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Nominal Corporate Defendant Allowed Substitution as Plaintiff Despite Lack of Express Sanction

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phase of the case nor duplicate any of the proceedings already undertaken. However, the intervenors were given the opportunity to move to dismiss the complaint pursuant to CPLR 3211(a)(3) and (7).

The court's holding seems consonant with the liberal attitude toward intervention which has been adopted by most of the courts which have considered the question.[110] When the intervenor has a definite interest in the litigation and can shed valuable light on the issues before the court, without causing undue delay, intervention is usually permitted. The practitioner would do well to keep the instant case in mind whenever intervention is sought either to sustain or contest a statute in which his client has a substantial interest—be it pecuniary or otherwise.

Nominal corporate defendant allowed substitution as plaintiff despite lack of express sanction in Article 10.

Lazar v. Merchants' Nat'l Properties, Inc.,[111] was a stockholders' derivative suit wherein the corporation was named as a nominal defendant[112] after refusing to bring suit in its own name. During the trial, however, the board of directors resolved that the prosecution of the action would be in the best interests of the corporation. It therefore moved to substitute the corporation as plaintiff in place of the plaintiff-shareholder, who did not object.[113] The appellate division, first department, granted the motion for substitution over the objection of the real-party defendants.[114]

The significance of this decision is that the court granted substitution in the absence of any express statutory provision[115] or judicial precedent authorizing such procedure. Impliedly,

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[110] See 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1012.04 (1964) and cases cited therein.

[111] 22 App. Div. 2d 253, 254 N.Y.S.2d 712 (1st Dep't 1964).

[112] A corporation, in whose name a derivative suit is brought, is held to be an indispensable party to the action for two reasons: (1) recovery must run in its favor, and, (2) it must be prevented from *itself* suing the defendants at a later date on the same cause of action. BAKER & CARY, CASES AND MATERIALS ON CORPORATIONS 650 (3d ed. abr. 1959). Therefore, it must be named as a defendant when it refuses to be joined as a plaintiff. CPLR 1001(a).

[113] An interesting and as yet unanswered problem would have arisen had the plaintiff-shareholder refused to acquiesce when the corporation requested substitution. There appears to be no case in which such a problem has been presented.

[114] The defendants had already made a motion to dismiss, and since CPLR 3211 allows only one such motion, the court conditioned the granting of substitution upon the corporation's consenting to allow defendant to make a new motion under that rule.

[115] Neither the CPLR nor the Business Corporation Law contains any provision which would expressly sanction such a procedure.

then, the provisions of the CPLR pertaining to substitution are not exclusive and a court may grant substitution in its discretion in the interest of justice. Moreover, the case now affords express judicial precedent for substitution in what might be a fairly common situation.

It is to be noted that in the instant case there was no attempt at collusion between the substituted plaintiff and the real-party defendant. The court warned, however, that in the future, a motion for substitution will not ordinarily be granted unless notice is given to the shareholders as an added precaution against collusion.

No abatement of action allowed against foreign insurer domiciled in state which has not adopted Uniform Insurers Liquidation Act.

At common law, a dissolved corporation was treated as if it did not exist. The result of its dissolution was analogized to the effect of death upon a natural person, viz., the abatement of all pending litigation to which such a person was a party.[116] With the adoption of the Uniform Insurers Liquidation Act into the Insurance Law,[117] New York has sought to eliminate the problems peculiar to the liquidation or reorganization of insurance companies having assets and/or liabilities in two or more states.[118] The New York act retains the common-law rule of abatement, but is confined to those states which have adopted the UILA.[119]

Dean Constr. Co. v. Agricultural Ins. Co.,[120] was an action against a Pennsylvania insurance company to recover for damage to property situated in New York. Defendant, a non-resident not licensed to do business in New York, was required to post a bond as a condition to answering the complaint.[121] During the trial, defendant was dissolved pursuant to a Pennsylvania court order, and thereafter moved for dismissal and judgment in its favor on the theory that the action abated after the dissolution.

The appellate division, in affirming the denial of the motion, held that by adoption of the UILA, New York had confined the operation of the abatement rule to reciprocating states. It reasoned that to apply the common-law rule to a non-reciprocating state (such as Pennsylvania) would "emasculate the key reciprocity feature of the Uniform Act." [122] In so holding, the court not

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[116] Matter of National Surety Co., 286 N.Y. 216, 36 N.E.2d 119 (1941).

[117] N.Y. INS. LAW §§ 517-24.

[118] For an excellent discussion of these problems see Commissioners' Prefatory Note to Uniform Insurers Liquidation Act, 9B U.L.A. 195 (1939).

[119] N.Y. INS. LAW § 517(7).

[120] 22 App. Div. 2d 82, 254 N.Y.S.2d 196 (2d Dep't 1964). This appears to be the first New York case construing Sections 517-24 of the New York Insurance Law.

[121] N.Y. INS. LAW § 59-a(3).

[122] Dean Constr. Co. v. Agricultural Ins. Co., 22 App. Div. 2d 82, 85, 254 N.Y.S.2d 196, 199 (2d Dep't 1964).