St. John's Law Review

Volume 41
Number 2 *Volume 41, October 1966, Number 2*

Article 22

April 2013

CPLR 1401: Contribution Between Joint Tort-Feasors Not Apportioned on a Strictly Mathematical Basis

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Klebanow by stating that the federal court must have "overlooked the fact that the New York legislature has not so extended the law as to limited partnerships." [106] The court reasoned that a limited partnership is solely the creature of statute,[107] having only such rights, duties and obligations as the statutes and its contracts may provide.[108] Therefore, since the legislature did not see fit to endow a limited partner with the right to sue derivatively in the name of the partnership, the court could not do so.[109] The court thus strictly interpreted Section 115 of the New York Partnership Law and therefore limited CPLR 1025, which permits a suit by or against two or more partners in the partnership name.

In a vigorous dissent, Justice Rabin stated that if the majority opinion was followed, there would then be no adequate remedy for wrongs committed by the general partners against the partnership. In urging that *Klebanow* be followed, he reasoned that a limited partner would be unable to maintain an individual action because of the difficulty of assessing and proving his personal loss. He noted that even if the limited partner could prove his loss, the remedy would remain inadequate since it was of greater interest to the limited partner to see the partnership maintain a firm and sound fiscal position. This greater interest, said Justice Rabin, "could not be protected by relegating the limited partner to a suit solely on his own behalf for his own specific damage." [110] He insisted that if the majority view were followed, the general partners could "loot the partnership with impunity. . . ." [111]

ARTICLE 14 — ACTIONS BETWEEN JOINT TORT-FEASORS

CPLR 1401: Contribution between joint tort-feasors not apportioned on a strictly mathematical basis.

In *McCabe v. Century Theatres, Inc.*,[112] the plaintiff was injured when she fell through open sidewalk doors leading to the cellar of a store operated by Adolph Rohde, a subtenant of Queens Park Operating Corporation. The building was owned by Grupenel Realty Corporation. Grupenel and Queens Park, while contending that *together* they should pay one-half of the judgment, nevertheless paid two-thirds of the amount in order to end the accrual of interest. They then moved, pursuant to CPLR 1401, to recover,

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[106] Millard v. Newmark & Co., 24 App. Div. 2d 333, 266 N.Y.S.2d 254 (1st Dep't 1966).
[107] Lanier v. Bawdoin, 282 N.Y. 32, 38, 24 N.E.2d 732, 735 (1939).
[108] Herrick v. Gould, 257 App. Div. 341, 342-43, 13 N.Y.S.2d 115, 117 (1st Dep't 1939).
[109] *Supra* note 106, at 337, 266 N.Y.S.2d at 259-60.
[110] *Id.* at 342, 266 N.Y.S.2d at 264 (dissenting opinion).
[111] *Ibid.*
[112] 25 App. Div. 2d 154, 268 N.Y.S.2d 48 (2d Dep't 1966).

through contribution from Rohde's estate, the difference between two-thirds and one-half of the judgment.

In reversing the special term and granting the motion, the appellate division, second department, following the case of *Wold v. Grozalsky*,[113] held that CPLR 1401 did not contemplate a strictly mathematical computation of liability for payment between joint tort-feasors.[114] "Rather . . . the whole pattern of litigation out of which the judgment was rendered is considered and the relative duties of the tort-feasors toward the injured party are assessed. The process is essentially equitable and not mathematical." [115]

The court stated that, for purposes of contribution, there were two distinct causes (one active and one passive) of the plaintiff's injuries, and, therefore, payment should be apportioned "not per capita but per stirpes." [116] The court consolidated the liability of Grupenel and Queens Park as one such cause since both had failed to perform *identical duties* arising from different sources, *i.e.*, their respective obligations as landlord and owner. In addition to this similarity of duties, the court noted that Grupenel and Queens Park were subsidiaries of the same parent, and were represented by the same employees and by the same attorneys. "Their interests and their positions were for all purposes the same. Except for reasons of corporate convenience, either could have executed the functions of the other." [117]

ARTICLE 31 — DISCLOSURE

CPLR 3101(a): Disclosure extends to all relevant information calculated to lead to relevant evidence.

Prior to *Beyer v. Keller*,[118] in order for materials to be the subject of an order for discovery and inspection, they had to be "evidence in chief," viz., admissible at trial.[119] *Beyer*, however, did away with this "evidence in chief" requirement.

With the adoption of Article 31 of the CPLR, it was felt that pretrial discovery practices would be liberalized and that more material would be made available to both parties. With the deci-

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[113] 277 N.Y. 364, 14 N.E.2d 437 (1939).

[114] *Id.* at 366-67, 14 N.E.2d at 438.

[115] McCabe v. Century Theatres, Inc., 25 App. Div. 2d 154, 156, 268 N.Y.S.2d 48, 50 (2d Dep't 1966).

[116] *Supra* note 115, at 158, 268 N.Y.S.2d at 52.

[117] *Ibid.*

[118] 11 App. Div. 2d 426, 207 N.Y.S.2d 591 (1st Dep't 1960).

[119] "Documents are not subject to inspection for the mere reason that they will be useful in supplying a clue whereby evidence can be gathered. Documents to be subject to inspection must be evidence themselves." People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 29, 156 N.E. 84, 85 (1927). See also Peters v. Marquez, 21 Misc. 2d 720, 196 N.Y.S.2d 840 (Sup. Ct. Westchester County 1959) and cases cited therein.