St. John's Law Review

Volume 41, October 1966, Number 2 Article 33

Collateral Estoppel: Defensive Assertion of Collateral Estoppel Allowed in Suit Involving Joint Tort-Feasors

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forty-five day demand he can forestall a motion to dismiss." [190] But such security is misleading. A defendant can demand that a note of issue be filed within forty-five days. Afterwards, he can seek a dismissal for the "general delay" which occurred *prior* to the filing of the note of issue. Thus, by failing to timely file, a plaintiff will play right into the hands of a defendant seeking a dismissal for "general delay." The net effect of this is that defendants are encouraged *not* to expedite the proceedings, but rather to allow the plaintiff enough rope to hang himself.

Collateral Estoppel: Defensive assertion of collateral estoppel allowed in suit involving joint tort-feasors.

Ten years ago, the Court of Appeals abolished the requirement of mutuality for the defensive assertion of collateral estoppel in *Israel v. Wood Dolson Co.*[191] Until recently, it did not appear that the lower courts had applied the *Israel* decision to cases involving joint tort-feasors. Although the facts given by the court are incomplete, it seems that the appellate division, fourth department, in *Hires v. New York Central R.R.*[192] has applied *Israel* to such a situation.

There, plaintiff's intestate was found to have been contributorily negligent in a prior suit against the State of New York and, therefore, plaintiff was denied recovery. Plaintiff then sued the New York Central on a cause of action arising out of the same accident. The court held that "the prior judgment is a complete defense and precludes the prosecution of the cause herein." [193]

This is a departure from the previous attitude of the lower courts in applying the *Israel* doctrine. For example, in the July, 1966 issue of *The Quarterly Survey of New York Practice*, a third department decision, *Cummings v. Dresher*, was examined. The court took great pains to show that there was no identity of issues so that the holding of *Israel* could be avoided.[194]

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[190] Davis, Jr., *Volker Law*, 156 N.Y.L.J., July 11, 1966, p. 1, col. 6.

[191] 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956). Collateral estoppel insures that issues once litigated will be conclusive in a subsequent suit involving different causes of action or parties. Prior to the *Israel* case, the courts imposed a requirement of mutuality in order to assert the estoppel. Since non-parties and non-privies are not bound by a judgment, normally they cannot attempt to benefit therefrom. Thus the party seeking to assert collateral estoppel must have been either party or privy to the previous action. *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 121, 148 (1966).

[192] 23 App. Div. 2d 1075, 265 N.Y.S.2d 895 (4th Dep't 1965).

[193] Hires v. New York Cent. R.R., 23 App. Div. 2d 1075, 265 N.Y.S.2d 895, 896 (4th Dep't 1965).

[194] 24 App. Div. 2d 912, 264 N.Y.S.2d 430 (3d Dep't 1965), as discussed in *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV.

The *Hires* decision is both a logical development of *Israel* and a desirable attitude for the courts to take. *X* sues *A* and is denied recovery because of his own contributory negligence. If *X* subsequently sues *B*, a joint tort-feasor, *B* should be permitted to assert collateral estoppel to defeat the action. This follows only if the contributory negligence in the first action is identical to the contributory negligence that would be shown in the second action.[195] It is apparent that plaintiff has had his day in court on the issue of contributory negligence. Thus, there seems to be no reason for not expanding the scope of the *Israel* decision to situations of this type.

ARTICLE 44 — TRIAL MOTIONS

CPLR 4404(b): Codefendants do not have standing to set verdict aside.

In an unreported decision, the jury returned a verdict against defendants Petroff and Miszuk and in favor of defendant Brzezinski. The trial court, upon a motion by the codefendants Petroff and Miszuk, set aside all the verdicts, solely upon a determination that the verdict in favor of Brzezinski was contrary to the weight of the evidence.

In *Petroff v. Brzezinski*,[196] the appellate division, fourth department, interpreting CPLR 4404, reversed and reinstated the original verdict. The court held that although the verdict in favor of Brzezinski was contrary to the weight of the evidence, his co-defendants had no standing to move to set the verdict aside "because they were not his adversaries." [197]

It should be noted that the refusal of the court to hear the motion defeats the codefendants' possible right to contribution under CPLR 1401. Thus, Petroff and Miszuk are "aggrieved" to the extent that they lose the chance to reduce their damages. They

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121, 150 (1966). However, this case has been reversed by the Court of Appeals, and will be treated in the next issue of the *Survey*.

[195] See also Friedman v. Parklane Motors, Inc., 18 App. Div. 2d 262, 238 N.Y.S.2d 973 (1st Dep't 1963). The court permitted the defensive assertion of collateral estoppel, after it had been established in a previous action against a party not in privity with the defendant therein that plaintiff's intestate's injuries had not been caused by the accident.

[196] 24 App. Div. 2d 1072, 265 N.Y.S.2d 804 (4th Dep't 1965).

[197] Petroff v. Brzezinski, 24 App. Div. 2d 1072, 1073, 265 N.Y.S.2d 804, 806 (4th Dep't 1965). *Accord*, Schultz v. Alfred, 11 App. Div. 2d 266, 203 N.Y.S.2d 201 (3d Dep't 1960); Hughes v. Parkhurst, 284 App. Div. 757, 134 N.Y.S.2d 798 (4th Dep't 1954).