St. John's Law Review

Volume 51
Number 1 *Volume 51, Fall 1976, Number 1*

Article 10

July 2012

CPLR 303: Counterclaim by Seider-Predicated Third-Party Dole Defendant Does Not Constitute Commencement of an Action

St. John's Law Review

This criticism, however, is more properly addressed to the legislature than the courts. It is submitted that CPLR 215(3) should be amended to include abuse of process among the intentional torts subject to a one-year statute of limitations. Until such an amendment is forthcoming, however, the *Levine* court's application of a three-year period is the proper result.

ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 303: Counterclaim by Seider*-predicated third-party* Dole *defendant does not constitute commencement of an action.*

CPLR 303 provides that the commencement of an action in New York by a person not otherwise amenable to personal jurisdiction exposes the plaintiff to full in personam jurisdiction in any action brought by a party to the original action which "would have been permitted as a counterclaim had the action been brought in the supreme court."[53] Thus, a nonresident who commences an action in New York assumes the risk that a party to the action may assert a claim against him, for which, pursuant to CPLR 303, he is subject to full in personam jurisdiction.[54] Recently, in *Green v. Bender*,[55] the Supreme Court, Westchester County, was confronted with the novel question whether a *Seider*-predicated[56] third-party

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[53] CPLR 303.

[54] *See* 1 WK&M ¶ 303.01.

[55] 175 N.Y.L.J. 115, June 15, 1976, at 11, col. 5 (Sup. Ct. Westchester County).

[56] In Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), the Court of Appeals held that a nondomiciliary may be brought within the jurisdiction of the New York courts by attachment of his automobile liability insurance policy if his insurer is present in this state. The Court reasoned that because the insurer had an obligation to the insured to defend and indemnify him to the extent of the insurance policy limits, a "debt" existed which was subject to attachment. The *Seider* decision was reconsidered and reaffirmed in Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), wherein the Court declared that a *Seider*-predicated defendant is entitled to make a limited appearance whereby his liability cannot exceed the limits of his insurance policy. *Id.* at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636-37. *See also* Bertucci v. Red Top Sedan Serv., Inc., 48 App. Div. 2d 677, 368 N.Y.S.2d 236 (2d Dep't 1975) (mem.); Seligman v. Tucker, 46 App. Div. 2d 402, 362 N.Y.S.2d 881 (4th Dep't), *motion for leave to appeal dismissed*, 36 N.Y.2d 921, 335 N.E.2d 844, 373 N.Y.S.2d 536 (1975) (mem.); Tjepkema v. Kenney, 31 App. Div. 2d 908, 298 N.Y.S.2d 175 (1st Dep't) (mem.), *motion for leave to appeal dismissed*, 24 N.Y.2d 740, 250 N.E.2d 68, 302 N.Y.S.2d 1025 (1969). The right to a limited appearance has been codified in CPLR 320(c)(1), which provides for a limited appearance where quasi-in-rem jurisdiction has been obtained over a defendant by virtue of attachment of his property within the state. As supplemented by *Simpson*, *Seider* has withstood constitutional attack in the federal courts. *See* Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), *aff'd en banc*, 410 F.2d 117 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969). For an analysis of the constitutional issues presented in *Seider*, see Note, Seider v. Roth: *The Constitutional Phase*, 43 ST. JOHN'S L. REV. 58 (1968).

defendant who counterclaims against the third-party plaintiff for *Dole*[57] apportionment commences an action which results in his submission to in personam jurisdiction pursuant to CPLR 303. In resolving this question, the *Green* court held that the assertion of a *Dole* apportionment claim by any procedural device against a party in a pending action does not result in the claimant's exposure to in personam jurisdiction under CPLR 303.[58]

