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Liberal Construction of Pleadings--Foley v. D'Agostino

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a court had the power to appoint a guardian ad litem prior to the commencement of an action.

The original draft of rule 1202 provided that a motion for the appointment of a guardian ad litem could be made "to the court in which the action is brought at any stage in an action, *or to the court in which the action is about to be brought.*"[82]

The Revisers after changing this clear and unequivocal language to its present form, indicated that the change in language was not intended to effect any change in meaning.[83] Thus the court's interpretation of rule 1202 appears consistent with its legislative history.

PLEADINGS

Liberal Construction of Pleadings — Foley v. D'Agostino

The December 1963 Survey expressed hope that the courts would give prompt and unambiguous indication that the CPA's pleading technicalities would not be permitted to encumber the CPLR; and that their inquiry on a motion to dismiss a pleading for failure to state a cause of action would be *only* that — *i.e.,* whether it states a cause of action — without regard to any prior-law notions that often laid more stress on form than on substance.

Such indication was soon forthcoming. In *Foley v. D'Agostino,*[84] the appellate division, first department, sustained a complaint that would in all likelihood have been dismissed under the CPA. It examined in depth the intent of the Revisers and treated in perspective the several provisions of the CPLR from which the new pleading requirements are culled.

The decision is the outstanding one on pleadings under the CPLR and, unless the Court of Appeals itself indicates otherwise, it appears destined to remain the judicial foundation for the bar's use of Article 30 of the CPLR. In an extensive and unanimous opinion by Justice Eager, a number of CPLR provisions are treated, including those which lie at the heart of CPLR pleading: section 3013, rule 3014 and section 3026.

The case speaks for itself, and with an authority that only judicial determination can command. To paraphrase it here would not be helpful, and to quote only portions of it would be an

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secured an appointment of a guardian ad litem before instituting the action); *In re* O'Malley's Trust, 286 App. Div. 869, 142 N.Y.S.2d 21 (2d Dep't 1955) (wherein the court indicated that it was a proper exercise of discretion for a court to appoint a guardian prior to the adjourned return day of order to show cause).

[82] SECOND REP. 375.

[83] FIFTH REP. 334.

[84] (App. Div. 1st Dep't), 151 N.Y.L.J., April 13, 1964, p. 1, col. 1.

incomplete treatment. The practitioner is urged to read the case thoroughly. His pleading burdens may be substantially relieved if he keeps in mind the admonitory words that *Foley* directs at anyone who would ask the court to dismiss the pleading upon any showing that does not manifest how its defects—whatever they be —prejudice him. If *Foley* is adhered to, the fear of the pleading draftsmen will be a thing of the past so long as the pleading gives basic notice to the other party of what it is that the pleader complains of.

Hypothetical Pleading — Indemnity

In a recent case,[85] a retailer brought an action against a doll manufacturer for breach of an implied warranty of merchantability. The plaintiff alleged that he was being sued in Connecticut on behalf of an infant who sustained an eye injury while playing with a doll purchased in one of the plaintiff's stores. The complaint indicated that the retailer had denied the allegations in the Connecticut suit, but that *if* liability should be adjudged against plaintiff (as defendant in that suit), he would be entitled to be indemnified by the doll manufacturer because ultimate fault would be in its breach of implied warranty in the manufacture of said doll. The appellate division, in reversing the lower court decision, held that the complaint was sufficient to state a cause of action for breach of implied warranty even though the cause of action was hypothetically pleaded.[86]

At common law hypothetical pleadings were subject to demurrer on the grounds of indefiniteness and uncertainty.[87] Even under the CPA, hypothetical pleadings were frowned upon by the courts,[88] with but few exceptions.[89] The court in the instant case read quite liberally Rule 3014 of the CPLR, which permits causes of action or defenses to be pleaded hypothetically. It sustained the complaint even though it did not unequivocally assert a present breach of the warranty. The court merely subjected the hypothetical pleading to a "good faith" test and found that the existence or non-existence of the breach was a fact concerning which the plaintiff had pleaded with "honesty and good faith." [90]

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[85] W. T. Grant Co. v. Uneeda Doll Co., *supra* note 71.

[86] *Id.* at 362-63, 243 N.Y.S.2d at 430-31.

[87] Stroock Publishing Co. v. Talcott, 129 App. Div. 14, 113 N.Y. Supp. 214 (2d Dep't 1908).

[88] General Aniline & Film Corp. v. Bayer Co., 305 N.Y. 479, 113 N.E.2d 844 (1953); Lazar v. Steinberg, 269 App. Div. 760, 54 N.Y.S.2d 859 (2d Dep't 1945).

[89] Polstein v. Smith, 239 App. Div. 724, 268 N.Y. Supp. 617 (1st Dep't 1934); R & L Goldmuntz Sprl v. Fischer, 57 N.Y.S.2d 489 (Sup. Ct. 1945).

[90] W. T. Grant Co. v. Uneeda Doll Co., *supra* note 71, at 363, 243 N.Y.S.2d at 430-31.