Legislative Document (1966) No. 90

STATE OF NEW YORK

REPORT
OF
THE ADMINISTRATIVE BOARD
OF
THE JUDICIAL CONFERENCE
OF
THE STATE OF NEW YORK
FOR THE JUDICIAL YEAR
JULY 1, 1964 THROUGH JUNE 30, 1965

CHARLES S. DESMOND, Chairman

BERNARD BOTEIN
GEORGE J. BELDOCK
JAMES GIBSON
ALGER A. WILLIAMS
OWEN McGIVERN
WILLIAM B. GROAT
CHARLES M. HUGHES
ARTHUR E. BLAUVELT
JOSEPH A. COX
ARCHIBALD C. WEMPLE
JOHN P. GUALTIERI
MARCUS L. FILLEY
JOHN M. MURTAGH
ROCCO A. PARELLA

THOMAS F. McCOY
State Administrator
and Secretary

justices is criminal or quasi-criminal in nature, the present Justice Court Act does not contain provisions governing the practice in this area. The proposed Uniform Justice Court Act corrects these existing shortcomings and at the same time promotes statewide uniformity in both civil and criminal procedure by being patterned after the Uniform City Court Act and the Uniform District Court Act. This bill is concerned only with the procedure of the court, and not with the numbers of judicial positions.

Copies of the bill as introduced in 1964 were circulated throughout the state to all interested groups and persons, including *each justice of the peace and police justice*, with a solicitation for comment and suggestion. In addition, five public hearings were held. The suggestions received due to these efforts resulted in the 1965 draft of the bill.

This bill passed the Senate (April 27) but failed of passage in the Assembly.

PROPOSED CHANGES IN RULES OF CPLR

Pursuant to subdivision 3 of section 229 of the Judiciary Law the Judicial Conference may submit proposals for changes in the rules of the CPLR to the Legislature prior to February 1st of each year. Unless disapproved by the Legislature such proposals become effective on the subsequent September 1st. In 1965 the Judicial Conference submitted six proposals to the Legislature. Only Proposal Number 1 was disapproved, although its substance was enacted into law in bill form as indicated below. Proposals 2, 3, 4, 5 and 6 all became effective on September 1, 1965.

Proposal Number 1—This proposal was disapproved by concurrent resolution S. 214 of the 1965 Legislature. However, the substance of the proposal was enacted into law by Chapter 749 of the Laws of 1965.

Proposal Number 2—This amended subdivision (b) of Rule 320 (b) to add the phrase "as provided in Rule 3211" at the end of the subdivision.

The prior language of subdivision (b) appeared to contravene the traditional policy of favoring the disposition of jurisdictional defenses before defenses going to the merits. The consequences could be highly undesirable. The court might be required to determine issues going to the merits, possibly in favor of the plaintiff, even in a case where later jurisdictional objection by the defendant would necessitate dismissal.

If such later jurisdictional objection were sustained after a ruling on a defense on the merits adverse to the defendant, a serious problem of *res judicata* would be involved in a second

action with the same parties based on the same cause. It is far from clear whether or not a relitigation of the same defense on the merits would be permitted on the ground that the determination thereof in the first action is void because rendered by a court not having jurisdiction.

A solution to this dilemma was recommended by way of an amendment to 3211(e) (see Proposal Number 6, discussed *infra*), to which the proposed amendment of 320(b) makes reference and is ancillary.

Proposal Number 3—This amended subdivision (c) of Rule 320 of the CPLR to indicate that an appeal from an order changing the place of trial must be taken in the department in which the motion for the order was heard and determined.

The change was designed to resolve fairly the long-standing question of the proper place for appeal from orders determining motions for change of venue. Uncertainty in the case law had developed under the former provision of the C.P.A. that appeal should be taken to the Appellate Division for the department in which the order was entered. Similar language is contained in section 5711 ("An appeal . . . shall be brought in the department embracing the county in which the . . . order appealed from is entered . . ."), which is applicable to an appeal from an order determining a motion to change venue. The problem arose because Rule 511(d) provides for the entry of the order in two different counties. The proposed change should preclude uncertainty as to the proper place for appeal from orders changing venue.

