NY CLS CPLR § 3026

Current through 2025 released Chapters 1-207

New York

Consolidated Laws Service ***>***

Civil Practice Law And Rules (Arts. 1 — 100) ***>***

Article 30 Remedies and Pleading (§§ 3001 — 3045)

§ 3026. Construction

Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.

History

Add, L 1962, ch 308, eff Sept 1, 1963; amd, L 1964, ch 388, § 12, eff Sept 1, 1964.

Annotations

Notes

Prior Law:

Earlier statutes: CPA § 275; CCP § 519; Code Proc § 159.

Advisory Committee Notes:

The first sentence of this section is virtually identical with CPA § 275. The second sentence is a specific directive toward such construction. It is intended to discourage useless pleading attacks by placing the burden on the attacker to show prejudice as well as failure of compliance.

It is intended that this section prevent a gloss from developing upon each of the other provisions in the same manner that the motion to make more definite and certain developed from RCP 90.

Notes to Decisions

15.Sufficiency of complaint

16.Implication and intendment

17.Construction in aid of jurisdiction

18.Construction during trial or new trial

19.Construction on appeal

20.Limits generally to rule of liberal construction

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44.Penalties

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48.Vendor and vendee

49.Wrongful death

I. Under CPLR

A. In General

1. Generally; construction of rule

The CPLR may be applied to a pleading served prior to its effective date. Roberts v Grandview Dairy, Inc., 20 A.D.2d 574, 245 N.Y.S.2d 877, 1963 N.Y. App. Div. LEXIS 2646 (N.Y. App. Div. 2d Dep't 1963).

Under CPLR 3013, the rules of pleadings are broad and under CPLR 3026 pleadings must be liberally construed and defects ignored if a substantial right is not prejudiced. CPLR 3013 is not a reformulation of former practice and the requirements that a pleading state “material facts” as well as former prohibition against pleading “evidence” has been abandoned. Card v Budini, 29 A.D.2d 35, 285 N.Y.S.2d 734, 1967 N.Y. App. Div. LEXIS 2741 (N.Y. App. Div. 3d Dep't 1967).

In examining complaint upon motion to dismiss, pleadings must be liberally construed. Coutu v Otis Elevator Co., 58 A.D.2d 131, 395 N.Y.S.2d 754, 1977 N.Y. App. Div. LEXIS 11842 (N.Y. App. Div. 3d Dep't), app. dismissed, 43 N.Y.2d 714, 401 N.Y.S.2d 208, 372 N.E.2d 42, 1977 N.Y. LEXIS 2516 (N.Y. 1977).

Pleadings, particularly claims over, should be liberally construed. Hobbs v Scorse, 59 A.D.2d 1037, 399 N.Y.S.2d 783, 1977 N.Y. App. Div. LEXIS 14323 (N.Y. App. Div. 4th Dep't 1977).

Pleadings are entitled to a liberal construction. North Colonie Cent. School Dist. v MacFarland Constr. Co., 60 A.D.2d 685, 399 N.Y.S.2d 933, 1977 N.Y. App. Div. LEXIS 14700 (N.Y. App. Div. 3d Dep't 1977).

Although CPLR is to be liberally construed, acquisition of personal jurisdiction is prerequisite to court’s exercise of its discretionary power to correct irregularity or to permit prosecution of matter brought in improper form. Common Council of Gloversville v Town Bd. of Johnstown, 144 A.D.2d 90, 536 N.Y.S.2d 881, 1989 N.Y. App. Div. LEXIS 322 (N.Y. App. Div. 3d Dep't 1989).

On motion addressed to sufficiency of complaint, pleading must be deemed to allege whatever can be implied from its statements by fair intendment, must be liberally construed and must be assumed to be true, and cause or causes of action must stand if in any aspect upon facts stated the plaintiff is entitled to recovery. Park v Chessin (1976) 88 Misc 2d 222, 387 NYS2d 204, mod

on other grounds (2d Dept) 60 App Div 2d 80, 400 NYS2d 110, mod on other grounds 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 .

