

Execution's Captioning Out of Civil Court Instead of Supreme Court Held Jurisdictional Defect

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ARTICLE 14—ACTIONS BETWEEN JOINT TORT-FEASORS

CPLR 1401, relating to contribution among joint tort-feasors, not circumvented by one defendant's taking assignment of plaintiff's judgment against other defendant.

In a negligence action, plaintiffs had judgment against Central Greyhound Lines, Inc. and Dorp Motors, Inc. Central appealed; Dorp did not. The judgment was reversed as to Central and remanded for a new trial. Before the new trial Central settled with plaintiffs, and plaintiffs assigned to Central their outstanding judgment against Central's co-tort-feasor, Dorp. The Greyhound Corporation succeeded to Central. A judgment of contribution had been procured against Dorp's insurer, and Greyhound brought suit on that judgment; it also brought an action to recover as assignee of plaintiffs' judgment against Dorp. The court of appeals held that neither suit would lie.¹¹⁴

The purported judgment of contribution was invalid. CPLR 1401 is narrow and permits contribution only when there is an outstanding judgment against two (at least) joint tort-feasors. The reversal as to Central meant that, when Central settled before the new trial, there was no joint judgment outstanding against both Central and Dorp. Moreover, the payment Central made to plaintiffs was one in settlement, and not payment of a *judgment* plaintiffs held against Central. In such circumstances prior case law made clear that contribution would not lie under what is now CPLR 1401.¹¹⁵

The assignment to Central (in whose shoes Greyhound now stood as successor) of plaintiffs' judgment against Dorp was held, in effect, to be a subterfuge to avoid the limitations on contribution imposed by CPLR 1401, and hence could give rise to no rights that Central would not have been entitled to under CPLR 1401 itself.

ARTICLE 20—MISTAKES, DEFECTS, IRREGULARITIES AND EXTENSIONS OF TIME

Execution's captioning out of civil court instead of supreme court held jurisdictional defect.

Plaintiff recovered a judgment against defendant on May 28. A transcript of that judgment was filed in the New York County Clerk's office and, via a transcript then issued by the latter, the judgment was docketed in the Suffolk County Clerk's office the

¹¹⁴ Greyhound Corp. v. General Acc. Fire & Life Assur. Corp., 14 N.Y.2d 380, 200 N.E.2d 625, 251 N.Y.S.2d 958 (1964).

¹¹⁵ Baidach v. Togut, 7 N.Y.2d 128, 164 N.E.2d 373, 196 N.Y.S.2d 67 (1959).

following day. That same day the Sheriff of Suffolk County received an execution issued by plaintiff's attorney out of the civil court, which was directed to the sheriff of any county. On June 5 the Suffolk Sheriff levied on the personal property of the defendant.¹¹⁶

On the defendant's motion to vacate the levy the court held that the execution was void since an execution issued by the New York City Civil Court may not be executed outside of the city.

The court referred to CCA § 701(a) which provides that all processes and mandates of the New York City Civil Court may be served, unless otherwise provided, only within the City of New York. In addition, CCA § 1504 provides that executions of that court are directed to the marshals within the city. The court deemed these provisions controlling.

However, a strong argument may be made on plaintiff's behalf that would reflect more accurately, than the instant decision, the present liberal attitude toward the effect of procedural defects upon substantive rights. Plaintiff's main contention is that the captioning of the execution in civil court is an irregularity only and that, since he could have issued a supreme court execution, such irregularity should not support a motion to vacate the levy. In support of this contention plaintiff indicated that defendant had not been prejudiced by the irregularity.

The CPLR's attitude toward such an irregularity is clear. Section 2001 provides that an irregularity may be disregarded if no substantive rights of a party are prejudiced.

While truly jurisdictional defects are not curable under CPLR 2001, it would appear that the defect at bar should not be considered jurisdictional. The defect boiled down to the use of a wrong word in the place of the proper word. The wrong word was "Civil"; the proper word was "Supreme." The place of its appearance was apparently in the caption of the execution.

The salient point here is that the execution issues without any court application whatever. The attorney himself issues it and the only defect at bar is that he captioned it "Civil Court" instead of "Supreme Court." The filing of the transcript with the county clerk made the judgment one of the supreme court under CPLR 5018(a), and the attorney was thereafter authorized, without more, to issue a supreme court execution. He negligently captioned the paper "Civil Court" instead of "Supreme Court"; the defendant could in no wise have been prejudiced by that sole oversight. A different conclusion would be in order if no transcript had been filed, because there would have been no *right* to issue execution out of the supreme court in such case. But the right having accrued by virtue of the transcript filing, the mistaken caption—

¹¹⁶ American Metal Climax, Inc. v. Seaboard Die Casting Corp., 43 Misc. 2d 781, 252 N.Y.S.2d 475 (Sup. Ct. 1964).

especially after accepted and acted upon by the Suffolk Sheriff, who would appear to be the only one so positioned as to refuse an execution improperly captioned—thereafter fell into the category of mere irregularity and would, under present law and the liberal intent underlying it, have been best disregarded. A great deal of time and effort, involving considerable expense, was overturned at bar because, at bottom, of use of the wrong word. CPLR 2001 could reasonably have been held to control here, with the irregularity being ignored. The court might have so held had the foregoing factors been called to its attention.

ARTICLE 23—SUBPOENAS, OATHS AND AFFIRMATIONS

Party applying for issuance of arbitrator's subpoena is proper party to petition for judicial enforcement thereof.

Petitioner moved pursuant to CPLR 2308(b) to compel compliance with a subpoena which had been issued by an arbitrator at the request of petitioner and served upon respondent. Respondent contended that only the "issuer may move . . . to compel compliance"¹¹⁷ with the subpoena and that the issuer here was the arbitrator and not petitioner.¹¹⁸

The court, in a brief opinion, indicated that respondent's contention was clearly incorrect and that the term "issuer" embraces the one who applied for the subpoena in a nonjudicial proceeding. The order of compliance issued upon petitioner's application was therefore valid, and respondent's disobedience of it punishable by contempt. The instant application for a warrant of commitment against respondent for disobeying that order was granted.

ARTICLE 30—REMEDIES AND PLEADINGS

CPLR 3017(a) — Judgment may be rendered on the proof, though relief of different nature than that prayed for.

*Nowak v. Wereszynski*¹¹⁹ involved a proceeding in the nature of mandamus, instituted by the Comptroller of the City of Utica, in order to compel the Common Council of the City to adopt a budget providing for the transfer of certain funds by the water board to the city. Special term denied the petition and directed that respondents prepare a new estimate with the objectionable funds deleted therefrom. In addition, the Common Council, upon the receipt of such estimate, was directed to adopt a new budget. Appellant-Comptroller contended that the relief granted was improper, since it was not requested in the pleadings. The appellate division,

¹¹⁷ CPLR 2308(b).

¹¹⁸ Application of Nelson, 43 Misc. 2d 132, 249 N.Y.S.2d 971 (Sup. Ct. 1964).

¹¹⁹ 21 App. Div. 2d 427, 250 N.Y.S.2d 981 (4th Dep't 1964).