

CPLR 2104: Matters Not Expressly Stipulated in Writing Will Not Be Given Effect

St. John's Law Review

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mined.¹² It therefore follows that a court should do all in its power to avoid delay so as to respect the summary nature of the proceeding. As the instant case illustrates, this may be accomplished by consideration of all the relevant papers served prior to the return date in determining the sufficiency of the petition.

ARTICLE 21 — PAPERS

CPLR 2104: Matters not expressly stipulated in writing will not be given effect.

CPLR 2104 provides in part: "An agreement between parties or their attorneys . . . is not binding upon a party unless it is in a writing subscribed by him or his attorney. . . ." This rule grew out of the frequent conflict between attorneys as to their agreements, and was intended to relieve the courts from the burden of resolving questions of fact arising out of such conflicts.¹³ However, the rule is not a Statute of Frauds, and courts have the power to give effect to oral stipulations when they find that they were in fact made and that the adverse party relied thereon.¹⁴ In the most common situation fraud is not involved, but rather, there is disagreement as to whether the parties' minds have ever met.¹⁵ In such a situation the courts seem inclined, and properly so, to hold parties to the letter of their written stipulation.

In a recent case, the attorneys stipulated that defendant might defer service of its answer until after completion of an examination of plaintiff. However, defendant did not utilize this extension of time, but rather, served his answer prior to his examination of plaintiff. Plaintiff then moved before examination to dismiss three separate defenses and counterclaims pleaded in defendant's answer. Although the stipulation contained no specific restrictions on plaintiff's so moving, special term concluded that plaintiff had agreed not to move until the examination before trial had been completed, and therefore held plaintiff's application premature. The appellate division, first department, disagreed,¹⁶ holding that, as is required by CPLR 2104, matters stipulated, in order to be given effect, must be set out in writing and that when the attorneys fail to do so, the courts will not examine the writing to determine the intention of the parties.

¹² See 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶402.01 (1968).

¹³ 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶2104.04 (1968).

¹⁴ *Id.*

¹⁵ 7B MCKINNEY'S CPLR 2014, *supp.* commentary 124 (1968).

¹⁶ *Columbia Broadcasting System, Inc. v. Roskin Distributors, Inc.*, 31 App. Div. 2d 22, 294 N.Y.S.2d 804 (1st Dep't 1968),

This case serves to put the practitioner on notice that those matters not *expressly* stipulated in writing will not be given effect.

ARTICLE 30—REMEDIES AND PLEADING

CPLR 3002: Defense of splitting not available to defendant who knows of subrogation of portion of property damage claim and fails to join subrogee in pending action.

The common-law doctrine of election of remedies was conceived as a means of precluding a plaintiff from being unjustly enriched by a double recovery and of preventing the harassment of a defendant and the courts with numerous suits involving the same transaction.¹⁷ Although based on valid policy considerations, application of the doctrine has produced many harsh results.¹⁸ CPLR 3002 was intended to modify this doctrine in certain instances. A related common-law doctrine is the rule against splitting a cause of action, *i.e.*, the rule that a single and indivisible claim cannot be divided and made the subject of several suits.¹⁹ When a plaintiff institutes suit for only part of his damages, a subsequent suit for the remainder of such damages is thereby precluded. The rule against splitting has not been codified and the courts have assumed the responsibility of modifying this doctrine by creating exceptions thereto.

In *Clarcq v. Chamberlain Mobile Home Transport, Inc.*,²⁰ plaintiffs had received judgment in a previous action for breach of a contract to deliver a trailer and for the loss of the personal property contained therein; their complaint had specifically excluded a claim of damages for the trailer itself. Plaintiff's insurance company paid plaintiff for the value of the trailer and received in exchange subrogation rights against the defendant. Subsequently, the plaintiffs, as nominal parties in behalf of their subrogated insurer, commenced an action to recover payments made to the insured. Upon the insurer's motion for summary judgment, it was held that in as much as the defendant had notice of the insurer's position by means of a demand letter, and did not join it in the first action, the defense of splitting a cause of action was not available. Since the defendant had notice of the impending second suit, and therefore had the power to avoid a second trial by joining the insurer in the first action, failure to do so was a waiver of the "splitting" defense.

¹⁷ 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶3002.01 (1968).

¹⁸ Cases modifying the doctrine: *Smith v. Kirkpatrick*, 305 N.Y. 66, 111 N.E.2d 209 (1953); *Clark v. Kirby*, 243 N.Y. 295, 153 N.E. 79 (1926); *Schenck v. State Line Tel. Co.*, 238 N.Y. 308, 144 N.E. 592 (1924).

¹⁹ CLARK, LAW OF CODE PLEADING §73 at 473 (2d ed. 1947).

²⁰ 58 Misc. 2d 227, 294 N.Y.S.2d 550 (Sup. Ct. Monroe County 1968).