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CPLR 1201: Court Vacates Default Judgment Against Party Incapable of Adequately Protecting His Rights

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ARTICLE 10 — PARTIES GENERALLY

CPLR 1007: Impleader permitted in summary proceeding.

In *Blackman v. Walker*[23] a landlord commenced a summary proceeding to evict respondent for nonpayment of rent. In turn, respondent impleaded the County Department of Social Services which had withheld payment of her shelter allowance. Respondent contended that violations of the Social Services Law by the landlord constituted a defense to the eviction proceeding[24] and that it was because of alleged infractions that the department had withheld her allowance.[25] Thus, respondent concluded that, inasmuch as the real dispute was between the landlord and the department, the latter should be made a party to the proceedings. The Nassau County District Court agreed.

Under the CPA, impleader was not permitted in a summary proceeding.[26] Nevertheless, recent cases have recognized both the utility and justifiability[27] of utilizing certain procedural devices contained in the CPLR in a summary proceeding.[28] Attempts at impleader in such proceedings are rare, partially because in circumstances such as *Blackman* the department has undertaken to assist the tenant in preparing his defense.[29] Where, for one reason or another, the department's aid is not forthcoming, impleader insures fairness to all parties. Although the landlord is certainly entitled to prompt consideration of his claim, it is manifestly unfair to deny the tenant every opportunity to pursue fully his defense.

ARTICLE 12 — INFANTS AND INCOMPETENTS

CPLR 1201: Court vacates default judgment against party incapable of adequately protecting his rights.

In *Rand v. Lockwood*[30] plaintiff was granted judgment upon the defendant Tiffany's default in appearing. After Tiffany died, his executor sought an order vacating the judgment on the ground that at the time the action was commenced and at the time the default judgment was

23 65 Misc. 2d 138, 316 N.Y.S.2d 930 (Dist. Ct. Nassau County 1970).

24 N.Y. SOC. SERVICES LAW § 143-b(5)(b) (McKinney 1966).

25 *Id.* § 143-b(2); *see also* Farrell v. Drew, 19 N.Y.2d 486, 227 N.E.2d 824, 281 N.Y.S.2d 1 (1967).

26 Edaviel Corp. v. Boykin, 205 Misc. 622, 129 N.Y.S.2d 149 (1st Dep't 1954).

27 *See* CPLR 103(b).

28 *See, e.g.*, Metropolitan Life Ins. Co. v. Carroll, 43 Misc. 2d 639, 251 N.Y.S.2d 693 (App. T. 1st Dep't 1964) (motion for summary judgment).

29 *See, e.g.*, Farrell v. Drew, 19 N.Y.2d 486, 227 N.E.2d 824, 281 N.Y.S.2d 1 (1967) (department appeared as *amicus curiae*); Caravetto v. Springfield, 54 Misc. 2d 759, 283 N.Y.S.2d 298 (Dist. Ct. Suffolk County 1967) (employees of department served as witnesses).

30 65 Misc. 2d 182, 316 N.Y.S.2d 950 (Sup. Ct. Nassau County 1970).

entered, the decedent was an adult incapable of adequately defending his rights within the meaning of CPLR 1201. The court agreed, ruling that the defendant should have been represented by a guardian *ad litem*. Accordingly, it vacated the prior judgment and granted leave to interpose an answer.

The court was skeptical that any appearance by the decedent either *pro se* or by an attorney would have been authorized without the appointment of a guardian *ad litem*.[31] Additionally, it was of the opinion that quite possibly the decedent was inadequately apprised of his position because of the mode of service employed by the plaintiff.[32] Undoubtedly, however, the court was primarily motivated by the decedent's condition and the resultant obligation of the judiciary to protect him.[33]

If neither the court nor the opposing party is cognizant of the defendant's incapacity, the proceedings taken against him are valid.[34] Nonetheless, once incompetency is discovered, protective measures will be undertaken by the court, and prior orders and judgments may be set aside.[35] Consequently, it would behoove the plaintiff (or defendant as the case may be) to move for an order appointing a guardian if he suspects that his opponent is incapable of protecting his rights.[36] Such a gesture may seem foreign to our conception of litigation[37] and it may prove embarrassing if the party is later found to be of sound mind.[38] But, it is an indispensable undertaking if the litigant desires to insure finality to the proceedings.

Article 30 — Remedies and Pleading

CPLR 3018: Affirmative defense of illegality is not waived if plaintiff is not surprised by its assertion at trial.

CPLR 3018(b) mandates that a party plead all matters which are likely to "surprise" his adversary or would bring forth factual questions that had not appeared on the face of the prior pleadings. In addition, many of the defenses contained in this subsection may be asserted

31 *See* CPLR 321.

32 The defendant in *Lockwood* was served by a substituted method authorized by former section CPLR 308(3).

33 *Cf.* Seton Psychiatric Institute v. Arundel, 31 Misc. 2d 1082, 1083, 220 N.Y.S.2d 736, 737 (Erie County Ct. 1961): "[I]t disturbs the conscience of this court to think that a man who was in Gowanda State Hospital could be served and thereafter a judgment could be served against him without his in any way being able to defend himself . . . ."

34 1 WK&M ¶ 321.03.

35 *Id.*

36 *See* CPLR 1202.

37 2 WK&M ¶ 1201.05.

38 *Id.*