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CPLR 8101: Costs Granted to Defendant Despite Unsuccessfulness of His Counterclaim

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conjunction with CPLR 301 (basis statute), CPLR 6201(2) appears to be unnecessary as a jurisdictional basis statute and therefore may be held unconstitutional. Legislative reconsideration would be salutary.

ARTICLE 81 — COSTS GENERALLY

CPLR 8101: Costs granted to defendant despite unsuccessfulness of his counterclaim.

CPLR 8101 provides that "[t]he party in whose favor a judgment is entered is entitled to costs in the action, unless otherwise provided by statutes or unless the court determines that to allow cost would not be equitable, under all of the circumstances." Where there is no counterclaim, determination of whom shall receive costs is a relatively simple matter: the party who prevails on the plaintiff's complaint is entitled to them. The matter becomes more complicated, however, when the defendant interposes a counterclaim.[138] If plaintiff prevails on his cause of action and defendant fails on his counterclaim, plaintiff is clearly entitled to costs, absent special circumstances.[139] If plaintiff loses on his complaint and defendant succeeds on his counterclaim, defendant is obviously entitled to costs. But, if the parties both succeed or both fail on their respective causes of action, who, if anyone, is entitled to costs?

In *Graybill v. Van Dyne*,[140] the Supreme Court, Monroe County, was called upon to determine who is entitled to costs when both the plaintiffs and the counterclaiming defendant failed to recover on their causes of action resulting from an automobile accident. The defendant moved to strike the plaintiff's bill of costs against her, and the motion was granted.[141] The court noted that under the Civil Practice Act and the Code of Civil Procedure, "the weight of New York authority" was in favor of granting costs to a successful defendant, even though he had failed on his counterclaim.[142] Under the CPLR, the court concluded, the test of which party is entitled to costs is who is the prevailing party, *i.e.*, "the party in whose favor a judgment is entered."[143] Where neither party succeeds on his course of action, the rule remains that only the

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138 *See, e.g.*, Checketts v. Collings, 78 Utah 93, 95, 1 P.2d 950, 951 (1931) ("the authorities on the question are in irreconcilable conflict").

139 *See* CPLR 8102.

140 67 Misc. 2d 228, 324 N.Y.S.2d 291 (Sup. Ct. Monroe County 1971).

141 *Id.* at 232, 324 N.Y.S.2d at 294.

142 *Id.* at 229, 324 N.Y.S.2d at 292, *citing* Gibbons v. Skinner, 150 App. Div. 706, 135 N.Y.S. 820 (1st Dep't 1912); Pagano v. Giuliani, 182 Misc. 375, 43 N.Y.S.2d 945, 946 (Sup. Ct. Onondaga County 1943); Rohrs v. Rohrs, 72 Misc. 108, 130 N.Y.S. 1093 (N.Y. City Ct. 1911); Thayer v. Holland, 63 How. Pr. 179 (N.Y.C.P. 1882); Whitelegge v. DeWitt, 12 Daly 319, 323-24 (N.Y.C.P. 1884).

143 67 Misc. 2d at 230, 324 N.Y.S.2d at 293, *quoting* CPLR 8101.

defendant is entitled to costs.[144] Nevertheless, if the counterclaim is independent and aggressive in nature, the court has discretion to deny costs to him.[145]

The rationale implicit in the *Graybill* decision is that the determination of who is entitled to costs should generally be based along upon the success or failure of the party who initially invokes the court's jurisdiction, *i.e.*, the plaintiff. If the plaintiff fails on his cause of action, he becomes liable for costs. The outcome of the adjudication of any counterclaim is irrelevant, unless the counterclaim is independent and unsuccessful, in which case the court may deny costs to the defendant. This rule is equitable, especially since the counterclaim is often a strategic device employed to bolster the defense to the main claim. Moreover, it is complementary to CPLR 8103, which enables the court to award costs to a defendant who prevails upon a counterclaim "which is not substantially the same as any cause of action upon which the plaintiff recovered the judgment."

> The theory of costs is that they are in a sense indemnification for a party against the expense of successfully asserting his rights in court. The theory upon which they are allowed to a plaintiff is that the default of the defendant made it necessary to sue him, and to the defendant, that the plaintiff sued him without cause.[146]

DEVELOPMENTS IN NEW YORK PRACTICE

Forum Non Conveniens: A Common-Law Doctrine Recently Revised

Introduction

While New York courts are vested with broad jurisdiction,[147] the exercise of their power is, under certain circumstances, discretionary. The doctrine of *forum non conveniens*, under which jurisdiction may be declined, has long been available in actions between nonresidents arising without the state. It has been applied when such actions would have

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144 *Id.* at 232, 324 N.Y.S.2d at 294. *Accord*, Rypkema v. Frauenhofer, 55 Misc. 2d 1000, 286 N.Y.S.2d 867 (Tioga County Ct. 1968).

145 *Id.* at 232, 324 N.Y.S.2d at 294. *E.g.*, De Hart v. Enright, 93 Misc. 213, 157 N.Y.S. 46 (Sup. Ct. Cattaraugus County 1916).

146 Benner v. English, 50 Misc. 2d 592, 594, 271 N.Y.S.2d 20, 23 (Sup. Ct. Erie County 1966).

147 CPLR 302 gives the courts personal jurisdiction over a nondomiciliary who, in person or through an agent, transacts any business within the state, commits a tortious act within the state, or under certain circumstances, commits a tortious act without the state; CPLR 313 provides for service without the state to secure personal jurisdiction; New York Business Corporation Law § 1314 outlines circumstances under which an action can be brought against a foreign corporation by another foreign corporation. *See generally* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) (suggesting lines for further development in cases and statutory law).