2. Construction of pleadings, generally

Under CPLR the sufficiency of a pleading to state a cause of action or defense will depend upon whether or not, considered as a whole, and construed liberally, it is sufficiently particular in its statement of facts to give notice to the court and litigants of the transactions intended to be proved, and the material elements of each cause of action or defense. Pleadings will be given a liberal construction under the CPLR. Foley v D'Agostino, 21 A.D.2d 60, 248 N.Y.S.2d 121, 1964 N.Y. App. Div. LEXIS 4213 (N.Y. App. Div. 1st Dep't 1964).

It is axiomatic that pleadings are to be liberally construed in favor of the pleader. Fisher v Queens Park Realty Corp., 41 A.D.2d 547, 339 N.Y.S.2d 642, 1973 N.Y. App. Div. LEXIS 5348 (N.Y. App. Div. 2d Dep't 1973).

Policy considerations against dismissing third-party actions require that such complaints be entitled to more liberal reading than others. Taft v Shaffer Trucking, Inc., 52 A.D.2d 255, 383 N.Y.S.2d 744, 1976 N.Y. App. Div. LEXIS 11990 (N.Y. App. Div. 4th Dep't 1976), app. dismissed, 42 N.Y.2d 974, 1977 N.Y. LEXIS 4341 (N.Y. 1977).

Dismissal of the application of modification of child visitation was reversed because even though problems were noted in the inmate’s pro se pleadings, such pleadings were to be liberally construed, and had the inmate’s appointed counsel communicated with him, these drafting deficiencies could have been rectified by the filing of an amended petition. Matter of Mitchell v Childs, 26 A.D.3d 685, 810 N.Y.S.2d 237, 2006 N.Y. App. Div. LEXIS 2166 (N.Y. App. Div. 3d Dep't 2006).

On motion addressed to sufficiency of complaint, pleading must be deemed to allege whatever can be implied from its statements by fair intendment, must be liberally construed and must be assumed to be true, and cause or causes of action must stand if in any aspect upon facts stated

the plaintiff is entitled to recovery. Park v Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204, 1976 N.Y. Misc. LEXIS 2656 (N.Y. Sup. Ct. 1976), modified, 60 A.D.2d 80, 400 N.Y.S.2d 110, 1977 N.Y. App. Div. LEXIS 13966 (N.Y. App. Div. 2d Dep't 1977).

If proceeding was improperly brought or brought by one who is not permitted to bring same, statute permitting pleadings to be liberally construed and defects to be ignored if substantial right of party has not been prejudiced is of no avail, and this is especially so in summary proceeding where essentials of petition and notice of petition are specifically regulated. Sollar v Bloom, 91 Misc. 2d 884, 398 N.Y.S.2d 836, 1977 N.Y. Misc. LEXIS 2439 (N.Y. Civ. Ct. 1977).

Although the Family Court has no jurisdiction to issue a nunc pro tunc order extending placement (Family Ct Act, § 1055) where the placement expired more than 20 months ago, since it has jurisdiction over questions of custody of children (Family Ct Act, § 651, subd [b]), it may treat the petitions for extensions of placement as a petition for custody brought by the Commissioner of Social Services and conduct a plenary hearing as to the issue of the custody of the child who was placed in foster care based upon a finding of abuse against respondent natural mother; there being no provision in the Family Court Act or rules for the liberal construction of pleadings, the provisions of the CPLR are applicable (Family Ct Act, § 165) and, under CPLR 3026, pleadings must be liberally construed and if the facts stated set forth a cognizable cause of action, the pleadings must be sustained. In re R., 102 Misc. 2d 723, 423 N.Y.S.2d 1007, 1980 N.Y. Misc. LEXIS 2008 (N.Y. Fam. Ct. 1980).

In a case in which defendant, an assignee’s owner, interposed a counterclaim against plaintiff guarantor to collect on a promissory note that was executed by a business, assigned to the owner, and personally guaranteed by the guarantor, the guarantor’s act of raising the affirmative defense of waiver in the guarantor’s reply to the owner’s counterclaim, if liberally construed as required by N.Y. C.P.L.R. 3026, gave notice that the guarantor intended to rely on the owner’s waiver of claims through the release and hold harmless provisions of a 1997 agreement, and, therefore, the defense of “release,” which was expressly raised in the guarantor’s response to the owner’s motion for summary judgment on the counterclaim, was not waived, and the trial

court erred in granting the owner summary judgment on the counterclaim on the basis that the guarantor waived the affirmative defense of release by failing to raise it properly. Brodeur v Hayes, 305 A.D.2d 754, 760 N.Y.S.2d 569, 2003 N.Y. App. Div. LEXIS 5231 (N.Y. App. Div. 3d Dep't 2003).

