St. John's Law Review

Volume 51, Summer 1977, Number 4 Article 10

CPLR 4102(a): Party Requesting Nonjury Trial May Not Later Object to Withdrawal of Another Party's Demand for Jury Trial

St. John's Law Review

spite the questionable result reached, the decision in *Blum* may have the salutory effect of focusing legislative attention upon this area. As a consequence, it is hoped legislative action significantly reducing the statute of limitations for actions in contribution will be forthcoming.

ARTICLE 41 — TRIAL BY A JURY

CPLR 4102(a): Party requesting nonjury trial may not later object to withdrawal of another party's demand for jury trial.

CPLR 4102(a) requires a party who desires a jury trial to include a demand in a note of issue served on all parties and filed with the court.[109] Failure to include the demand is deemed a waiver of the right to a jury trial.[110] To withdraw a demand under 4102(a), a party must obtain the consent of the other parties to the action.[111] Recently, in *Gonzalez v. Concourse Plaza Syndicates, Inc.*,[112] the Court of Appeals, in a per curiam opinion, held that a party who indicates his preference for a nonjury trial in a note of issue thereby consents to any subsequent withdrawal of demand for a jury trial.[113]

The *Gonzalez* plaintiff commenced a wrongful death action after her husband fell from a window he was washing at the Concourse Plaza Hotel, naming the hotel and the Weinbergs, occupants of the apartment whose windows the decedent was washing, as defendants. Plaintiff filed a note of issue requesting a trial without a

---

accrue at the time the tortfeasor is served with process and is able to obtain jurisdiction over the third-parties. *Id.* at 230-32.

[109] CPLR 4102(a) provides in pertinent part:

> Any party may demand a trial by jury of any issue of fact triable of right by a jury, by serving upon all other parties and filing a note of issue containing a demand for trial by jury. Any party served with a note of issue not containing such a demand may demand a trial by jury by serving upon each party a demand for a trial by jury and filing such demand . . . within fifteen days after service of the note of issue.

For a general discussion of CPLR 4102, see 4 WK&M ¶¶ 4102.01-.22.

[110] CPLR 4102(a). Although the right to trial by jury is protected by the state constitution, "a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law." N.Y. CONST. art. 1, § 2. The Court of Appeals has held that the right to a jury trial must be timely asserted. *See* Brenner v. Great Cove Realty Co., 6 N.Y.2d 435, 442, 160 N.E.2d 826, 829, 190 N.Y.S.2d 337, 342 (1959). *See generally* Craig v. City of New York, 228 App. Div. 275, 239 N.Y.S. 328 (1st Dep't 1930); 4 WK&M ¶ 4102.10.

[111] CPLR 4102(a). *See* Russell v. Russell, 40 App. Div. 2d 945, 339 N.Y.S.2d 319 (4th Dep't 1972) (mem.); Schrank v. Rensselaer Assocs., 65 Misc. 2d 428, 317 N.Y.S.2d 674 (Sup. Ct. Rensselaer County 1970) (mem.).

[112] 41 N.Y.2d 414, 361 N.E.2d 1011, 393 N.Y.S.2d 362 (1977) (per curiam), *aff'g* 51 App. Div. 2d 42, 378 N.Y.S.2d 716 (1st Dep't 1976).

[113] 41 N.Y.2d at 416, 361 N.E.2d at 1013, 393 N.Y.S.2d at 363.

jury, but due to a demand by the Weinbergs a jury trial was held. After three jury trials a verdict was rendered in favor of defendants Weinberg and against defendant Concourse Plaza.[114] Subsequently, the appellate division set aside the verdict against Concourse,[115] and the Flatiron Window Cleaning Company, decedent's employer, was impleaded upon remand.[116] As the jury for the fourth trial was about to be selected, the defendants joined in a motion to transfer the action to the nonjury calendar.[117] The trial court granted the motion and denied plaintiff's application to file a demand for a jury trial *nunc pro tunc*. A divided appellate division affirmed.[118]

The Court of Appeals, in reaching its conclusion to uphold the lower court's decision,[119] endorsed an interpretation of CPLR 4102 previously employed by the Appellate Division, First Department, in *Downing v. Downing*.[120] The *Downing* court had reasoned that the clause in 4102(a) conditioning the right to withdraw a demand upon the consent of all the parties was designed to "protect the party who in reliance on his opponent's demand for a jury trial properly fails to make demand in his own note of issue."[121] Noting that the plaintiff in *Gonzalez* had specifically expressed a preference for a nonjury trial,, the *Gonzalez* Court ruled that she was without need of this statutory protection. Her request for trial without a jury was

[114] *Id.* at 416, 361 N.E.2d at 1012, 393 N.Y.S.2d at 363. The first trial was declared a mistrial. *Id.* at 415, 361 N.E.2d at 1012, 393 N.Y.S.2d at 363. At the second trial, plaintiff's cause of action was dismissed at the close of her case in chief, but the first department reversed. 31 App. Div. 2d 401, 298 N.Y.S.2d 167 (1st Dep't 1969).

