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Article 12

CPLR 2104: Oral Settlement Reached at Informal Conference in Judge's Chambers Held Not Made in Open Court

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publication costs for indigents necessitates a definitive Court of Appeals decision or legislation. Moreover, the Legislature should specifically authorize the use of expedient service under CPLR 308(5) in matrimonial actions, so that the onerous costs of service by publication can be avoided. "Why . . . , in a matrimonial action, should a plaintiff unable to effect personal service be forced to bear the expense of publication?"[58]

ARTICLE 21 — PAPERS

CPLR 2104: Oral settlement reached at informal conference in judge's chambers held not made in open court.

CPLR 2104 requires agreements between parties relating to matters in an action to be in writing and subscribed, except when such agreements are made between counsel in "open court." Some courts have held that a stipulation of settlement is not an agreement relating to a matter "in an action" within the meaning of the statute,[59] although the opposite view is more widely held.[60] A second unsettled issue has been whether the term "open court" includes informal proceedings in the judge's chambers.[61] The Court of Appeals, in *In re Dolgin Eldert Corp.*,[62] resolved both issues.

In *Dolgin*, an intrafamily dispute arose over jointly-owned prop-

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58 *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 768, 781 (1972).

59 *See* Langlois v. Langlois, 5 App. Div. 2d 75, 169 N.Y.S.2d 170 (3d Dep't 1957) (per curiam); Lloyd v. R.S.M. Corp., 225 App. Div. 85, 232 N.Y.S. 290 (1st Dep't 1928), *rev'd on other grounds*, 251 N.Y. 318, 167 N.E. 456 (1929); Smith v. Bach, 82 App. Div. 608, 81 N.Y.S. 1057 (2d Dep't 1903); *In re* Estate of Sakel, 31 Misc. 2d 791, 220 N.Y.S.2d 688 (Sur. Ct. N.Y. County 1961); *In re* Gardiner, 204 Misc. 884, 126 N.Y.S.2d 121 (Sur. Ct. N.Y. County 1953); Lee v. Rudd, 120 Misc. 407, 198 N.Y.S. 628 (Sup. Ct. Onondaga County 1923). *See also* 7B MCKINNEY'S CPLR 2104, commentary at 672 (1970).

60 *See* Solins v. Klosky, 8 App. Div. 2d 848, 190 N.Y.S.2d 633 (2d Dep't 1959) (mem.); Anders v. Anders, 6 App. Div. 2d 440, 179 N.Y.S.2d 274 (1st Dep't 1958); Ariel v. Ariel, 5 App. Div. 2d 168, 171 N.Y.S.2d 138 (1st Dep't 1958) (per curiam); Cook v. Bianco, 226 App. Div. 691, 233 N.Y.S. 729 (2d Dep't 1929); Macrina v. Macrina, 78 N.Y.S.2d 244 (Sup. Ct. Herkimer County 1947). *See generally* 2 CARMODY-WAIT 2d, § 7:7, at 13-14 (1965); 2A WK&M ¶ 2104.03.

61 For cases holding that the term "open court" does not include informal proceedings in the judge's chambers, see People *ex rel.* Putziger v. Putziger, 22 App. Div. 2d 821, 254 N.Y.S.2d 916 (2d Dep't 1964) (mem.); Rosen v. Grand, 6 App. Div. 2d 799, 175 N.Y.S.2d 441 (2d Dep't 1958) (mem.); Accarino v. Hirsch, 6 App. Div. 2d 795, 175 N.Y.S.2d 435 (2d Dep't 1958) (mem.); Brozyna v. Andreski, 6 App. Div. 2d 601, 179 N.Y.S.2d 945 (3d Dep't 1958). For the contrary view, see Gass v. Arons, 131 Misc. 502, 227 N.Y.S. 282 (N.Y. City Ct. Bronx County 1928). *Cf.* Golden Arrow Films, Inc. v. Standard Club of Cal., Inc., 38 App. Div. 2d 813, 328 N.Y.S.2d 901 (1st Dep't) (mem.), *motion for leave to appeal granted*, 30 N.Y.2d 486, 286 N.E.2d 926, 335 N.Y.S.2d 1025 (1972), *discussed in The Quarterly Survey*, 47 ST. JOHN'S REV. 148, 164 (1972) (holding that there was substantial compliance with CPLR 2104 when an uncontested settlement was recorded by justice in chambers); Royal Globe Ins. Co. v. Dinan, 42 Misc. 2d 595, 598, 248 N.Y.S.2d 469, 472 (Sup. Ct. Nassau County 1964) (dictum).

62 31 N.Y.2d 1, 286 N.E.2d 228, 334 N.Y.S.2d 833, *rev'g* 38 App. Div. 2d 554, 328 N.Y.S.2d 384 (2d Dep't 1972).

erties. One branch of the family sued for an accounting and dissolution of close corporations, while the other demanded specific performance of an alleged agreement for a specific division of the properties. The actions were consolidated and a pretrial hearing was held in the Supreme Court, Kings County. Initially, the parties discussed the matter with the clerk at special term; they then conferred with the presiding justice in his chambers. No stenographer was present, and no record was kept. It appeared that an agreement had been reached, and the justice requested the parties to prepare written stipulations of settlement. The stipulations submitted were contradictory: one provided for an accounting; the other did not. The parties then appeared in a formally recorded proceeding before the presiding justice, at which it became apparent that an accounting had been discussed with the clerk, but had not been mentioned in the justice's chambers. The court then held that no accounting had been provided for, and decided that the respondents' stipulation should be enforced. The Appellate Division, Second Department, affirmed.

