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Article 35

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 *Bianual 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

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 law¹²⁵ 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

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).