

## CPLR 4102: Conduct of Parties Held To Constitute a Waiver of the Right to a Jury Trial

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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

<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).

based on the same transaction with other jury counterclaims,<sup>143</sup> the court held that both parties, by their conduct in delaying disposition of the issues through "an over-zealous adherence to procedural, preliminary detail,"<sup>144</sup> waived the right to a jury trial.<sup>145</sup>

The parties amply demonstrated that they were not serious about their right to a trial by jury. Instead, their general behavior evinced an intention to waive this right — a waiver according to decisional law. Ironically, the county court felt compelled to return the case to the city court to determine whether it could dispose of the case without the use of a referee.<sup>146</sup>

#### ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

*CPLR 5222: Liability of the judgment creditor is not absolute.*

Under the CPA, money judgments were enforceable by execution or supplementary proceedings.<sup>147</sup> Consequently there were numerous inconsistencies within each procedure and many money judgments remained unsatisfied, or were satisfied only after extensive litigation involving the expenditure of substantial amounts of time and money.<sup>148</sup> CPLR 5222 was introduced to eliminate these dual procedures and to create a simple and consistent system for the enforcement of money judgments.<sup>149</sup> The rule provides in part that

[a] judgment creditor who has specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor, for any damages sustained by reason of the restraint . . . .<sup>150</sup>

While disposing of one problem, the statute created a new one. Is the judgment creditor's liability absolute, or subject to a finding of irresponsibility or bad faith? The civil court, in *Stathopoulos v. Seaways Shipping Corp.*,<sup>151</sup> chose the latter approach.

<sup>143</sup> *Academy Street Realty Corp. v. Young*, 25 App. Div. 2d 435, 266 N.Y.S.2d 906 (2d Dep't 1966); *Sue v. Homer*, 15 App. Div. 2d 729, 223 N.Y.S.2d 231 (4th Dep't 1962); *Liberty Bank of Buffalo v. Lansing*, 259 App. Div. 797, 18 N.Y.S.2d 311 (4th Dep't 1940); see also 7B MCKINNEY'S CPLR 4102, supp. commentary at 41 (1970). Professor Seigal notes that in such a situation a single fact-finder is required in order to preclude inconsistent determinations.

<sup>144</sup> 67 Misc. 2d at 476, 323 N.Y.S.2d at 892.

<sup>145</sup> See, e.g., *Phoenix Life Ins. Co. v. Conway*, 11 N.Y.2d 367, 183 N.E.2d 754, 229 N.Y.S.2d 740 (1962).

<sup>146</sup> 67 Misc. 2d at 477, 323 N.Y.S.2d at 894.

<sup>147</sup> 12 NEW YORK STANDARD CIVIL PRACTICE SERV. 60 (1963).

<sup>148</sup> *Id.* 59.

<sup>149</sup> 9 CARMODY-WAIT 2d 64:2, at 331 n.7 (1966).

<sup>150</sup> CPLR 5222(b).

<sup>151</sup> 66 Misc. 2d 607, 321 N.Y.S.2d 717 (N.Y.C. Civ. Ct. N.Y. County 1971).