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Counterclaim Permitted in Holdover Proceeding

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disposed to read in the requirement that due diligence in attempting personal delivery of the summons precede the express alternatives of section 735, there seems ample basis for finding such requirement in section 735 itself without becoming tied up with section 308(3). Section 735 permits its alternative of substituted service to be used only "if service cannot be made in such manner" (*i.e.*, in the manner in which a summons is served). One would naturally assume the use of due diligence in attempting such service before it could be concluded that such service "cannot be made."

The better construction of the opening language of section 735 is that it intends to refer only to subdivision (1) of section 308, *i.e.*, to require an effort at personal delivery. The original service of summons provision sought to be embraced by that reference has been so changed (as it now appears as section 308) as to make impractical an effort to give section 735 its original intent; and imputing to the section an intent to adopt all of the present section 308. When, at the premises, service cannot be made thereunder of section 735 creates that weird situation in which there is then involved two entirely separate, yet very similar, substituted service provisions, each involving its own conditions precedent and its own distinctions as to method.

The proceeding is supposed to be "summary." If it is to retain its summary function, then the opening language of section 735 should be read as a reference only to subdivision (1) of section 308. When, at the premises, service cannot be made thereunder by personal delivery, service should be permissible by the alternatives expressly set forth in section 735, and no further reference should be made to section 308 or *its* alternatives. And service by the section 735 alternatives should be sufficient for both possession and for rent due, without distinction between them. However, prior law may have come by its distinctions in that regard, there appears to be no support for them in the present RPAPL.

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In *Great Park Corp. v. Goldberger*,[266] a holdover summary proceeding by the landlord, defendant tenant sought to interpose an

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portion of litigation in our state. The ambiguities that create the problem are readily traceable to their source. The RPAPL is the product of the Law Revision Commission; the CPLR is the work of the Advisory Committee on Practice and Procedure and, later, of the Senate Finance Committee. While the earlier reports of the Advisory Committee indicate some kind of effort at coordination regarding all the provisions involved, that early rapport was later lost. The result is that the final RPAPL as done by the Law Revision Commission was insufficiently coordinated with the final CPLR as it came out of the Senate Finance Committee, and the chief product of that loss of rapport is the problem we have been discussing here regarding service.

[266] 246 N.Y.S.2d 810 (N.Y. City Civil Ct. 1964).

equitable counterclaim. Under Section 1425 of the CPA counterclaims were not permitted in holdover proceedings, although they were allowed in non-payment of rent cases.

The court found that the restrictive language of Section 1425 of the CPA was not incorporated in Section 743 of the RPAPL, and held that counterclaims may be interposed in any summary proceeding whether the proceeding be for non-payment or for holding over.

Although the desire for quick disposition of landlord and tenant matters restricts the utilization of counterclaims, the court noted that "where it is so intertwined with the defense as to become part and parcel thereof,"[267] the counterclaim should be entertained in the same proceeding. However, where the counterclaim does not bear upon the question of whether the landlord is entitled to immediate possession of his property, the counterclaim should be severed and sent off as a separate action or proceeding. Thus, a counterclaim for negligence resulting in personal injuries interposed by the tenant in a summary proceeding should be severed from the proceeding.

MVAIC

Clause in Endorsement Reducing Award Held to Violate Policy Behind MVAIC

The Motor Vehicle Accident Indemnification Corporation [hereinafter refered to as MVAIC] was created to provide compensation for innocent persons injured by an uninsured motorist.[268] The courts have sought to uphold this broad purpose in a number of recent decisions.

In *Durrant v. MVAIC*,[269] petitioner was involved in an accident with an uninsured automobile. He was covered by the New York Automobile Accident Indemnification endorsement contained in his employer's policy and hence was an "insured" person under the MVAIC law.[270] The endorsement contained the standard clause reducing MVAIC's liability by such workmen's compensation as may have been received by the insured for the same injuries. Petitioner filed his claim with MVAIC. The arbitrator refused to reduce the award by the amount of workmen's compensation received by the petitioner, finding that the Legislature did not intend that MVAIC should have the power through its right to draw the

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[267] *Id.* at 812.

[268] N.Y. INS. LAW § 600(2); McCarthy v. MVAIC, 16 App. Div. 2d 35, 38, 224 N.Y.S.2d 909, 912, *aff'd*, 12 N.Y.2d 922, 188 N.E.2d 405, 238 N.Y.S. 2d 101 (1963).

[269] 20 App. Div. 2d 242, 246 N.Y.S.2d 548 (2d Dep't 1964).

[270] N.Y. INS. LAW § 601(i).