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Civil Procedure—Notice of Amount on Summons for Default Judgment Not Restrictive of Jurisdiction as to Causes of Actions Sued

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negligence of the deceased employee and had recovered judgment. In this action by the State Fund, he pleaded that the accident, subject of both suits, was caused solely by the employee, the State of New York, which the defendant identified with the State Insurance Fund, being bound by the prior judgment.

The Court of Appeals, acknowledging that there is no exact precedent on the question of the identity of the State and the Fund for purposes of res judicata, determined that this was not a question of res judicata but rather a collateral estoppel, and hence, in effect, determined that the State and State Insurance Fund are two separate and distinct parties. Judge Desmond further stated that "[i]t would be unreal to say that the plaintiffs in this present suit participated in the prior suit and we are admonished to be cautious in extending these doctrines [of res judicata] to cases where a party might be deprived of a full day in court."

In effect, then, the prior judgment was nothing more than persuasive precedent not binding upon the present suit. The decision appears to recognize the realities of the situation wherein, in fact, the operations of the State of New York and the State Insurance Fund are quite separate.

Notice of Amount on Summons for Default Judgment Not Restrictive of Jurisdiction as to Causes of Actions Sued

Rule 46 of the Rules of Civil Practice provides that if an action be brought for the breach of an express or implied contract for a specific sum, and a complaint is not served with the summons, plaintiff *may* serve with the summons a notice stating the sum of money for which judgment will be taken in case of default.

The Court in *Everitt v. Everitt*[21] was faced with the problem of whether, after a general appearance had been entered by a non-resident defendant, plaintiff could serve a complaint adding several causes of action to the initial cause contemplated by the notice under Rule 46.

Defendant, a non-resident, was served with summons and notice while temporarily within the state. She filed notice of general appearance and demanded a complaint. Upon service of the complaint, the defendant moved to strike the additional causes stated therein on the ground that she was not a person subject to the jurisdiction of the court.[22] This motion was granted by the Special Term,[23] and the second and third causes of action were dismissed. The Appellate Division reversed,[24] and certified questions to the Court of Appeals as to whether

21. 4 N.Y.2d 13, 171 N.Y.S.2d 836 (1958).
22. N. Y. CIV. PRAC. ACT §237(a).
23. 157 N.Y.S.2d 130 (Sup.Ct. 1956).
24. 3 A.D.2d 413, 161 N.Y.S.2d 172 (1st Dep't 1957).

the Special Term had jurisdiction over the defendant as to the additional causes of action, and whether the denial of the motion to dismiss deprived defendant of due process.

The Court held (5-2) that upon filing a general appearance defendant subjected herself to the jurisdiction of the court for all purposes. The majority reasoned that the sole purpose of Rule 46 is to enable a plaintiff, in the event of a defaulting defendant, to obtain a money judgment by application to the clerk of the court.[25] This facilitates a more economic dispersal of court time. In making a general appearance the defendant rendered the notice immaterial since no judgment could then be taken against her without the service of a complaint. Her liability is founded entirely by the allegations contained in the complaint.[26]

The defendant's main contention seems to be founded on the premise that her consent to appear in the action did not embrace the additional causes of action. The Court noted and stressed the fact that she could have demanded a notice of the complaint prior to entering a general or special appearance.[27] The majority indicated that had she availed herself of this statutory safeguard, the element of surprise, which seems to be present, would have been avoided and defendant would have been apprised of the full scope of the claims plaintiff was seeking to litigate. The Court felt that if defendant was lulled into complacency by the notice of default, believing it to be the sole claim to be pressed, it was her misfortune.

The dissent felt that since the notice gave essentially the same information as a complaint, advising the defendant of a contract action for a specific amount of money, her consent to appear in the action as to the first cause should not subject her to all claims plaintiff may allege.

Under New York practice it is ordinarily permissible for the plaintiff to add a new cause of action to the complaint by amendment, within the time allowed for such amendment, as of right.[28] But the problem of whether a complaint may be amended after a non-resident has appeared generally in the action, has not been settled in New York.[29] In an Appellate Division case such amendment was allowed against a non-resident who had appeared voluntarily in the action.[30]

25. N. Y. CIV. PRAC. ACT, §486-487.
26. Sharp v. Clapp, 15 App.Div. 445, 44 N.Y.Supp. 451 (1st Dep't 1897).
27. N. Y. CIV. PRAC. §257.
28. *Id.* §244.
29. As to the discretionary powers of the court regarding amendments after the statutory period has elapsed see *Alkalaj v. Alkalaj,* 190 Misc. 326, 73 N.Y.S.2d 678 (Sup.Ct. 1947); *but see Wajtman v. Brooklyn Eastern District Terminal* 276 App. Div. 853, 93 N.Y.S.2d 586 (2d Dep't 1949).
30. Mendoza v. Mendoza 273 App.Div. 877, 73 N.Y.S.2d 264; *motion for leave to appeal dismissed,* 297 N.Y. 950, 80 N.E.2nd 347 (1948).

