see* 3 WK&M ¶ 3026.01. Moreover, as is the general principle in applying a statute without the benefit of precedent, it is suggested that the *Suthers* court determined the most reasonable statutory interpretation in light of the facts. *See* McNaught v. Rosenfeld, 168 Misc. 888, 888, 6 N.Y.S.2d 687, 688 (N.Y.C. City Ct. N.Y. County 1938); CPLR 104 (1972); N.Y. STAT. §§ 71, 92 (McKinney 1971).

[114] CPLR 3026 (1974) provides: "Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced." *See, e.g.*, Ragto, Inc. v. Schneiderman, 69 App. Div. 2d 815, 816, 414 N.Y.S.2d 746, 747 (2d Dep't 1979). The author of one treatise observed:

terpretation of the statute ensures that a party will be able to exercise intelligently and effectively his single opportunity to amend his pleading as of right.[115] Very often, the time of service of the pleadings upon the individual parties in an action is staggered through no fault of the plaintiff or counterclaiming defendant.[116] If a party were compelled to expend his right to respond as of course inefficiently upon receiving the first responsive pleading, the pleadings subsequently received from the remaining parties might necessitate otherwise avoidable motion practice under CPLR 3025(b).[117] Moreover, it appears that the same result would obtain whether

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> The primary function of pleadings under the CPLR is to give adequate notice to the court and the adverse party of the transactions or occurrences intended to be proved and the material evidence of each cause of action or defense. . . .
>
> Lawsuits should be determined on their merits and according to the dictates of justice, not on the existence or nonexistence of artfully drawn sentences.

3 WK&M ¶ 3026.01.

[115] An exception exists to the rule that a party may amend his pleading only once as of right. In such a situation, the first amendment as of right may take place when the defendant amends his answer. If the plaintiff then amends his complaint and the defendant serves the required answer, the defendant may thereafter reamend his answer—the second amendment as of right. *See* Brooks Bros. v. Tiffany, 117 App. Div. 470, 471-72, 102 N.Y.S. 626, 627 (1st Dep't 1907); SIEGEL § 236; 3 WK&M ¶ 3025.02.

[116] Delays causing staggered pleadings could, for example, be the result of a stipulation, *see* SIEGEL § 204, the requirement that an incompetent or an infant be represented by a guardian, *see* CPLR §§ 1201-1203 (1974), the mere inability of a party to serve process on his adversaries at the same time, or the service of a summons and complaint on one of several defendants outside the state, *see* CPLR 320(a)(1974).

[117] A party is still permitted to amend by obtaining leave of the court under CPLR 3025(b) after he has utilized his amendment as of course or allowed the time period for making an amendment as of course to expire. SIEGEL § 236. CPLR 3025(b) (1974) provides in pertinent part:

> A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences at any time by leave of court . . . . Leave shall be freely given upon such terms as may be just . . . .

CPLR 3025(b) has been interpreted to mandate that the court liberally grant leave to amend "unless the rights of [the responding] party are substantially prejudiced." Sheldon Elec. Co. v. Oriental Blvd. Corp., 56 App. Div. 2d 886, 392 N.Y.S.2d 485 (2d Dep't 1977); *see* Mitchell v. City of New York, 44 App. Div. 2d 852, 852, 355 N.Y.S.2d 805, 806 (2d Dep't 1974); FIRST REP., at 419. Sufficient prejudice exists for a court to deny leave to amend where there is "some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add." SIEGEL § 237; *see* Crombie v. Miller, 14 App. Div. 2d 895, 896, 221 N.Y.S.2d 374, 375 (2d Dep't 1961); Lehman v. Hartke, 286 App. Div. 661, 664, 146 N.Y.S.2d 444, 446 (3d Dep't 1955) (per curiam). In determining whether to grant leave to amend, "[t]he court need only assure itself that the timing and scope of the requested pleading does not prejudice the rights of another party." 3 WK&M ¶ 3025.14. Accordingly, full litigation of a controversy should be allowed in all cases in which pleading errors create no real prejudice. Rife v. Union College, 30 App. Div. 2d 504, 505, 294 N.Y.S.2d 460, 462 (3d Dep't 1968).

