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Amendment to Pleading Refused When Substantial Prejudice Results

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A counterclaim therefore may never appear in a reply. If a counterclaim could be asserted in a reply, in essence, the court would be allowing the amendment of the complaint without compelling plaintiff to comply with the requisites of such amendment.

The rule then is clear. Its application, however, can get somewhat imprecise, since it may be difficult to distinguish between a counterclaim [185] and an affirmative defense which may always be included in a reply.

This problem is reflected in *Rill v. Darling*.[186] In *Rill* the plaintiff brought an action to recover damages for the death of her husband which, she claimed, was accelerated by defendant's negligence. Defendant's answer alleged a release from the plaintiff. Plaintiff replied admitting the release, but asked the court to rescind the agreement.

Plaintiff's claim for rescission in the reply was unchallenged. Since rescission is an equitable cause of action the plaintiff asserted a counterclaim.

Apparently defendant's counsel did not object to the reply. The issue of the case then became the right of the defendant to have the question of rescission tried by a jury. However, that issue need never have been reached had defendant's counsel moved to dismiss the reply for stating a counterclaim.

Amendment to pleading refused when substantial prejudice results.

CPLR 3025(b), which requires that leave to amend be freely given, does not preclude the court from exercising its discretion and denying a defendant's motion for leave to amend his answer. So held the court in *Ciccone v. Glenwood Holding Corp.*,[187] where plaintiff, a tenant in defendant's building, alleged that she was injured in December 1961 by a ceiling which collapsed. A complaint was served in February 1963 and in April 1963 defendant interposed an answer. Defendant moved in August 1964 for leave to amend his answer so that he could allege that plaintiff was in his employ at the time of the accident and could, therefore, receive workmen's compensation. The court denied the defendant's motion to amend, indicating that plaintiff's right to workmen's compensation was lost since an action therefor must be brought within two years of an accident.[188]

This decision is based upon a firm foundation of cases [189] which indicate that freedom to amend pleadings is bridled by the

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[185] A counterclaim must state a cause of action.

[186] 44 Misc. 2d 174, 253 N.Y.S.2d 184 (Sup. Ct. 1964).

[187] 44 Misc. 2d 273, 253 N.Y.S.2d 576 (Civ. Ct. 1964).

[188] N.Y. WORKMEN'S COMP. LAW § 28.

[189] See, *e.g.*, Zulinsky v. Bradford, 279 App. Div. 765, 108 N.Y.S.2d 756 (2d Dep't 1951); Jennings v. Perkins, 277 App. Div. 1143, 101 N.Y.S.2d 303 (2d Dep't 1950).

discretion of the court. That discretion will be exercised when substantial prejudice to the opposing party would result from amendment.

ARTICLE 31 — DISCLOSURE

Accident reports are subject to disclosure.

Recently the courts have been faced with the problem of reconciling the provisions for exemption from disclosure found in Sections 3101(c) and 3101(d) of the CPLR. CPLR 3101(c) grants an *absolute* immunity from disclosure to the work product of an attorney, whereas 3101(d) provides only that "any writing . . . created by or for a party . . . in preparation for litigation" shall be exempt from disclosure unless a special circumstance exists.[190]

In *Calace v. Battaglia*,[191] a personal injury action, the plaintiff sought disclosure of a statement given by the defendant to his insurance company. The court, acknowledging the irreconcilable conflict in case law in this area,[192] held the statement subject to disclosure. It reasoned that since the policy is to permit maximum disclosure, "those provisions of CPLR Rule [*sic*] 3101 which spell out the exceptions should be narrowly construed to embrace only what is explicity exempted from disclosure." [193] In accordance with this liberal policy, it appears that the court did not consider the statement as either an attorney's work product or material prepared for litigation.[194]

A report to a claims agent should not be considered the work product of an attorney within the purview of 3101(c). By narrowly construing this absolute privilege the courts could, in effect, expand the range of *discretion* under 3101(d), and thus provide a more flexible standard. It would seem advisable where ambiguity exists for the courts to apply subsection (d). The Revisers state that they have adopted the rule of *Hickman v. Taylor* [195] where the Supreme Court held that statements compiled

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[190] "The following shall not be obtainable unless the court finds that the material can no longer be duplicated because of a change in conditions and that withholding it will result in injustice or undue hardship." CPLR 3101(d).

[191] 44 Misc. 2d 97, 252 N.Y.S.2d 973 (Sup. Ct. 1964).

[192] *Id.* at 99, 252 N.Y.S.2d at 975. See cases cited therein.

[193] *Ibid.*

[194] *Cf.* Babcock v. Jackson, 40 Misc. 2d 757, 243 N.Y.S.2d 715 (Sup. Ct. 1963), wherein the court recognized a distinction between a statement taken by a claims adjuster and one taken by an attorney. "The attorney . . . in taking a statement, is preparing his case and is working on a legal theory. Contrary to this, claims agents are making routine investigations for the company's records and are not preparing only for trial." *Id.* at 761, 243 N.Y.S.2d at 720.

[195] 329 U.S. 495 (1947).