St. John's Law Review

Volume 38, May 1964, Number 2 Article 23

Section 1003--Nonjoinder and Misjoinder of Parties

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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).

the former provision[55] authorized the court to substitute a new party plaintiff, if the original plaintiff was not entitled to maintain the action.

This same question has created marked disagreement in the federal courts under Rule 21 of the Federal Rules of Civil Procedure. It has been held that rule 21 does not admit of substitution and therefore a sole party plaintiff or defendant could not be dropped and another added.[56] On the other hand, in conformity with a more liberal approach, substitution has been permitted in cases where the same person would be a party both before and after substitution,[57] or where there was a mistake as to the person entitled to bring suit.[58]

The court in the present case, by permitting the executor to become a party plaintiff, seems to indicate that under section 1003 the more liberal view of permitting substitution will be followed. Here the executor made no formal motion to be made a party plaintiff, but requested this relief in his affidavit submitted in opposition to the defendant's motion to dismiss. Certainly the result is sanctioned by the broad discretion afforded the court under section 1003 and the precedents under the CPA, indicating that the section should be liberally construed.[59] Allowing substitution will prevent the abatement of an action where the statute of limitations has run, and will expedite trials by avoiding the unnecessary delay involved in requiring an action to be commenced anew on an identical subject matter.

Section 1007 and Rule 1010 — Third-Party Practice

Section 1007 of the CPLR authorizes impleader where a third person may be liable over to the defendant "for all or part of the plaintiff's claim against the defendant," the same criterion used for third-party practice by the CPA. The purposes of this section are to avoid a multiplicity of suits and to determine initial and ultimate liability in one action.[60] The CPLR section governing the avail-

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[55] CPA §§ 192-93.

[56] Gruman v. Sturgeon Bay Winter Sports Club, 304 F.2d 98 (7th Cir. 1962); Matsuoka v. United States, 28 F.R.D. 350 (D.C. Hawaii 1961); United States v. Swink, 41 F. Supp. 98 (E.D. Va. 1941). For a criticism of this view, see 3 MOORE, FEDERAL PRACTICE § 2907 (2d ed. 1948).

[57] Owen v. Paramount Productions, 41 F. Supp. 557 (S.D. Cal. 1941).

[58] Hackner v. Guaranty Trust Co., 117 F.2d 95 (2d Cir.), *cert. denied*, 313 U.S. 559 (1941); *In re* Raabe Glissman & Co., 71 F. Supp. 678 (S.D.N.Y. 1947); Keystone Tel. Co. v. United States, 49 F. Supp. 508 (E.D.N.Y. 1943).

[59] Albano v. Michaelson, 14 Misc. 2d 76, 175 N.Y.S.2d 949 (Sup. Ct. 1958); Mapley v. Board of Educ., 13 Misc. 2d 88, 175 N.Y.S.2d 354 (Sup. Ct. 1958).

[60] See 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1007.01 (1964).