Proposal Number 4—This amended subdivision (d) of Rule 511 of the CPLR to indicate that an appeal from an order changing the place of trial must be taken in the department in which the motion for the order was heard and determined.

The change was designed to resolve fairly the long-standing question of the proper place for appeal from orders determining motions for change of venue. Uncertainty in the case law had developed under the former provision of the C.P.A. that appeal should be taken to the Appellate Division for the department in which the order was entered. Similar language is contained in § 5711 ("An appeal . . . shall be brought in the department embracing the county in which the . . . order appealed from is entered. . . ."), which is applicable to an appeal from an order determining a motion to change venue. The problem arose because R 511(d) provides for the entry of the order in two different counties. The proposed change should preclude uncertainty as to the proper place for appeal from orders changing venue.

Proposal Number 5—This amended subdivision (b) of Rule 3211 of the CPLR to provide that a party may move for judgment dismissing one or more defenses not only on the ground

that a defense is not stated, but also on the ground that a defense has no merit.

As the provision was previously worded, a defense raised in the answer which had no merit but which was not invalid on its face would not be the subject of a motion to dismiss, should the provision have been interpreted literally. The spirit of the CPLR, and specifically of 3211, is to the contrary, and therefore the rule was amended to expressly permit the early testing of the merit of a defense.

Proposal Number 6—This amended subdivision (e) of the Rule 3211 of the CPLR in several complex ways, especially as it relates to the motion to plead over but also in some other respects.

Part of this amendment was designed to enable the court to determine any issue of jurisdiction over the person or of jurisdiction *in rem* or *quasi in rem* before it is required to determine any issue reaching the merits of the case. The necessity for this amendment is discussed above in relation to the proposed amendment to CPLR 320, subdivision (b).

Another portion of the amendment was designed to solve a complicated problem related to repleading.

The prior text of Rule 3211(e) created problems for the lawyer who prepared his pleading with misplaced confidence in its adequacy. If he failed to comply with the present requirement that evidence supporting leave to plead again be set forth in his papers opposing a motion to dismiss, he might find himself not only with a dismissed pleading, but also unable to make a belated request for leave to plead again, and, if he was asserting an affirmative claim, faced with the alternatives of appeal from the order of dismissal or the commencement of a new action. The problem might become acute where the statute of limitations was about to expire.

On the other hand, the cautious pleader, though satisfied with the adequacy of his pleading, might feel obliged, in order to avoid the foregoing problems, not only to seek leave in his opposing papers to plead again, but also to submit his supporting evidence in those papers, thus indicating to the court a perhaps unwarranted defeatist attitude. If, having done so, he nevertheless succeeded in overcoming the motion to dismiss, he found not only that his labors were unnecessary, but also that he had prematurely laid bare much of his case and much of the evidence upon which he ultimately intended to rely to prove his case.

This portion of the rule had been subject to much criticism from Bench and Bar which the Conference felt justified, while at the same time believing that the old C.P.A. practice of granting leave to plead again without any evidentiary showing should not be restored. The Conference believes that this

amendment steers a desirable middle course by dispensing with the previous requirement that supporting evidence must be set forth in the papers opposing the motion to dismiss. The amendment leaves to the court's discretion the timing and method for the submission of evidence supporting a request for leave to plead again, while retaining the present requirement that the request for leave to plead again must be stated in the papers opposing the motion to dismiss.

Another change with respect to a motion to dismiss a defense is necessitated by the change in Rule 3211(b), discussed above.

The bills which were sponsored by the Administrative Board are as follows:

1. Senate Int. 2300, Pr. 2387 (Senator Bookson)
Assembly Int. 4466, Pr. 4589 (Assemblyman Bartlett)

This bill was designed to amend the judiciary law in relation to the establishment of a unit of centralized court services within any county or city. Section 212 of the Judiciary Law relates to the functions of the Administrative Board of the Judicial Conference. This section presently indicates that among the functions of the Administrative Board are the creation of standards and policies relating to the dispatch of judicial business, the hours of court, the assignment of terms, parts, judges and justices, the transfer of judges and justices and causes between and among the courts of such court system, the need for additional judicial or non-judicial personnel, and the publication of judicial opinions.

