

## Collateral Estoppel: Stranger to Prior Suit Properly Held Not Bound by Previous Determination of the Issues

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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).

collateral estoppel would not be applied against the plaintiff since she was not a party to the prior suit<sup>137</sup> and did not have a full and fair opportunity to litigate the issues presented in that suit. The Court remarked that this was the first time that a defendant had sought "to apply the principle of collateral estoppel to a plaintiff who was not a party to the prior litigation."<sup>138</sup>

Being a stranger to the previous suit, the plaintiff could not and should not have been bound to the prior determination, since she would thereby be deprived of her day in court. The Court of Appeals answered the objection that the decedent's father might share in any recovery by the plaintiff by pointing out that the statute<sup>139</sup> which imputes to an owner-non-operator the negligence of his driver in order to impose liability to an injured third party does not impute the driver's negligence to the owner when he attempts to recover his own damage.<sup>140</sup>

#### ARTICLE 41 — TRAIL BY A JURY

*CPLR 4102: Conduct of parties held to constitute a waiver of the right to a jury trial.*

CPLR 4102 provides that a party may waive his right to a jury trial by failing to make a demand in the note of issue or after service of the note of issue, by failing to appear at trial, by filing a written waiver with the clerk, or by oral waiver in court.<sup>141</sup>

In *Clark v. Garth*,<sup>142</sup> the Monroe County Court was presented with an appeal from an Order of Reference granted by the City Court of Rochester on February 23, 1970. The defendant appealed on the ground that referral would deprive him of his right to a jury trial. The action, commenced on September 4, 1968, involved a claim for \$500, the balance due on a sale. The parties amassed a mountainous record as a result of an escalation of statements, notices, affidavits, memoranda, motions, and cross-motions. In addition to finding that the defendant waived his right to a jury trial by joining an equitable counterclaim

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<sup>137</sup> See, e.g., *Neenan v. Woodside Astoria Transp. Co.*, 261 N.Y. 159, 184 N.E. 744 (1933).

<sup>138</sup> 29 N.Y.2d at 48, 272 N.E.2d at 325, 323 N.Y.S.2d at 819-20.

<sup>139</sup> N.Y. VEH. & TRAF. LAW § 388 (McKinney 1970).

<sup>140</sup> 29 N.Y.2d at 49, 272 N.E.2d at 325-26, 323 N.Y.S.2d at 821, citing *Continental Auto Lease Corp. v. Campbell*, 19 N.Y.2d 350, 227 N.E.2d 28, 280 N.Y.S.2d 123 (1967), discussed in *The Quarterly Survey*, 42 ST. JOHN'S L. REV. 438, 460 (1968); *Mills v. Gabriel*, 284 N.Y.2d 755, 31 N.E.2d 512 (1940), discussed in *The Quarterly Survey*, 42 ST. JOHN'S L. REV. 438, 459 (1968).

<sup>141</sup> A party may also waive his right to a jury trial by joining a claim not triable by jury based on the same transaction with a claim triable by jury. See, e.g., *Noto v. Headley*, 21 App. Div. 2d 686, 250 N.Y.S.2d 503 (2d Dep't 1964). A waiver does not deprive the other party of his right to a jury trial without his consent, CPLR 4102 (c).

<sup>142</sup> 67 Misc. 2d 473, 323 N.Y.S.2d 890 (Monroe County Ct. 1971).