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CPLR 602: First Department Clarifies Distinction Between Joint Trial and Consolidation

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CPLR 602: First department clarifies distinction between joint trial and consolidation.

CPLR 602 provides that when two or more actions involve a common question of law or fact, the court may order either a consolidation or a joint trial. Since neither of these methods of uniting actions is defined in the statute, confusion can arise as to the nature and appropriate application of each. Generally, consolidation unites suits into a single trial, but requires realignment of parties so that a single judgment can be rendered. A joint trial, on the other hand, preserves the original alignment of parties with the corresponding rights to open and close.[66] There are separate verdicts, separate judgments and separate bills of cost.[67]

In *Padilla v. Greyhound Lines, Inc.*,[68] the appellate division, first department, illustrated this distinction in a multiple-party action arising out of a collision of an automobile with a bus. Separate actions were commenced in three different counties, and in the last of these, New York County, the supreme court granted consolidation of all the suits.

The appellate division reversed the lower court on both the method of joining the actions and the venue.[69] It agreed that common questions of law and fact existed, but held that organic consolidation would both obliterate the plaintiff's choices of specific defendants and serve to confuse the jury.[70] A joint trial, on the other hand, would produce all the advantages of a consolidation without disrupting the original strategy of the parties.[71]

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[66] In consolidated actions, the general rule is that the party bringing the first action has this right, Gallagher v. Barth, 268 App. Div. 865, 50 N.Y.S.2d 473 (2d Dep't 1944), but exceptions to this rule are not uncommon. *See, e.g.*, Kappa Frocks, Inc. v. Alan Fabrics Corp., 263 App. Div. 326, 32 N.Y.S.2d 985 (1st Dep't 1942); Diesel Installation Corp. v. Nu-Boro Park Cleaners, Inc., 262 App. Div. 969, 30 N.Y.S.2d 207 (2d Dep't 1941).

[67] Vidal v. Sheffield Farms Co., 208 Misc. 438, 141 N.Y.S.2d 82 (Sup. Ct. Bronx County 1955).

[68] 29 App. Div. 2d 495, 288 N.Y.S.2d 641 (1st Dep't 1968).

[69] The appellate division disagreed with the supreme court's decision that venue should be where the majority of plaintiffs commenced their action. Looking to the convenience of witnesses, the nearness to the site of the accident, the respective trial delays and the county where the earliest suit was brought, preferable venue was deemed to be in Onondaga County. The test to be applied, said the court, was not whether change of venue of the one action before this court would be justified, but, since a single place of trial must be chosen, which county is most appropriate.

[70] Realignment would be required here since the automobile driver's personal representative was a plaintiff in one action and a defendant in another.

[71] Smith v. Witteman Co., 10 App. Div. 2d 793, 197 N.Y.S.2d 877 (4th Dep't 1960).

Besides clarifying the frequently misunderstood distinction between joint trials and consolidations, this decision shows a distinct preference for joint trials over consolidations in most multiple-action situations. Further, it offers a warning to the practitioner to be precise in his use of language; when a joint trial is desired, it should not be referred to haphazardly as a consolidation.

CPLR 602: Second department allows consolidation of action with special proceeding.

In *In re Elias*,[72] the plaintiff sought to consolidate a special proceeding to nullify a corporate election with a stockholder's derivative action. Such a consolidation was prohibited under the CPA, which provided only for consolidations of two actions or two special proceedings.[73] Supporting case law was provided by the appellate division, second department, which held in *In re Big W Construction Corp.*[74] that lack of specific statutory authorization barred any cross-consolidations of actions with special proceedings.

The parallel CPLR provision[75] when viewed alone appears to be even more restrictive, since it speaks only of the consolidation of "actions." However, this section must be read in conjunction with the definition of an action in the CPLR, *i.e.*, any form of litigation including both traditional actions and special proceedings.[76] On the basis of this rationale, the CPLR has been construed by the first department,[77] and now, in the instant case, by the second department, to allow consolidation of actions with special proceedings. No logical reason was found to continue to disallow[78] cross-consolidations where common questions of fact and law exist.

It should be noted that an additional reason supporting the second department's decision lies in the fact that the CPLR permits a court to change the form of a civil proceeding.[79]

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[72] 29 App. Div. 2d 118, 286 N.Y.S.2d 371 (2d Dep't 1967).
[73] CPA 96.
[74] 278 App. Div. 977, 105 N.Y.S.2d 827 (2d Dep't 1951).
[75] CPLR 602.
[76] CPLR 105(b).
[77] Schuster v. 490 West End Corp., 26 App. Div. 2d 535, 271 N.Y.S.2d 171 (1st Dep't 1966) (mem.).
[78] In Hanft v. Hanft, 46 Misc. 2d 548, 260 N.Y.S.2d 104 (Sup. Ct. Bronx County 1965), the court, prior to the *Schuster* decision, chose to follow *Big W*, and refused to allow cross-consolidation.
[79] CPLR 103(c); 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 602.18 (1968).