[115] 41 N.Y.2d at 416, 361 N.E.2d at 1012, 393 N.Y.S.2d at 363. Since the Weinbergs' verdict was undisturbed, they were dismissed from the case. 37 App. Div. 2d 822, 324 N.Y.S.2d 962 (1st Dep't 1971) (mem.).

[116] Decedent's employer was impleaded for contribution pursuant to the decision in Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

[117] 41 N.Y.2d at 416, 361 N.E.2d at 1012, 393 N.Y.S.2d at 363.

[118] 51 App. Div. 2d at 43, 378 N.Y.S.2d at 718. Under CPLR 3402(b), a new party brought into an action must be served with the note of issue already filed. The new party may then demand a jury trial by following the procedures outlined in CPLR 4102. Flatiron did not, however, demand trial by jury. Since neither Concourse Plaza nor Flatiron had requested a jury trial, and the Weinbergs were no longer parties to the litigation, the first department considered the situation similar to one in which no party had ever demanded a jury trial. 51 App. Div. 2d at 43, 378 N.Y.S.2d at 718.

[119] 41 N.Y.2d at 417, 361 N.E.2d at 1013, 393 N.Y.S.2d at 364.

[120] 32 App. Div. 2d 350, 302 N.Y.S.2d 334 (1st Dep't 1969). The facts in *Downing* were quite similar to those in *Gonzalez*. The *Downing* plaintiff had waived a jury trial by failing to include a demand in his note of issue, but defendant did make such a demand. Before trial, defendant moved to strike his demand for a jury and plaintiff objected, insisting that his consent was required under CPLR 4102(a). The court found plaintiff's consent unnecessary. *Id.* at 351, 302 N.Y.S.2d at 336.

[121] *Id.*

deemed advance consent to any withdrawal or waiver of a demand for jury trial.[122] Judge Fuchsberg, who authored a dissenting opinion,[123] contended that CPLR 4102(a) clearly requires the consent of all parties for the withdrawal or waiver of a demand.[124] Pointing to the state constitution's guarantee of the right to a jury trial, the Judge reasoned that provisions for waiver of that right should be strictly construed.[125] Thus, Judge Fuchsberg concluded that plaintiff may invoke the protection of 4102(a).[126]

The *Gonzalez* majority appears to have reached the proper conclusion.[127] A plaintiff who has waived a jury trial either by failing to file a demand or by indicating a preference for a nonjury trial, absent reliance on another party's demand, should not later be permitted to fall back on CPLR 4102(a).[128] Indeed, it is difficult to conceive of a situation in which the *Gonzalez* result would work an injustice.[129] The lower courts have been applying this rationale with apparently satisfactory results.[130] If a situation should arise where a party is aggrieved by the withdrawal of a demand, however, the court may grant leave to request a jury trial *nunc pro tunc* by virtue of the discretionary powers bestowed by CPLR 4102(e).[131]

---

[122] 41 N.Y.2d at 416, 361 N.E.2d at 1012-13, 393 N.Y.S.2d at 363.

[123] Judge Cooke filed a separate dissenting opinion. 41 N.Y.2d at 418, 361 N.E.2d at 1014, 393 N.Y.S.2d at 364 (Cooke, J., dissenting). Although he agreed with the majority's construction of 4102(a), Judge Cooke voted to reverse and remand the case for a determination whether relief should be granted under CPLR 4102(e). *Id. See* note 131 *infra.*

[124] 41 N.Y.2d at 417, 361 N.E.2d at 1013, 393 N.Y.S.2d at 364 (Fuchsberg, J., dissenting).

[125] *Id.* at 418, 361 N.E.2d at 1013, 393 N.Y.S.2d at 364 (Fuchsberg, J., dissenting). Judge Fuchsberg's position on the importance of the right to trial by jury and the concomitant necessity to strictly construe statutes limiting that right appears to command wide support. *See, e.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). *See also* Aetna Ins. Co. v. Kennedy *ex rel.* Bogash, 301 U.S. 389 (1937); McNulty v. Mount Morris Elec. Light Co., 172 N.Y. 410, 65 N.E. 196 (1902).

[126] 41 N.Y.2d at 418, 361 N.E.2d at 1013, 393 N.Y.S.2d at 364 (Fuchsberg, J., dissenting).

[127] It should be noted that Professor David Siegel has indicated that "[t]he legislative view, insofar as any can be discerned, would apparently" not support the *Gonzalez* result. CPLR 4102, commentary at 54 (McKinney Supp. 1976-1977). He also has stated, however, that the "result is not inherently an unjust one." *Id.*

[128] *See* Downing v. Downing, 32 App. Div. 2d 350, 302 N.Y.S.2d 334 (1st Dep't 1969).