Construing plaintiff's complaint liberally pursuant to N.Y. C.P.L.R. 3026, and in favor of plaintiff for the purposes of defendants' motions to dismiss under N.Y. C.P.L.R. 3211(a)(7), a claim for prima facie tort was sufficiently stated by plaintiff's allegations that defendants' overhead electric, cable, and telecommunications wires interfered with plaintiff's public works contract with the City of New York, that defendants had an affirmative legal obligation to remove or alter the wires pursuant to New York City, N.Y., Admin. Code § 24-521, and that special damages were satisfied by letters from plaintiff to defendants which delineated the specific damages sustained. DeMicco Bros. v Consol. Edison Co., 8 A.D.3d 99, 779 N.Y.S.2d 10, 2004 N.Y. App. Div. LEXIS 8345 (N.Y. App. Div. 1st Dep't 2004).

Issue of dismissal of the complaint was procedurally before the court and the court declined to consider the pending application as only a discovery motion, because the notice of motion, read in conjunction with the first sentence in the borrower's attorney's affidavit clearly indicated that the borrower was seeking dismissal of the pending foreclosure action. Kearney v Kearney, 979 N.Y.S.2d 226, 42 Misc. 3d 360, 2013 N.Y. Misc. LEXIS 5183 (N.Y. Sup. Ct. 2013).

3. Attacks on pleadings; burden of allegation and proof

One who attacks a pleading for insufficiency has the burden of showing that he is prejudiced by the deficiencies in its allegations. Foley v D'Agostino, 21 A.D.2d 60, 248 N.Y.S.2d 121, 1964 N.Y. App. Div. LEXIS 4213 (N.Y. App. Div. 1st Dep't 1964).

On a motion to dismiss on the ground that the plaintiff fails to state a cause of action, the burden is placed on one who attacks a pleading for deficiencies in its allegations to show that he is prejudiced. Catli v Lindenman, 40 A.D.2d 714, 337 N.Y.S.2d 46, 1972 N.Y. App. Div. LEXIS

3594 (N.Y. App. Div. 2d Dep't 1972), aff'd, 33 N.Y.2d 1002, 353 N.Y.S.2d 965, 309 N.E.2d 428, 1974 N.Y. LEXIS 1728 (N.Y. 1974).

The defendants' application for dismissal of plaintiff's complaint for failure to plead the state of incorporation of the plaintiff was denied, although that issue might have been raised by an answer or corrective motion, where the motion relied solely upon the fact of omission rather than any consequence resulting therefrom and did not contain an allegation of prejudice. Dari-Delite, Inc. v Priest & Baker, Inc., 50 Misc. 2d 654, 271 N.Y.S.2d 355, 1966 N.Y. Misc. LEXIS 1956 (N.Y. Sup. Ct. 1966).

Although automobile liability insurer had not in its answer specifically mentioned or pleaded estoppel as normally required, where plaintiff insured's full knowledge of all matters obviated any possible surprise and insurer's counsel had argued elements of estoppel in his favor, estoppel was available to insurer on motion for summary judgment in action for declaratory judgment that insurer's attempted imposition of lien against any tort recovery by insured was impermissible. Pavone v Aetna Casualty & Surety Co., 91 Misc. 2d 658, 398 N.Y.S.2d 391, 398 N.Y.S.2d 630, 1977 N.Y. Misc. LEXIS 2384 (N.Y. Sup. Ct. 1977).

If proceeding was improperly brought or brought by one who is not permitted to bring same, statute permitting pleadings to be liberally construed and defects to be ignored if substantial right of party has not been prejudiced is of no avail, and this is especially so in summary proceeding where essentials of petition and notice of petition are specifically regulated. Sollar v Bloom, 91 Misc. 2d 884, 398 N.Y.S.2d 836, 1977 N.Y. Misc. LEXIS 2439 (N.Y. Civ. Ct. 1977).

4. Determination of motion to dismiss

On a motion to dismiss, the complaint must be construed liberally, all factual averments of the pleadings must be taken as true and only where the plaintiff has not stated any cause of action, whether or not it is properly stated, will the complaint be dismissed. Taylor v State, 36 A.D.2d 878, 320 N.Y.S.2d 343, 1971 N.Y. App. Div. LEXIS 4182 (N.Y. App. Div. 3d Dep't 1971).

