Florida Law Review

Volume 4 | Issue 3 Article 12

September 1951

Practice and Procedure: Timeliness of Demand for Jury Trial, of Nolle Prosequi as Partial Bar Only

Robert Eagan

poration. Yet in so holding it lets down the floodgates on an already overcrowded federal court docket, and fails to answer the question posed in *Patch v. Wabash R. R.*:[12] Why should a corporation incorporated under the laws of a state, existing by virtue of the laws of that state, and incurring a liability under the laws of that state, escape the jurisdiction of the state courts by reason of its being incorporated in another state? The United States Supreme Court, which has not considered this problem since 1912, should set forth some definite formula to clear up this conflict of interpretation and relieve lawyers from wasting so much of their time and their clients' money on a question that does not even approach the merits of the case.[13]

D. CHANSLOR HOWELL

PRACTICE AND PROCEDURE: TIMELINESS OF DEMAND FOR JURY TRIAL

Messana v. Maule Industries, Inc., 50 So.2d 874 (Fla. 1951)

The original complaint, in which plaintiff made no demand for jury trial, was dismissed on motion. Plaintiff filed an amended complaint and submitted therewith a request for trial by jury. Defendant moved to strike this request on the ground that it was not made in the original complaint. HELD, demand for jury trial was timely made.

Florida Rule 31, based on Federal Rule of Civil Procedure 38, with modifications,[1] expressly stipulates that unless the demand for trial by jury is made in either the complaint or the answer it is

---

[12]207 U.S. 277, 283 (1907); the opinion continues: "The assent of the State to such incorporation elsewhere . . . cannot be presumed to have been intended to or to import such a change."

[13]Many theories concerning the desired treatment of the fiction of a corporation's citizenship have been advanced; see BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES §3 (5th ed. 1949); HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 193, 194 (1918); WILLIAMS, JURISDICTION AND PRACTICE OF FEDERAL COURTS 71 (1917); McGovney, *A Supreme Court Fiction*, 56 HARV. L. REV. 853, 1090, 1225 (1943).

[1]See Wigginton, *New Florida Common Law Rules*, 3 U. OF FLA. L. REV. 1, 25 (1950).

deemed waived.[2] Accordingly the Florida attorney contemplating the desirability of a jury trial is, even when in doubt, obliged to request one in the original pleading to the cause if he wishes to preserve this right. In contrast, the federal provision allows this request at any time within ten days after service of the last pleading directed to the issues on which trial by jury is sought; and the request may specify those issues.[3] Ample time is allowed for a sound determination of this question as the case progresses through the pleading stage. The unfortunate effect of the Florida modification is apparent; the cautious attorney will simply request jury trial as a matter of course because he is not afforded the opportunity to make an intelligent choice.

Both the Florida Constitution[4] and the Constitution of the United States[5] guarantee the right to trial by jury in their respective courts in specified instances; but it is well settled that the procedure and time for asserting this right may be regulated by statute or by rule of court, and that the right may be lost if not demanded as prescribed.[6] Under the federal system this right, once waived by failure to make a timely demand, is not revived by reversal of the case for new trial or by belated amendment to the pleadings touching the same general issues.[7] Similarly, the time within which demand for jury may be made is not extended by service of an amended pleading unless it introduces new issues triable by a jury.[8]

Failure to demand a jury does not waive the right to jury trial when there is sufficient excuse for the failure.[9] Some states by statute give the court discretion to accept accident or mistake as an excuse.[10] In the absence of such a statute, however, personal rea-

[2]FLA. C.L.R. 31: "Unless the plaintiff in his complaint or the defendant in his answer shall demand a trial by jury, a trial by jury shall be deemed to have been waived."

[3]FED. R. CIV. PROC. 38.

[4]FLA. CONST. Decl. of Rights §3.

[5]U. S. CONST. Amend. VII.

[6]*E.g.*, McNabb v. Kansas City Life Ins. Co., 139 F.2d 591 (8th Cir. 1943); Baker v. General Motors Corp., 10 F.R.D. 512 (E.D. Mich. 1950); Sturtz v. Title Guarantee & Trust Co., 254 App. Div. 573, 2 N.Y.S.2d 661 (2d Dep't 1938); Universal Film Exch., Inc. v. King, 144 Misc. 708, 259 N.Y. Supp. 242 (Sup. Ct. 1932).

[7]Roth v. Hyer, 142 F.2d 227 (5th Cir. 1944).

[8]*Ibid.*

[9]Crouch v. United States, 8 F.2d 435 (4th Cir. 1925).

[10]For exercise of such discretion see, *e.g.*, Stern v. Hillman, 115 Cal. App.

sons arising in the detailed work of an attorney's office have been held insufficient to excuse failure to make a timely demand.[11] Similarly, ignorance of the law as to the time within which such demand must be made is no excuse.[12]

The Florida Court in the instant decision holds that a jury trial may be requested in connection with an amended complaint touching upon the same general issues as the original, and that this request may be made in a separate document. Furthermore, by way of dictum, the opinion states that even if the demand be made after the time specified in the rule the trial court enjoys the usual discretion in the matter.[13] Quite possibly statutes and rules governing the procedure for obtaining a jury should be liberally construed[14] and any doubts should be resolved in favor of the party asserting the right to jury trial.[15] This rule of construction is not self-evident, however.

In any event, the apparently precise language of the Florida rule is ambiguous in that it fails to indicate whether a plaintiff's amended complaint is "his complaint." Since the Supreme Court has the power to adopt any procedural rule that it deems appropriate, the advisability of perpetuating the present confused terminology is questionable, even assuming any merit in requiring a choice as to jury trial before the factors essential to intelligent election can be known. The Florida Bar Committee on Rules of Civil Procedure has recommended that the present rule be replaced by one substantially the same as the federal rule.[16] Whether this recommendation be accepted or not, the adoption of a rule that actually conforms to the Court's practice is far more desirable than strained interpretation of the ambiguous existing rule.

ROBERT EAGAN

156, 300 Pac. 972 (1931); Cooper v. Hamlen, 121 Me. 80, 115 Atl. 553 (1921); New York Investors, Inc. v. Laurelton Homes, Inc., 230 App. Div. 712, 243 N.Y. Supp. 246 (2d Dep't 1930).

[11]Whitton Automotive Parts Co. v. Yale Elec. Corp., 136 Misc. 831, 241 N.Y. Supp. 26 (Sup. Ct. 1930).

[12]Bennett v. Hillman, 37 Cal. App. 586, 174 Pac. 362 (1918).

[13]At p. 876.

[14]*See* Curlee v. State, 16 Ala. App. 62, 63, 75 So. 268, 269 (1917).

[15]See Mill Factors Corp. v. Handman, 141 Misc. 620, 252 N.Y. Supp. 898 (Sup. Ct. 1931).

[16]25 FLA. L.J. 175 (1951).