[129] *See* note 127 *supra.*

[130] *See, e.g.*, Schrank v. Rensselaer Assocs., Inc., 65 Misc. 2d 428, 317 N.Y.S.2d 674 (Sup. Ct. Rensselaer County 1970) (mem.); Halpert v. Ingram & Greene, Inc., 70 Misc. 2d 872, 333 N.Y.S.2d 913 (N.Y.C. Civ. Ct. N.Y. County 1972). *See also* Jefferson Pulp & Paper, Inc. v. Arrington, 76 Misc. 2d 794, 352 N.Y.S.2d 127 (N.Y.C. Civ. Ct. Queens County 1974).

[131] Under CPLR 4102(e), "[t]he court may relieve a party from the effect of failing to comply with [4102(a)] if no undue prejudice to the rights of another party would result." *Id.* The plaintiff in *Gonzalez* had applied for relief under this section, but the trial court summarily denied the motion. 41 N.Y.2d at 415, 361 N.E.2d at 1012, 393 N.Y.S.2d at 362. It is submitted that the lower court properly denied relief. Section 4102(e) has uniformly been

Nonetheless, the *Gonzalez* Court may have overlooked an argument supportive of the plaintiff's position. A line of pre-CPLR authority holds that the right to demand a jury revives upon the granting of a new trial.[132] Under this view, plaintiff's expressed preference for a trial without a jury would apparently not be binding at a retrial.[133] If so, plaintiff arguably was entitled to the protection of CPLR 4102(a), since, in failing to demand a jury for the second and

---

construed as allowing a court to favorably consider such a motion only when a party has failed to demand a jury through excusable mistake or inadvertance. *See, e.g.*, International Mining Corp. v. Aerovias Nacionales De Colombia, 49 App. Div. 2d 855, 374 N.Y.S.2d 18 (1st Dep't 1975) (mem.); Heller v. Hacken, 40 App. Div. 2d 1012, 338 N.Y.S.2d 943 (2d Dep't 1972) (mem.); Zelvin v. Pagliocca, 32 App. Div. 2d 561, 300 N.Y.S.2d 361 (2d Dep't 1969); Eastern Air Lines, Inc. v. Town of Islip, 14 App. Div 2d 792, 220 N.Y.S.2d 461 (2d Dep't 1961) (mem.); Schwartz v. Sunlight Apts., Inc., 274 App. Div. 901, 83 N.Y.S.2d 80 (2d Dep't 1948) (mem.). Since the *Gonzalez* plaintiff waived her right by making a specific request for a nonjury trial, 41 N.Y.2d at 415, 361 N.E.2d at 1012, 393 N.Y.S.2d at 362-63, her situation does not appear to satisfy either of these criteria. *See generally* 4 WK&M ¶ 4102.17.

[132] A substantial number of cases appear to hold that the right to demand a jury revives upon retrial. *See, e.g.*, Midtown Contracting Co. v. Goldsticker, 169 App. Div. 21, 154 N.Y.S. 451 (1st Dep't 1915) (per curiam); Asbestolith Mfg. Co. v. Rowland, 143 App. Div. 418, 128 N.Y.S. 173 (1st Dep't 1911); Manheim v. Seitz, 36 App. Div. 352, 55 N.Y.S. 321 (2d Dep't 1899); Fuller Coal & Oil Corp. v. Dayton Holding Corp., 9 Misc. 2d 341, 170 N.Y.S.2d 121 (Sup. Ct. App. T. 1st Dep't 1957) (per curiam); Lefkowitz v. Resnick, 196 Misc. 661, 92 N.Y.S.2d 441 (Bronx Mun. Ct. 1949). In one case, the court remarked that this "proposition is not questioned and appears to be sustained by authority." Asbestolith Mfg. Co. v. Rowland, 143 App. Div. 418, 420, 128 N.Y.S. 173, 174 (1st Dep't 1911) (citations omitted); *cf. In re* Will of Allaway, 187 App. Div. 87, 175 N.Y.S. 70 (2d Dep't 1919) (the court has discretion to grant a jury trial upon retrial). Nevertheless, one commentator has stated that a party who has waived his right to a jury trial may not reassert this right upon the granting of a new trial. 4 WK&M ¶ 4102.17. This view stems from the Appellate Division, Second Department, decision in Caldovino v. Scala, 10 App. Div. 2d 853, 199 N.Y.S.2d 63 (2d Dep't 1960) (mem.). In *Caldovino*, the court held that "[i]n the absence of a material change in the issue, appellant, having waived her right to a jury trial, may not retract that waiver, which remains operative during the life of the litigation." *Id.*, 199 N.Y.S.2d at 64, (citing Vincent v. Cooperman, 283 App. Div. 812, 128 N.Y.S.2d 634 (2d Dep't 1954) (mem.); Laventhall v. Fireman's Ins. Co., 266 App. Div. 756, 41 N.Y.S.2d 302 (2d Dep't 1943) (mem.); Tracy v. Falvey, 102 App. Div. 585, 92 N.Y.S. 625 (1st Dep't 1905)). The *Laventhall* court relied on two Court of Appeals cases, *In re* Cooper, 93 N.Y. 507 (1883), and Baird v. Mayor of New York, 74 N.Y. 382 (1878). Unfortunately, this reliance appears to be misplaced. The *Cooper* case, an eminent domain proceeding, involved neither a jury trial nor a retrial situation. Rather, the appellant there sought to set aside an appraisal of his land made by a commissioner of estimate and assessment. In consenting to the appointment of this commissioner, the court held, appellant had waived certain statutory and constitutional protections. 93 N.Y. at 512. This waiver precluded a later objection premised upon the waived provisions. *Id.* In *Baird*, the appellant had acquiesced in the referral of his action to a referee. 74 N.Y. at 385. Later seeking to set aside the order of reference, appellant urged that he had a right to a jury trial. The Court of Appeals held that the lack of objection to the referral constituted a waiver of trial by jury. *Id.* at 385-86. Thus, the Court of Appeals has not yet determined whether a party has a renewed opportunity to demand a jury upon retrial. The weight of lower court authority indicates, however, that a demand may be made in such a situation.

