

Motion Papers to Substitute Parties Must Be Served on Them in Manner of Summons

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.

conflict with *Frankel v. Berman*,¹⁰⁷ a first department case. In *Frankel*, the court reversed a judgment against the third-party defendant who had appealed, but declined to disturb the judgment against the defendant in the main action, who had not appealed, even though the court found that the plaintiff had failed to establish a cause of action.

The CPLR,¹⁰⁸ like its prior law counterpart,¹⁰⁹ appears to support the determination of the *Rome* case by giving the third party defendant all the rights "of a party adverse to the other parties," expressly including the right of appeal.

Motion papers to substitute parties must be served on them in manner of summons.

In *Lewis v. Lewis*¹¹⁰ the defendant died after commencement of the action. Plaintiff moved for an order, pursuant to CPLR 1015(a), to continue the action against the executrices of the estate. Defendant was a resident of Florida and the executrices were appointed in that state.

The court denied the motion, noting that service on the executrices must be given in the appropriate manner. The court stated that "if notice is given to a non-party to be substituted, it is served in the same way as a summons pursuant to Article 3 of the CPLR. . . ." ¹¹¹ The court cited as well CPLR 1921, which provides that a person may be made a party defendant if he does not voluntarily appear. The word "defendant" was a change in language from a prior draft which read "by service of a summons" and, as indicated in the Revisers' notes, no change in meaning was intended.¹¹²

The practitioner's attention is called to the fact that, although the papers must be served as a summons, there is no need to start over. When a substitution is required, the action continues "in all respects as if the substituted party had been in the action from the beginning 'and all prior proceedings are valid and operative.'" ¹¹³ In other words, once substitution of the appropriate party is accomplished, the litigation continues from the point it had reached at the time the event requiring substitution took place.

¹⁰⁷ 10 App. Div. 2d 838, 199 N.Y.S.2d 261 (1st Dep't 1960).

¹⁰⁸ See the last sentence of CPLR 1008.

¹⁰⁹ CPA § 193-a(2).

¹¹⁰ 43 Misc. 2d 349, 250 N.Y.S. 2d 984 (Sup. Ct. 1964).

¹¹¹ *Lewis v. Lewis*, 43 Misc. 2d 349, 349-50, 250 N.Y.S.2d 984, 986 (Sup. Ct. 1964).

¹¹² FIFTH REP. 323-24.

¹¹³ 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1021.08 (1964).