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Article 22

Section 1001--Necessary Joinder of Parties

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the lower court. In *Stevens v. MVAIC*,[46] plaintiff sought leave to transfer the action from the supreme court to the New York City Civil Court. The action had arisen out of an alleged hit-and-run accident, and since it was brought directly against MVAIC it was governed by Section 618(a) of the Insurance Law. This section provides that the supreme court has the power to allow an action to be brought directly against MVAIC "in such court." Due to the exactness of this language, the court held that only the supreme court had jurisdiction over such a suit, and therefore removal to the civil court must be denied. Since the civil court lacked *subject matter* jurisdiction, the action could not properly have been commenced there, and hence Section 325 of the CPLR precluded any such removal.

PARTIES GENERALLY

Section 1001 — Necessary Joinder of Parties

Section 1001 of the CPLR, providing for joinder of necessary parties, essentially maintains prior practice but provides for greater flexibility in the resolution of nonjoinder problems. Subdivision (b) of the statute permits the court, under certain enumerated situations, discretion to excuse the nonjoinder of a person who ought to be a party, but over whom jurisdiction cannot be obtained.[47] The determination of whether or not to permit the action to continue without joinder of such a person will not depend on his being classified as "conditionally necessary" or "indispensable," because such language has been eliminated.

The section achieves flexibility by suggesting criteria for the court in its determination of whether or not to dismiss the action for nonjoinder. Essentially, these criteria permit the court to weigh the interests of the litigants, the absentee and the public.[48]

Two cases have recently interpreted this statute. In one,[49] the court held that an action to foreclose a second mortgage would be allowed to continue without the joinder of the first mortgagee since the rights of all the parties presently before the court could be adjudicated without his being joined. The court indicated that prior case law determining which parties were "necessary" would still be important under the CPLR.[50]

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[46] (Sup. Ct., New York County), 151 N.Y.L.J., Feb. 6, 1964, p. 12, col. 3.

[47] 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1001.01 (1964).

[48] For a discussion of these various factors, see 1957 N.Y. LEG. DOC. No. 6(b), FIRST PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 248-52 [hereinafter cited as FIRST REP.].

[49] Commercial Trading Co. v. Little N. Parkway Realty Corp., 41 Misc. 2d 472, 245 N.Y.S.2d 731 (Sup. Ct. 1963).

[50] *Ibid.*

In the second case,[51] the court denied a motion to dismiss a complaint for failure to join a foreign sovereign who was immune from suit in this jurisdiction. The court decided that the nonjoinder of the party could be excused in the interests of justice under section 1001. The court indicated that the possibility that the State of Basellande might have a direct cause of action against defendant for breach of warranty with respect to material supplied to plaintiff for installation in a hospital in Switzerland pursuant to a contract between plaintiff and Basellande was too remote to make it a necessary party to the action.

Thus, although precedent will still be influential in the area, section 1001 appears to afford greater discretion in permitting an action to continue despite the fact that a "necessary" party has not been joined.

Section 1003 — Nonjoinder and Misjoinder of Parties

Section 1003 of the CPLR provides that where there has been a nonjoinder or misjoinder of proper parties, the court, either on its own initiative or on the motion of any party, may add or drop a party "upon such terms as are just." In a recent case[52] the defendant, an insurance company, issued a fire policy payable to the "Estate of Frank Pallante." The insured property was destroyed, and plaintiff, as devisee of the property under the unprobated will of Frank Pallante, sought a declaratory judgment determining the policy's coverage. Plaintiff joined as defendants her brother, the executor of the unprobated will, and her sister, who had filed objections to the will. Defendant insurance company moved to dismiss the complaint on the ground that the plaintiff lacked capacity to sue. The court indicated that even though plaintiff might lack the capacity to maintain the action, it would not presently dismiss the complaint. A dismissal would apparently have barred any remedy because the one year limitation in the policy had already run.

The court, under the authority of section 1003, made the executor, who had been named a party defendant, a party plaintiff, with leave to serve a supplemental complaint.[53] While under Section 192 of the CPA it had been held that an action would not be dismissed merely because one of the plaintiffs was not entitled to the relief sought,[54] there was little precedent as to whether

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[51] Johns-Manville Int'l Corp. v. Insul-Fil Co., 41 Misc. 2d 233, 245 N.Y.S.2d 14 (Sup. Ct. 1963).

[52] Cariello v. Northern Ins. Co., 41 Misc. 2d 456, 244 N.Y.S.2d 713 (Sup. Ct. 1963).

[53] *Id.* at 461-62, 244 N.Y.S.2d at 719-20.

[54] Majestic Loose Leaf, Inc. v. Cannizzaro, 10 Misc. 2d 1040, 169 N.Y.S. 2d 566 (Sup. Ct. 1957).