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# CPLR 1007: Vouching-In Notice--Third Party Practice

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porate beneficiary, an indispensable party. Pursuant to CPLR 3211(a)(10), a motion was made to dismiss the complaint upon the ground that "the court should not proceed in the absence of a person who should be a party." In ruling on the motion, the court was faced with the question of whether the CPA's dual-motion procedure was incorporated into the CPLR. Under prior practice,[114] it was necessary to make two motions: first, to direct the plaintiff to join the omitted party; and, second, if plaintiff refused, to dismiss the complaint.[115]

The court adopted the view put forth by the *Biannual Survey of New York Practice*[116] that in light of CPLR 104, the former dual-motion requirement was merely an unnecessary delay.

*CPLR 1007: Vouching-in notice — third-party practice.*

At common law a defendant having a third party liable over to him could vouch him into the litigation, and, by giving him proper notice of the suit, bind him by a final judgment.[117] Vouching-in, though still available, is seldom employed since CPLR 1007 provides a much easier method of impleading a third-party defendant. However, vouching-in remains an integral part of our procedural law since it can be employed to reach a third-party defendant when the impleading party cannot meet the requirements of CPLR 1007.[118]

*Bouleris v. Cherry-Burrell Corp.*[119] discusses some of the more significant aspects of the vouching-in procedure. *Bouleris* involved a proceeding on a motion to vacate a vouching-in notice prior to a trial on the merits. In denying the motion to vacate, the court held that the only ground upon which such a motion can be granted, at that stage of the proceeding, is untimely notice.[120]

The ruling in the instant case is based upon an examination of the nature of notice procedures for vouching-in. The court found that vouching-in is merely an invitation to a party, whom the defendant considers to be liable over to him, to come in and defend. If that party defaults, the third-party defendant will be held liable for any judgment that might be recovered against the third-party

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[114] RCP 102; CPA §§ 192-93.

[115] *E.g.*, Wolff v. Brontown Realty Corp., 281 App. Div. 752, 118 N.Y.S.2d 74 (2d Dep't 1953); Marsico v. Tramutolo, 135 N.Y.S.2d 258 (Sup. Ct. Queens County 1954).

[116] 38 ST. JOHN'S L. REV. 447-48 (1964).

[117] Note, 11 BUFFALO L. REV. 90 (1962).

[118] For instance, if the defendant were a domiciliary of a foreign state and not amenable to service under CPLR 301 or 302(a).

[119] 45 Misc. 2d 318, 256 N.Y.S.2d 537 (Sup. Ct. Albany County 1964).

[120] *Id.* at 319, 256 N.Y.S.2d at 538; see also Urback v. City of New York, 46 Misc. 2d 503, 259 N.Y.S.2d 975 (Sup. Ct. Kings County 1965).

plaintiff. The procedure is entirely informal, requiring no particular language; it can be written or oral. In view of this, the court determined that it would serve no purpose to vacate the notice at this stage of the proceeding.[121]

Upon default, and after liability is determined in the first action, the third-party plaintiff may proceed against the third-party defendant; in that second action the latter will be bound by the prior decision. However, the third-party plaintiff's right to this relief over will not be enforceable unless his action against the third-party defendant is *identical* to that asserted by the plaintiff in the original action. Thus, if the third-party defendant is improperly vouched-in, he may *always* raise this as a defense. There is, therefore, no automatic liability flowing from such a notice.[122]

## ARTICLE 12 — INFANTS AND INCOMPETENTS

### *CPLR 1201: Guardian ad litem appointed for unadjudicated-incompetent plaintiff.*

CPLR 1201, although providing that an adult defendant may have a guardian ad litem appointed where he is incapable of adequately defending his rights, makes no provision for a plaintiff similarly incapacitated.[123] In *Leibowitz v. Hunter*,[124] a motion was made for the appointment of a guardian ad litem for the adult plaintiff in a personal injury action. It was entirely possible that plaintiff would remain unconscious for a period of several months. The court granted the motion stating that CPLR 1201 did not preclude by negative inference the appointment of a guardian ad litem for an unadjudicated-incompetent plaintiff. It would appear that the court was justified in taking this position due to the fact that CPLR 1201 is the analogue of CPA § 207 which was amplified by subsequent case law[125] to extend the scope of the statute to include unadjudicated-incompetent adult plaintiffs.

It would seem that the court has reached a favorable conclusion in affording the incompetent plaintiff the opportunity to pursue his cause of action with the aid of a guardian ad litem. An interpretation which would have precluded a plaintiff under

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[121] See Urback v. City of New York, *supra* note 120, at 504, 259 N.Y.S.2d at 977, where the court points out that a vouching-in notice does not have the same effect as process.

[122] Bouleris v. Cherry-Burrell Corp., 45 Misc. 2d 318, 319, 256 N.Y.S.2d 537, 541 (Sup. Ct. Albany County 1964).

[123] 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1201.01 (1964).

[124] 45 Misc. 2d 580, 257 N.Y.S.2d 434 (Sup. Ct. N.Y. County 1965).

[125] Sengstack v. Sengstack, 4 N.Y.2d 502, 510, 151 N.E.2d 887, 890, 176 N.Y.S.2d 337, 342 (1958).