This bill would have added to the list of powers and duties of the Administrative Board, the establishment within any county or city of a unit or division of court services to provide common non-judicial services to the several courts within such county or city. It was also provided in the bill that no appointee of a sheriff would be affected without the approval of the sheriff.

The courts are assisted in their work by many auxiliary services. Much duplication of expense is avoided by the use of "pools" in a given city or county from which all courts in that location may draw assistance. This system has had remarkable success in the case of the central jury pool used in New York County.

It is clear that expanded use of pools of non-judicial services would facilitate the more efficient operation of the court system and would also facilitate greater economies in the operation of the courts.

This bill died in Committee.

the object of the action and the relief sought, and, in an action for a sum certain or for a sum which can by computation be made certain, the sum of money for which judgment will be taken in case of default."

Reason

As this subdivision is presently worded, a plaintiff whose cause of action is not for a sum certain, and who elects not to serve the complaint, is precluded from taking a default upon failure of the defendant to appear. No sound reason for this result appears. The proposed amendment would permit the plaintiff, in any action, to serve a summons with a notice stating the object of the action and the relief sought, thus enabling him to apply for a default judgment should the defendant default, in accordance with the provisions of 3215(e).

→ **Rule 320(b) and (c) Proposed Change**

At the end of subdivision (b) add the phrase "as provided in rule 3211." In subdivision (c) after the words "is asserted" delete the phrase "at the time of appearance" and after the words "by motion or in the answer" insert the

Reason

The present language of subdivision (b) appears to contravene the traditional policy of favoring the disposition of jurisdictional defenses before defenses going to the merits. The consequences may be highly undesirable. The court may be required to determine issues going to the merits, possibly in favor of the plaintiff, even in a case where later jurisdictional objection by the defendant would necessitate dismissal.

If such later jurisdictional objection were sustained after a ruling on a defense on the merits adverse to the defendant, a serious problem of *res judicata* would be involved in a second action with the same parties based on the same cause. It is far from clear whether or not a re-litigation of the same defense on the merits would be permitted on the ground that the determination thereof in the first action is void because rendered by a court not having jurisdiction.

A solution to this dilemma is recommended by way of an amendment to 3211(e) (see below) to which the proposed amendment of 320(b) makes reference and is ancillary.

The amendment here proposed to 320(c) is recommended for reasons of consistency since there is no reason why the wording of 320(c) should differ

Rule 2222 Proposed Change

At the end of the sentence delete the words "or affecting the title to, or the possession, use or enjoyment of, real property."

Reason

Consultation with attorneys, clerks and representatives of title companies indicates that the provision which mandates the docketing as judgments of orders affecting real property is not only burdensome but has served no practical purpose and has been of no significant benefit to the public or to the bar. It is, therefore, recommended that this unnecessary requirement be eliminated. (See also the discussion below of § 5018(a).)

§ 3126 Proposed Change

In the first sentence, after the words "refuses to obey an order" insert the phrase "or a notice."

Reason

Under the present wording of this section there have been conflicting interpretations as to the power of the court to punish for failure to comply with

a notice to disclose. Failure to clarify this question in the affirmative could lead to the necessity of making numerous and unnecessary motions to disclose since attorneys might well hesitate to rely on a notice without an order. Since the CPLR encourages use of the notice procedure, the penalties for non-disclosure should apply equally where a party has proceeded by notice, as well as where he has obtained an order.

Rule 3211(b) Proposed Change

At the end of subdivision (b), add the phrase "or has no merit."

Reason

As the provision is presently worded, a defense raised in the answer which has no merit but which is not invalid on its face may not be the subject of a motion to dismiss, should the provision be interpreted literally. The spirit of the CPLR, and specifically of 3211, is to the contrary, and therefore, the rule should expressly permit the early testing of the merit of a defense.

→ **Rule 3211(e) First Proposed Change**

In subdivision (e) of this rule, after the words "Any objection or defense based upon a ground set forth in," insert the words "paragraphs one, three, four, five and six of." After the clause "unless raised either by such motion or in the responsive pleading" insert a period and delete the phrase "except that a" and insert the word "A" to commence a new sentence beginning "A motion based upon a ground specified. . .," and in this same sentence delete the words "by motion." Immediately following this sentence insert a new sentence to read as follows, "An objection based upon a ground specified in paragraphs eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he does not raise such objection in the responsive pleading."

