

# CPLR 1025: Limited Partner Cannot Sue Derivatively on Behalf of His Partnership

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without making the third person a party, may vouch him in by giving him sufficient notice of the pendency of the suit and by offering him the opportunity to control the defense.<sup>99</sup> Whether or not the third person chooses to accept, he would then be held bound by the judgment. This procedure, however, may only be used when the person sought to be vouched in is the indemnitor of the defendant.

In *C. K. S. Inc. v. Helen Borgenicht Sportswear, Inc.*,<sup>100</sup> the plaintiff retailer sought to recover the amount paid by him in settlement of a separate action for personal injuries sustained when a blouse sold by the plaintiff caught fire. The plaintiff, claiming that the defendant was the manufacturer of the blouse and, therefore, through an implied warranty of fitness, an indemnitor, vouched him in.

In reversing an order of the lower court, the appellate division, first department, held that in the subsequent indemnification action it was proper for the defendant to show that he was not the plaintiff's indemnitor and, therefore, that he could not be vouched in.<sup>101</sup> The court noted, however, that had it been conclusively established below that the defendant was an indemnitor, he could not here deny liability by contesting facts already established.<sup>102</sup> Had it been determined that the defendant was the plaintiff's indemnitor, he would have been bound by that decision in the subsequent indemnification action.

*CPLR 1025: Limited partner cannot sue derivatively on behalf of his partnership.*

In *Klebanow v. New York Produce Exch.*,<sup>103</sup> the second circuit permitted limited partners to sue on behalf of the partnership after the general partners had rendered themselves unable to sue by placing the partnership in the hands of a liquidator allegedly affiliated with the defendants.

Though it has been suggested that New York law would be influenced by *Klebanow*,<sup>104</sup> in *Millard v. Newmark & Co.*,<sup>105</sup> the appellate division, first department, in a 3-2 decision, held that 32 of 100 limited partners could not maintain a derivative suit on behalf of the partnership. The majority in *Millard* distinguished

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<sup>99</sup> Hartford Acc. & Indem. Co. v. First Nat'l Bank & Trust Co., 281 N.Y. 162, 167-68, 22 N.E.2d 324, 326 (1939).

<sup>100</sup> 25 App. Div. 2d 218, 268 N.Y.S.2d 409 (1st Dep't 1966).

<sup>101</sup> *C. K. S. Inc. v. Helen Borgenicht Sportswear, Inc.*, 25 App. Div. 2d 218, 268 N.Y.S.2d 409 (1st Dep't 1966).

<sup>102</sup> *Id.* at 220, 268 N.Y.S.2d at 411.

<sup>103</sup> 344 F.2d 294 (2d Cir. 1965).

<sup>104</sup> *E.g.*, *Standing of Limited Partners to Sue Derivatively*, 65 COLUM. L. REV. 1463 (1965).

<sup>105</sup> 24 App. Div. 2d 333, 266 N.Y.S.2d 254 (1st Dep't 1966).

*Klebanow* by stating that the federal court must have "overlooked the fact that the New York legislature has not so extended the law as to limited partnerships."<sup>106</sup> The court reasoned that a limited partnership is solely the creature of statute,<sup>107</sup> having only such rights, duties and obligations as the statutes and its contracts may provide.<sup>108</sup> Therefore, since the legislature did not see fit to endow a limited partner with the right to sue derivatively in the name of the partnership, the court could not do so.<sup>109</sup> The court thus strictly interpreted Section 115 of the New York Partnership Law and therefore limited CPLR 1025, which permits a suit by or against two or more partners in the partnership name.

In a vigorous dissent, Justice Rabin stated that if the majority opinion was followed, there would then be no adequate remedy for wrongs committed by the general partners against the partnership. In urging that *Klebanow* be followed, he reasoned that a limited partner would be unable to maintain an individual action because of the difficulty of assessing and proving his personal loss. He noted that even if the limited partner could prove his loss, the remedy would remain inadequate since it was of greater interest to the limited partner to see the partnership maintain a firm and sound fiscal position. This greater interest, said Justice Rabin, "could not be protected by relegating the limited partner to a suit solely on his own behalf for his own specific damage."<sup>110</sup> He insisted that if the majority view were followed, the general partners could "loot the partnership with impunity. . . ." <sup>111</sup>

#### ARTICLE 14 — ACTIONS BETWEEN JOINT TORT-FEASORS

*CPLR 1401: Contribution between joint tort-feasors not apportioned on a strictly mathematical basis.*

In *McCabe v. Century Theatres, Inc.*,<sup>112</sup> the plaintiff was injured when she fell through open sidewalk doors leading to the cellar of a store operated by Adolph Rohde, a subtenant of Queens Park Operating Corporation. The building was owned by Grupenel Realty Corporation. Grupenel and Queens Park, while contending that *together* they should pay one-half of the judgment, nevertheless paid two-thirds of the amount in order to end the accrual of interest. They then moved, pursuant to CPLR 1401, to recover,

<sup>106</sup> *Millard v. Newmark & Co.*, 24 App. Div. 2d 333, 266 N.Y.S.2d 254 (1st Dep't 1966).

<sup>107</sup> *Lanier v. Bawdoin*, 282 N.Y. 32, 38, 24 N.E.2d 732, 735 (1939).

<sup>108</sup> *Herrick v. Gould*, 257 App. Div. 341, 342-43, 13 N.Y.S.2d 115, 117 (1st Dep't 1939).

<sup>109</sup> *Supra* note 106, at 337, 266 N.Y.S.2d at 259-60.

<sup>110</sup> *Id.* at 342, 266 N.Y.S.2d at 264 (dissenting opinion).

<sup>111</sup> *Ibid.*

<sup>112</sup> 25 App. Div. 2d 154, 268 N.Y.S.2d 48 (2d Dep't 1966).