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Civil Practice—Construction of Complaint

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"Doing Business" within the State

The test to determine whether a foreign corporation is "doing business" within the state to such an extent as to be amenable to process, is that the corporation be "here with a fair measure of permanence and continuity."[5] This test, formulated by Cardozo and derived from the United States Supreme Court,[6] has been followed by the Court of Appeals.[7]

In *Elish v. St. Louis Southwestern Ry. Co.*,[8] the Court of Appeals again applied this test. A Missouri corporation, although not qualified to do business within the state, had an office in New York City and Buffalo to solicit freight. It also maintained a separate New York City office, listed as one of the corporation's three general offices, which conducted fiscal business and was the location for one of the corporation's four annual board of director's meetings. The corporation argued that its only *business* within the state was solicitation, which alone is insufficient for the New York courts to acquire jurisdiction.[9] The court held, however, that solicitation plus other business activities conducted in this state renders the corporation "here" and therefore amenable to process.

Construction of Complaint

Under Civil Practice Act § 275, pleadings must be liberally construed. If the defendant moves under Civil Practice Rule 106 to dismiss the complaint on the grounds that it is legally insufficient, the complaint will not be dismissed if in any aspect of the facts stated, the plaintiff is entitled to recovery. Every inference is in favor of the pleading.[10]

In the recent case of *Curren v. O'Connor*,[11] these principles of law were applied by the court. Plaintiffs, social guests of defendants, brought an action for personal injuries and loss of services, charging the defendants with negligence. Defendants moved under Rule 106 to dismiss the complaint, challenging its legal sufficiency. The Appellate Division, reversing Special Term, granted the motion because the plaintiffs, as social guests of the defendants could not recover.

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5. *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 268, 115 N. E. 915, 918 (1917).
6. *International Harvester v. Kentucky*, 234 U. S. 579 (1914).
7. *Chaplin v. Selznick*, 293 N. Y. 529, 58 N. E. 2d 719 (1944); *Sterling Novelty Corp. v. Frank & Hirsch Distributing Co.*, 299 N. Y. 208, 86 N. E. 2d 564 (1949).
8. 305 N. Y. 267, 112 N. E. 2d 842 (1953).
9. *Yeckes-Eichenbaum, Inc. v. McCarthy*, 290 N. Y. 437, 49 N. E. 2d 517 (1943).
10. *Dyer v. Broadway Central Bank*, 252 N. Y. 430, 169 N. E. 635 (1930); *Pomerance v. Pomerance*, 301 N. Y. 254, 93 N. E. 2d 832 (1950).
11. 304 N. Y. 515, 109 N. E. 2d 605 (1952).

The Court of Appeals reversed the ruling of the Appellate Division, stating the court's liberal view toward the sufficiency of complaints, particularly in negligence actions, in at least permitting the parties to go to trial where the plaintiffs, under other allegations in the complaint, *may* be able to submit evidence entitling them to recover,[12] and no bill of particulars is involved.

Counterclaim in Suit by Partnership

Action was brought by a partnership composed of two general and two limited partners against its former attorney, who had been discharged for cause. Defendant attorney set up a counterclaim against one general and one limited partner, as individuals, for damages resulting from their conspiracy to destroy his professional standing. The counterclaim was held improper because under C. P. A. § 266 the claim and counterclaim must be between the same parties.[13]

The interesting aspect of the case is the statement of the court that for the purposes of pleading, the partnership is to be regarded as a legal entity.[14] The court strengthens its position by referring to C. P. A. § 222-a (two or more persons carrying on business as partners may sue or be sued in their partnership name), and the commentary of the Judicial Council in proposing the enactment of this section, which stated that the old common law concept of the partnership as simply a group of individuals, for purposes of pleading, is undesirable.[15]

Although C. P. A. § 266 liberalized the practice relating to counterclaims, defining a counterclaim as any cause of action in favor of the defendants against the plaintiffs, or *some of them,* the section did not change the rule that the counterclaim must be by and against the same party in the *same capacity.*[16]

The court, in the instant case, combines the above two tenets to conclude that the partnership sues as an entity and the counterclaim must be against that entity, not the individual partners. It would seem that the court, by its reasoning, has deftly evaded the plain meaning of C. P. A. § 266.

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12. *Higgins v. Mason,* 255 N. Y. 104, 174 N. E. 77 (1930); *Faber v. Meiler,* 278 App. Div. 849, 104 N. Y. S. 2d 485 (2d Dep't 1951).
13. *Ruzicka v. Rager,* 305 N. Y. 191, 111 N. E. 2d 878 (1953).
14. *Id.* at 197, 111 N. E. 2d 881.
15. Eleventh Annual Report of N. Y. Judicial Council, pp. 221, 224-225 (1945).
16. *U. S. Trust Co. of N. Y. v. Stanton,* 139 N. Y. 531, 34 N. E. 1098 (1893); *Binon v. Boel,* 297 N. Y. 528, 74 N. E. 2d 466 (1947); *Select Theatres Corp. v. Harms, Inc.,* 273 App. Div. 505, 78 N. Y. S. 2d 159 (1st Dep't 1948).