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CPLR 4103: Liberally Construed

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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).

right to make a jury demand within ten days of filing.[234] The appellate court, however, concluded that the defendant had not waived his right to a jury trial[235] and, carrying out its duty under CPLR 4103, afforded the defendant thirty days in which to demand a jury. This case illustrates how, as a matter of practice, CPLR 4103 is to be applied.

CPLR 4111: Used to specifically provide a means of interpreting a jury verdict.

The courts should employ CPLR 4111 in cases wherein two conflicting theories of liability are presented to the jury. In *Dore v. Long Island R.R.*,[236] the case was presented to the jury on the issues of ordinary negligence and last clear chance.[237] The jury rendered a general verdict and the appellate court was unable to determine upon which theory the verdict rested. It was obvious that the evidence produced would not support both theories. In remanding, the court stated that when inconsistent theories are presented to the jury, the trial court should utilize the procedure available under CPLR 4111, which permits either the rendition of a special verdict[238] or a general verdict accompanied by written answers to written interrogatories.[239]

ARTICLE 42 — TRIAL BY THE COURT

CPLR 4213: Properly utilized when essential fact absent from record on appeal.

CPLR 4213(b) provides that in a nonjury trial, the decision of the court shall state the facts it deems essential.[240] However, on appeal, when the record does not contain essential facts, the court has three possible alternatives: (1) reverse and remand for a new trial; (2) make de novo findings of fact; or (3) remand to the court of original instance for the essential findings of fact.[241] In *Conklin v. State*,[242] the lower court failed to allocate specific

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234 CPLR 4102(a).

235 See Micro Precision Corp. v. Brochi, 4 App. Div. 2d 697, 164 N.Y.S.2d 454 (2d Dep't 1957).

236 23 App. Div. 2d 502, 256 N.Y.S.2d 425 (2d Dep't 1965).

237 Jasinski v. New York Cent. R.R., 21 App. Div. 2d 456, 461-63, 250 N.Y.S.2d 942, 947-49 (4th Dep't 1964).

238 CPLR 4111(b); see Martin Fireproofing Corp. v. Maryland Cas. Co., 45 Misc. 2d 354, 257 N.Y.S.2d 100 (Sup. Ct. 1965).

239 CPLR 4111(c).

240 CPLR 4213; see 4 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 216, ¶ 4213.09.

241 4 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 216, ¶4213.09.

242 22 App. Div. 2d 481, 256 N.Y.S.2d 477 (3d Dep't 1965).