In *Green,* plaintiff, a New York resident, was injured in New Hampshire when the automobile in which he was riding collided with a double-parked truck. Plaintiff commenced a personal injury action against the operator of the automobile, Bender, who impleaded Harlowe, the nonresident owner of the truck, for *Dole* apportionment. As a predicate for jurisdiction, Bender served an order of attachment upon Harlowe's casualty insurer. In response, Harlowe served an answer containing general denials and a counterclaim against Bender for *Dole* apportionment. Subsequently, plaintiff attempted to bring Harlowe into the action as a prime defendant,[59] contending that the interposition of the counterclaim by Harlowe constituted the commencement of an action within the meaning of CPLR 303 and thus subjected Harlowe to service of process upon his counsel.[60] Harlowe, however, argued that a claim for *Dole* apportionment is a defensive maneuver rather than the commencement of an action within the ambit of CPLR 303, and therefore should not expose a *Seider*-predicated defendant to in

[57] In Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), the Court adopted the theory of equitable apportionment of fault among joint tortfeasors. It ruled that a claim for apportionment may be asserted by either a third-party action or a separate proceeding. *Id.* at 149, 282 N.E.2d at 292, 331 N.Y.S.2d at 387. In Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972), wherein defendants crossclaimed for *Dole* apportionment, the Court ruled that the degree of responsibility of each tortfeasor should be determined at trial. Consequently, claims for *Dole* apportionment have taken many forms. *See, e.g.,* Katz v. Dykes, 41 App. Div. 2d 913, 343 N.Y.S.2d 399 (1st Dep't 1973) (mem.) (counterclaim); Wallace v. Weiss, 82 Misc. 2d 1053, 372 N.Y.S.2d 416 (Sup. Ct. Monroe County 1975) (cross-claim); Szarewicz v. Alboro Crane Rental Corp., 73 Misc. 2d 232, 341 N.Y.S.2d 153 (Sup. Ct. Bronx County 1973) (third-party action). *Dole* apportionment is now codified in CPLR 1403, which provides: "A cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third-party claim in a pending action."

[58] 175 N.Y.L.J. 115 at 12, col. 2.

[59] *Id.* at 11, cols. 5-6. In the alternative, plaintiff sought an order of attachment against Harlowe's insurance policy. *Id.*, col. 6. The court summarily granted this motion. *See id.* at 12, col. 3.

[60] *Id.* at 11, col. 6. A counterclaim is a cause of action, CPLR 3019(a), and thus lies within the ambit of CPLR 303. Pursuant to a strict interpretation of this provision, it can be argued that a *Seider*-predicated defendant who counterclaims may lose his jurisdictional defenses. *See* note 70 *infra.*

personam jurisdiction.[61]

In arriving at his decision, Justice Gagliardi noted that CPLR 303 is designed to permit service of process upon local counsel representing a nonresident who has commenced an action in New York. It was the opinion of Justice Gagliardi that Harlowe's *Dole* counterclaim fell within the literal scope of this provision.[62] Nevertheless, the court declined to hold that interposition of a *Dole* counterclaim exposed Harlowe to in personam liability. This conclusion was based essentially upon New York's refusal to strictly apply the "ancient" doctrine that a nonresident defendant who seeks affirmative relief in the forum waives all his jurisdictional defenses.[63] Since the liberalization of this doctrine, New York courts have held that the assertion of a counterclaim, at least one related to the complaint, by a nonresident defendant does not result in a waiver of jurisdictional defenses.[64] Also in line with this approach is CPLR 320(c)(1), which permits a nonresident defendant, in a case where jurisdiction has been obtained only by the attachment of property within the state, to contest on the merits without subjecting himself to in personam jurisdiction.[65]

Since a *Dole* counterclaim for apportionment is related to the subject matter of the complaint, the *Green* court concluded that its interposition should not be viewed as the commencement of an action within the meaning of CPLR 303.[66] Thus, the *Green* court

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[61] 175 N.Y.L.J. 115 at 11, col. 6.

[62] *Id.* at 12, col. 2.

[63] *Id.*, col. 1; *see* CPLR 3211(e); CPLR 3211, commentary at 63-64 (McKinney 1970); *id.* at 18-19 (McKinney Supp. 1976).

