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Splitting a Cause of Action: All Installments Due on a Lease Must Be Sought in One Action

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Splitting a cause of action: All installments due on a lease must be sought in one action.

The rule is well settled in New York that where several amounts or installments are due upon a single contract they must be sought in one action.[62] The purpose of such a rule is to prevent vexatious and oppressive litigation.[63] The necessity of such a rule is quite apparent, for it is unreasonable both to the defendant and the court to split one action into many, when one would suffice.

In the recent case of *Haviland & Co. v. Sphinx Import Co.*,[64] the plaintiff-landlord was suing for back rent from April, 1961, to December, 1963, due under a ten-year lease. Previously, the plaintiff had brought a summary proceeding against defendant claiming, incidentally as damages, rent due for January and February of 1964 and had received a judgment in his favor. The defendant pleaded that the present action was barred, since it amounted to splitting a cause of action. The court agreed with the defendant and held that the prior action by the plaintiff amounted to an election not to seek the earlier arrearages, thus barring plaintiff in the present suit.[65]

While the courts are disposed against the splitting of one's cause of action, they are also opposed to the idea of depriving one of his just due. In *Rockefeller v. St. Regis Paper Co.*,[66] the court vacated a prior judgment for sums due under a contract, so that the plaintiff could bring another action, which would include amounts which the plaintiff failed to sue for in his original action. However, *Rockefeller* may be distinguished from the present case. There the plaintiff brought his second suit on the heels of the first and, at the time of the original action, was under the mistaken belief that the subsequent sums would be paid.

While, as in the *Rockefeller* case, the court occasionally relieves a party from the consequences of his mistake by vacating a prior judgment, this will only be done under certain circum-

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[62] Kennedy v. City of New York, 196 N.Y. 19, 89 N.E. 360 (1909); Lorillard v. Clyde, 122 N.Y. 41, 25 N.E. 292 (1890).

[63] Maloney v. McMillan Book Co., 52 Misc. 2d 1006, 277 N.Y.S.2d 499 (Syracuse City Ct. 1967).

[64] 55 Misc. 2d 448, 285 N.Y.S.2d 414 (N.Y.C. Civ. Ct. 1967).

[65] Plaintiff argued that his cause of action had not been split since the arrearages in the first action had been claimed merely as incidental relief. This contention the court characterized as "semantic legerdemain" which set up a "distinction without a difference." 55 Misc. 2d at 449, 285 N.Y.S.2d at 417. For a discussion of the doctrine preventing the splitting of causes of action for rent, see 3 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE § 16:17 (2d ed. 1965).

[66] 39 Misc. 746, 80 N.Y.S. 975 (Sup. Ct. St. Lawrence County), *appeal dismissed*, 85 App. Div. 267, 83 N.Y.S. 138 (3d Dep't 1903).

stances.[67] Therefore, counsel should take care to include all amounts due at the time when he initiates his original action in order to insure collection of all the sums due.

Guidelines established for attorney's fees recoverable when indemnitor "leaves" indemnitee.

In *Clarke v. Fidelity & Casualty Co. of New York*,[68] plaintiff, a firm of consulting engineers and landscape architects, agreed to indemnify the State for any damage resulting from the plaintiff's negligence. Pursuant to this agreement, plaintiff was "impleaded" [69] in a supreme court action against the individual contractors and "vouched-in" [70] in an action commenced in the Court of Claims. Upon notice to their insurer of these pending actions, and the subsequent "repudiation" by the insurer of the contractual agreement to defend,[71] plaintiff acquired the assistance of a private law firm. The court, awarding damages to the plaintiff for the costs of these services, held that one who is "vouched-in" or "impleaded" is himself being sued.[72] Thus, where the insurance contract stipulates that the company shall defend any suit against the insured no matter how "groundless, false or fraudulent," the factual, legal or jurisdictional validity of the commenced suit does not vitiate the duty to defend.[73]

In addition to a lengthy discussion of the "vouching-in procedure," *Clarke* offers the practitioner a detailed guideline for

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[67] *Haviland* shows that the courts will not go out of their way to vacate a prior judgment in order to nullify the defense of splitting a cause of action, unless there are circumstances which would make it manifestly unjust to bar the second action. *See also* Maloney v. McMillan Book Co., 52 Misc. 2d 1006, 277 N.Y.S.2d 499 (Syracuse City Ct. 1967).

[68] 55 Misc. 2d 327, 285 N.Y.S.2d 503 (Sup. Ct. N.Y. County 1967).

[69] *See* CPLR 1007.

[70] *See* 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1007.03 (1965). *See generally* Hartford Acc. & Indem. Co. v. First Nat'l Bank, 281 N.Y. 162, 22 N.E.2d 324 (1939); *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 145-46 (1965).

[71] *See* 55 Misc. 2d 327, 330, 285 N.Y.S.2d 503, 505 n.1 (Sup. Ct. N.Y. County 1967). The court stated that by repudiating in relation to the Court of Claims action, it was not necessary that additional notice be given the insurer of the subsequent impleading of plaintiff in the supreme court proceeding. The latter, the court held, is an anticipatory breach. *Id.* at 352, 285 N.Y.S.2d at 525.

[72] Two cases of similar conclusion are Doyle v. Allstate Ins. Co., 1 N.Y.2d 439, 136 N.E.2d 484, 154 N.Y.S.2d 10 (1956) (injunction action held to be a "suit for money damages" under the insurance contract); Madawick Contracting Co. v. Travelers Ins. Co., 307 N.Y. 111, 120 N.E.2d 520 (1954) (arbitration held a "suit").

[73] *See* Goldberg v. Lumber Mut. Cas. Ins. Co., 297 N.Y. 148, 44 N.E.2d 131 (1948) which the court considered an adequate analogy to the instant case.