Court properly declined to dismiss cause of action purported to be stockholders' derivative action, although plaintiffs were not entitled to maintain such action, where action was pleaded in plaintiffs' individual capacity and sufficient facts were stated to make out cause of action for breach of contract; it did not matter that plaintiffs had mislabeled their cause of action. Pullin v Feinsod, 142 A.D.2d 561, 530 N.Y.S.2d 226, 1988 N.Y. App. Div. LEXIS 7304 (N.Y. App. Div. 2d Dep't 1988).

Complaint, although long and somewhat inartfully drawn, should not have been dismissed since it complied with requirements of CLS CPLR §§ 3013 and 3014, 8 of 12 defendants answered complaint, and none of defendants moved under CLS CPLR § 3024 to correct pleadings. Estate of Unterweiser v Town of Hempstead, 235 A.D.2d 453, 652 N.Y.S.2d 1007, 1997 N.Y. App. Div. LEXIS 410 (N.Y. App. Div. 2d Dep't 1997).

Dismissal of subcontractor's claims for damages due for work performed under prime contracts between a prime contractor and State was proper because, inter alia, subcontractor was not in privity with State, was not a third-party beneficiary of the prime contracts, and was not entitled to recover under implied or quasi contract theories. IMS Engineers-Architects, P.C. v State of New York, 51 A.D.3d 1355, 858 N.Y.S.2d 486, 2008 N.Y. App. Div. LEXIS 4634 (N.Y. App. Div. 3d Dep't), app. denied, 11 N.Y.3d 706, 866 N.Y.S.2d 609, 896 N.E.2d 95, 2008 N.Y. LEXIS 2963 (N.Y. 2008).

Construing the complaint liberally pursuant to N.Y. C.P.L.R. 3026, transferors stated a claim for a constructive trust because the complaint alleged that a transferee promised to convey the property at issue back to the transferors, and it could have been inferred that the transferors relied on that promise, and that the transferee would have been unjustly enriched without court intervention; dismissal of the constructive trust claim was error. Thomas v Thomas, 70 A.D.3d 588, 896 N.Y.S.2d 30, 2010 N.Y. App. Div. LEXIS 1549 (N.Y. App. Div. 1st Dep't 2010).

Although plaintiff properly demonstrated that defendant's motion to strike certain allegations of the complaint as prejudicial was untimely, where the continuation of the complaint without a paring of the specified allegations would be prejudicial to the defendant and acceptance and

approval of the corrective motion would not correspondingly operate to the prejudice of the plaintiff, the motion to strike was granted. Szolosi v Long Island R. R. Co., 52 Misc. 2d 1081, 277 N.Y.S.2d 587, 1967 N.Y. Misc. LEXIS 1748 (N.Y. Sup. Ct. 1967).

In considering motion to dismiss, court must accept as true material allegations of fact contained in complaint and proof of any reasonable inferences that may be drawn therefrom; if any cause of action can be spelled out from facts alleged, it must deny motion. Fisher v Syracuse, 78 Misc. 2d 124, 355 N.Y.S.2d 239, 1974 N.Y. Misc. LEXIS 1344 (N.Y. Sup. Ct.), aff'd, 46 A.D.2d 216, 361 N.Y.S.2d 773, 1974 N.Y. App. Div. LEXIS 3361 (N.Y. App. Div. 4th Dep't 1974).

On motion to dismiss a complaint for failure to state a cause of action, the court does not assume the correctness of any legal conclusion drawn by the pleader; the inquiry is limited to whether the pleader has a cause of action rather than whether one is stated. Reger v National Ass'n of Bedding Mfrs. Group Ins. Trust Fund, 83 Misc. 2d 527, 372 N.Y.S.2d 97, 1975 N.Y. Misc. LEXIS 2936 (N.Y. Sup. Ct. 1975).

In malpractice action for “wrongful life” on behalf of child who suffered from allegedly foreseeable congenital defects, that pleading under attack did not fall within ambit of some prior case did not constitute basis for or require dismissal of complaint. Park v Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204, 1976 N.Y. Misc. LEXIS 2656 (N.Y. Sup. Ct. 1976), modified, 60 A.D.2d 80, 400 N.Y.S.2d 110, 1977 N.Y. App. Div. LEXIS 13966 (N.Y. App. Div. 2d Dep't 1977).

