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CPLR 3402: Alleged Conflict Between Court Rules and the CPLR

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complied with on all motions, even those based on general delay.[227] This issue has not been passed upon by either the third or fourth department and will undoubtedly require further resolution by the Court of Appeals.[228]

ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3402: Alleged conflict between court rules and the CPLR.

In *Bedingfield v. Dairymaid Farms, Inc.*,[229] the court declared plaintiff's note of issue, filed without a statement of readiness, premature under the applicable rules of the appellate division, second department.[230] Plaintiff contended that this conclusion was in conflict with CPLR 3402 which allows the filing of the note of issue forty days after the completion of the service of summons since the CPLR does not specifically mention the requirement of a statement of readiness. The court ruled that the CPLR authorizes the adoption of rules pertaining to calendar practice. In holding that the CPLR is "consistent with the inherent power of the court to control its business," [231] the case confirms the view that unless the practitioner can point to an unambiguous clash between court rule and CPLR provision, the rule is not likely to be upset.

ARTICLE 41 — TRIAL BY A JURY

CPLR 4103: Liberally construed.[232]

In *Vinlis Constr. Corp. v. Roreck*,[233] the plaintiff originally sought an accounting and thereafter amended his complaint to include an action for money damages. Since a new note of issue was not filed, the defendant was precluded from exercising the statutory

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[227] The approach taken by the second department can be traced in McLoughlin v. Weiss, 23 App. Div. 2d 881, 259 N.Y.S.2d 941 (2d Dep't 1965); Gilligan v. Farmers Co-op. Marketing Assoc., 23 App. Div. 2d 850, 259 N.Y.S.2d 219 (2d Dep't 1965); Tex Mode Inc. v. Dogmar Bag, Inc., 23 App. Div. 2d 652, 257 N.Y.S.2d 516 (2d Dep't 1965); Devita v. Metropolitan Dist. Inc., 45 Misc. 2d 761, 257 N.Y.S.2d 618 (Sup. Ct. Nassau County 1965); Kalning v. New York Cent. R.R., 45 Misc. 2d 1036, 258 N.Y.S.2d 743 (Sup. Ct. Queens County 1965).

[228] For a more thorough treatment of the repercussions of the 1964 amendment, see 7B MCKINNEY'S CPLR 3216, supp. commentary 160 (1965).

[229] 46 Misc. 2d 146, 259 N.Y.S.2d 292 (Sup. Ct. Suffolk County 1965).

[230] N.Y. App. Div. R. I(a), pt. 7 (2d Dep't 1964).

[231] Bedingfield v. Dairymaid Farms, Inc., 46 Misc. 2d 146, 147, 259 N.Y.S.2d 292, 294 (Sup. Ct. Suffolk County 1965).

[232] Under CPLR 4103, if it appears during the trial of an action that the adverse party is entitled to a jury trial on any legal question, then the court shall give that party an opportunity to demand a jury.

[233] 23 App. Div. 2d 895, 260 N.Y.S.2d 245 (2d Dep't 1965).