The Court of Appeals unanimously reversed, holding that while CPLR 2104 is applicable to stipulations of settlements, the proceedings therein did not qualify under the statutory exception. "[T]he open court exception," stated the Court, ". . . does not extend to a conference in a Judge's chambers, even in these days of judicial intervention in settlement negotiations."[63] The Court was clearly influenced by its finding that no agreement had actually been reached between the parties,[64] for it emphasized that the limited but necessary exception to CPLR 2104 should not be extended, especially where, as in this case, issues of fact and credibility are generated, a situation which is detrimental not only to the litigation itself but also to the dignity of the court.[65] In the absence of a proven agreement in "open

[63] 31 N.Y.2d at 9-10, 286 N.E.2d at 233, 334 N.Y.S.2d at 840, *citing* People *ex rel.* Putziger v. Putziger, 22 App. Div. 2d 821, 254 N.Y.S.2d 916 (2d Dep't 1964) (mem.); Rosen v. Grand, 6 App. Div. 2d 799, 175 N.Y.S.2d 441 (2d Dep't 1958) (mem.); Accarino v. Hirsch, 6 App. Div. 2d 795, 175 N.Y.S.2d 435 (2d Dep't 1958) (mem.); Brozyna v. Andreski, 6 App. Div. 2d 601, 179 N.Y.S.2d 945 (3rd Dep't 1958).

[64] 31 N.Y.2d at 10, 286 N.E.2d at 233, 334 N.Y.S.2d at 841. The Court indicated that the result might have been different if there were a definite and complete agreement and estoppel elements were present. Several early cases held that a party may be estopped from invoking the statutory requirement of a writing where his opponent may be prejudiced or deceived by his reliance upon the oral stipulation. *See, e.g.*, Mutual Life Ins. Co. v. O'Donnell, 146 N.Y. 275, 40 N.E. 787 (1895); People v. Stephens, 52 N.Y. 306 (1873); Zwecker v. Levine, 135 App. Div. 432, 120 N.Y.S. 425 (1st Dep't 1909); Gass v. Arons, 131 Misc. 502, 227 N.Y.S. 282 (N.Y. City Ct. Bronx County 1928); Lee v. Rudd, 120 Misc. 407, 198 N.Y.S. 628 (Sup. Ct. Onondaga County 1923).

[65] 31 N.Y.2d at 10, 286 N.E.2d at 233, 334 N.Y.S.2d at 840-41. The Court further stated: "It is critical that transactions of this import, and court proceedings in particular,

court," the Court did not reach the question of the applicability of the Statute of Frauds to an oral stipulation.[66]

While the courts generally favor the resolution of issues by stipulation of the parties, CPLR 2104's requirement that such agreements be in writing is intended to insure that courts will not be confronted constantly with the task of resolving controverted issues of fact which invariably arise out of oral stipulations. The statute excepts open court stipulations because they are generally recorded, and the *Dolgin* decision recognized that an extension of this exception to informal conferences would defeat its purpose.

ARTICLE 30 — REMEDIES AND PLEADING

CPLR 3015(a): Where plaintiff alleges performance of contractual conditions precedent, requirement that defendant deny such performance with particularity is not applicable.

CPLR 3015(a) provides that the performance or occurrence of conditions precedent in a contract need not be pleaded. Hence, in order to raise a triable issue with respect to any such condition, the defendant must indicate "specifically and with particularity" those conditions which he contends have not been fulfilled.[67]

In *Allis-Chalmers Manufacturing Co. v. Malan Construction Corp.*,[68] the plaintiff alleged that certain conditions precedent had been performed, and the defendant entered a general denial.[69] When the defendant attempted to examine the plaintiff during its pretrial examination regarding its performance under the contract, it was precluded by the court from doing so. The Court of Appeals unanimously

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not be embroiled in inchoate, unprovable arrangements, in which the court or its officers play a part." *Id.* at 11, 286 N.E.2d at 234, 334 N.Y.S.2d at 841.

66 The alleged agreement involved the transfer of land and would ordinarily come under the purview of General Obligations Law §§ 5-703 and 15-501. However, some courts have held that such an oral stipulation made in open court is not barred by the Statute of Frauds. *See* Anders v. Anders, 6 App. Div. 2d 440, 179 N.Y.S.2d 274 (1st Dep't 1958); Rudolph v. Cinco, 34 Misc. 2d 1016, 229 N.Y.S.2d 892 (Sup. Ct. Westchester County 1962). The *Dolgin* Court characterized this authority as "sparse but persuasive." 31 N.Y.2d at 8, 286 N.E.2d at 232, 334 N.Y.S.2d at 839.

67 A host of cases illustrate this rule. *See, e.g.*, Lourie v. Mishkin, 279 App. Div. 754, 108 N.Y.S.2d 777 (2d Dep't 1951) (mem.); Arrow Plumbing Co. v. Dare Constr. Corp., 212 N.Y.S.2d 438 (Sup. Ct. Nassau County 1961); Rao v. Katz, 6 Misc. 2d 760, 161 N.Y.S.2d 504 (Sup. Ct. Kings County 1957); Koeppel v. Koeppel, 138 N.Y.S.2d 366 (Sup. Ct. Queens County 1954); Klapper v. Greenfield, 100 N.Y.S.2d 921 (Sup. Ct. Kings County 1948). These cases construed RCP 92, the predecessor of CPLR 3015(a).

68 30 N.Y.2d 225, 282 N.E.2d 600, 331 N.Y.S.2d 636 (1972).

69 Dean McLaughlin has stated that "the parties charted a middle course between the common law [which required that the performance or occurrence of all conditions precedent be pleaded in detail] and the CPLR . . . ." *New York Trial Practice*, 167 N.Y.L.J. 112, June 9, 1972, at 4, col. 3.