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CPLR 1201: Guardian Ad Litem Appointed for Unadjudicated-Incompetent Plaintiff

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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).

these circumstances from obtaining this relief could not have been intended by the legislature.

CPLR 1207: Settlement of action or claim by infant or incompetent.

CPLR 1207 provides the defendant with the only sure method whereby he can obtain a release from an infant or incompetent for a claim settled out of court.[126] The section prescribes two procedures: (1) when an action is pending, a motion should be made, and (2) where this is not the case, the section provides for the commencement of a special proceeding. While this distinction appears to be only formal, it has been enforced by denying the application for approval of a settlement when the wrong procedure was utilized.[127]

The practitioner should note that this section alters prior law in that it extends coverage to the judicially declared incompetent, prohibits the parent from moving or petitioning for a settlement when he is not the child's legal guardian and does not require an infant to join in the motion or petition.[128]

ARTICLE 20 — MISTAKES, DEFECTS, IRREGULARITIES AND EXTENSIONS OF TIME

CPLR 2003: Irregularity in judicial sale.

A foreclosure sale scheduled for January 6, 1965, was postponed to the following day due to the referee's illness. An order to that effect was signed by the court. The defendant-owner's motion to set aside the sale on the ground that there was no publication of the substituted date was denied. The court held that under CPLR 2003, the omission was a mere irregularity which could be the basis for setting aside the sale only if substantial rights of a party were prejudiced.[129] In the instant case no prejudice was shown. In fact, approximately fourteen bids were received and the bidding was described as "spirited."

This decision is in accord with prior law,[130] the attitude of the CPLR as expressed in sections 2001 and 2003, and the reports

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[126] 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1207.06 (1964).

[127] Bittner v. MVAIC, 45 Misc. 2d 584, 257 N.Y.S.2d 521 (Sup. Ct. N.Y. County 1965).

[128] 7B McKINNEY'S CPLR 1207, commentary 512 (1963).

[129] Criterion Capital Corp. v. Valven Holding Corp., 23 App. Div. 2d 878, 259 N.Y.S.2d 946 (2d Dep't 1965).

[130] CPA § 109-a(1); 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 2003.01, .03 (1964).