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Collateral Estoppel: Glaser Doctrine No Longer Followed in First Department

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45 days of the demand.[93] Prior to the 1967 amendment of 3216, the law was unsettled as to whether a written demand was required where the ground for dismissal was "general delay," or whether it was required only where the ground was failure to file a note of issue.[94] Clearly, under present law, a demand is necessary in either situation.[95]

In a recent case, *Horn v. Cooley*,[96] the appellate division, third department, reversed special term, Schenectady County, and granted defendant's motion to dismiss under 3216, on the ground of "general delay." While no 45 day demand was served, the fact that a note of issue was filed, and the circumstance of inordinate delay in prosecution—since 1960—demanded a dismissal despite the lack of demand.

In light of 3216's amendment in 1967, which would require a written demand under the facts of the instant case, practitioner should be aware, that the third department is apparently not applying 3216 retroactively—and to that extent, is now following the first department.[97]

Collateral Estoppel: Glaser *doctrine no longer followed in first department.*

Glaser v. Huette [98] established the rule that co-defendants in a prior action are precluded from using collateral estoppel defensively against each other in a subsequent action because they were not adversaries in the prior action. Since there was no duty to defend *against each other* in the former action, they can relitigate the issue of negligence as between themselves in a later action.

In recent years, technical requirements for the defensive use of collateral estoppel have been liberalized by the Court of Appeals.

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[93] This requirement became effective on September 1, 1967. 3216, as originally enacted, did not require any demand. The 1964 amendment added a demand requirement, but that amendment was repealed when the present amendment was enacted.

[94] For a discussion of this problem, see 7B McKINNEY'S CPLR 3216, supp. commentary 311-16 (1967).

[95] CPLR 3216(b)(3) provides that a court may not take any initiative and no motion shall be made until a written demand is served upon plaintiff. The rigidity of this requirement is strengthened somewhat by the express denomination of this procedure as a "condition precedent."

CPLR 3216(d) provides that where a note of issue has been filed, with or without demand, the court cannot consider any delay *prior* to the filing of the note of issue.

[96] 30 App. Div. 2d 729, 291 N.Y.S.2d 549 (3d Dep't 1968).

[97] For a discussion of the conflict regarding the retroactive application of 3216, see *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 330 (1968); 43 ST. JOHN'S L. REV. 142, 159 (1968); 42 ST. JOHN'S L. REV. 438, 456 (1968).

[98] 232 App. Div. 119, 249 N.Y.S. 374 (1st Dep't), *aff'd mem.*, 256 N.Y. 686, 177 N.E. 193 (1931).

In *Israel v. Wood Dolson Co.*,[99] it was held that, where the issues in a prior and subsequent suit were identical and where the party against whom the defense was being asserted had had his day in court on the issues, defensive use of collateral estoppel could be interposed. The mutuality requirement was thus, presumably, abandoned.[100] However, in cases involving joint tortfeasors, the New York courts have continued to follow *Glaser*, without considering the "identity of issues plus opportunity to be heard" test.[101]

It is arguable that the *Glaser* doctrine was further eroded by a recent Court of Appeals decision, *Cummings v. Dresher*.[102] There, P-1 (passenger in car number 1) and D-1 (driver of car number 1) sued D-2 (driver of car number 2) for personal injuries. P-1 recovered, but D-1 lost because the jury found him guilty of contributory negligence. However, the jury made a gratuitous finding that D-2 was guilty of negligence as against D-1. In a subsequent action by D-2 against D-1, D-1 was permitted to interpose the defense of collateral estoppel, *i.e.*, D-2's negligence as established by the prior action was equivalent to a finding of contributory negligence in this action. The ratio decidendi was that where the issues are the same and *both litigants were parties* to the first action, there is no reason to relitigate the issues.

