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fault.¹⁶⁶ The court concluded that problems as to the receipt of the copy of the notice and petition which the Secretary of State is required to mail the respondent do not affect the court's jurisdiction, but may be grounds for opening a default judgment.¹⁶⁷

DAMAGES

Damages: Where survival and wrongful death actions are combined, medical and funeral expenses are allocated to former when estate is responsible and to latter when distributees are responsible.

Where a decedent's personal injury action¹⁶⁸ has been combined¹⁶⁹ with a wrongful death action, separate verdicts are required,¹⁷⁰ and medical and funeral expenses must be allocated to one of the causes of action. These expenses are allocated to the survival cause and thus to the decedent's estate when "paid by the estate or for the payment of which the estate is responsible. . . ;"¹⁷¹ they are allocated to the wrongful death action and thus to the decedent's distributees when "paid by the distributees, or for the payment of which any distributee is responsible. . . ."¹⁷² When such expenses have not been paid prior to trial or settlement, the court must determine who is responsible for payment.

The Surrogate's Court, Kings County, was faced with this problem in *In re Estate of Jackson*.¹⁷³ At the time of trial, medical and funeral bills exceeding \$5000 remained unpaid. After the jury awarded recovery in each cause, allocation was essential because a lien in excess of the total assets of the estate existed.¹⁷⁴ Correct procedure would be for the personal representative to advise in his account to the court

¹⁶⁶ 71 Misc. 2d at 843-44, 337 N.Y.S.2d at 309.

¹⁶⁷ *Id.* at 844, 337 N.Y.S.2d at 309. See *Cascione v. Acme Equip. Corp.*, 23 App. Div. 2d 49, 258 N.Y.S.2d 234 (1st Dep't 1965) (per curiam); *Montulli v. Sherlo Realty, Inc.*, 37 Misc. 2d 655, 234 N.Y.S.2d 754 (Sup. Ct. Monroe County 1962), *aff'd mem.*, 18 App. Div. 2d 1139, 239 N.Y.S.2d 864 (4th Dep't 1963).

¹⁶⁸ EPTL 11-3.3(a) limits the damages recoverable in such an action to those accruing before death plus reasonable funeral expenses in appropriate cases. N.Y. Est., POWERS & TRUSTS LAW § 11-3.3(a) (McKinney 1967).

¹⁶⁹ *Id.* § 11-3.3(b)(1). The decedent's estate gets the benefit of the wrongful death rule which makes contributory negligence a defense to be pleaded and proved by the defendant. *Id.* § 11-3.2(b).

¹⁷⁰ *Id.* § 11-3.3(b)(1).

¹⁷¹ *Id.* § 11-3.3(a).

¹⁷² *Id.* § 5-4.3. See *Murphy v. New York C. & H.R.R.*, 88 N.Y. 445 (1882); *Loeb v. Sheldon Foster Supply Co.*, 243 App. Div. 740, 277 N.Y.S. 439 (2d Dep't 1935).

¹⁷³ 71 Misc. 2d 133, 335 N.Y.S.2d 587 (Sur. Ct. Kings County 1972).

¹⁷⁴ There are two basic reasons for allocation. First, the decedent's debts are payable only out of estate funds. Second, even if there are no estate debts, "[t]he same persons do not necessarily share in the survival (pain and suffering) recovery and the wrongful death recovery. . . . Even when the same persons do share in each recovery, they do not share in the same proportion." *Id.* at 134-35, 335 N.Y.S.2d at 590.

from which fund medical and funeral expenses are to be paid.¹⁷⁵ In the instant case, the petition allocated the expenses to the survival action. The court, however, after inquiry of the trial court, upheld this allocation. Noting that attorneys' compensation is not an element of damages in either cause of action, the court further held that counsel fees should be charged separately against each recovery.¹⁷⁶

SUMMARY PROCEEDING

Summary proceeding: Landlord, by its excessive delay, forfeited right to summary resolution of claims.

A summary proceeding under article 7 of the Real Property Actions and Proceedings Law provides an expeditious means for a landlord to recover possession of his real property.¹⁷⁷ *Gramford Realty Corp. v. Valentin*¹⁷⁸ involved three summary nonpayment proceedings by a landlord which had immediately ceased to demand rent after acquiring an apartment building in June, 1971, and had billed its tenants in June, 1972, for the total amount then due. The tenants, who had paid nothing in the interim, were unable to pay. Although the tenant's defense of equitable estoppel¹⁷⁹ failed for lack of evidence,¹⁸⁰ the New York City Civil Court, New York County, relying on its inherent power to prevent injustice, dismissed the proceedings, without prejudice, however, to an action to collect the accrued rents.¹⁸¹ The court held that "by its excessive delay, the landlord . . . forfeited the right to resort to summary proceedings."¹⁸²

¹⁷⁵ *Id.* at 139, 335 N.Y.S.2d at 594.

¹⁷⁶ *Id.* at 134, 335 N.Y.S.2d at 590. See *In re Estate of Bruno*, 36 Misc. 2d 909, 233 N.Y.S.2d 913 (Sur. Ct. N.Y. County 1962).

¹⁷⁷ *Cotignola v. Lieber*, 34 App. Div. 2d 700, 701, 309 N.Y.S.2d 498, 499 (3d Dep't 1970) (mem.); *Great Park Corp. v. Goldberger*, 41 Misc. 2d 988, 989, 246 N.Y.S.2d 810, 812 (N.Y.C. Civ. Ct. N.Y. County 1964).

¹⁷⁸ 71 Misc. 2d 784, 337 N.Y.S.2d 160 (N.Y.C. Civ. Ct. N.Y. County 1972).

¹⁷⁹ "The answer may contain any legal or equitable defense, or counter-claim." RPAPL 743. See *Great Park Corp. v. Goldberger*, 41 Misc. 2d 988, 246 N.Y.S.2d 810 (N.Y.C. Civ. Ct. N.Y. County 1964). The tenants claimed that the landlord sought a means of removing them, without the eviction certificate required by N.Y. UNCONSOL. LAWS tit. 23, § 51 *et seq.* (McKinney App. 1969), by deliberately postponing rent collection until they were unable to pay the accumulated rent due. The court, considering this contention, found the tenants' reliance on *Midman Realty Corp. v. Kane*, 165 N.Y.L.J. 13, Jan. 20, 1971, at 19, col. 4 (N.Y. Civ. Ct. N.Y. County), to be misplaced. 71 Misc. 2d at 785, 337 N.Y.S.2d at 162. The tenants therein tendered the rent.

¹⁸⁰ Leave of court is required for use of disclosure devices in special proceedings. CPLR 408.

¹⁸¹ 71 Misc. 2d at 786, 337 N.Y.S.2d at 163. The tenants may also raise the defense of equitable estoppel in such an action. For rents coming due after the commencement of the summary proceedings, the landlord may bring new summary proceedings against the tenants after appropriate demand. *Id.*

¹⁸² *Id.* The court distinguished the requirement of RPAPL 711(2) that a landlord's