

CPLR 2214: Deficiency in Notice Held To Be Procedural Defect

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ARTICLE 22 — STAY, MOTIONS, ORDERS AND MANDATES

CPLR 2201: Stay denied because of attorney's conflict of interest.

CPLR 2201 provides that the court in which an action is pending may grant a stay of proceedings. While this is a discretionary power,³⁸ such discretion is normally exercised only when other remedies are inadequate and the equities are compelling.³⁹ Stays have been denied when danger of harm to the party requesting the stay is not imminent.⁴⁰ However, pending actions have been stayed when another action for a declaratory judgment that will bear heavily on the first action is brought.⁴¹

The question of what factors should be considered when granting a stay was before the court recently in *Treiber v. Hopson*,⁴² in which the scope of the inquiry was held to include the ethics of the attorney. A stay of a negligence action was requested by defendant's counsel, presumably without his client's knowledge. This attorney had been furnished by the defendant's insurance company. The reason for the request was the initiation of a declaratory judgment action by the insurance company to declare the policy void. This declaratory judgment action was being prosecuted by the same attorney who was representing the defendant in the negligence action. The appellate division denied the stay because the attorney was acting against the best interests of the defendant in contravention of the Canons of Professional Ethics.⁴³

In considering this additional factor, the courts have again moved toward more realistic solutions to the procedural problems caused when an insurance company attorney defends a policy holder.

CPLR 2214: Deficiency in notice held to be procedural defect.

CPLR 2214(b) provides that "a notice of motion . . . shall be served at least eight days before the time at which the motion is noticed to be heard." This period is extended an additional three days when service is made by mail.⁴⁴

³⁸ 7B MCKINNEY'S CPLR 2201, commentary 2 (1963).

³⁹ 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 2201.05 (1965).

⁴⁰ *Ibid.* See also *Ticon Corp. v. Emerson Radio & Phonograph Corp.*, 206 Misc. 727, 134 N.Y.S.2d 716 (Sup. Ct. N.Y. County 1954).

⁴¹ *Cf.*, *Hunter v. Hunter*, 10 App. Div. 2d 937, 201 N.Y.S.2d 961 (1st Dep't 1960) (memorandum decision); *Westchester Fire Ins. Co. v. Lipsky*, 9 Misc. 2d 390, 170 N.Y.S.2d 566 (Sup. Ct. N.Y. County 1958).

⁴² 27 App. Div. 2d 151, 277 N.Y.S.2d 241 (3d Dep't 1967).

⁴³ ABA CANONS OF PROFESSIONAL ETHICS Nos. 6, 45.

⁴⁴ CPLR 2103(b)(2).

In *Baciagalupo v. Baciagalupo*,⁴⁵ the court granted plaintiff's motion to serve a supplemental complaint even though defendant was given only ten days notice served by mail. Admitting that the decided "numerical" weight of authority has considered such a deficiency a jurisdictional defect which would deprive it of any authority to hear the substance of the motion,⁴⁶ the court nevertheless interpreted the most recent precedent as treating the improper notice as a procedural irregularity which might be disregarded absent prejudice to the defendant.⁴⁷

In so holding, the court discounted the significance of the eleven day requirement as a strict jurisdictional prerequisite by outlining several avenues of circumvention. It was noted that the defect might be readily waived by any opposition on the merits;⁴⁸ furthermore, the defect might be avoided altogether by an order to show cause.⁴⁹ The court, in reaching its decision, relied heavily on *Shanty Hollow Corp. v. Poladian*,⁵⁰ a case which found it to be within the discretion of the court under CPLR 2214(c) to hear a jurisdictional motion without notice.⁵¹ While the court in the instant case treated lightly the fact that the motion in *Shanty Hollow* was addressed to a jurisdictional question, that very fact may have caused the court there to dispense with the notice requirement.

Though the instant case bears no factual resemblance to *Shanty Hollow*, the court adopted a realistic approach. Since there had been no prejudice to the defendant, and since there apparently was no denial of due process, a strict requirement of the eleven days notice would have proved a meaningless exercise in procedural formalism. Perhaps, in granting the motion, the court

⁴⁵ 53 Misc. 2d 13, 277 N.Y.S.2d 260 (Sup. Ct. Suffolk County 1967).