On a motion to dismiss a complaint for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff. The court must accept the facts alleged in the complaint, and reasonable inferences therefrom, as true, and determine whether the facts as alleged fit within any cognizable legal theory; in doing so, the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint. N.Y. State Ass'n of Tobacco & Candy Distribs. v City of New York, 773 N.Y.S.2d 783, 3 Misc. 3d 876, 2003 N.Y. Misc. LEXIS 1776 (N.Y. Sup. Ct. 2003).

Owners sufficiently alleged a 42 U.S.C.S. § 1983 due process violation because, presuming that the allegations in the complaint were true, and affording the owners benefit of every favorable inference with respect to those allegations, the complaint, as amplified by supporting affidavits, alleged an aggravated pattern of misuse of the city's taxing power; however, the owners failed to sufficiently allege a deprivation of their right to equal protection. Subject to constitutional inhibitions, the legislature had very nearly unconstrained authority in the design of taxing impositions. Way v City of Beacon, 96 A.D.3d 829, 947 N.Y.S.2d 531, 2012 N.Y. App. Div. LEXIS 4671 (N.Y. App. Div. 2d Dep't 2012).

5. Amendment or correction of pleadings

Where matter was first raised on appeal and advanced stages of litigation pending for a long period of time, plaintiff would not be required to amend complaint to allege timeliness of action. Bucci v Port Chester, 22 N.Y.2d 195, 292 N.Y.S.2d 393, 239 N.E.2d 335, 1968 N.Y. LEXIS 1341 (N.Y. 1968).

In view of statutory provision that pleadings shall be liberally construed and defects ignored in absence of prejudice, where complaint in negligence action against city clearly stated theory of recovery, trial court did not err in granting plaintiffs' motion to conform pleadings to proof, despite defendant city's contention that neither notice of claim nor complaint had stated plaintiffs' cause of action and that it had no knowledge of real nature of accident until time of trial. Antonetti v City of Syracuse, 52 A.D.2d 742, 382 N.Y.S.2d 189, 1976 N.Y. App. Div. LEXIS 12440 (N.Y. App. Div. 4th Dep't), app. denied, 39 N.Y.2d 711, 1976 N.Y. LEXIS 3450 (N.Y. 1976).

Petitioners should be granted leave to amend their caption where respondents' objection to the caption is unrelated to the substantive issues and no prejudice will result. Times-Union of Capital Newspaper Div. of Hearst Corp. v Harris, 71 A.D.2d 333, 423 N.Y.S.2d 263, 1979 N.Y. App. Div. LEXIS 13479 (N.Y. App. Div. 3d Dep't 1979), app. dismissed, 50 N.Y.2d 801, 1980 N.Y. LEXIS 2942 (N.Y. 1980).

In light of CLS CPLR § 3026, which provides for liberal construction of pleadings and states that "[d]efects shall be ignored if a substantial right of a party is not prejudiced," proper remedy is dismissal of pleading with leave to re-plead where party has failed to separately set forth and number allegations of pleading as required by CLS CPLR § 3014. In Article 78 proceeding challenging denial of parole, petitioner was entitled to leave to re-plead to cure technical defects relating to statement of allegations in separately numbered paragraphs where State Division of Parole failed to show that it would suffer prejudice by petitioner's submission of amended petition complying with CLS CPLR § 3014, and adjudication of merits was premature in absence of answer to petition complying with § 3014. Gerena v New York State Div. of Parole, 266 A.D.2d 761, 698 N.Y.S.2d 750, 1999 N.Y. App. Div. LEXIS 12140 (N.Y. App. Div. 3d Dep't 1999).

Amended complaint, adding third-party defendant as direct defendant, would relate back to date of third-party complaint, and thus amendment should not be permitted where third-party complaint had been interposed after expiration of statute of limitations. Mason v Rodolitz Org., 282 A.D.2d 581, 722 N.Y.S.2d 905, 2001 N.Y. App. Div. LEXIS 3833 (N.Y. App. Div. 2d Dep't 2001).

