

Summary Proceeding: Landlord, by Its Excessive Delay, Forfeited Right to Summary Resolution of Claims

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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

This decision, to be read on its unique facts, is a meritorious application of a court's authority to prevent misuse of summary proceedings.

DOLE V. DOW CHEMICAL CO.

Dole v. Dow Chemical Co.: *Recent developments.*

In *Dole v. Dow Chemical Co.*,¹⁸³ the Court of Appeals revolutionized New York law by eliminating the active-passive test for indemnification and allowing equitable apportionment of damages among joint tortfeasors based on relative responsibility. In *Kelly v. Long Island Lighting Co.*,¹⁸⁴ the Court confirmed that a *Dole* claim can be made by cross-claim against a co-defendant as well as by impleader of an unjoined co-tortfeasor or by a separate indemnity action.¹⁸⁵

A number of New York courts¹⁸⁶ and one federal court¹⁸⁷ have also permitted defendants to seek a *Dole* apportionment by counterclaim against plaintiffs suing in a representative capacity or in more than one capacity. The decision with the greatest potential impact has

waiver of these proceedings be expressed in writing as a Statute of Frauds protection, not designed to interfere with a court's power to prevent abuse of summary proceedings.

For examples of waiver by a landlord, see *Fanchild Investors, Inc. v. Cohen*, 43 Misc. 2d 39, 250 N.Y.S.2d 446 (N.Y.C. Civ. Ct. Bronx County 1964); *Valentine Gardens Cooperative, Inc. v. Oberman*, 237 N.Y.S.2d 535 (Sup. Ct. Westchester County 1963).

¹⁸³ 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), noted in 37 ALBANY L. REV. 154 (1972); 47 N.Y.U.L. REV. 815 (1972); 47 ST. JOHN'S L. REV. 185 (1972). For an extended discussion of the ramifications of *Dole* by Professor David D. Siegel, see 7B MCKINNEY'S CPLR 3019, supp. commentary at 205-38 (1972).

¹⁸⁴ 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972).

¹⁸⁵ For discussion of the problem of the waiver of *Dole* rights, see 7B MCKINNEY'S CPLR 3019, supp. commentary at 230-32 (1972) (strongest case for waiver where tortfeasor fails to cross-claim against co-defendant); Note, *Dole v. Dow Chemical Co.: A Revolution in New York Law*, 47 ST. JOHN'S L. REV. 185, 208 (1972) (waiver problem should be avoided by resolving all issues arising from breach of duty in one action).

In *Henriquez v. Mission Motor Lines, Inc.*, 72 Misc. 2d 782, 339 N.Y.S.2d 478 (Sup. Ct. N.Y. County 1972), the defendants sought a *Dole* charge based on the service of a notice of "vouching in" after the jury had been selected. Since the plaintiffs received notice of the defendants' claim, the court treated it as a counterclaim, but disallowed it for laches, without prejudice to a subsequent action for *Dole* indemnity.

The common-law device of "vouching in" is "simply a notice that an action is pending, and an offer to the vouchee to come in and defend, in default thereof the voucher will hold him liable." *Bouleris v. Cherry-Burrell Corp.*, 45 Misc. 2d 318, 319, 256 N.Y.S.2d 537, 538 (Sup. Ct. Albany County 1964).

¹⁸⁶ *Moreno v. Galdorisi*, 39 App. Div. 2d 450, 336 N.Y.S.2d 646 (2d Dep't 1972); *Meade v. Roberts*, 71 Misc. 2d 120, 335 N.Y.S.2d 349 (Sup. Ct. Broome County 1972); *Yarish v. Dowling*, 70 Misc. 2d 467, 333 N.Y.S.2d 508 (Sup. Ct. Queens County 1972) (mem.); *DeLucia v. Bundock*, 168 N.Y.L.J. 12, July 19, 1972, at 13, col. 4 (Sup. Ct. Westchester County); *Lipson v. Gewirtz*, 70 Misc. 2d 599, 334 N.Y.S.2d 662 (Dist. Ct. Nassau County 1972). In *Sanchez v. Hertz Corp.*, 70 Misc. 2d 449, 333 N.Y.S.2d 698 (Sup. Ct. Kings County 1972) (mem.), the court allowed the defendants' "cross-complaint" against a co-plaintiff.

¹⁸⁷ *Sorrentino v. United States*, 334 F. Supp. 1308 (E.D.N.Y. 1972).