

St. John's Law Review

Volume 40
Number 1 *Volume 40, December 1965, Number*
1

Article 60

CPLR 4103: Liberally Construed

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

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

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. 1(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 trial²³⁵ 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 rendering, 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 verdict²³⁸ 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

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).