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CPLR 1001: Dismissal for Failure to Join Necessary Party

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notice," since it was known that the insurer had no knowledge of the defendant's whereabouts.[19]

While the decision in the present case is commendable, it indicates that much of the law interpreting the statutory language of 308(4) is being made by the lower and intermediate courts of New York. Therefore, unless silence means acceptance, practitioners will have to await an interpretation by the Court of Appeals to know how far the New York courts may go in fashioning orders under 308(4).

ARTICLE 10 — PARTIES GENERALLY

CPLR 1001: Dismissal for failure to join necessary party.

Where both a husband and wife signed a contract for the purchase of a home, the supreme court, in *Mechta v. Scaretta*,[20] held that the wife was a necessary party to an action to recover the down payment and that in her absence the action could not proceed.

CPLR 1001(a) provides that necessary parties are persons who might be inequitably affected by a judgment, or persons whose absence would preclude complete relief between plaintiff and defendant. Necessary parties shall be made either plaintiffs or defendants.[21] When such a person is not joined, and jurisdiction over him cannot be obtained, the court may allow the action to proceed if justice requires. In determining whether to allow the action to proceed, CPLR 1001(b) directs the court to consider: (1) whether plaintiff has another effective remedy if the action is dismissed for non-joinder; (2) whether the defendant or the person not joined will be prejudiced thereby; (3) whether such prejudice might be avoided; (4) whether the court might fashion a protective measure; and, (5) whether an effective judgment can be rendered in the party's absence.

Compulsory joinder is by no means a new development in the law. CPLR 1001 did not change the law, but rather was

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[19] 53 Misc. 2d at 5, 277 N.Y.S.2d at 804. While the court indicated that the defendant, in fact, had received no notice of the pending action, even if he had, due process would not be satisfied unless the mode of service was reasonably calculated to give the defendant notice. *See also* Wuchter v. Pizzutti, 276 U.S. 13 (1928).

[20] 52 Misc. 2d 696, 276 N.Y.S.2d 652 (Sup. Ct. Queens County 1967).

[21] For example, joint obligees and joint obligors are necessary parties, but joint tort-feasors are not because they are jointly and severally liable. 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1001.06 (1965).

intended to codify past practices in New York.[22] The principal difference between this section and its predecessor[23] is the omission of the word "indispensable." Under the Civil Practice Act, an indispensable party had to be joined or the action would be dismissed.[24] At the present time, if the questions listed in CPLR 1001(b) cannot be answered favorably, the absent party is "indispensable,"[25] so the action must be dismissed. However, it must not be forgotten that despite the codification of these factors, the court may still exercise wide discretion in determining whether to dismiss the action.[26]

In the *Mechta* case,[27] the court found the wife to be a *necessary* party as prejudice to both her and the defendant might have accrued from the non-joinder, an effective judgment could not be rendered in her absence, and, a protective measure could not be fashioned by the court. She was, therefore, *"indispensable,"* and the action was dismissed.

While it may have been impossible for the court to fashion a substantive measure that would have protected the parties, it would appear that instead of outright dismissal, an alternative would have been some form of procedural device. For example, the court might have dismissed on the condition that the defendant stipulate to accept service in a jurisdiction where the wife could be joined. With this device, the plaintiff would still have had a way of determining his alleged right, and prejudice to *all* parties could have been avoided.

CPLR 1005(a): Limited partners allowed to bring class action and derivative action.

CPLR 1005(a) provides that

> [w]here the question is one of a common or general interest of many persons or where the persons who might be made parties are very

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22 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1001.01 (1965); 7B McKINNEY's CPLR 1001, commentary 219 (1963). But note, however, that under the CPLR it is no longer necessary to make two motions—one to join the absent party, and in the event of non-joinder, another to dismiss. Now a single motion to dismiss under CPLR 3211(a)(10) is all that is required. Blumenthal v. Allen, 46 Misc. 2d 688, 260 N.Y.S.2d 363 (Sup. Ct. N.Y. County 1965); *The Biannual Survey of New York Practice,* 40 ST. JOHN'S L. REV. 122, 144-45 (1965).

23 CPA § 193.

24 7B McKINNEY'S CPLR 1001, supp. commentary 26 (1966).

25 *Ibid.*

26 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1001.08 (1965). A recent example is *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co.,* 365 F.2d 802 (3d Cir. 1966). *See* 42 ST. JOHN'S L. REV. 108 (1967), wherein FED. R. CIV. P. 19, which is almost identical to CPLR 1001, is explained and interpreted.

27 Mechta v. Scaretta, 52 Misc. 2d 696, 276 N.Y.S.2d 652 (Sup. Ct. Queens County 1967).