Plaintiff's rejection notice, although timely served on pro se defendant, was defective for failing to state why verified answer was required, and since answer in form of letter served by defendant was otherwise sufficient, court would deem letter to be answer properly interposed; thus, plaintiff's summary judgment motion based on defendant's default in answering would be denied. Cook v Freight Force, Inc., 139 Misc. 2d 459, 529 N.Y.S.2d 435, 1988 N.Y. Misc. LEXIS 304 (N.Y. Sup. Ct. 1988).

In determining whether to permit department of social services (DSS) to amend bill of particulars after it has commenced its case-in-chief in child protective proceeding, court should apply balancing test which takes into account any prejudice or surprise to respondent, reason that DSS failed to include issues or facts in its initial pleadings, ability of continuance to ameliorate prejudice of allowing late introduction of new evidence, over-all affect on orderly administration

of justice, and policy considerations set forth in CLS Family Ct Act § 1011. Albany County Dep't of Social Servs. v James T., 172 Misc. 2d 427, 658 N.Y.S.2d 184, 1997 N.Y. Misc. LEXIS 175 (N.Y. Fam. Ct. 1997).

In proceeding by New York City Housing Authority (NYCHA) to remove respondents on ground that they were licensees whose license expired on death of tenant of record, NYCHA's failure to allege in holdover petition that respondents were afforded grievance proceeding (and outcome of such proceeding) did not require reversal of judgment in favor NYCHA, where all facts concerning grievance proceeding were proven at trial and respondents were not prejudiced; under circumstances, pleading was amended to conform to proof. New York City Hous. Auth. v Winkler, 175 Misc. 2d 1018, 672 N.Y.S.2d 972, 1998 N.Y. Misc. LEXIS 146 (N.Y. App. Term 1998).

In nonpayment proceeding wherein landlord failed to request attorney's fees in petition or during 15-day trial and did not seek amendment of pleadings or argument on issue when matter proceeded to judgment and was then appealed, claim for attorney's fees interposed for first time in landlord's post-judgment motion 9 months after appeal was untimely, and court did not abuse its discretion in declining to deem petition amended to include prayer for such relief. AD 1619 Co. v VB Mgmt., 175 Misc. 2d 1021, 672 N.Y.S.2d 985, 1998 N.Y. Misc. LEXIS 144 (N.Y. App. Term 1998).

Trial court did not believe that the formal defect of a proposed amendment that proposed several legal theories for an affirmative defense required denial of the motion to amend, given that the court could condition its relief on the correction or clarification of the pleading. Unger v Leviton, 787 N.Y.S.2d 625, 5 Misc. 3d 925, 2004 N.Y. Misc. LEXIS 1891 (N.Y. Sup. Ct. 2004).

B. Particular Defects

6. Generally

Absence of dollar amount in ad damnum clause of contractor's counterclaim was properly cured by correction within trial court's discretion where such absence was adequately explained as typographical oversight, where such dollar amount was stated elsewhere in the pleading, and where timely motion to cure such defect was made without prejudice to owner. Serena Constr. Corp. v Valley Drywall Service, Inc., 45 A.D.2d 896, 357 N.Y.S.2d 214, 1974 N.Y. App. Div. LEXIS 4516 (N.Y. App. Div. 3d Dep't), app. denied, 35 N.Y.2d 642, 1974 N.Y. LEXIS 2295 (N.Y. 1974).

Pleadings are to be liberally construed (CPLR 3026) and, in the case of examining pleadings upon a motion for summary judgment, a court may take into account an unpleaded defense. Adirondack Park Agency v Ton-Da-Lay Associates, 61 A.D.2d 107, 401 N.Y.S.2d 903, 1978 N.Y. App. Div. LEXIS 9709 (N.Y. App. Div. 3d Dep't), app. dismissed, 45 N.Y.2d 710, 1978 N.Y. LEXIS 3199 (N.Y. 1978).

Absent claim that substantial right of party was prejudiced, Supreme Court properly treated verified affirmation of petitioner's attorney as petition for purposes of commencing special proceeding under CLS Elec § 16-102. Page v Ceresia, 265 A.D.2d 730, 697 N.Y.S.2d 373, 1999 N.Y. App. Div. LEXIS 11228 (N.Y. App. Div. 3d Dep't 1999).

