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CPLR 4102(c): Failure To Oppose Consolidation Motion Held To Constitute a Waiver of Trial by a Jury

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ARTICLE 41 — TRIAL BY A JURY

CPLR 4102(c): Failure to oppose consolidation motion held to constitute a waiver of trial by a jury.

One of the primary advantages of a merged system of law and equity is that it is conducive to the determination of both legal and equitable claims in a single action. Problems, however, with respect to the right to jury trial have plagued the merged system from its inception.

Prior to the enactment of the CPLR there was confusion as to whether or not a waiver of trial by jury resulted when a plaintiff joined legal and equitable causes of action arising out of separate transactions.[40] In order to resolve the conflict of authority, CPLR 4102(c) provides that where a party has two or more causes of action against another party or parties he shall not be deemed to have waived his right to trial by jury upon a claim, by joining it with another claim, arising out of a separate transaction, with respect to which there is no right to trial by jury. Conversely, where a plaintiff either joins legal and equitable causes of action arising out of the same transaction or seeks both legal and equitable relief for the same cause of action he is deemed to have waived his right to a jury trial.[41] This is a desirable solution, for if a claimant were to risk a ruling that he has waived the right to jury trial he might be encouraged to bring separate causes of action, and such would seem contrary to the CPLR's policy of promoting liberal joinder of action.[42]

By analogy it would seem, then, that the provision relating to joinder would apply to situations wherein the plaintiff seeks to consolidate both legal and equitable claims. Nevertheless, the question arises as to whether failure to object to a defendant's motion to consolidate legal and equitable claims arising out of the same transaction would amount to a waiver by the plaintiff of his right to a jury trial on the legal issues. A pre-CPLR case held that it did, on the broad ground that where a plaintiff seeks legal and equitable relief in respect to the same wrong, his right to trial by

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[40] *Compare* Ehrle v. Sutton Place Apartments, Inc., 137 Misc. 122, 241 N.Y.S. 386 (Sup. Ct. N.Y. County 1930), *aff'd without opinion*, 231 App. Div. 712, 246 N.Y.S. 866 (1st Dep't 1930) (granting jury trial), *with* Lavisch v. Schwartz, 235 App. Div. 18, 256 N.Y.S. 416 (3d Dep't 1932) (denying jury trial). *See also* SECOND REP. 574-75.

[41] Di Menna v. Cooper & Evans Co., 220 N.Y. 391, 115 N.E. 993 (1917); Cogswell v. New York, N. H. & H. R. R., 105 N.Y. 319, 11 N.E. 518 (1887); Hirsch v. Flick, 17 App. Div. 2d 961, 233 N.Y.S.2d 916 (2d Dep't 1962).

[42] *See* CPLR 601.

jury is lost.[43] Similarly in a recent appellate division case, *Tanne v. Tanne*,[44] the court, in a per curiam opinion, held that failure to oppose a motion to consolidate actions arising out of the same transaction amounted to a waiver of the plaintiff's right to trial by jury.

Courts should not presume that a party has waived so substantial a right as trial by jury when confronted with ambiguous conduct. Although inaction is often a prima facie indication of waiver, it would seem questionable to attach such a consequence to the failure to oppose consolidation motions which are favored and frequently granted. Nevertheless, *Tanne* stands upon firm ground and warns of the harsh result which can arise upon failure to oppose defendant's motion for consolidation of legal and equitable causes of action.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201: Second Circuit upholds constitutionality of "Seider" *attachment.*

In *Minichiello v. Rosenberg*,[45] the United States Court of Appeals, Second Circuit, by a 2-1 decision, has upheld the constitutionality of a *"Seider"* attachment.[46] The action was commenced in the New York supreme court by attaching the foreign defendant's liability insurance policy. The defendant, on the basis of diversity of citizenship, sought and obtained removal to the District Court for the Western District of New York. Once in the district court, a motion was made to dismiss on the ground that the *"Seider"* procedure is unconstitutional. This motion was denied. However, since the Southern District, in *Podolsky v. DeVinney*,[47] had previously declared that *Seider* is unconstitutional, a certificate to appeal to the Court of Appeals was issued.

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[43] Lavisch v. Schwartz, 235 App. Div. 18, 256 N.Y.S. 416 (3d Dep't 1932): "where plaintiff consented to have the action at law and the action in equity tried together in effect as one suit, this constituted a waiver of his right to a trial by jury. . . ." Compare Judge Cardozo's defense of the constitutionality of the waiver doctrine in Di Menna v. Cooper & Evans, 220 N.Y. 391, 115 N.E. 993 (1917); If *plaintiff elects* to take advantage of equitable relief *"he elects* that the whole controversy in all its aspects, may be determined by the court. . . . One cannot be heard to urge as a breach of one's constitutional right the concession of a remedy which one has one's self demanded." *Id.* at 395, 115 N.E. at 994 (emphasis added). The reasoning of *Schwartz* would seem to be a curious extension of *Di Menna.*

[44] 30 App. Div. 2d 956, 294 N.Y.S.2d 247 (1st Dep't 1968).

[45] — F.2d — (2d Cir. 1968).

[46] Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

[47] 281 F. Supp. 488 (S.D.N.Y. 1968).