[133] *See* note 132 *supra*.

subsequent retrials, she may have relied upon the fact that the case already was on the jury calendar. Because this contention was not discussed in *Gonzalez*, it may provide a vehicle for the return of the issue to the Court of Appeals in the future.

The *Gonzalez* decision represents Court of Appeals' approval of a practice already commonly employed in the lower courts.[134] The decision highlights the significance of a party's initial determination whether to demand a jury trial. Practitioners should carefully consider this question, as a failure to demand a jury or a request for a nonjury trial, in the absence of reliance upon another demand in the case, will preclude later relief under CPLR 4102(a).

ARTICLE 45 — EVIDENCE

CPLR 4502(b): Spousal privilege does not extend to conversations which advance joint criminal activity.

To preserve the confidentiality inherent in a marital relationship, CPLR 4502(b) prohibits the disclosure of "a confidential communication made by one [spouse] to the other during marriage."[135] Various public policy considerations, however, have prompted the

---

[134] *See* notes 120-121 & 130 and accompanying text *supra*.

[135] CPLR 4502(b). There exists a rebuttable presumption that all communications between husband and wife are confidential and hence privileged. *See* Poppe v. Poppe, 3 N.Y.2d 312, 317, 144 N.E.2d 72, 75, 165 N.Y.S.2d 99, 103 (1957). The marital privilege applies in both civil and criminal actions, *see, e.g.*, People v. Daghita, 299 N.Y. 194, 198, 86 N.E.2d 172, 173 (1949); 5 WK&M ¶ 4502.26; and protects acts as well as words, *see* People v. Monahan, 21 App. Div. 2d 76, 78, 249 N.Y.S.2d 562, 563-64 (4th Dep't 1974) (per curiam); People v. Sullivan, 42 Misc. 2d 1014, 249 N.Y.S.2d 589 (Sup. Ct. Queens County 1964). The privilege may be waived, provided that both the husband and wife join in the waiver. People v. Wood, 126 N.Y. 249, 271, 27 N.E. 362, 368 (1891).

At common law a husband or wife was deemed incompetent to testify in any action involving the other spouse. *See, e.g.*, Wilke v. People, 53 N.Y. 525 (1873). Apparently, this common law doctrine was related to the concept that the husband and wife are a single person. The doctrine promoted the social goals of preventing perjury and preserving the stability and harmony of the family by protecting the confidence of the marriage. *See* Comment, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 CUM. L. REV. 307, 308 (1976); 74 DICK. L. REV. 499, 500-01 (1970). Although common law incompetency has been abandoned, most jurisdictions retain a marital privilege. *See, e.g.*, ALA. CODE tit. 15, § 311 (1958); KY. REV. STAT. ANN. § 421.210(1) (Supp. 1976); VT. STAT. ANN. tit. 12, § 1605 (1973).

As early as 1929, the justification for the marital privilege was questioned by commentators seeking to free suppressed testimony from what was perceived as the "law of evidence making a rather ineffectual effort . . . to stem the tide [of the breakup of the family]." Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 679 (1929). The decrease in marital stability may be attributed to many social forces, including liberal divorce laws, economic stress, and increased mobility. *See generally* Hutchins & Slesinger, *supra*, at 682-85.