St. John's Law Review

Volume 44
Number 2 *Volume 44, October 1969, Number 2*

Article 20

CPLR 1007: Premature Suit for Indemnification Not Permitted

St. John's Law Review

CPLR 325(d): Damages sought not limited by monetary jurisdiction in lower court after transfer by supreme court without plaintiff's consent.

Article VI, section 19(a) of the New York State Constitution empowers the supreme court to transfer actions and proceedings over which it does not have exclusive jurisdiction, independent of the amount of damages sought, to any other court in the judicial department possessing jurisdiction of the subject matter and over the parties. It has been noted that this provision is self-executing, thus permitting the supreme court to ease its calendar congestion directly.[75]

The constitution further permits the state legislature to provide that verdicts or judgments in such transferred actions shall not be subject to the lower monetary jurisdiction of the court to which the action is transferred.[76] Accordingly, CPLR Rule 325(d) was enacted in 1968, and the legislature thereby delegated this power to the appellate division.[77] To date, calendar conditions in the state have been such that transfer rules have only been adopted by the appellate divisions in the third[78] and fourth[79] judicial departments.

Kloc v. Cissell[80] affords a recent illustration of the operation of the transfer rule in the fourth department. The trial court transferred plaintiff's action to recover damages for personal injuries to a city court because the potential recovery was, in the court's view, within the monetary jurisdiction of the city court. However, the trial court had neglected to consider any of plaintiff's medical testimony. The appellate division nevertheless affirmed in light of the fact that plaintiff would not be aggrieved by such transfer since his recovery would not now be limited by the monetary ceiling in the city court.

ARTICLE 10 — PARTIES GENERALLY

CPLR 1007: Premature suit for indemnification not permitted.

Under CPLR 1007, third party indemnity suits are permitted by defendant "after the service of his answer." However, a premature in-

75 Frankel Associates, Inc. v. Dun & Bradstreet, Inc., 45 Misc. 2d 607, 610, 257 N.Y.S.2d 555, 558 (Sup. Ct. N.Y. County 1965); 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 325.04 (1968).

76 N.Y. CONST. art. VI, § 19(k).

77 *See* 7B MCKINNEY'S CPLR 325, supp. commentary 218 (1968).

78 22 NYCRR 861.18 (1969).

79 N.Y. STANDARD CIVIL PRACTICE DESK BOOK, supp. 108 (3d ed. 1969). *See* 7B MCKINNEY'S CPLR 325, supp. commentary 218, 219 (1968): "In view of the congestion in the lower courts of the first and second departments, implementing provisions in these departments do not seem to be in the offing."

80 31 App. Div. 2d 885, 298 N.Y.S.2d 107 (4th Dep't 1969).

demnity suit (*i.e.*, one instituted before service of an answer) was permitted in *W. T. Grant Co. v. Uneeda Doll Co.*[81] by the first department where the main suit was instituted in Connecticut, presumably because the New York courts could not exercise control over that litigation.[82]

Apparently in the absence of the "jurisdictional problem" presented in a case such as *Grant*, the courts will not permit such suits.[83] Thus, in *Lasker-Goldman Corp. v. Delma Engineering Corp.*,[84] the first department recently reversed an order granting plaintiff partial summary judgment on a cause of action based upon an indemnity clause. The clause was unambiguous as to defendant's potential liability, but third party complainants had done no more than file claims for damages at the time judgment was rendered. The plaintiff was therefore clearly not yet entitled to recovery and the denial of the motion for summary judgment was proper.

ARTICLE 31 — DISCLOSURE

CPLR 3101(d): Second department adopts liberal view with regard to disclosure of witnesses' names.

In *Peretz v. Blekicki*,[85] the second department gave appellate affirmation to the policy, recently promulgated by a supreme court in that department,[86] of liberal disclosure of a witness' name.

In modifying the lower court decision to allow the disclosure of the identity of a witness to an accident, unless it appears that such matter is otherwise privileged under CPLR 3101(c) or (d), the appellate division relied upon both *Hartley v. Ring*[87] and *Allen v. Crowell-Collier Publishing Co.*[88] In *Allen*, the Court of Appeals promulgated a test of "usefulness and reason" which should be liberally construed so as to require pre-trial disclosure of a witness' name.

The importance of *Peretz* lies in the fact that it puts the weight of the appellate division behind the pronouncement previously issued

---

81 19 App. Div. 2d 361, 243 N.Y.S.2d 428 (1st Dep't 1963).

82 *See* 7B MCKINNEY'S CPLR 3014, supp. commentary 117, 118 (1968).

83 *See* Lasker-Goldman Corp. v. Delma Eng'r Corp., 32 App. Div. 2d 513, 298 N.Y.S.2d 747 (1st Dep't 1969); Morey v. Sealright Co., 41 Misc. 2d 1068, 1070, 247 N.Y.S.2d 306, 308-09 (Sup. Ct. Onondaga County 1964).

84 32 App. Div. 2d 513, 298 N.Y.S.2d 747 (1st Dep't 1969).

85 31 App. Div. 2d 934, 298 N.Y.S.2d 805 (2d Dep't 1969).

86 *See* Hartley v. Ring, 58 Misc. 2d 618, 296 N.Y.S.2d 394 (Sup. Ct. Queens County 1969). *See also The Quarterly Survey of New York Practice*, 44 ST. JOHN'S L. REV. 135, 140 (1969) for an analysis of the history leading to this decision.

87 58 Misc. 2d 618, 296 N.Y.S.2d 394 (Sup. Ct. Queens County 1969).

88 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968). *See also The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 324-25 (1968).