

CPLR 1401: Court Distinguishes True Joint Tort-Feasors from Successive Tort-Feasors

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ARTICLE 11 — POOR PERSONS

CPLR 1102(d): Statute affords relief from expense of service of summons by publication in divorce action.

CPLR 1102(d) provides in part that "a poor person shall not be liable for the payment of any costs or fees. . . ." In *Jeffreys v. Jeffreys*,⁴⁵ a divorce action, the supreme court, Kings County, found that the "poor persons" statute affords relief from the expense of service of summons by publication.

In this case, since the plaintiff failed to give notice to the City of the application to proceed as a poor person,⁴⁶ the court directed that the Corporation Counsel be served with notice of the application to direct the Treasurer of the City of New York to pay the costs of publication. The City appeared and consented to the motion. The court stated that in the future all applications to proceed as a poor person should be made on notice to the City, and all applications requiring the City to pay the costs of publication should also be made on notice.

The court reasoned that since only stenographic transcripts are automatically furnished by statute upon notice of application to proceed as a poor person,⁴⁷ application for this further subsidy should be on notice.

ARTICLE 14 — ACTIONS BETWEEN JOINT TORT-FEASORS

CPLR 1401: Court distinguishes true joint tort-feasors from successive tort-feasors.

In *Kotler v. Monticello Hospital*,⁴⁸ a medical malpractice action, plaintiff brought suit against defendants (hospital and physicians) for aggravation of injuries sustained in an automobile accident. Defendants moved for summary judgment on the ground that the plaintiff had been fully compensated for his injuries and had issued a satisfaction of judgment therefor. The court denied the motion.

Plaintiff originally sued and obtained judgment in a personal injury action against the automobile negligence defendants. Subsequent to the commencement of the present action, plaintiff executed a satisfaction of judgment discharging those defendants at one half the adjudicated damages. In support of the motion for summary

⁴⁵ 57 Misc. 2d 416, 292 N.Y.S.2d 767 (Sup. Ct. Kings County 1968).

⁴⁶ See 7B MCKINNEY'S CPLR 1101, supp. commentary 86 (1966).

⁴⁷ See 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶1101.13 (1967).

⁴⁸ 56 Misc. 2d 742, 290 N.Y.S.2d 385. (Sup. Ct. Queens County 1968).

judgment the present defendants contended that the plaintiff's election to proceed against the automobile negligence defendants in the original action precluded the present action and that the discharge of prior defendants by satisfaction of judgment discharged the present defendants.

The primary and critical finding of the court was that the present defendants and prior defendants were not joint but successive tort-feasors. Through this finding the court distinguished *McTigue v. Levy*,⁴⁹ relied upon by the defendants. In a true joint tort-feasor situation, a satisfaction of judgment recovered against one joint tort-feasor discharges all joint tort-feasors.

The court then addressed itself to a determination of whether plaintiff's attempt to recover against the malpractice defendants would violate the rule barring a double satisfaction for a single injury. The court stated that the word satisfaction contemplates full and total compensation for the injuries suffered. When plaintiff accepted what he could get from the judgment debtor and the debtor's carrier he was merely getting part payment on account of his injuries.

The court recognized that *Milks v. McIver*,⁵⁰ from the Court of Appeals, holds that a general release given to the original wrongdoer bars action against the negligent physician who aggravates the damages. However, in *Milks*, the release given to the original wrongdoer was clearly with a view to cover both original and aggravated injuries. In the instant case, the malpractice action was pending when the satisfaction of judgment was given for an amount much less than that of the judgment. Thus, the contention that it was intended to cover all the injuries was negated.⁵¹

ARTICLE 30 — REMEDIES AND PLEADING

CPLR 3012: Court dismisses plaintiff's action because of false affidavit.

In *DiRusso v. Kravitz*,⁵² plaintiff served a summons without a complaint. After plaintiff failed to comply with defendant's demand for a complaint, pursuant to CPLR 3012(b), defendant moved to dismiss. The plaintiff then interposed an affidavit stating that he was unable to serve a complaint because of ill health. The court accepted this excuse and denied defendant's motion.

⁴⁹ 260 App. Div. 928, 23 N.Y.S.2d 114 (2d Dep't 1940).

⁵⁰ 264 N.Y. 267 (1934).

⁵¹ See, e.g., *Rask v. County of Nassau*, 24 App. Div. 2d 580, 262 N.Y.S.2d 56 (2d Dep't 1965).

⁵² 27 App. Div. 2d 926, 279 N.Y.S.2d 586 (1st Dep't 1967), *aff'd*, 21 N.Y.2d 1008, 238 N.E.2d 329, 290 N.Y.S.2d 928 (1968).