

# CPLR 7503: Third-Party Action Stayed Pending Arbitration

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*CPLR 7503: Third-party action stayed pending arbitration.*

CPLR 1007 permits a prime defendant to implead a third person who may be liable to him if the prime plaintiff is successful in his suit. This provision is intended to determine all issues and liabilities at once and thereby avoid a multiplicity of actions.<sup>137</sup> If the defendant was compelled to prosecute a separate action subsequently, the third person would not be bound by any of the determinations in the first suit. Although the critical issues might be identical, they would have to be re-tried since the fact that the third person did not have the opportunity to litigate them would preclude the use of collateral estoppel.<sup>138</sup> Thus, use of third-party practice precludes the possibility of inconsistent decisions.<sup>139</sup>

Though it no doubt had these considerations in mind, the supreme court in *Sherwood Village Cooperative A, Inc. v. Had-Ten Estates Corp.*,<sup>140</sup> stayed the prosecution of a general contractor's third-party claim against its subcontractor. The general contractor was being sued in contract for alleged faulty masonry work. The defendant in turn impleaded his masonry subcontractor basing the third-party complaint on breach of the subcontract. This contract provided for arbitration of all disputes arising thereunder. After reviewing conflicting authority,<sup>141</sup> the court held that the agreement to arbitrate could not be avoided by the initiation of a third-party action. Therefore, the action was stayed with directions to submit the claim to arbitration pursuant to CPLR 7503.

Since a court in a subsequent action would not be bound by a prior determination in the prime suit, it would follow that an arbitrator could also reach an opposite conclusion as to the issue of defective workmanship. Thus, the defendant may find himself liable to the plaintiff but not entitled to recovery from the subcontractor.

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<sup>137</sup> 11 N.Y. JUD. COUNCIL REP. 58 (1945).

<sup>138</sup> *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

<sup>139</sup> 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE, ¶ 1007.01 (1966).

<sup>140</sup> 53 Misc. 2d 27, 277 N.Y.S.2d 877 (Sup. Ct. Queens County 1967).

<sup>141</sup> *Greene Steel & Wire Co. v. F. W. Hartmann & Co.*, 235 N.Y.S.2d 238 (Sup. Ct. Kings County 1962), *aff'd mem.*, 20 App. Div. 2d 683, 247 N.Y.S.2d 1008 (2d Dep't), *appeal dismissed*, 14 N.Y.2d 688, 198 N.E.2d 914, 249 N.Y.S.2d 886 (1964) (stay of third party action granted); *Knolls Cooperative Section No. 1, Inc. v. Hennessey*, 3 Misc. 2d 220, 150 N.Y.S.2d 713 (Sup. Ct. Bronx County 1956) (stay of third party action granted); *Puritan Fabrics, Inc. v. Charm Togs, Inc.*, 70 N.Y.S.2d 453 (Sup. Ct. N.Y. County 1947) (stay of third party action denied).

This is precisely the situation CPLR 1007 was meant to prevent. However, the court in this case appears to have had no alternative since the defendant had contracted away his right to judicial resolution of disputes. This decision stands as a warning against careless drafting of arbitration agreements. This unfortunate situation could have been avoided by a clause exempting from arbitration disputes originating in suits against the general contractor. Under such a clause, the parties could still arbitrate the many disputes that would be solely *inter se*. This suggested provision must be clear and express since, as this case indicates, the courts will not find an implied one.

#### DOMESTIC RELATIONS LAW

##### *DRL § 236: Impact on support proceedings in Family Court.*

While the Family Court is powerless to entertain matrimonial actions, it does have the power under Section 412 of the Family Court Act to order support of the wife. The award may be on a minimum "public charge" basis, *i.e.*, based on preventing the wife from becoming a public charge, or, in the court's discretion, it may be based on the husband's ability to pay.<sup>142</sup> Although the Family Court has independent discretion, it has usually followed certain criteria used by the supreme court in matrimonial actions.<sup>143</sup>

Prior to section 236, the rule in the supreme court had been that where the wife lost her separation action due to her voluntarily living apart, she was not entitled to support.<sup>144</sup> Following the supreme court's direction, the Family Court denied support on a "means" basis where the wife was voluntarily living apart.<sup>145</sup>

Since the adoption of Section 236 of the Domestic Relations Law,<sup>146</sup> the supreme court has been more liberal in awarding

<sup>142</sup> Section 412 of the Family Court Act provides that: "[a] husband is chargeable with the support of his wife and, if possessed of sufficient means . . . , may be required to pay for her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties" (emphasis added).

<sup>143</sup> Zunder v. Zunder, 187 Misc. 557, 62 N.Y.S.2d 776 (Dom. Rel. Ct. Bronx County 1946); Kenneson v. Kenneson, 178 Misc. 832, 36 N.Y.S.2d 676 (Dom. Rel. Ct. Bronx County 1942).

<sup>144</sup> Batchelor v. Batchelor, 295 N.Y. 544, 68 N.E.2d 681 (1946); Solomon v. Solomon, 290 N.Y. 337, 49 N.E.2d 470 (1943); Roosevelt v. Roosevelt, 13 App. Div. 2d 334, 216 N.Y.S.2d 604 (1st Dep't 1961).

<sup>145</sup> Zunder v. Zunder, 187 Misc. 557, 62 N.Y.S.2d 776 (Dom. Rel. Ct. Bronx County 1946).

<sup>146</sup> Section 236 provides that ". . . the court may direct the husband to provide suitably for the support of the wife as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. . . . Such direction may be made . . . notwithstanding that the court refuses to grant the relief requested by the wife . . ." (emphasis added).