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Court of Appeals Confirms that Recoupment Counterclaim Against Assignee Is Valid Although Arising after Assignment and Notice Thereof

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escrow agreement. Respondent defended on the ground that the relief could be sought only in a plenary action and that a special proceeding would not lie. The supreme court, special term, held that the respondent had waived his right to object as to form by not raising an objection to the form of the procedure at trial;[2] that the objection could not be raised initially on a motion for leave to re-argue. Because of the procedural distinctions that existed between actions and special proceedings, applications brought in the wrong form under prior law were dismissed on that ground alone. Application of this rule became "absurd when made in a case in which the court could dispose of the issues equally well, and without prejudice to the rights of the respondent . . . ."[3] In the enactment of CPLR 103(c), the CPLR recognizes that fact and changes that prior law rule. Under CPLR 103(c), if a court obtains "jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form. . . ." The court is directed instead to make whatever order is required for its prosecution. The instant decision further indicates that whatever defense is left to defendants (or respondents) under this liberal CPLR provision may be lost by an untimely objection to form.

The court, in its opinion, indicated that because there was no attorney-client relationship between petitioner and respondent a plenary action and not a special proceeding would have been appropriate. But since the respondent did not raise the objection to form in the original special proceeding, he was held to have waived it. The court noted that under CPLR 103 the distinction between an action and a proceeding is not a jurisdictional one.

The implications of CPLR 103 carry even further. The practitioner should note that even if the respondent *had* raised the objection timely (*i.e.*, in the proceeding itself and prior to disposition of it), the result would not have been a dismissal. It would have been, at most, a *conversion* of the special proceeding into an action with pleadings and time periods adjusted accordingly.[4]

ARTICLE 2 — LIMITATIONS OF TIME

Court of Appeals confirms that recoupment counterclaim against assignee is valid although arising after assignment and notice thereof.

In an action by an assignee of a claim arising out of a contract between defendant and plaintiff's assignor, defendant, after he had

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[2] Avalon E., Inc. v. Monaghan, 43 Misc. 2d 401, 251 N.Y.S.2d 290 (Sup. Ct. 1964).

[3] 3 N.Y. JUD. COUNCIL REP. 129, 145 (1937).

[4] See the initial installment of the *Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 190, 197-98 (1963).

received notice of its assignment to the plaintiff, counterclaimed for commissions that arose out of the contract. The court held that the claim could be pleaded although it arose after notice of the assignment.[5]

Prior to 1936, CPA § 266 clearly defined two types of counterclaims: the set-off, which arose as a result of a transaction other than the one sued upon; and the recoupment, which was related to the transaction on which plaintiff was suing. The latter, it was clear, could be pleaded although it arose after the assignment while the former could only be interposed if it arose before notice of the assignment.[6]

In 1936, CPA §§ 266 and 267 were amended. The amendments left doubt as to whether the distinction was continued.[7] Some judges decided cases from the point of view that the distinction was abolished while others ruled with the distinction in mind.[8] This conflict was brought into the CPLR by 3019(c), which is essentially the same, for present purposes, as its CPA counterpart.

In the instant case the court of appeals ended all doubt by ruling that the distinction was intended to remain after the 1936 alteration of the statute, upholding the theory that "the doctrines of set-off and recoupment promote justice and diminish circuity of litigation." [9]

It is useful here to analogize these categories of counterclaims to the new statute of limitations provision governing them. As a result of CPLR 203(c) any counterclaim relates back to the time when the complaint was interposed. "In effect, commencement of an action extends the limitation period indefinitely as to any defenses or counterclaims which are not barred at the time the action is commenced."[10] But, as to the recoupment counterclaim, even if it was barred at the time the plaintiff's cause of action was interposed, it will still be allowed if it "arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends. . . ."[11] In such instance "it is not barred to the extent of the demand in the complaint. . . ." [12]

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[5] James Talcott, Inc. v. Winco Sales Corp., 14 N.Y.2d 227, 199 N.E.2d 499, 250 N.Y.S.2d 416 (1964).

[6] For an expansion of this point see *Siebert v. Dunn,* often cited by the court of appeals in the instant case. 216 N.Y. 237, 110 N.E. 447 (1915).

[7] The two distinctive subdivisions were merged in 1936 in CPA § 266.

[8] Whitehall Mercantile Corp. v. Jamaica Ellbee Furrier's Corp., 54 N.Y.S.2d 653 (Sup. Ct. 1945), indicated that the distinction had been extinguished. *Contra,* Termini v. John Arthur Exhibitions, 9 Misc. 2d 833, 169 N.Y.S.2d 584 (Sup. Ct. 1957).

[9] Siebert v. Dunn, *supra* note 6, at 245, 110 N.E. at 450.

[10] 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 203.24 (1963).

[11] CPLR 203(c).

[12] *Ibid.*

That is, where the counterclaim is untimely under the foregoing measure but is connected with the plaintiff's claim, it is allowed to the extent of neutralizing plaintiff's claim; but no affirmative judgment may be given on it for the defendant. If, measured by the time plaintiff's cause of action was interposed, the counterclaim would have been timely, such an affirmative judgment could be granted on it. So it is with the "recoupment" counterclaim. Where the counterclaim has no relationship to the plaintiff's claim, on the other hand, it is not a "recoupment"; such a counterclaim must be timely as measured by the time of plaintiff's interposition of the main claim or defendant cannot use it for *any* purpose.

Section 203(e): An expansion of the types of amendments that "relate back" and thereby avoid bar of statute of limitations.

In *Rice v. Spencer*[13] plaintiff moved to amend his complaint from one alleging defendant's liability by virtue of Section 388 of the Vehicle and Traffic Law, to one alleging liability based on common-law negligence. Defendant contended that the amendment was untimely, since the statute of limitations had run. The court held that it may "allow the amendment of a complaint by even allowing a cause of action barred by the Statute of Limitations. But in such a case, the defendant must not be deprived of his defense of the statute." [14] The court cited *Harriss v. Tams* [15] in support of that conclusion. It appears that the court's attention was not called to CPLR 203(e).

Prior to CPLR 203(e) the rule in New York, as to the relation back of amendments to complaints, was indeed based upon the *Harriss v. Tams* case, wherein the plaintiff moved to amend his complaint to add a ground alleging liability due to breach of implied warranty. The amendment was permitted, but the court indicated that "the defendant must not be deprived of his defense of the statute." [16] In *Harriss* the court held that the type of amendment that relates back to the time the complaint was interposed was one that merely expands or amplifies the allegations and not one "on a different obligation or liability."

CPLR 203(e) is intended to "overcome the effect of *Harriss v. Tams*." [17] It achieves this end by permitting amendments to relate back unless the pleading did not give notice of the "transac-

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[13] 43 Misc. 2d 331, 250 N.Y.S.2d 620 (Sup. Ct. 1963).
[14] *Id.* at 333, 250 N.Y.S.2d at 622.
[15] 258 N.Y. 229, 179 N.E. 476 (1932).
[16] *Id.* at 240-41, 179 N.E. at 481.
[17] SECOND PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 51 (1958) [herein cited as SECOND REP.]