St. John's Law Review

Volume 44, January 1970, Number 3 Article 30

CPLR 4112: Proper Time To Request Jury Poll in a Two-Stage Trial Held To Be at Conclusion of Second Stage

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must assent before a jury demand can be withdrawn. The majority found that the provision is meant "to protect the party who *in reliance on his opponent's* demand for a jury trial properly fails to make demand in his own note of issue."[172]

Since a note of issue must be filed in order to place a case on the court's calendar,[173] it is usually the plaintiff who files first. In *Downing*, however, it was the defendant who did so, and no demand for a jury trial was included in his note of issue. Plaintiff subsequently demanded a jury trial, and the controversy arose when the defendant objected to plaintiff's motion to withdraw her jury demand. Despite 4102(a)'s apparent prohibition of such unilateral action, the motion was granted. The appellate division affirmed trial term's order, reasoning that the defendant could not have been in a position to object to plaintiff's subsequent withdrawal of her demand since, in light of the fact that he filed his note of issue first without making a demand, it was logically impossible for him to contend that he relied upon her demand to safeguard his right to a jury trial. The court noted that the defendant was in no way prejudiced because the same result would have been achieved if the plaintiff had not subsequently demanded a jury trial.

In opposition to the majority's position, and in reliance upon two earlier decisions,[174] the dissent called for strict interpretation of the statute. However, the two cases cited by the dissent are readily distinguishable in that the defendants in those cases were not first to file the note of issue. Instead, they relied upon the plaintiffs' demands for a jury trial.

Furthermore, the dissent's concern over the possibility that the defendant had been forced to expend much effort and undergo great expense in preparation for a jury trial is equally meretricious. If such were indeed the case, the court, in its discretion, could have granted a jury trial pursuant to subsections (d) and (e) of CPLR 4102 without interpreting subsection (a) in the literal sense suggested by the dissent.

CPLR 4112: Proper time to request jury poll in a two-stage trial held to be at conclusion of second stage.

The right of the nonprevailing party to poll the jury[175] after a verdict has been rendered is deeply entrenched in the common law of

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172 *Id.* at 351, 302 N.Y.S.2d at 336 (emphasis added).

173 CPLR 3402(a).

174 Schnur v. Gajewski, 207 Misc. 637, 140 N.Y.S.2d 82 (Sup. Ct. Bronx County 1955); Huntsberry v. Millers Mut. Fire Ins. Co., 199 So. 2d 196 (La. App. 3d Cir. 1967).

175 One object of polling the jury is to ascertain whether the jurors in fact agree with the rendered verdict and to insure that no juror has had a change of mind before entry of the decision in the minutes of the court. *See* Labor v. Koplin, 4 N.Y. 547 (1851).

New York.[176] The significance attached to this right is evidenced by the fact that the clerk will refrain from recording the jury's verdict until the completion of the polling procedure.[177] If the jury does not agree with the announced verdict, the court will then direct that it be reconsidered.[178] While the party against whom the verdict is pronounced has the prerogative of polling the jury, this right may be waived. However, an inappropriate denial of counsel's request to poll will be deemed reversible error, and a new trial will be granted upon appeal.[179]

A party should properly assert his right to have the jury polled immediately after the verdict has been delivered; if counsel fails to act at this time, his client's right to poll will be deemed impliedly waived.[180] An implied waiver may also result from counsel's failure to pursue the issue if it appears that he had an opportunity to assert his right to poll after his initial request was denied.[181]

Recently, the Second Department found the latter principle dispositive of the question presented in *Pickering v. Freedman*,[182] which involved a two-stage trial before the same jury on the issues of liability and damages arising from an automobile collision. Separate verdicts were rendered; the first established the defendants' liability, and the second, the amount of compensation awarded to the plaintiff for the damages sustained. The trial court had denied defendants' request for a poll of the jurors at the conclusion of the first phase of the trial, and defendant did not renew the request at the end of the second phase. After refuting defendants' contention that the trial court erred in denying a poll of the jury at the conclusion of the liability phase of the trial, the appellate court further held that the defendants' right to poll after either phase was waived by their failure to reassert the privilege at the conclusion of the damages phase.

