

CPLR 1005(a): Limited Partners Allowed to Bring Class Action and Derivative Action

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intended to codify past practices in New York.²² The principal difference between this section and its predecessor²³ 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

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).

numerous and it may be impractical to bring them all before the court, one or more may sue or defend for the benefit of all.

In *Lichtyger v. Franchard Corp.*,²⁸ the plaintiffs, thirty-one of the limited partners of a real estate syndicate,²⁹ sued on their own behalf and on behalf of the other limited partners. The plaintiffs alleged "mismanagement" and "waste" on the part of the general partners in the renegotiation of a lease and mortgage on partnership property, thereby reducing their return from eleven percent to eight percent. The Court of Appeals held that CPLR 1005(a) entitled the limited partners to bring a *class action* for damages on behalf of all the limited partners.

The decision is significant for two reasons. First, the ordinary rule is that suits between partners should be brought in equity, particularly for an accounting, and that an action at law may not be maintained until after an accounting.³⁰ Here, the Court allowed an action at law for damages by one partner against another without an accounting, reasoning that limited partners are in a position analogous to corporate shareholders—limited liability and no voice in the operation of the enterprise; that the same fiduciary relationship that exists between corporate director and shareholder exists between general partner and limited partner; that shareholders could bring a representative suit against the directors for fraudulent waste and mismanagement;³¹ and, therefore, to allow the shareholders to maintain such action but to deny limited partners would be an anomaly.³²

Secondly, and equally important, was the Court's allowance of a class action. The Court noted that CPLR 1005(a) allows a class action where the "question is one of a common or general interest of many persons," and that since the limited partners were entitled to receive a fixed return on their investment, if that return were wrongfully impaired "all of the limited partners would be injured in the same way and the matter would be of 'common or general interest' to them."³³ The Court indicated that since

²⁸ 18 N.Y.2d 528, 223 N.E.2d 869, 277 N.Y.S.2d 377 (1966).

²⁹ Initially there were only thirty-one partners but others joined bringing the total to 215. 18 N.Y.2d at 531 n.l., 223 N.E.2d at 870 n.l., 277 N.Y.S.2d at 379 n.l.

³⁰ N.Y. PARTNERSHIP LAW § 44. *But see* *Herrick v. Guild*, 257 App. Div. 341, 13 N.Y.S.2d 115 (1st Dep't 1939); *Burnstine v. Geist*, 257 App. Div. 792, 15 N.Y.S.2d 48 (1st Dep't 1939).

³¹ A corporate shareholder in New York is authorized to bring an action on behalf of the corporation where the directors wrongfully refuse to do so. N.Y. BUS. CORP. LAW § 626.

³² *Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528, 537, 223 N.E.2d 869, 874, 277 N.Y.S.2d 377, 384 (1966).

³³ *Id.* at 534, 223 N.E.2d at 872, 277 N.Y.S.2d at 381-82.

some of the limited partners might not feel that the defendants were guilty of wrongdoing and were apparently satisfied with the new lease, rescission could not be awarded because these persons would not be afforded the protection due process requires. This, however, was not an "impediment" to money damages as a judgment could in no way prejudice the absent parties.³⁴

In *Riviera Congress Associates v. Yassky*,³⁵ decided the same day as *Lichtyger*, the Court, again relying on CPLR 1005(a), held that limited partners were authorized to sue, on behalf of the partnership, to enforce a partnership claim where those in control of the partnership wrongfully declined to do so. Section 115 of the New York Partnership Law states that a limited partner "is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership." The Court reasoned that since the purpose of this statute is solely to prevent interference by the limited partners with the general partner's conduct of the business, and that the gravamen of the complaint was that the general partners have declined to carry on the business of the partnership by wrongfully refusing to enforce a partnership claim, it would not bar the suit.³⁶

In *Lichtyger*, the plaintiffs were suing in a *representative* capacity, whereas in *Riviera*, the Court allowed the plaintiffs (five out of approximately 350 limited partners) to maintain a *derivative* suit on behalf of the partnership.³⁷ It should be noted that a representative action differs in theory from a derivative action: in the former, the plaintiff is a representative of the class for the benefit of the members of the class, while the latter is technically on behalf of the organization of which plaintiff is a member. The allowance of the derivative suit by a limited partner in *Riviera* is apparently an extension of the Court's analogy of a limited partner to a corporate shareholder in *Lichtyger*.

Both *Lichtyger* and *Riviera* represent departures from established partnership principles based primarily on the analogy between the limited partner and corporate shareholder and indicate that the Court will employ CPLR 1005(a) to authorize a class suit or a derivative suit where substantial justice will be achieved.

³⁴ *Id.* at 537 n.2, 223 N.E.2d at 874 n.2, 277 N.Y.S.2d at 384 n.2.

³⁵ 18 N.Y.2d 540, 223 N.E.2d 876, 277 N.Y.S.2d 386 (1966).

³⁶ *Riviera Congress Associates v. Yassky*, 18 N.Y.2d 540, 547, 223 N.E.2d 876, 879, 277 N.Y.S.2d 386, 391 (1966).

³⁷ CPLR 1025 authorizes a partnership to "sue or be sued in the partnership name."