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CPLR 1502: A Proceeding Pursuant to Article 75 Can Be a Subsequent Action

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point[90] and then discussed the privileges which the law grants to indigents.

First, the court noted that CPLR 1102(d) waives jury fees.[91] Second, it concluded that, while no statute waives witness fees, failure of the city or county to absorb the cost would deny to the poor equal access to the courts.[92] Third, it held that the fourteenth amendment encompasses "the right of an indigent to assigned counsel . . . to defend his right to remain in possession of his dwelling. . . ."[93] The trial court was directed to assign counsel, if such were not available to defendant through a public or semi-public agency.[94]

This decision confirms Professor McLaughlin's prescient observations that "[i]t was only a matter of time before [application of the equal protection clause of the fourteenth amendment to protect the indigent] would percolate into the field of civil litigation," and that "much more will be heard . . . about the right of the indigent in civil litigation."[95]

Of course, whether the public must absorb the substantial cost of providing attorneys to indigent tenants in nonpayment of rent cases, and perhaps in other actions, is a matter ultimately resolvable by the United States Supreme Court.

ARTICLE 15 — ACTIONS AGAINST PERSONS JOINTLY LIABLE

CPLR 1502: A proceeding pursuant to article 75 can be a subsequent action.

When a co-obligor was not summoned in the original action, CPLR 1502 requires a subsequent action against him in order to procure a judgment enforceable against his individually held property.[96]

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[90] Tenant made a prima facie showing of indigency by her affidavit stating she was a recipient of public assistance and was without assets; and her sworn denial that she owed any rent was a sufficient showing of merit to support the motion. It was therefore error to deny her application for leave to defend as a poor person (CPLR 1101).

Id. at 834, 322 N.Y.S.2d at 140. *Accord,* Emerson v. Emerson, 33 App. Div. 2d 1022, 308 N.Y.S.2d 691 (2d Dep't 1970).

[91] 66 Misc. at 834, 322 N.Y.S.2d at 140.

[92] *Id., citing* Boddie v. Connecticut, 401 U.S. 371 (1971); Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. Kings County 1968),*discussed in The Quarterly Survey,* 46 ST. JOHN'S L. REV. 147, 157 (1971); *The Quarterly Survey,* 44 *id.* 135, 139 (1969).

[93] *Id.* at 835, 322 N.Y.S.2d at 141, *citing* Boddie v. Connecticut, 401 U.S. 371, 377 (1971); Tate v. Short, 401 U.S. 395 (1971); Griffin v. Illinois, 351 U.S. 12 (1956).

[94] *Id.* at 836, 322 N.Y.S.2d at 142, *citing* People *ex rel.* Baumgart v. Martin, 9 N.Y.2d 351, 174 N.E.2d 475, 214 N.Y.S.2d 370 (1961).

[95] 7B MCKINNEY'S CPLR 1102, supp. commentary at 110 (1969).

[96] *See* Funaro v. Houston, 19 Misc. 2d 1078, 193 N.Y.S.2d 729 (Sup. Ct. Kings County 1959) (the court applied CPA 1201, the predecessor to CPLR 1502).

This provision restates the law as set forth in CPA sections 1185 and 1201.[97] Whether a proceeding, pursuant to article 75, to confirm an arbitrator's award sufficiently complies with the statutory language demanding the commencing of an "action" has recently been answered by the Appellate Division, First Department, in *Lauratex Textile v. Gorin.*[98]

The petitioner proceeded to arbitration after a dispute arose with the respondent. At the time the petitioner was under the mistaken impression that Gorin was the sole proprietor of the Herald Textile Company. During proceedings supplementary to execution of the judgment entered on the arbitrator's award, he discovered that respondent LoPinto was partner in the business. Lauratex moved to amend the judgment to add LoPinto as a judgment debtor. Only Gorin had been served with notice of motion, however, so the court, citing CPLR 1502, denied the motion. The petitioner then served both Gorin and LoPinto and moved for confirmation of the award against both. The court again denied the motion, on the ground that the new steps were not in compliance with CPLR 1502.