Reason

This amendment is designed to enable the court to determine any issue of jurisdiction over the person or of jurisdiction *in rem* or *quasi in rem* before it is required to determine any issue reaching the merits of the case. The necessity for this amendment is discussed above in relation to the proposed amendment to CPLR 320, subdivisions (b) and (c).

→ **Rule 3211(e) Second Proposed Change**

In the third sentence delete the words "or in subdivision (b)," and substitute therefor the words "on the ground that a defense is not stated,"; and after the words "opposing papers and " delete the words "in them" and substitute the word "may." At the end of the third sentence add the following final clause "; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave."

Reason

The present text of R 3211(e) creates problems for the lawyer who has prepared his pleading with misplaced confidence in its adequacy. If he fails to comply with the present requirement that evidence supporting leave to plead again be set forth in his papers opposing a motion to dismiss, he may find himself not only with a dismissed pleading, but also unable to make a belated request for leave to plead again, and, if he is asserting an affirmative claim, faced with the alternatives of appeal from the order of dismissal or the commencement of a new action. The problem may be acute where the statute of limitations is about to expire.

On the other hand, the cautious pleader, though satisfied with the adequacy of his pleading, may feel obliged, in order to avoid the foregoing problems, not only to seek leave in his opposing papers to plead again, but also to submit his supporting evidence in those papers, thus indicating to the court a perhaps

unwarranted defeatist attitude. If, having done so, he nevertheless succeeds in overcoming the motion to dismiss, he finds not only that his labors were unnecessary but also that he has prematurely laid bare much of his case and much of the evidence upon which he ultimately intends to rely to prove his case.

This portion of the rule has been subject to much criticism from bench and bar which the Conference feels justified, while at the same time believing that the former practice of granting leave to plead again without any evidentiary showing should not be restored. The Conference believes that the proposed amendment steers a desirable middle course by dispensing with the present requirement that supporting evidence must be set forth in the papers opposing the motion to dismiss. The proposed amendment would leave to the court's discretion the timing and method for the submission of evidence supporting a request for leave to plead again, while retaining the present requirement that the request for leave to plead again must be stated in the papers opposing the motion to dismiss.

The proposed change with respect to a motion to dismiss a defense is necessitated by the proposed change in rule 3211(b) discussed above.

§ 3213 Proposed Change

Delete from the first sentence the last phrase "returnable at least twenty days after service". Before the last sentence insert the following new provision: "The minimum time for return of the motion shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. The summons served with such motion papers shall require the defendant to answer the motion within the time provided in the notice of motion. If the plaintiff makes the motion returnable after the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such return day."

Reason

This provision, dealing with motion for summary judgment in lieu of complaint, presently provides that the notice of motion served with the summons is returnable at least twenty days after service. Since the time limits peculiar to motion practice remain applicable in all other respects, a defendant may have less time to respond than in an action commenced in the usual way, depending on the return date. Furthermore, a defendant served otherwise than by personal delivery within the state would apparently be deprived of the additional ten days to answer that he would have in the ordinary action. In addition to its adverse effect on the defendant, this section seems in conflict with the provisions of R 320(a) governing the time for defendant's appearance.

The proposed change, by making applicable the time periods governing defendant's appearance, would resolve this conflict and restore any loss of time to respond which the defendant might suffer under the present provision. To allow plaintiff time to study the answering papers, the proposed amendment provides that he may extend the minimum period of return and require answering papers within an equal period, up to a limit of ten days, in advance of the return date. The proposed change would also provide that the summons served with such a motion shall direct the defendant to answer the appended notice of motion, thus apprising the bar that the usual form of summons is not to be used with this new procedure.

§ 3215(b) Proposed Change

At the end of the last sentence insert the words "or notice served pursuant to rule 305(b)."

Reason

See discussion with respect to change in rule 305(b) proposed above.

shall be made only after motion on such notice as the court may require, the motion to be captioned in the action or special proceeding, as the case may be.

