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Section 1007 and Rule 1010--Third-Party Practice

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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).

ability of impleader is by its terms more liberal than its predecessor in two respects: (1) there is no requirement of an identity between the original and the third-party claim, and (2) the court, in its discretion, as authorized by rule 1010,[61] may permit entirely new questions of law and fact to be raised in the third-party action.[62]

In a recent case[63] construing section 1007, plaintiff, alleging that defendant had stopped payment on his check and that this constituted a failure of consideration, sought to set aside a deed given by her to the defendant. Defendant sought to implead as third-party defendants the plaintiff, her husband and their attorney. The basis for the indemnity claim was the alleged fraud perpetrated by the parties in inducing defendant to contract for purchase of land with a realty company knowing that title was not in the company but in the plaintiff and her husband individually. The court held that no third-party claim was shown, but denied the motion to dismiss the third-party complaint; it then held, apparently on its own motion, that even though third-party practice was unavailable here, the third-party complaint could be treated as an independent action. It then noted that there were common questions of law and fact between that action and the main one and, that being the criteria for consolidation under the CPLR, the court ordered such consolidation.[64]

The decision illustrates how readily the procedural devices of the CPLR can be adjusted to make them subserve, rather than frustrate, the substantive rights involved. The court indicated that the theory of third-party practice under the CPLR is substantially the same as it was under the CPA.[65] In fact, in determining that impleader was improper, the court employed the CPA test of whether the liability of the third-party defendant arose from the same liability as that of the original defendant.[66] Here the wrong alleged against the defendant in the main action, viz., stopping

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[61] Rule 1010 provides: "The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party."

[62] Ellenberg v. Sydharv Realty Corp., 247 N.Y.S.2d 226 (Sup. Ct. 1964).

[63] *Ibid.*

[64] *Id.* at 230.

[65] *Id.* at 228-29.

[66] For cases employing similar tests under the CPA, see Unger v. Horowitz, 17 App. Div. 2d 807, 232 N.Y.S.2d 771 (1st Dep't 1962); B.M.C. Mfg. Corp. v. Tarshis, 278 App. Div. 266, 104 N.Y.S.2d 254 (3d Dep't 1951). For a discussion of the kind of third-party complaints allowed in the federal courts, see Note, 58 COLUM. L. REV. 532 (1958).

payment of the check, did not arise from any act of, and therefore need not be indemnified by, the third-party defendants.

However, unlike the practice under the CPA, where the complaint would likely have been dismissed,[67] Rule 1010 of the CPLR affords the court broad discretion in disposing of third-party causes of action. In applying this rule the court examined the relative equities of the parties and decided that a consolidation would effect the best result. Though Section 602 of the CPLR, which treats specifically of consolidation, appears to require a motion for such relief, the "such other order as may be just" words of rule 1010 appear to give a firm ground to the court's action in the instant case.

In view of the hesitancy of the courts to dismiss third-party complaints at the pleading stage,[68] and considering the broad discretion afforded by rule 1010, outright dismissal of third-party complaints should be less frequent in the future.

Policy Held to Limit Insurer's Right to Implead Tortfeasor

Substantive law determines whether a third-party cause of action exists.[69] For example, in the recent case of *Ross v. Pawtucket Mut. Ins. Co.*,[70] an insured brought an action against an insurance carrier on an automobile collision policy. The insurer served a third-party complaint on the alleged tortfeasors. The Court of Appeals in affirming the dismissal of the third-party complaint, held that since the right of subrogation did not accrue under the policy until payment of the claim by the carrier, the carrier may not implead the third-party tortfeasors.[71]

Prior to this decision there was a divergence of opinion in New York on the issue *Ross* resolved. Some cases indicated that the insurer may not implead a third-party before payment of the

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[67] For cases dismissing complaints where impleader was improper, see Central Budget Corp. v. Perdigan, 32 Misc. 2d 655, 228 N.Y.S.2d 311 (Sup. Ct. 1961); Verder v. Schack, 90 N.Y.S.2d 801 (Sup. Ct. 1949).

[68] De Lilli v. Niagara Mohawk Power Corp., 11 App. Div. 2d 839, 202 N.Y.S.2d 857 (3d Dep't 1960) (court must look at third-party pleadings liberally on a motion to dismiss); Schellhorn v. New York State Elec. & Gas Corp., 283 App. Div. 678, 127 N.Y.S.2d 182 (3d Dep't 1954) (where main complaint may be construed as charging third-party plaintiff with passive negligence even though it also charges him with active negligence, court will not dismiss third-party complaint).

[69] See Bernstein v. El-Mar Painting & Decorating Corp., 13 N.Y.2d 1053, 195 N.E.2d 456, 245 N.Y.S.2d 772 (1963) (landlord's cross-complaint dismissed since he was actively negligent); Note, 28 FORDHAM L. REV. 782 (1960).

[70] 13 N.Y.2d 233, 195 N.E.2d 892, 246 N.Y.S.2d 213 (1963).

[71] *Id.* at 234, 195 N.E.2d at 893, 246 N.Y.S.2d at 214. *But see* W. T. Grant Co. v. Uneeda Doll Co., 19 App. Div. 2d 361, 243 N.Y.S.2d 428 (1st Dep't 1963).