On appeal, the appellate division rejected the respondents' contention that the petitioner should have started an entirely new proceeding under article 75 against both parties to confirm the award. It ruled that Lauratex had sufficiently complied with CPLR 1502 and article 75 to warrant a confirmation of the arbitrator's award against both parties.[99] The court concluded that there is no reason why the provisions of CPLR 1502 cannot be applied to a "proceeding under Article 75, the end product of which, as in an action, is to be a judgment."[100] The court based this conclusion on CPLR 103(b)[101] and (c).[102]

At first glance, the *Lauratex* decision seems to be a laudable effort by the court to avert attempts to delay the judicial process through reliance on form rather than substance. However, it becomes clear that the result is achieved without due regard to section 1502. In its eagerness to provide the petitioner with relief, the court has overlooked the

97 CPLR 1502 combines both these sections. Section 1185 had authorized a subsequent action "when the co-obligor had not been summoned." Section 1201 had authorized such an action "when the co-obligor had neither been joined nor secured." 2A WK&M ¶ 1502.01.

98 37 App. Div. 2d 540, 322 N.Y.S.2d 76 (1st Dep't 1971).

99 *See* 7B McKINNEY'S CPLR 1502, supp. commentary at 139 (1964): "In the second action the first judgment is not res judicata, since the statute mandates that the second action proceed as though the first one had not been brought."

100 37 App. Div. 2d at 541, 322 N.Y.S.2d at 77.

101 CPLR 103 (b): "[P]rocedure in special proceedings shall be the same as in actions, and the provisions of the civil practice law and rules applicable to actions shall be applicable to special proceedings."

102 CPLR 103(c): "[A] civil proceeding shall not be dismissed solely because it is not brought in the proper form." *Discussed in The Quarterly Survey*, 43 ST. JOHN'S L. REV. 688, 689 (1969).

fact that by granting petitioner's motion to add LoPinto as a judgment debtor it denies the latter's right to argue the merits, as provided for by 1502.[103]

ARTICLE 20 — MISTAKES, DEFECTS, IRREGULARITIES AND EXTENSIONS OF TIME

CPLR 2001: Failure to state court and county in summons is a jurisdictional defect.

Despite the legislative mandate that ". . . [a] defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given,"[104] the courts have not allowed all defects to be so corrected. They have drawn a distinction between summonses with mistakes in form and those with jurisdictional defects. The former may be corrected or disregarded;[105] the latter may not.[106]

In *Tamburo v. P. & C. Food Markets, Inc.*,[107] the Appellate Division, Fourth Department, decided that a summons which fails to specify the court and county in which it is returnable is jurisdictionally defective. Thus, the summons could not be amended *nunc pro tunc* and failure to return it was not a waiver of the omission.[108] A supplementary summons would be futile, for the statute of limitations had run.[109]

That the summons was void and not merely irregular is technically correct insofar as there is case law to support it. But it should be noted that the two cases providing this support were decided in 1851.[110] The

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103 CPLR 1502: "The defendant in the subsequent action may raise any defenses or counterclaims that he might have raised in the original action if the summons had been served on him when it was first served on a co-obligor, and may raise objections to the original judgments, and defenses or counterclaims that have arisen since it was entered."

104 CPLR 2101(f).

105 CPLR 2001 states:

> At any stage of an action, the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded.

See, eg., Barron v. Hadcox, 47 Misc. 2d 435, 262 N.Y.S.2d 758 (Sup. Ct. Oneida County 1965); D'Alessandra v. Manufacturers Cas. Ins. Co., 106 N.Y.S.2d 561 (Sup. Ct. Kings County 1951).

106 *E.g.*, Rockefeller v. Hein, 176 Misc. 659, 28 N.Y.S.2d 266 (Sup. Ct. Queens County 1941) stated that CPA 105, predecessor of CPLR 2001, could not be utilized where there was a jurisdictional error.

107 36 App. Div. 2d 1017, 321 N.Y.S.2d 487 (4th Dep't 1970).

108 CPLR 2101(f).

109 36 App. Div. 2d at 1017, 321 N.Y.S.2d at 488.

110 Dix v. Palmer & Schoolcraft, 5 How. Pr. 233 (N.Y. Sup. Ct. Oneida County 1851) (dictum); James v. Kirkpatrick, 5 How. Pr. 241 (N.Y. Sup. Ct. Albany County 1851).