APPENDIX B(1)

The Judicial Conference hereby amends the rules of civil practice of the civil practice law and rules, effective September first, nineteen hundred sixty-five, by the following proposals:

Proposal Number 1.* Subdivision (b) of rule three hundred five of such law and rules is hereby amended to read as follows:

(b) Summons and notice. If [the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, and the complaint is not served with the summons, the plaintiff may serve with the summons a notice stating] *the complaint is not served with the summons, the summons may contain or have attached thereto a notice stating the object of the action and the relief sought, and, in an action for a sum certain or for a sum which can by computation be made certain,* the sum of money for which judgment will be taken in case of default.

Proposal Number 2. Subdivision (b) of rule three hundred twenty of such law and rules is hereby amended to read as follows:

(b) When appearance confers personal jurisdiction, generally. Subject to the provisions of subdivision (c), an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer *as provided in rule 3211.*

Proposal Number 3. Subdivision (c) of rule three hundred twenty of such law and rules is hereby amended to read as follows:

(c) When appearance confers personal jurisdiction, in certain actions. In a case specified in section 314 where the court's jurisdiction is not based upon personal service on the defendant, an appearance is not equivalent to personal service of the summons upon the defendant if an objection to jurisdiction under paragraphs eight or nine of subdivision (a) of rule 3211, or both, is asserted [at the time of appearance] by motion or in the answer *as provided in rule 3211,* unless the defendant proceeds with the defense after asserting the objection to jurisdiction and the objection is not ultimately sustained.

Proposal Number 4. Subdivision (d) of rule five hundred eleven of such law and rules is hereby amended to read as follows:

(d) Order [and] , subsequent proceedings *and appeal.* Upon filing of consent by the plaintiff or entry of an order changing the place of trial by the clerk of the county from which it is changed, the clerk shall forthwith deliver to the clerk of the county to which it is changed all papers filed in the action and certified copies of all minutes and entries, which shall be filed, entered or recorded, as the case requires, in the office of the latter clerk. Subsequent proceedings shall be had in the county to which the change is made as if it had been designated originally as the place of trial, except as otherwise directed by the court. *An appeal from an order changing the place of trial shall be taken in the department in which the motion for the order was heard and determined.*

---

*This proposal was disapproved by concurrent resolution No. 214 of the 1965 Legislature. However, the substance of the proposal was enacted into law by Chapter 749 of the Laws of 1965.

Proposal N
such law and
(b) Motio
missing one
or has no me

Proposal N
such law and
(e) Numb
any time bef
move on one
more than on
upon a groun
division (a)
sive pleading
paragraphs tv
at any subseq
tion based up
(a) is waived
sion (a) with
subdivision (c
Where a mot
division (a),
stated, if the
motion is gra
set forth evi
mary judgme
be granted un
to support hi
seeking leave
such leave.

I, Thoma
cial Conf
above pro
of New
tion 229
of 1962.

Dated: Janua
New

Proposal Number 5. Subdivision (b) of rule thirty two hundred eleven of such law and rules is hereby amended to read as follows:

(b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated *or has no merit.*

Proposal Number 6. Subdivision (e) of rule thirty two hundred eleven of such law and rules is hereby amended to read as follows:

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in *paragraphs one, three, four, five and six of* subdivision (a) is waived unless raised either by such motion or in the responsive pleading [, except that a]. *A* motion based upon a ground specified in paragraphs two, seven or ten of subdivision (a) may be made [by motion] at any subsequent time or in a later pleading, if one is permitted. *An objection based upon a ground specified in paragraphs eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he does not raise such objection in the responsive pleading.* Where a motion is made on the ground set forth in paragraph seven of subdivision (a), [or in subdivision (b),] *on the ground that a defense is not stated,* if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and [in them] *may* set forth evidence that could properly be considered on a motion for summary judgment in support of a new pleading; leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action or defense; *the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave.*

I, Thomas F. McCoy, State Administrator and Secretary to the Judicial Conference of the State of New York, do hereby certify that the above proposals were adopted by the Judicial Conference of the State of New York on January 29, 1965 pursuant to the provisions of section 229 of the Judiciary Law as added by Chapter 309 of the Laws of 1962.

Dated: January 29, 1965
New York, New York

THOMAS F. McCOY
STATE ADMINISTRATOR AND SECRETARY