Although defendants' failure appears to fall within the category of an implied waiver of the right to poll the jury, the question of

176 Warner v. New York Cent. R.R., 52 N.Y. 437 (1873); Labor v. Koplin, 4 N.Y. 547 (1851); Fox v. Smith, 3 Cow. 23 (N.Y. 1824); Farhart v. Matuljak, 283 App. Div. 977, 130 N.Y.S.2d 611, *leave to appeal denied*, 284 App. Div. 817, 132 N.Y.S.2d 347 (3d Dep't 1954).

177 *See* 4 WK&M ¶ 4112.05 (1969).

178 The direction of reconsideration by the court is discussed in 4 WK&M ¶ 4112.07 (1969).

179 Dore v. Wyer, 1 App. Div. 2d 973, 150 N.Y.S.2d 886 (2d Dep't 1956) (failure to grant request to poll jury reversible error even though verdict was sealed and signed by the jurors). For a discussion of sealed verdicts see 4 WK&M ¶ 4112.02 (1969).

180 Reed v. Cook, 103 N.Y.S.2d 539 (Sup. Ct. Onondaga County 1951).

181 *See* Farhart v. Matuljak, 283 App. Div. 977, 130 N.Y.S.2d 611, *leave to appeal denied*, 284 App. Div. 817, 132 N.Y.S.2d 347 (3d Dep't 1954), wherein in response to counsel's request to have the jury polled, the court merely stated that the verdict was unanimous without denying the request. However, due to the attorney's failure to except to this response, the right to poll was adjudged waived.

182 32 App. Div. 2d 649, 300 N.Y.S.2d 742 (2d Dep't 1969).

what constitutes an implied waiver in the case of a two-stage trial had not been previously adjudicated and thus should have been dealt with more extensively by the court. The polling procedure gives each juror the opportunity to dissent from the verdict to which he had previously agreed. A denial of this opportunity may therefore cause the verdict to be recorded in the minutes of the court[183] without specific confirmation. In view of the procedure employed in *Pickering*, the damages issue would be tried only after the liability verdict was recorded. By denying defendants' request to have the jury polled at the conclusion of the liability phase of the proceedings, the trial court did not give due recognition to the possible implications of its denial. If the jury had not confirmed the first verdict upon being polled, the question of liability would have to have been reconsidered, no entry in the court's records could have been made, and the need for proceeding with the second phase of the trial would have been obviated.

Moreover, the second department failed to consider the primary purpose of the polling procedure — to make certain that each juror actually agrees with the pronounced verdict and that no coercion has taken place in the jury room.[184] It would seem that a juror who has been coerced into acquiescing in a verdict would be less likely to disclose the coercion several days after it has occurred. In addition, once the damages phase had begun, the defendants' liability for such damages would likely have become conclusively fixed in the jurors' minds. Accordingly, it would have been proper to confirm the liability verdict immediately after it was rendered and not several days thereafter.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201: Constitutionality of Seider v. Roth *reluctantly upheld by divided fededral court.*

The recently added subdivision (1) in CPLR 320(c) provides that "an appearance is not equivalent to personal service upon the defendant . . . if jurisdiction is based solely upon a levy on defendant's property within the state pursuant to an order of attachment." This amendment to CPLR 320 was necessitated by the widely criticized *Seider v. Roth*[185] doctrine authorizing a New York plaintiff

183 *See* CPLR 4112.

184 It has been stated that the object of the poll is to "ascertain with certainty . . . that no one has been coerced or induced to agree to a verdict to which he does not actually assent." Brith Trumpeldor of America, Inc. v. Bermil Sales & Serv. Co., 16 Misc. 2d 186, 174 N.Y.S.2d 725 (N.Y.C. Munic. Ct. N.Y. County 1958), *modified*, 17 Misc. 2d 206, 183 N.Y.S.2d 887 (App. T. 1st Dep't 1959).

185 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).