⁴⁶ *Miot v. Jo Carl Realty Corp.*, 19 App. Div. 2d 889, 244 N.Y.S.2d 721 (2d Dep't 1963), *modified*, 20 App. Div. 2d 664, 246 N.Y.S.2d 542 (1964); *Thrasher v. United States Liab. Ins. Co.*, 45 Misc. 2d 681, 257 N.Y.S.2d 360 (Sup. Ct. N.Y. County 1965).

⁴⁷ *Baciagalupo v. Baciagalupo*, 53 Misc. 2d 13, 14, 277 N.Y.S.2d 260, 261 (Sup. Ct. Suffolk County 1967).

⁴⁸ *Todd v. Gull Contracting Co.*, 22 App. Div. 2d 904, 255 N.Y.S.2d 452 (2d Dep't 1964).

⁴⁹ CPLR 2214(d) states: "The court in a proper case may grant an order to show cause, to be served in lieu of a notice of motion, at a time and in a manner specified therein."

⁵⁰ 23 App. Div. 2d 132, 259 N.Y.S.2d 541 (3d Dep't 1965), *aff'd*, 17 N.Y.2d 536, 215 N.E.2d 168, 267 N.Y.S.2d 912 (1966). There, appellants appeared "specially" and objected to the jurisdiction of the court because of improper delivery of a notice and petition—the court sustained appellants' objection as an oral motion without notice.

⁵¹ See CPLR 2214(c), which provides: "Only papers served shall be read in support of, or in opposition to, the motion, *unless the court for good cause shall otherwise direct*" (emphasis added).

was trying to give expression to the statutory mandate that pleadings be liberally construed.⁵² But it is more likely that the result in the present case is attributable to the nature of the motion being heard.⁵³

ARTICLE 30—REMEDIES AND PLEADING

CPLR 3013: Request for equitable relief not fatal where facts indicated legal relief was proper.

In *Lane v. Mercury Record Corp.*,⁵⁴ the appellate division, first department, held that a complaint which asked for equitable relief could not be dismissed for failure to state a cause of action merely because the complaint only stated facts sufficient for legal relief. Recently, the Court of Appeals affirmed this decision,⁵⁵ thereby making it applicable to the whole state.

CPLR 3013 requires that "statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions . . . or occurrences . . . intended to be proved and the material elements of each cause of action or defense."⁵⁶ This section underlines the plan of the CPLR to do away with the technicalities of pleading—to sustain any cause of action which can be found within the pleading.⁵⁷ It is, therefore, a departure from the old law which required that a pleading state "material facts" only.⁵⁸ Now, pleadings must only identify the transaction, and the facts alleged must be sufficient to entitle plaintiff to relief under some theory of substantive law.⁵⁹

⁵² CPLR 3026.

⁵³ CPLR 3025 provides that supplemental pleadings be "freely given upon such terms as may be just." Furthermore, under CPA § 105, amendments to pleadings were liberally granted so as to permit complete litigation of the issues. See 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3025.11 (1965).

⁵⁴ 21 App. Div. 2d 602, 252 N.Y.S.2d 1011 (1st Dep't 1964). The plaintiff had asked for an accounting, and while such equitable relief was unavailable under the alleged facts, the facts did show a cause of action in contract with damages as the appropriate remedy.

⁵⁵ *Lane v. Mercury Records Corp.*, 18 N.Y.2d 889, 223 N.E.2d 35, 276 N.Y.S.2d 626 (1966).

⁵⁶ CPLR 3013.

⁵⁷ 7B MCKINNEY'S CPLR 3013, supp. commentary 60 (1966).

⁵⁸ CPA § 241. 7B MCKINNEY'S CPLR 3013, supp. commentary 60 (1966); 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3013.01 (1965).

⁵⁹ WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 112 (1963); 7B MCKINNEY'S CPLR 3013, supp. commentary 64-65 (1966). The instant case does, however, directly overrule *Jackson v. Strong*, 222 N.Y. 149, 118 N.E. 512 (1917), and *Terner v. Glickstein & Terner, Inc.*, 283 N.Y. 299, 28 N.E.2d 846 (1940), wherein the Court of Appeals held that where the