[64] 175 N.Y.L.J. 115 at 12, col. 1. *See, e.g.*, Goodman v. Solow, 27 App. Div. 2d 920, 279 N.Y.S.2d 377 (1st Dep't) (mem.), *leave to appeal denied*, 20 N.Y.2d 646, 231 N.E.2d 789, 285 N.Y.S.2d 1026 (1967); M. Katz & Son Billiard Prods., Inc. v. G. Correale & Sons, Inc., 26 App. Div. 2d 52, 270 N.Y.S.2d 672 (1st Dep't 1966), *aff'd*, 20 N.Y.2d 903, 232 N.E.2d 864, 285 N.Y.S.2d 871 (1967) (mem.).

[65] *See* CPLR 320, commentary at 373 (McKinney 1972).

[66] Where a counterclaim is the outgrowth of the primary action, courts have held that in the interest of judicial economy, assertion of such a counterclaim should not result in a loss of jurisdictional defenses. *See, e.g.*, Italian Colony Restaurant, Inc. v. Wershals, 45 App. Div. 2d 841, 358 N.Y.S.2d 448 (2d Dep't 1974) (mem.). *See also* CPLR 320, commentary at 379 (McKinney 1972), wherein Professor McLaughlin draws a similar distinction between those claims which are related to the plaintiff's complaint and those based on events independent of the matters in the complaint. Where a defendant institutes a cross-claim or counterclaim unrelated to the plaintiff's cause of action, he is really introducing what could, and indeed, should, be a separate lawsuit. Professor McLaughlin thus concludes:

> Since it is no more convenient for the court to try that claim in the plaintiff's litigation than to try it in an independent lawsuit, . . . judicial efficiency is not particularly enhanced by this procedure, and, therefore, if the defendant desires to take this tack, he should be forced to surrender his limited appearance and to submit to full in personam jurisdiction.

held that the "injection" of *Dole* apportionment by any procedural device against a party in a pending action does not expose the claimant to in personam jurisdiction.[67]

Prior to *Green,* it was generally accepted that a claim for *Dole* apportionment merely constitutes a defense—an attempt by the defendant to avoid being held liable for the full amount of plaintiff's claim.[68] In fact, it was stated that a *Dole* claim has no existence independent of the primary claim asserted by the plaintiff.[69] Consequently, the *Green* court appears to have been on sound footing in characterizing Harlowe's *Dole* counterclaim as a defense rather than an attempt to seek affirmative relief.[70]

It is submitted, however, that the *Green* court neglected to examine fully the applicability of CPLR 303 to the case at bar. Although the statute does not expressly so provide, it seems apparent that it was intended to be utilized only by a defendant.[71] The terms of the statute require that the action in which in personam

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Id. But if the defendant is asserting a claim which arises out of the identical action, and is really defending his interest, "only the gravest considerations" should cause the defendant's limited appearance to ripen into full jurisdiction. The defendant should be encouraged to interpose his counterclaim, rather than to wait for a determination of plaintiff's claim and then bring a separate action. *Id.* at 379-80.

[67] 175 N.Y.L.J. 115 at 12, col. 2.

[68] *See, e.g.,* Tarantola v. Williams, 48 App. Div. 2d 552, 555, 371 N.Y.S.2d 136, 140 (2d Dep't 1975).

[69] *Id.* The *Tarantola* court, in interpreting the effect of a general release on the right to *Dole* apportionment, stated that such a claim "is more in the nature of a defense . . . than an affirmative claim . . . ." *Id.* at 554, 371 N.Y.S.2d at 140. Consequently, the general release did not result in loss of the right to indemnification or apportionment of liability. *Accord,* Slater v. American Mineral Spirits Co., 33 N.Y.2d 443, 449, 310 N.E.2d 300, 303, 354 N.Y.S.2d 620, 625 (1974) (Jasen, J., dissenting).

