St. John's Law Review

Volume 43
Number 3 *Volume 43, January 1969, Number 3*

Article 20

December 2012

CPLR 3012: Court Dismisses Plaintiff's Action Because of False Affidavit

St. John's Law Review

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Recommended Citation
St. John's Law Review (1969) "CPLR 3012: Court Dismisses Plaintiff's Action Because of False Affidavit," *St. John's Law Review*: Vol. 43 : No. 3 , Article 20.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol43/iss3/20

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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-feasorers. 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.

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[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).

During trial it was established that the plaintiff had falsified his affidavit. He had not been ill, but rather had been actively seeking to procure a barber's license. Defendant's renewal motion to dismiss was denied by the trial court, but, the appellate division reversed and granted the motion *nunc pro tunc* on the ground that the plaintiff's lie had deprived the defendant of the relief he should have originally received.

The Court of Appeals affirmed the appellate division's conclusion noting that, since an honest man would originally have been thrown out of court, a failure to dismiss would put a premium on perjury.[53]

CPLR 3025(c): Infant plaintiff permitted to amend ad damnum after verdict.

CPLR 3025(c) allows a court to permit amendment of pleadings, before or after judgment, on such terms as may be just, so as to conform them to the evidence. CPLR 3017 allows a court to grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded. It would seem that these sections would permit recovery beyond a complaint's ad damnum clause.[54] However, it has long been established in New York that a plaintiff's recovery is limited to the amount of damages sought in his complaint.[55]

An exception to this rule has been created by *Naujokas v. H. Frank Carey High School*.[56] Infant plaintiff sustained severe injuries in an accident on a school trampoline and demanded $50,000 in damages. After a jury returned a verdict for five times that amount, the court permitted the plaintiff to increase the amount of damages sought in the ad damnum clause. The court based its decision on the fact that defendant would not be prejudiced and that the rights of an infant were involved. Emphasizing that an infant is considered a ward of the court, whose rights cannot be lost through the negligence, mistake or inadvertence of his guardian ad litem or attorney, the court cited previous instances of judicial

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[53] *See* 7B McKINNEY'S CPLR 3012, supp. commentary 72 (1968).

[54] In Riggs, Ferris & Greer v. Lillibridge, 316 F.2d 60, 62 (2d Cir. 1963), the court so construed the then soon to be enacted CPLR. *But see* 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶3017.06 (1965); FIRST REP. 68.

[55] *See, e.g.*, Michalowski v. Ey, 7 N.Y.2d 71, 163 N.E.2d 863, 195 N.Y.S.2d 633 (1959); Garden Hill Estates, Inc. v. Bernstein, 24 App. Div. 2d 512, 261 N.Y.S.2d 648 (2d Dep't 1965); Silbert v. Silbert, 22 App. Div. 2d 893, 255 N.Y.S.2d 272 (2d Dep't 1964).

[56] 57 Misc. 2d 175, 292 N.Y.S.2d 196 (Sup. Ct. Nassau County 1968).