St. John's Law Review

Volume 45, December 1970, Number 2 Article 15

CPLR 2103(a): Licensing Statute Upheld by Lower Court

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ARTICLE 6 — JOINDER OF CLAIMS, CONSOLIDATION AND SEVERANCE

CPLR 602: Court reestablishes prerequisites to consolidation.

Much has been said about the broad discretion of the courts to order the consolidation of actions involving a common question of law or fact.[46] Indeed, consolidation is not prevented by the fact that one action is at law and the other in equity;[47] or by the fact that the parties in the two actions are not identical;[48] or by the fact that all of the issues raised are not common.[49] Consolidation "is not only a saving in time, trouble, and expense to the parties and the state, but a preventive of the injustice which may result from divergent decisions in each separate case."[50]

Despite the ostensible ease with which actions may be joined, counsel should not be lulled into a false sense of security. As recently ruled by the Second Department in *Rubin v. Grossman*,[51] consolidation is not automatic; certain prerequisites must be met. In *Rubin* an order granting a motion to consolidate a personal injury action and a wrongful death action was reversed on the ground that plaintiff failed to produce "*medical* proof showing the *causal* relationship between the accident and the subsequent death. . . ."[52]

At first glance, the actions in *Rubin* would seem to invoke similar questions of law and fact, particularly defendant's liability for the infliction of the initial injury. Nonetheless, courts have stated in the past,[53] and now again in *Rubin*, that some medical proof is required to show the causal connection between the injury and the death; conjecture on the part of the movant is insufficient. Obviously, the medical affidavits need not be so extensive as to *prove* the causation, but they must, at least, connect the death to the injury.

ARTICLE 21 — PAPERS

CPLR 2103(a): Licensing statute upheld by lower court.

In an apparent attempt to control the "systematic and widespread abuses so prevalent in the field of process serving,"[54] the New York

46 CPLR 602.

47 *See* Philip Shlansky & Brother, Inc. v. Grossman, 273 App. Div. 544, 78 N.Y.S.2d 127 (1st Dep't 1948).

48 *See* Edelstein v. Hacker, 152 N.Y.S.2d 525 (Sup. Ct. Westchester County 1956).

49 *See* Moore v. Parks, 29 App. Div. 2d 912, 289 N.Y.S.2d 877 (4th Dep't 1968).

50 Philip Shlansky & Brother, Inc. v. Grossman, 273 App. Div. 544, 566, 78 N.Y.S.2d 127, 128 (1st Dep't 1948).

51 34 App. Div. 2d 680, 310 N.Y.S.2d 395 (2d Dep't 1970) (mem.).

52 *Id.*, 310 N.Y.S.2d at 396 (emphasis added).

53 *See* Augenbraun v. G&B Distrib., 17 App. Div. 2d 785, 232 N.Y.S.2d 635 (1st Dep't 1962); *cf.* McCarthy v. Downes, 17 App. Div. 2d 919, 233 N.Y.S.2d 402 (1st Dep't 1962).

54 ABC Process Serving Bureau Inc. v. City of New York, 63 Misc. 2d 33, 34, 310 N.Y.S. 2d 859, 861 (Sup. Ct. N.Y. County 1970). *See also* N.Y. Times, Oct. 14, 1969, at 60, col. 1.

City Council enacted Article 43, Chapter 32 of the Administrative Code of the City of New York,[55] providing in pertinent part that "it shall be unlawful for any person to be employed as or perform the services of a process server without a license therefor."[56] This provision was challenged in *ABC Process Serving Bureau Inc. v. City of New York*[57] on two grounds: first, that it was applicable only to individual process servers, and, second, that the new law was in conflict with CPLR 2103(a).[58]

Neither argument prevailed. From the definition of "process server" in the statute,[59] the court found an intention on the part of the City Council to include those in the business of serving process as well as the actual servers. Regarding a possible conflict with the CPLR, the court held that the local law was complementary to the statewide procedure. Furthermore, there was no evidence of legislative preemption as a bar to its enactment.

ABC Process represents the first sign of dissatisfaction with the new provision. However, a more relevant question for the future will not be to whom does the provision apply but to what types of papers does it apply. While the need for some kind of control over process servers is obvious, the new proviso may result in the opening of a pandora's box of inconveniences if it is construed in its broadest sense to include the service of *all* process. More sensibly, the law should be applied only in the case of service of initiatory process and not to other less important papers whch are often served by the attorney's clerk or secretary.

ARTICLE 23 — SUBPOENAS, OATHS AND AFFIRMATIONS

CPLR 2303: Propriety of substituted service of subpoena confirmed.

Under the CPA, a subpoena issued to compel the attendance of a witness was required to be "delivered to the witness."[60] Although this requirement for personal delivery was not construed so strictly as to

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55 1969 Local Laws of the City of New York, No. 80 (effective April 1, 1970).

56 *Id.* § B32-450.0.

57 63 Misc. 2d 33, 310 N.Y.S.2d 859 (Sup. Ct. N.Y. County 1970).

58 CPLR 2103(a) provides that "[e]xcept where otherwise prescribed by law or order of court, papers may be served by any person not a party of the age of eighteen years or over."

59 1969 Local Laws of the City of New York, No. 80, § B32-451.0, provides:

> A process server is a person engaged in the business of serving or one who purports to serve or one who serves personally or by substituted service upon any person, corporation, governmental or political subdivision or agency, a summons, subpoena, notice, citation or other process, directing an appearance or response to a legal action, legal proceeding or administrative proceedings.

60 CPA 406.