

CPLR 2501: Party May Not Be His Own Surety

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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.

In a recent case, *Alex v. Grande*,⁸⁵ plaintiff, a New York resident, and defendant, a New Jersey resident, were involved in an automobile accident in New Jersey. Plaintiff obtained an order of attachment and defendant was served with a summons and complaint in New Jersey. Defendant moved to dismiss the complaint contending that the undertaking was defective since it was signed by the plaintiff without an independent surety. The appellate division, third department, agreed, holding that a party may not be his own surety under CPLR 2501.

There is nothing in CPLR 2502(a)⁸⁶ which specifically states that a party may not be his own surety; however, this was apparently the law under the CCP,⁸⁷ and no case to the contrary has been found. Even though a party may not be his own surety, he may, under 2501, advance cash in lieu of a bond.⁸⁸

ARTICLE 30 — REMEDIES AND PLEADING

CPLR 3012(b): Retention of belatedly served complaint held to be waiver of objection.

CPLR 3012(b) provides that "[i]f the complaint is not served within twenty days after service of demand [for the complaint] the court upon motion may dismiss the action."

In *Lucenti v. City of Buffalo*,⁸⁹ plaintiff served a summons but failed to serve the required complaint within the allotted time after defendant's appearance and demand. However, while defendant's motion to dismiss for failure to serve the complaint was pending, defendant retained a belatedly served complaint. The appellate division, fourth department, held that "retention of the complaint was a waiver of the untimely service . . . and deprived defendant of the right to relief under CPLR 3012."⁹⁰ It is thus

⁸⁵ 29 App. Div. 2d 616, 285 N.Y.S.2d 909 (3d Dep't 1967).

⁸⁶ CPLR 2502(a) provides, *inter alia*, unless the court orders otherwise, that the surety shall be:

"2. a natural person, except an attorney, who shall execute with the undertaking his affidavit setting forth his full name and address and that he is domiciled within the state and worth at least the amount specified in the undertaking exclusive of liabilities and of property exempt from application to the satisfaction of a judgment."

⁸⁷ See *Nichols v. MacLean*, 98 N.Y. 458 (1885).

⁸⁸ The court further decided that defendant would not be prejudiced by allowing plaintiff, under CPLR 6223, a reasonable opportunity to correct the defect. CPLR 6223 changes prior law which held that defects in attachment papers render an attachment null and void on "jurisdictional" grounds. See 7B MCKINNEY'S CPLR 6223, commentary 106 (1963).

⁸⁹ 20 App. Div. 2d 833, 287 N.Y.S.2d 612 (4th Dep't 1968).

⁹⁰ *Id.* at 834, 287 N.Y.S.2d at 613. See also *Rogers v. Rockwood*, 59 Hun. 628, 13 N.Y.S. 939 (Sup. Ct. 5th Dep't 1891).