

CPLR 3041: Bill of Particulars May Not Contain Reservation of Right To File Supplemental Bill

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succinctly applied its new discretion to decline to exercise its jurisdiction. On the facts, New York was an inconvenient forum, and another forum was available where "the ends of justice and the convenience of the parties"⁵³ could better be served.

The *Hubbell* decision epitomizes the flexibility and simplicity of the *Silver* doctrine and its codification, CPLR 327.

ARTICLE 30 — REMEDIES AND PLEADING

CPLR 3025(b): Second Department reverses order denying leave to amend answer where no prejudice was shown.

CPLR 3025(b) provides that "[l]eave [to amend pleadings] shall be freely given upon such terms as may be just. . . ." Accordingly, amendments are freely allowed in the absence of prejudice to the opposing party.⁵⁴ This permits "the full litigation of a controversy."⁵⁵

In *Lermit Plastics Co. v. C. W. Lauman & Co.*,⁵⁶ the Appellate Division, Second Department, held that the denial of a co-defendant's motion for leave to serve an amended answer raising certain affirmative defenses, including the statute of limitations, was "an improvident exercise of discretion absent a showing of prejudice to plaintiffs."⁵⁷ Therefore, the order was unanimously reversed, and the motion was granted.

If the plaintiff's attorney proceeds to prepare for trial when the defendant's answer contains no statute of limitations defense, the plaintiff will be in a position to show prejudice should the defendant seek to amend his answer.

CPLR 3041: Bill of particulars may not contain reservation of right to file supplemental bill.

The bill of particulars serves to amplify the pleadings, limit the proof, and prevent surprise at trial, "by enabling the adverse party to know definitely the claim which he is called upon to meet."⁵⁸ When one party is unable to furnish all the information demanded by the adverse party, he cannot serve a bill of particulars and reserve the right

⁵³ 40 App. Div. 2d at 696, 336 N.Y.S.2d at 312.

⁵⁴ See, e.g., *Petrozzi v. Passamonte*, 32 App. Div. 2d 716, 300 N.Y.S.2d 183 (3d Dep't 1969) (mem.); *Stillwell v. Giant Supply Corp.*, 47 Misc. 2d 568, 262 N.Y.S.2d 833 (Sup. Ct. Nassau County 1965); *Leutloff v. Leutloff*, 47 Misc. 2d 458, 262 N.Y.S.2d 736 (Sup. Ct. Onondaga County 1965) (amendment of pleadings freely allowed in absence of laches, undue prejudice, and unfair advantage). See also 3 WK&M ¶ 3025.11.

⁵⁵ 3 WK&M ¶ 3025.11.

⁵⁶ 40 App. Div. 2d 680, 336 N.Y.S.2d 187 (2d Dep't 1972) (mem.).

⁵⁷ *Id.*, 336 N.Y.S.2d at 188.

⁵⁸ *Elman v. Ziegfeld*, 200 App. Div. 494, 497, 193 N.Y.S. 133, 136 (1st Dep't 1922).

to file a supplemental bill upon the receipt of complete information.⁵⁹ Some courts, however, have allowed service of a supplemental bill, as of right, within a specified time before trial.⁶⁰

In *Watrous v. Harris*,⁶¹ the Supreme Court, Albany County, followed the great weight of authority, requiring the plaintiff to state his lack of knowledge under oath and to seek leave to serve a supplemental bill.⁶² This procedure permits the court to examine the merits of such a request at the time the information is available.⁶³

ARTICLE 31 — DISCLOSURE

CPLR 3101: Restrictions on pretrial disclosure in matrimonial actions deemed obsolete.

While the Third⁶⁴ and Fourth⁶⁵ Departments permit pretrial disclosure of financial matters in matrimonial actions, the First⁶⁶ and Second⁶⁷ Departments deny such disclosure in contested cases⁶⁸ in the

⁵⁹ See, e.g., *In re May's Will*, 17 App. Div. 2d 729, 232 N.Y.S.2d 39 (1st Dep't 1962) (mem.); *Rotondi v. Vaughan*, 28 Misc. 2d 656, 220 N.Y.S.2d 213 (Sup. Ct. Nassau County 1961); *Guilizio v. Rios*, 14 Misc. 2d 513, 184 N.Y.S.2d 205 (Sup. Ct. Kings County 1958); *McGrath v. Calabrese*, 13 Misc. 2d 267, 176 N.Y.S.2d 431 (Sup. Ct. Nassau County 1958).

⁶⁰ See *Schondorf v. Stein-Tex, Inc.*, 28 App. Div. 2d 835, 281 N.Y.S.2d 630 (1st Dep't 1967); *Rico v. Pierleoni*, 33 Misc. 2d 955, 226 N.Y.S.2d 309 (Sup. Ct. Monroe County 1962) (allowing reservation of right to issue supplemental bill to be served at least ten days before trial and limited to recital of further medical expenses for known injuries); *Lesser v. Kennedy*, 19 Misc. 2d 812, 193 N.Y.S.2d 63 (Sup. Ct. Queens County 1959).

⁶¹ 71 Misc. 2d 63, 335 N.Y.S.2d 553 (Sup. Ct. Albany County 1972).

⁶² *Accord, In re May's Will*, 17 App. Div. 2d 729, 232 N.Y.S.2d 39 (1st Dep't 1962) (mem.); *Force v. Tracy Towing Lines, Inc.*, 190 Misc. 446, 74 N.Y.S.2d 454 (Sup. Ct. Kings County 1947).

⁶³ Cf. *McLaughlin, New York Trial Practice*, 168 N.Y.L.J. 90, Nov. 10, 1972, at 3, col. 3:

While it is eminently sensible to prevent the plaintiff from stating in his bill of particulars that he reserves the right to prove other injuries at trial, would it not be "better practice" to permit the plaintiff to serve a supplemental bill of particulars, as of right, before trial?

⁶⁴ See *Plohn v. Plohn*, 281 App. Div. 1056, 121 N.Y.S.2d 336 (3d Dep't 1953) (mem.); *Berlin v. Berlin*, 17 Misc. 2d 768, 187 N.Y.S.2d 553 (Sup. Ct. Broome County 1959).

⁶⁵ See *Dunlap v. Dunlap*, 34 App. Div. 2d 889, 312 N.Y.S.2d 441 (4th Dep't 1970) (mem.), discussed in *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 519 (1971) (disclosure of all relevant matters).

⁶⁶ See *Stern v. Stern*, 39 App. Div. 2d 87, 332 N.Y.S.2d 334 (1st Dep't 1972).

⁶⁷ See *Plancher v. Plancher*, 35 App. Div. 2d 417, 422, 317 N.Y.S.2d 140, 145 (2d Dep't 1970), *aff'd mem.*, 29 N.Y.2d 880, 278 N.E.2d 650, 328 N.Y.S.2d 444 (1972); *Campbell v. Campbell*, 7 App. Div. 2d 1011, 184 N.Y.S.2d 479 (2d Dep't 1959) (mem.). "Actually, the Second Department's rule is substantially encroached by treating a formally 'contested' matter as 'uncontested' if it is not 'seriously' contested." *Schaeffer v. Schaeffer*, 70 Misc. 2d 1033, 1036, 335 N.Y.S.2d 510, 513 (Sup. Ct. Nassau County 1972), citing *Plancher v. Plancher, supra*.

⁶⁸ The First and Second Departments allow pretrial disclosure of financial matters in uncontested matrimonial actions in the absence of a showing of special circumstances warranting denial. See *Stern v. Stern*, 39 App. Div. 2d 87, 332 N.Y.S.2d 334 (1st Dep't