[70] *But see* Brooks v. Birmes, 169 N.Y.L.J. 14, Jan. 19, 1973, at 17, col. 5 (Sup. Ct. Queens County). In *Brooks,* a *Seider*-predicated defendant sought to counterclaim for *Dole* apportionment against the plaintiff. In granting the defendant's motion to amend his answer to allow interposition of the claim, the court warned that the defendant was subjecting himself to in personam liability.

In discussing *Brooks,* Justice Gagliardi distinguished the factual situation present in *Green.* In *Brooks,* he explained, "apportionment was not in the case prior to the motion for leave to amend, the claim was directed against the plaintiff and CPLR 303 was not considered." 175 N.Y.L.J. 115 at 12, col. 2. In accord with *Brooks,* however, is Ausubel, *The Impact of New York's Judicially Created Loss Apportionment Amongst Tortfeasors,* 38 ALB. L. REV. 155, 168-69 (1974), wherein the author agrees that when a defendant interposes a counterclaim, cross-claim or third-party complaint, even for *Dole* apportionment, he seeks *affirmative* relief, and is not merely asserting a defense to plaintiff's claim.

[71] CPLR 303 is based on CPA 227-a, which was specifically limited to defendants. CPLR 303, commentary at 156 (McKinney 1972). "It applies to a 'separate action brought against the plaintiff by the defendant in an action first brought against him by the plaintiff.' " 37 ST. JOHN'S L. REV. 285, 306 (1963), *quoting* PRASHKER, NEW YORK PRACTICE § 99A, at 232 (4th ed. 1959) (discussing CPA 227-a).

jurisdiction is sought be one which could have been brought as a counterclaim in the original action had the original action been brought in the supreme court. Since only a defendant can counterclaim,[72] it is logical to conclude that CPLR 303 should be available only to a defendant.[73]

In *Green,* the party seeking to take advantage of CPLR 303 was the plaintiff in the primary action. Harlowe's counterclaim was asserted not against him, but rather against Bender; hence, the primary plaintiff should not be considered a defendant within the context of CPLR 303. Moreover, since a *Dole* claim has generally been considered a defense rather than the commencement of an action, it would seem that even Bender could not have utilized CPLR 303 to secure in personam jurisdiction over Harlowe.[74]

Finally, it should also be noted that the counterclaim interposed by Harlowe was superfluous. Bender had already introduced the apportionment issue by impleading Harlowe, and the latter's counterclaim added nothing to the action. In all probability, Harlowe, who could not actually benefit by the interposition of a *Dole* counterclaim, did so in conformity with his insurer's pro forma practice.[75]

In conclusion, while it is clear that Justice Gagliardi reached the correct result in *Green,* it is submitted that the court's inquiry into CPLR 303 should have revealed that, by its terms, this statute was intended to be utilized not by a plaintiff in the primary action, but instead, only by a defendant.

CRIMINAL PROCEDURE LAW

Court of Appeals reaffirms vitality of Donovan-Arthur *rule.*

Stemming from a long line of New York decisions, the *Donovan-Arthur* rule requires suppression of any statements elicited from a criminal defendant in the absence of his retained or assigned counsel unless the defendant has first waived his rights in the presence of his attorney.[76] Although it was originally held to be

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[72] *See* CPLR 3019(a).

[73] *See* CPLR 303, commentary at 156-57 (McKinney 1972).

[74] *See* notes 66-70 and accompanying text *supra.*

[75] Indeed, had the court ruled in favor of Green and held that Harlowe waived his jurisdictional defenses by counterclaiming, it is quite possible that Harlowe would have had a claim against his insurer "for its counsel's zealousness in exposing the insured to personal liability." 175 N.Y.L.J. 115 at 12, col. 3 (footnote omitted).

[76] The *Donovan-Arthur* rule was developed in a line of cases that predated the Supreme Court decisions in Miranda v. Arizona, 384 U.S. 436 (1966), and Escobedo v. Illinois, 378 U.S.