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CPLR 3212: Dobkin "Real Party in Interest Doctrine" Not Extended to Motion for Summary Judgment

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in *Hartley*. Thus, the ability of a party to "hide" the name of a witness, which was ended in theory by *Allen*, is also being terminated by the lower courts in practice.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3212: Dobkin *"real party in interest doctrine" not extended to motion for summary judgment.*

In *Kopperman v. Zar*,[89] plaintiff was injured while riding as a passenger in one co-defendant's vehicle when it struck the rear of the other co-defendant's vehicle. Both defendants were insured by the same liability carrier, and there was no question but that the accident was caused by the negligence of either or both defendants. Since she clearly was not contributorily negligent, the plaintiff, relying upon *Dobkin v. Chapman*,[90] sought summary judgment against the insurer on the grounds that it was the "real party in interest."

The "real party in interest issue" arose in *Dobkin* when the defendants moved to set aside service because of an alleged denial of due process. Defendants could not be located for service after they had become involved in an automobile accident in New York, and the Court upheld service whereby the summons and complaint were mailed to defendant's last known address in New York and a copy thereof was delivered to defendant's insurance carrier — the real party in interest. The *ratio decidendi* of *Dobkin* is that the requirements of due process have been met if defendant has been given reasonable notice. And the question of reasonableness depends upon a balancing of interests after consideration is given to all the attendant circumstances.[91] Accordingly, it noted that in view of "the plaintiff's need, the public interest, the reasonableness of the plaintiff's efforts under all the cricumstances to inform the defendant, and the availability of other safeguards for the defendant's interest,"[92] service in *Dobkin* was reasonable, whereas the same manner of service in another case might fail to meet the requirements of due process.

It is readily apparent from the tone of the *Kopperman* opinion that the "real party in interest" theory may well be limited and restricted to those situations in which a plaintiff would otherwise be unable to serve the proper defendant. The court suggests three problems which

89 59 Misc. 2d 102, 298 N.Y.S.2d 150 (N.Y.C. Civ. Ct. Queens County 1969).

90 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968). *Dobkin* is a consolidation of three cases. *See The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 310 (1968). *See also* 7B MCKINNEY'S CPLR 308, supp. commentary 167 (1968).

91 7B MCKINNEY'S CPLR 308, supp. commentary 167 (1968).

92 21 N.Y.2d at 503, 236 N.E.2d at 458, 289 N.Y.S.2d at 172.

militate against the extension sought by the plaintiff; all arise because the respective liabilities and alleged negligence of the individual wrongdoer have not been proven. First, the policy limits of the co-defendants may differ, and the payment of any judgment may be impossible if one or both of the policy limits have been exceeded. Secondly, the issue of the defendant's liability *inter se*, even though the carrier will ultimately pay the judgment, affects, if nothing else, the co-defendants' respective future liability insurance rates and the availability of future insurance coverage. Finally, the co-defendants should be granted the opportunity to protect themselves against the imposition of a judgment even if the insurance carrier pays the same. Since the latter two considerations are neither moot nor hypothetical, there seems to be no good reason to fail to adjudicate respective liabilities in favor of mere acceleration, although the *Kopperman* court suggests that such a procedure for "innocent plaintiffs" should be adopted by the legislature.

Kopperman thus appears to stand for the proposition that the judiciary is not about to give *carte blanche* application to any "real party in interest" theory, and will limit it to the truly worthy plaintiff, contemplated in *Dobkin*, who is otherwise remediless.

CPLR 3213: Court suggests that error in computation of motion date can be remedied through exercise of its discretion.

One of the problems confronting an attorney desiring to utilize the special procedure afforded by CPLR 3213 arises because he is compelled to set the hearing date in advance of actual knowledge of the time that the summons and motion for summary judgment in lieu of a complaint are to be served on the defendant.[93] This requirement represents a potential conflict within CPLR 3213 in that the section has a built-in time sequence which dictates that there be a specified limit of time between the service of the summons and notice of motion and the motion return date.

CPLR 320(a), incorporated by reference into CPLR 3213, prescribes the minimum time after service before which the motion can be heard, and, under this rule, if service is made by personal delivery of the summons to the defendant in New York, he has twenty days within which he must answer; if the summons is served by any other

93 *See* CPLR APPENDIX OF OFFICIAL FORMS, Form 29, at 57 (Bender Pamphlet ed. 1968). The notice of motion must specifically set forth the time that the motion is to be heard.