However, this decision does not appear to be decisive, since apparently no constitutional question was raised as to the amendment.

In *Chapman v. Chapman*[31] the Third Department of the Appellate Division, while not deciding the issue, indicated that such amendment liberally might infringe on the constitutional rights of the non-resident defendant. In support of this contention the court referred to the Restatement of Judgments, section 5, comment 6, which while not adopted by the New York courts, propounds a view more in keeping with considerations of fairness. This section states that if an amended complaint is served upon a non-resident defendant who has appeared in the action but is no longer subject to the jurisdiction of the state, and such complaint contains new and different causes of action, a judgment for plaintiff on the new causes of action is void for want of jurisdiction of the court upon the defendant's person. The rationale of the *Chapman* case and the Restatement is that a non-resident defendant who desires to appear voluntarily in the action to contest a specific cause of action, should not be compelled to submit to the jurisdiction of the court for all conceivable claims plaintiff may choose to litigate.

The Court in the instant case stated in a strong dictum, citing *Chapman v. Chapman* and the Restatement: "It may well be that if an action has been commenced against a nonresident by the service of a summons and complaint, the complaint cannot be amended by adding new causes of action after defendant has left the State."[32] This dictum takes on added strength in view of the stress the majority put upon defendant's right to demand a complaint before entering any appearance; such a right would be meaningless if plaintiff could amend the complaint to add new causes of action after defendant had entered a general appearance relying on the original complaint. The dissent by attempting to draw an analogy between the functions of the notice of default and a complaint proper, indicated, by reiterating the majority dictum cited above, that as such it would not be amendable.

The strong majority and dissenting views in the instant case indicate a willingness by the Court of Appeals to adopt the dicta and rationale of the *Chapman* case and the Restatement of Judgments respectively. They are indicative of a trend in New York to disallow such amendments even when they are usually permitted as a matter of right. Such a tendency is sound since if a plaintiff is allowed such amendment liberality, the statutory safeguards of sections 237-a and 257 of the Civil Practice Act are of little value to the nonresident defendant. With the amendment right thus curbed, the plaintiff is compelled to assert the whole scope of his action, and the non-resident will have adequate notice, prior to appearing, of the nature and extent of the claims to be pressed. "Parties should

31. 284 App.Div. 504 132 N.Y.S.2d 707 (3d Dep't 1954).
32. Everitt v. Everitt, *supra* note 21, at 16, 171 N.Y.S.2d at 838.

be encouraged to appear in actions so judgments will have in personam validity. The possibility that such appearance may result in the addition of other causes of action will deter general appearances."[33]

Retirement of Court Approval for Execution of Old Judgment

Under New York State law a judgment of record is good for twenty years.[34] A lien for ten years is placed on the real estate of the judgment debtor by virtue of the original judgment[35] and execution thereon may be issued as of course within the first five years.[36] However, after this five year period has elapsed, execution may be issued only where one was issued within the first five years or by leave of court.[37]

In *Levine v. Bornstein,*[38] the judgment creditor issued an execution against personal and specific real property under section 512 of the Civil Practice Act[39] to satisfy a judgment within one day of being 20 years old and on which there was no prior execution and no leave obtained pursuant to section 651 of the Civil Practice Avt. The judgment creditor, respondent here, claimed that as section 512 refers only to judgments and their liens, and section 651 refers to executions generally, section 651 is not applicable to section 512.

The Supreme Court sitting at Special Term held that the provisions of section 651 requiring leave of court before execution were applicable to executions under the authority of section 512.[40] The Appellate Division disagreed with Special Term but granted leave to appeal.[41] The Court of Appeals, however, agreed with Special Term, holding that all sections are part of the same act and that as such they should be read and construed together to determine the legislative intent and that they should all be harmonized with one another.[42] Section 512 was placed in the Civil Practice Act to clarify the right to levy by execution on real property after the judgment is ten years old but nowhere is there a suggestion that section 651 may be disregarded. But, even if it were conceded that section 512 gives the judgment creditor a right to execute solely on real property without leave of court, the wording of the execution here defeated his cause as it stated the judgment should be satisfied out of personal property, or if the same could not be

33. Alkalaj v. Alkalaj, *supra* note 29, at 327, 73 N.Y.S.2d at 679.
34. N. Y. Civ. Prac. Act §44.
35. N. Y. Civ. Prac. Act §510.
36. N. Y. Civ. Prac. Act §650.
37. N. Y. Civ. Prac. Act §651.
38. 4 N.Y.2d 241, 173 N.Y.S.2d 599 (1958).
39. N. Y. Civ. Prac. Act §512. After 10 years has passed from the date of the judgment, real property which the judgment debtor or his heir or devisee has title to in any county may be levied upon by virtue of an execution against the property.
40. 5 Misc.2d 155, 159 N.Y.S.2d 240 (Sup.Ct. 1957).
41. 4 A.D.2d 55, 162 N.Y.S.2d 522 (1st Dep't 1957).
42. McKinney's Consolidated Laws, Statutes, §§97, 98.