the amendment was made under subsection (a) or (b). Notions of fairness and expeditiousness, therefore, dictate permitting a party to exercise his sole opportunity to amend as of right upon the receipt of the last responsive pleading. To require leave to amend under CPLR 3025(b) would serve neither the interests of the litigants nor judicial economy.[118]

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ARTICLE 45—EVIDENCE

CPLR 4502(b): Spousal privilege waived by commencement of wrongful death action

CPLR 4502(b) generally prohibits compulsory disclosure of confidential interspousal communications made in reliance upon the marital relationship.[119] It is well settled, however, that the priv-

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[118] *See generally* S. NAGEL, IMPROVING THE LEGAL PROCESS 269-328 (1975). An amendment adding an additional theory of recovery based on the same transactions set forth in the original complaint, without alleging new and essential facts, is likely to be permitted under CPLR 3025(b). CPLR 3025(b), commentary at 479-80 (1974). The related claim, if otherwise stale for statute of limitations purposes, is nevertheless timely by virtue of CPLR 203(e) (1972). A claim that does not arise out of the transactions set forth in the original pleading, therefore, will generally not be deemed interposed at the time of the original pleading. *See, e.g.*, New York Tel. Co. v. County Asphalt, Inc., 86 Misc. 2d 958, 382 N.Y.S.2d 211 (Sup. Ct. Ulster County 1976); Werner Spitz Constr. Co. v. Vanderlinde Elec. Corp., 64 Misc. 2d 157, 314 N.Y.S.2d 567 (Monroe County Ct. 1970).

Although the issue has not arisen under the CPLR, several courts construing the CPA indicated that additional claims set forth in amendments as of right always relate back to the time of the original pleading, even if they arose from unrelated transactions. *See* Guntzer v. County of Westchester, 273 App. Div. 2d 966, 966, 78 N.Y.S.2d 70, 72 (2d Dep't), *aff'd*, 298 N.Y. 755, 83 N.E.2d 157 (1948); Webber v. Socony Mobil Oil Co., 41 Misc. 2d 153, 153, 244 N.Y.S.2d 830, 831 (Sup. Ct. N.Y. County 1963); Rusher Ford Sales, Inc. v. Glens Falls Ins. Co., 32 Misc. 2d 468, 469, 223 N.Y.S.2d 392, 394 (Sup. Ct. Erie County), *aff'd mem.*, 16 App. Div. 2d 1034, 230 N.Y.S.2d 680 (4th Dep't 1962); McNaught v. Rosenfeld, 168 Misc. 888, 889, 6 N.Y.S.2d 687, 688 (N.Y.C. Civ. Ct. N.Y. County 1938); *In re* Miller's Will, 162 Misc. 563, 570-71, 295 N.Y.S. 943, 952 (Sur. Ct. Kings County), *aff'd mem.*, 252 App. Div. 872, 300 N.Y.S. 798 (2d Dep't 1937). Commentators have argued that such a construction may continue to be applicable under the CPLR. H. WACHTELL, *supra* note 97, at 144; 3 WK&M ¶ 3025.09.

[119] CPLR 4502(b) (1963) provides:

> A husband or wife shall not be required, or, without the consent of the other if living, allowed, to disclose a confidential communication made by one to the other during the marriage.

At common law, spouses were considered incompetent to testify for or against each other. *See* RICHARDSON, EVIDENCE § 445 (10th ed. 1973); 8 WIGMORE, EVIDENCE §§ 2227, 2236 (McNaughton rev. ed. 1961). By statute, New York, along with the majority of other jurisdictions, removed the incompetency in most situations. *See* CPLR 4502(a), 4512 (1963). The