

CPLR 1002: Plaintiff May Rely upon Any Evidence Introduced in Case as Against Any Defendant

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ARTICLE 10—PARTIES GENERALLY

CPLR 1002: Plaintiff may rely upon any evidence introduced in case as against any defendant.

CPA 212(2) provided, *inter alia*, that "judgment may be given according to their respective liabilities, against one or more defendants as may be found liable upon all of the evidence, without regard to the party by whom it has been introduced." This provision was intended to correct the rule⁸⁰ laid down in *Bopp v. New York Electric Vehicle Transportation Co.*⁸¹ Under *Bopp*, a plaintiff, in making out a prima facie case, could rely upon his own proof as well as that adduced from a particular defendant, but he could not utilize proof presented by a co-defendant. Thus, where P sued A and B, and failed to make out a case against A, A could withdraw at the close of P's evidence, and anything thereafter offered by B against A, could not be used in support of P's case against A.⁸²

In a recent case, *Shaw v. Lewis*,⁸³ defendant Lewis rested without offering any evidence, whereupon co-defendant MVAIC introduced testimony from which a jury could infer Lewis' negligence. The court denied Lewis' motion to dismiss, holding that CPA 212(2) had been inadvertently omitted from CPLR 1002. In reiterating that no change in the law has resulted from the omission, the court stated that a plaintiff "may rely upon any evidence in the case as against any defendant, whether or not said defendant continues to participate in the trial after his motion to dismiss at the end of plaintiff's case is denied" ⁸⁴

ARTICLE 25—UNDERTAKINGS

CPLR 2501: Party may not be his own surety.

CPLR 2501 defines an undertaking to include "[a]ny obligation . . . which contains a covenant by a surety to pay the required amount, as specified therein, if any required condition, as specified therein or as provided in subdivision (c) section 2502, is not fulfilled. . . ."

⁸⁰ See *Simon v. Lowenthal*, 169 Misc. 718, 721, 8 N.Y.S.2d 484, 487 (Mun. Ct. Bronx County 1938); 4TH ANNUAL REPORT OF THE JUDICIAL CONF. 20 (1938).

⁸¹ 177 N.Y. 33, 69 N.E. 122 (1903).

⁸² See 7B MCKINNEY'S CPLR 1002, supp. commentary 37 (1967); CARMODY-FORKOSCH, NEW YORK PRACTICE 755 n.36 (8th ed. 1963).

⁸³ 55 Misc. 2d 664, 286 N.Y.S.2d 758 (Civ. Ct. Bronx County 1968).

⁸⁴ *Id.* at 666, 286 N.Y.S.2d at 761.