

CPLR 2606:Obtaining Order for Payment Out of Court

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the law of the case and was therefore binding upon all courts of co-ordinate jurisdiction.¹³⁵

The court's refusal to sanction this procedure, which involves, in effect, taking an appeal to a justice sitting in the same court, is supported by the tenor of CPLR 2221 and 2217(a). These sections provide that "any motion may be referred to a judge who decided a prior motion in the action,"¹³⁶ and that a motion affecting a prior order "shall be made . . . to the judge who signed the order. . . . A motion made to other than a proper judge under this rule shall be transferred to the proper judge."¹³⁷

While the above cited sections did not bind the court in this situation, they evidence a legislative intention to prohibit the procedure employed by the petitioner in the instant case.

ARTICLE 26 — PROPERTY PAID INTO COURT

CPLR 2606: Obtaining order for payment out of court.

The application for obtaining a court order for the payment of property previously paid into court can be made either by motion or by special proceeding.¹³⁸ In the case of *Application of Godfrey*,¹³⁹ the petitioner utilized the special proceeding. The court considered this procedure preferable because the court-designated custodian, the county treasurer, no longer had possession of the property but had erroneously released the money to the state comptroller and thus was not a party to the application. As a result of this voluntary relinquishment, the supreme court noted that although the order withdrawing the funds should emanate from the court which directed that the property be paid into court,¹⁴⁰ here, the action of the treasurer removed it from the exclusive control of the county court and thus allowed the supreme court to assume jurisdiction. Although CPLR 2606 and 2607 require the petitioner to show that he is the person entitled to payment, it does not specify the manner of proof formerly required by RCP

¹³⁵ *Id.* at 489, 257 N.Y.S.2d at 205.

¹³⁶ CPLR 2217(a).

¹³⁷ CPLR 2221.

¹³⁸ CPLR 2606. The purpose of this rule and rule 2607 is to prevent the property from being released upon unlawful claims. *County of Tompkins v. Ingersoll*, 81 App. Div. 344, 347, 81 N.Y. Supp. 242, 245-46 (3d Dep't 1903), *aff'd*, 177 N.Y. 543, 69 N.E. 1132 (1904).

¹³⁹ 46 Misc. 2d 452, 259 N.Y.S.2d 953 (Sup. Ct. Nassau County 1965).

¹⁴⁰ *Zirinsky v. Pesce*, 188 Misc. 539, 68 N.Y.S.2d 309 (N.Y. City Ct. 1947); *People v. Brown*, 83 Misc. 495, 146 N.Y. Supp. 123 (Sup. Ct. 1914). This procedure is continued under CPLR 2606(2). See 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶2606.01 (1964).

31.¹⁴¹ The revisers considered such a specification unnecessary since, if consent is required, it may be proved when the motion is made or in the special proceeding.¹⁴²

The instant case, although not substantially altering established practice, presents a good illustration of the operation of the CPLR in this area.

ARTICLE 30 — REMEDIES AND PLEADING

CPLR 3011: Counterclaim not permitted in plaintiff's reply.

Under Section 272 of the Civil Practice Act, a plaintiff's reply to a counterclaim was generally limited to denials or defenses.¹⁴³ Thus, the plaintiff could not, in his reply, interpose an affirmative cause of action against the defendant. The First Report of the Advisory Committee declared that "there is no provision for the assertion of a crossclaim or counterclaim by a plaintiff in a reply."¹⁴⁴ CPLR 3011 provides that "there shall be a reply to a counterclaim." Whether or not a counterclaim could be contained in a reply under CPLR 3011, however, was not judicially resolved until *Habiby v. Habiby*.¹⁴⁵

In *Habiby*, the defendant moved to strike certain items from the plaintiff's reply, one of which was, in effect, a counterclaim. Granting the defendant's motion, the appellate division held that CPLR 3011 does not call for a departure from the old rule which prohibited the pleading of a counterclaim in a reply.

In spite of the fact that the court seems to have discretionary power to allow the assertion of a counterclaim in a reply,¹⁴⁶ if the plaintiff wants to assert a new cause of action against the defendant the proper procedure is to move to amend his original complaint under CPLR 3025(b). He thus has an ample procedural tool to assert additional claims; he does not need the reply as a means of asserting them.

¹⁴¹ Rule 31 required an acknowledgment of a consent to the payment and proof of identity of the applicant by some other person. See 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶2606.04 (1964).

¹⁴² THIRD REP. 418.

¹⁴³ E.g., *Seligmann v. Mandel*, 19 Misc. 2d 418, 190 N.Y.S.2d 388 (Sup. Ct. 1959); *Phillips v. Manufacturers Trust Co.*, 175 Misc. 1009, 26 N.Y.S.2d 58 (Sup. Ct. 1940), *aff'd*, 261 App. Div. 946, 27 N.Y.S.2d 185 (1st Dep't 1941).

¹⁴⁴ FIRST REP. 71.

¹⁴⁵ 23 App. Div. 2d 558, 256 N.Y.S.2d 634 (1st Dep't 1965).

¹⁴⁶ Cf. CPLR 3011. "There shall be no other pleading unless the court orders otherwise." *Ibid*.