In a recent case, *Schwartz v. Public Administrator*,[103] the appellate division, first department, held that *Glaser* is no longer a viable precedent and can no longer be followed.[104] D-1 (owner and operator of car 1) and D-2 (owner of car 2), co-defendants, lost a personal injury action brought by passengers in car 1. In the instant action, D-1 sued D-2 for personal injuries. D-2 sought to set up the defense of collateral estoppel, on the ground that D-1 could only recover upon a showing of freedom from contributory negligence, whereas the prior action conclusively

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[99] 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

[100] The doctrine of mutuality of estoppel is based on the principle that a party who is a stranger to an action is not bound by its outcome. Therefore, since nonparties and nonprivies are not bound by the outcome they should not be able to benefit from it. *See* H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 347-48 (2d ed. 1966).

[101] *See, e.g.*, Minkoff v. Brenner, 10 N.Y.2d 1030, 180 N.E.2d 434, 222 N.Y.S.2d 47 (1962); Grande v. Torello, 12 App. Div. 2d 937, 210 N.Y.S.2d 562 (2d Dep't 1961); Friedman v. Salvatti, 11 App. Div. 2d 104, 201 N.Y.S.2d 709 (1st Dep't 1960). *See also The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 128, 152 (1967); 42 ST. JOHN'S L. REV. 436, 462 (1968); H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 347-49 (2d ed. 1966).

[102] 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966).

[103] 30 App. Div. 2d 193, 291 N.Y.S.2d 151 (1st Dep't 1968).

[104] Justice Rabin, with whom Justice McGivern concurred, dissented on the ground that *Glaser* has never been overruled and the appellate division is, therefore, bound by its holding until such time as the Court of Appeals chooses to expressly overrule it.

established his negligence as a cause of the accident. Special term, relying on *Glaser*, held that D-1's cause of action was *not* barred by the prior adjudication. The appellate division reversed, holding that

> the *Glaser* case should no longer be blindly followed as a controlling precedent. Recent decisions in the Court of Appeals give clear indication that *Glaser* may not be accepted as an authority under the present day application of the principles of res judicata and collateral estoppel.[105]

It was found that the prior action included a determination of whether or not D-1 caused or contributed to the collision, and that implicit in the jury's verdict was a finding that D-1 was negligent. Under these circumstances, the court felt that the defensive application of collateral estoppel was fair and just.

Where the issues involved in an action were previously fully litigated, and the parties are the same, there is no reason to relitigate those issues. In light of recent Court of Appeals activity in the field of collateral estoppel, the holding in *Schwartz* is not surprising.

Collateral Estoppel: Glaser *doctrine retained in second department.*

The rule of *Glaser v. Huette* [106] will continue to be applied in the second department. In a recent case, *Higginbothom v. Rath*,[107] D-1 and D-2 (owner and operator of car 1) were awarded a verdict for property damage and personal injuries against D-3 and D-4 (owner and operator of car 2), in a prior action. In the instant action, plaintiff (passenger in car 1) sued all four defendants for personal injuries. D-1 and D-2 moved for leave to serve an amended answer setting up the affirmative defense of res judicata, on the ground that, in the prior action, the issue of negligence on the part of the drivers had been decided. The motion was granted, but the merits of the defense were left for adjudication in the trial court.

Subsequently, D-3 and D-4 moved to strike out the affirmative defense, but special term denied the motion on the ground that movants had no standing to question the sufficiency of a defense in their co-defendants' answer addressed to the complaint.

As stated by the appellate division, here, the general rule in cases involving joint tortfeasors is that, prior to judgment and prior to the time when the issue of contribution becomes directly relevant, one defendant is not aggrieved by a determination in favor

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[105] 30 App. Div. 2d at 195, 291 N.Y.S.2d at 153.
[106] 232 App. Div. 119, 249 N.Y.S. 374 (1st Dep't), *aff'd mem.*, 256 N.Y. 686, 177 N.E. 193 (1931).
[107] 30 App. Div. 2d 93, 289 N.Y.S.2d 899 (2d Dep't 1968).