St. John's Law Review

Volume 45, March 1971, Number 3 Article 18

CPLR 3025(b): Practice of Granting Leave To Amend Pleadings Without Inquiry into the Merits of the Cause of Action as Amended Ruled No Longer Tolerable

St. John's Law Review

In both the above hypothetical and *Perez*, the manufacturer, *i.e.*, the guilty party, has been immunized from liability at the expense of a party with a legitimate claim. In all fairness, *Mendel* is only partly responsible for this result inasmuch as earlier cases had labelled the defendant's claim as one for breach of warranty, rather than one for indemnification.[91] The latter construction could conceivably remedy much of the injustice inherent in this area;[92] the statute of limitations on the claim for indemnification would not begin to run until defendant paid a judgment secured by the injured party.[93] Regrettably, lower courts have not been willing to adopt this approach. Nonetheless, there could be little objection to thrusting ultimate liability on the actual wrongdoer.[94] Perhaps, judicial reaction to *Mendel* will result in a reappraisal of the earlier decisions which refused to compare the innocent retailer with a passive tortfeasor in negligence cases.

ARTICLE 30 — REMEDIES AND PLEADINGS

CPLR 3025(b): Practice of granting leave to amend pleadings without inquiry into the merits of the cause of action as amended ruled no longer tolerable.

Among those powers "inherent in the court as a part of its ordinary jurisdiction" is the power to amend pleadings.[95] The statutory declaration of this authority, contained in CPLR 3025(b), instructs that leave to amend shall be "freely given," but is silent as to what mode of inquiry should be made into the propriety of such amendment. Historically, the courts have applied a rule of strict non-inquiry into the merits of the proposed amended pleadings, save in instances where the allegations contained therein are patently without substance.[96] Recently, however, in *East Asiatic Co. v. Corash*,[97] the Appellate Division, First Department, characterized this practice as no longer tolerable, reasoning that "[t]he day when motion practice would be allowed to proliferate through avoiding coming to grips with the substantial question

91 *See* cases cited note 88 *supra*.

92 *See* Siegel, *Injury, Warranty and Time: Procedure Catches Up and Makes Trouble*, 164 N.Y.L.J. 103, Nov. 30, 1970, at 4, col. 5-7 (addendum).

93 Musco v. Conte, 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964).

94 *See* Note, *An Appraisal of Judicial Reluctance to Imply an Indemnity Contract in Time-Barred Breach of Warranty Suits*, 39 ST. JOHN'S L. REV. 361, 366-67 (1965).

95 Christal v. Kelly, 88 N.Y. 285, 290 (1882); *see also* Kalt Lumber Co. v. Dupignac, 150 App. Div. 400, 134 N.Y.S. 1098 (1st Dep't 1912).

96 *See* Martin v. Katz, 15 App. Div. 2d 767, 224 N.Y.S.2d 568 (1st Dep't 1962); Anderson v. New York Cent. R.R., 284 App. Div. 64, 130 N.Y.S.2d 308 (4th Dep't 1954); Cohen v. Dana, 273 App. Div. 1017, 79 N.Y.S.2d 261 (2d Dep't 1948); Warren v. Putnam, 263 App. Div. 474, 33 N.Y.S.2d 635 (3d Dep't 1942); *see also* 3 WK&M ¶ 3025.23; 7B MCKINNEY'S CPLR 3025, supp. commentary at 203 (1970).

97 34 App. Div. 2d 432, 312 N.Y.S.2d 311 (1st Dep't 1970).

is past. We can no longer afford the time or judicial manpower for the repeated applications for the same relief which necessarily result from postponing decision."[98]

There would seem to be nothing to preclude the *East Asiatic* decision. The time-honored rule of non-inquiry into the merits of a 3025(b) motion to amend is derived strictly from the case law of the various departments of the appellate division.[99] Lacking any instruction to the contrary from the Court of Appeals, the discretion available to the court under rule 3025(b) would appear to be broad enough to include an inquiry into the merits.

ARTICLE 31 — DISCLOSURE

CPLR 3101: Court recognizes that public policy grounds for restricting disclosure in matrimonial action are no longer viable.

It had long been ruled that disclosure in matrimonial actions should be limited to cases wherein the movant demonstrated "special circumstances."[100] For, disclosure was deemed to be burdensome and it was feared that discovery proceedings would jeopardize the parties' chances for a reconciliation.[101] With the enactment of the DRL, however, and its provision for extensive conciliation proceedings,[102] it was posited that the public policy grounds for restricting the use of disclosure devices in matrimonial actions were no longer viable.[103] This approach was adopted by the Appellate Division, Fourth Department, in *Dunlap v. Dunlap*.[104]

In *Dunlap* plaintiff-wife sought to examine defendant on two claims: her cause of action for divorce based on the nonfault ground of living apart for a period of two years pursuant to a separation agreement and defendant's counterclaim based on adultery. Recognizing that the grounds for denying disclosure have been "substantially diminished," the court permitted plaintiff to examine defendant regarding her action for divorce. However, the court properly disallowed

---

98 *Id.* at 434, 312 N.Y.S.2d at 313.

99 *See* note 96 *infra*.

100 Hunter v. Hunter, 10 App. Div. 2d 291, 198 N.Y.S.2d 1008 (1st Dep't 1960); Kennedy v. Kennedy, 40 Misc. 2d 672, 243 N.Y.S.2d 737 (Sup. Ct. Kings County 1963).

101 *See, e.g.*, Campbell v. Campbell, 7 App. Div. 2d 1011, 184 N.Y.S.2d 479 (2d Dep't 1959); *see also* CARMODY-FARKOSCH, NEW YORK PRACTICE 575-76 (8th ed. 1963).

102 DRL § 215(c) *et seq.*

103 7B MCKINNEY'S CPLR 3101, commentary 15, at 18-20 (1970).

104 34 App. Div. 2d 889, 312 N.Y.S.2d 491 (4th Dep't 1970); *see also* Hochberg v. Hochberg, 63 Misc. 2d 77, 310 N.Y.S.2d 737 (Sup. Ct. Nassau County 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 342, 356 (1970).