

CPLR 4111(c): Case Arising Under CPA Illustrates Utility of CPLR Provision

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ARTICLE 41—TRIAL BY JURY

CPLR 4111(c): Case arising under CPA illustrates utility of CPLR provision.

In *Kennard v. Welded Tank & Construction Co.*,¹⁵⁹ an action was commenced against the manufacturer of a water tank, Welded Tank & Construction Co. (Welded), and a component part manufacturer, Colorado Fuel & Iron Co. (C.F. & I.), for injuries resulting from the explosion of Welded's water tank. Welded thereupon cross-claimed against C.F. & I. alleging breach of warranty. Subsequently, the jury returned a general verdict against both defendants on plaintiff's negligence claim, but returned special findings on the cross-claim that C.F. & I. was not negligent.¹⁶⁰ In response to motions by the plaintiff and Welded to resubmit the case to the jury, or, in the alternative, to order a new trial, the court, acceding to the mandatory language of CPA 459,¹⁶¹ resolved the inconsistencies in favor of the special findings, and dismissed the plaintiff's claim as well as Welded's cross-claim against C.F. & I. On appeal, a divided court held that the refusal of the lower court to resubmit the case to the jury or order a new trial was not reversible error.

In drafting CPLR 4111(c), the legislature vested the trial court with the discretion to direct the jury to further consider its answers or order a new trial in lieu of directing a judgment in accordance with the special findings.¹⁶² Hence, as noted by the Court of Appeals,¹⁶³ the problems presented by the *Kennard* facts should not recur under the CPLR.

ARTICLE 71—RECOVERY OF CHATTEL

CPLR 7102: Court vacates replevin since summons and complaint was not promptly served upon defendant in possession.

Ancillary to an action for the recovery of a chattel, CPLR 7102 authorizes seizure of the chattel by a sheriff on behalf of the plaintiff

¹⁵⁹ 26 Misc. 2d 1000, 209 N.Y.S.2d 479 (Sup. Ct. Nassau County 1961), *aff'd*, 27 App. Div. 2d 578, 277 N.Y.S.2d 817 (2d Dep't 1966), *aff'd*, 25 N.Y.2d 324, 253 N.E.2d 197, 305 N.Y.S.2d 477 (1969).

¹⁶⁰ The interrogatories were submitted to the jury in order to facilitate the trial court's determination of third-party actions instituted by Welded against C.F. & I. Statutory authorization for such interrogatories was provided by CPA 193-a(5), and is now covered by CPLR 4111.

¹⁶¹ CPA 459 directed that "where a special finding is inconsistent with a general verdict, the former controls the latter and the court must render judgment accordingly."

¹⁶² CPLR 4111(c). See SECOND REPORT 235.

¹⁶³ *Kennard v. Welded Tank & Constr. Co.*, 25 N.Y.2d 324, 328, 253 N.E.2d 197, 199, 305 N.Y.S.2d 477, 480 (1969).