

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 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).

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

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).