

# CPLR 3031, 3033, 3034: Motion for Settlement of Terms Is Prerequisite to Motion for Judgment Under Simplified Procedure

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citizenship. This principle governs even where the validity of the agreement depends on the validity of the patent.<sup>120</sup>

In the instant case, plaintiff's New York suit on the contract was stayed in favor of defendant's federal suit, which challenged the validity of the patent.

The Appellate Division, Third Department, affirmed the trial court's deference to "the Federal court's expertise"<sup>121</sup> and "the interests of comity, orderly procedure and uniformity."<sup>122</sup> Because defendant's contractual duty would be discharged if plaintiff's patent was declared void, determination of the validity of the patent logically should be decided before an action on the contract.<sup>123</sup> The appellate court emphasized, however, that the fact "that plaintiff must rely on a patent in support of his cause of action is not determinative and neither vests the Federal court with jurisdiction nor deprives the State court of power to entertain the action."<sup>124</sup>

#### ARTICLE 30 — REMEDIES AND PLEADINGS

*CPLR 3031, 3033, 3034: Motion for settlement of terms is prerequisite to motion for judgment under Simplified Procedure.*

CPLR 3031 through 3037 provides a consensual Simplified Procedure for disposition of cases.<sup>125</sup> Under section 3031, an action may be commenced by the filing of a statement, signed by both parties or by their attorneys, specifying claims, defenses and requested relief.<sup>126</sup> Neither a summons nor pleadings are necessary, and submission is deemed a waiver of the right to trial by jury.<sup>127</sup> The parties may contract in writing for submission of either present or future controversies, and then secure specific enforcement under section 3033.<sup>128</sup> Under rule 3034, in the event that one party to a contract refuses to submit the controversy under Simplified Procedure, or if the parties are unable to agree upon a statement, either party may move for an order directing determination of the controversy pursuant to Simplified Procedure.<sup>129</sup>

<sup>120</sup> *American Harley Corp. v. Irvin Indus., Inc.*, 27 N.Y.2d 168, 172, 262 N.E.2d 552, 553, 315 N.Y.S.2d 129, 131 (1970), *cert. denied*, 401 U.S. 976 (1971).

<sup>121</sup> 36 App. Div. 2d 987, 988, 320 N.Y.S.2d 818, 820 (1971).

<sup>122</sup> *Id.*

<sup>123</sup> *Lear Inc. v. Adkins*, 395 U.S. 653 (1968).

<sup>124</sup> 36 App. Div. 2d at 988, 320 N.Y.S.2d at 821.

<sup>125</sup> See 7B MCKINNEY'S CPLR 3031, commentary at 231-35 (1970).

<sup>126</sup> See 3 WK&M ¶ 3031.03.

<sup>127</sup> CPLR 3031.

<sup>128</sup> See 3 WK&M ¶¶ 3033.02, 3033.03.

<sup>129</sup> See *id.* ¶ 3034.01.

At this point there is a right to a jury trial on the question whether the parties had agreed upon Simplified Procedure.<sup>130</sup>

In *Time Writers, Inc. v. Coleman*,<sup>131</sup> the plaintiff moved for a default judgment in an action allegedly commenced under CPLR 3031. The court denied the motion, because plaintiff's action had been commenced unilaterally. Plaintiff contended that his action was authorized by 3033 and 3034, on the ground that the parties had contracted to use the Simplified Procedure set down in section 3031. The court indicated that rule 3034, in conjunction with sections 3031 and 3033, requires the plaintiff to move for settlement of the terms of the statement prior to moving for a judgment.<sup>132</sup> Plaintiff was advised to personally serve the potential defendant, in order to empower the court to determine whether the parties had in fact agreed to submit.<sup>133</sup>

#### ARTICLE 32 — ACCELERATED JUDGMENT

*Collateral Estoppel: Stranger to prior suit properly held not bound by previous determination of the issues.*

Res judicata precludes relitigation of the same cause of action between the same parties or their privies when the cause of action has previously been adjudicated on the merits.<sup>134</sup> Collateral estoppel precludes relitigation of the identical issue actually litigated and necessarily determined in a prior action based on a different cause of action in which a party or one in privity with him participated.<sup>135</sup>

*Molino v. County of Putnam*<sup>136</sup> was an action for the wrongful death and conscious pain and suffering of the plaintiff-administratrix's daughter, who died from injuries sustained in a one-car accident. The plaintiff sought recovery against Putnam County and against an individual defendant, a passenger in the automobile, who had previously recovered against the car owner, the decedent's father, in an action in a federal district court. The Court of Appeals held that the principle of

130 7B MCKINNEY'S CPLR 3033, commentary at 238 (1970). Section 3033(2) confers the right of jury trial; rule 3034(3) provides the procedure through which it may be demanded. 181 67 Misc. 2d 258, 323 N.Y.S.2d 862 (Sup. Ct. Onondaga County 1971).

132 "It would seem that total compliance with § 3034 would be a prerequisite to a motion for judgment." *Id.* at 259, 323 N.Y.S.2d at 864. See 3 WK&M ¶ 3034.01.

133 67 Misc. 2d at 259, 323 N.Y.S.2d at 864.

134 See, e.g., *Smith v. Kirkpatrick*, 305 N.Y. 66, 111 N.E.2d 209 (1953).

135 See, e.g., 5 WK&M ¶ 5011.24 *et seq.*; Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165 (1969). The New York test for applying the doctrine of collateral estoppel involves two elements: (1) an identity of issue necessarily decided previously, and (2) a full and fair opportunity to contest the previous decision. *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 960 (1969). See also *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 144-51 (1969).

136 29 N.Y.2d 44, 272 N.E.2d 323, 323 N.Y.S.2d 817 (1971).