While liberality is generally shown in permitting amendments to pleadings, lack of legal standing to sue is not amendable, particularly in statutory proceedings. Zisser v Bronx Cigar Corp., 91 Misc. 2d 1025, 399 N.Y.S.2d 109, 1977 N.Y. Misc. LEXIS 2472 (N.Y. Civ. Ct. 1977).

7. Complaints, generally

Under the CPLR a complaint is sufficient which adequately advises the adverse party of the pleader's claim and its elements. Pope v Zeckendorf Hotels Corp., 22 A.D.2d 647, 252 N.Y.S.2d 975, 1964 N.Y. App. Div. LEXIS 3140 (N.Y. App. Div. 1st Dep't 1964).

Where a complaint, although inartfully drawn, is sufficiently particular to give notice of the occurrences intended to be proved and the material elements of the cause of action, and it does

not appear that the defendant's rights are prejudiced by the defects in the pleading, it will not be dismissed under CPLR 3211 subd (a) ¶ 7. Holzer v Feinstein, 23 A.D.2d 771, 258 N.Y.S.2d 546, 1965 N.Y. App. Div. LEXIS 4456 (N.Y. App. Div. 2d Dep't 1965).

Motion to dismiss should have been granted where complaint did not adhere to requirements that pleadings be set out in plain and concise statements in consecutively numbered paragraphs and be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense and even liberal construction of the pleadings could not sustain them. Joffe v Rubenstein, 24 A.D.2d 752, 263 N.Y.S.2d 867, 1965 N.Y. App. Div. LEXIS 3168 (N.Y. App. Div. 1st Dep't 1965), app. dismissed, 21 N.Y.2d 721, 287 N.Y.S.2d 685, 234 N.E.2d 706, 1968 N.Y. LEXIS 1686 (N.Y. 1968).

Where complaint did not state a cause of action for reformation of a mortgage but did set forth facts and circumstances constituting a wrong for which plaintiff was entitled to relief, it was error to dismiss the complaint in view of the requirement that pleading should be liberally construed where a substantial right of a party is not prejudiced. Barrick v Barrick, 24 A.D.2d 895, 264 N.Y.S.2d 888, 1965 N.Y. App. Div. LEXIS 2915 (N.Y. App. Div. 2d Dep't 1965).

The rule of CPLR 3015 requiring a defendant to deny the performance of any condition precedent specifically and with particularity, is not immune from the policy of New York law that the allegations of a pleading shall be liberally construed with a view to substantial justice between the parties, and where a plaintiff pleads as her sole cause of action a right of recovery as one standing in the shoes of the insured, it being alleged that the latter "duly performed all the conditions of said policy of insurance on its part", an answer that the "insured" had failed to give notice should have been liberally construed as applicable to the cause of action brought to recover under Insurance Law § 167. Frazier v Fidelity & Casualty Co., 27 A.D.2d 922, 279 N.Y.S.2d 599, 1967 N.Y. App. Div. LEXIS 4400 (N.Y. App. Div. 1st Dep't 1967).

Giving complaint a fair and liberal reading, it sufficiently alleged constructive notice of alleged defect in roadway which was a condition precedent to law suit against town with respect to said

defective condition in roadway. Schmalenberger v Brookhaven, 28 A.D.2d 536, 279 N.Y.S.2d 390, 1967 N.Y. App. Div. LEXIS 4287 (N.Y. App. Div. 2d Dep't 1967).

Although pleading must be liberally construed, prejudicial defects may not be ignored, and the complete failure of a complaint to comply with CPLR 3013 is fatal to cause of action. Meltzer v Klein, 29 A.D.2d 548, 285 N.Y.S.2d 920, 1967 N.Y. App. Div. LEXIS 2805 (N.Y. App. Div. 2d Dep't 1967).

If a complaint can be read to disclose any theory upon which the cross-claimant would be entitled to indemnity it should be upheld. Bollinger v Borden (1968, 3d Dept) 30 App Div 2d 607, 290 NYS2d 403, holding that defendant’s claims, although designated a third-party action, would be treated as a cross-claim which could be maintained against codefendant for indemnification.

While pleadings will be given a liberal construction, it is still necessary for a complaint to comply with the requirements of CPLR 3013 that a pleading shall be sufficiently particular to give the court and parties notice of the material elements of a cause of action. Woolridge v Rosen, 35 A.D.2d 714, 315 N.Y.S.2d 45, 1970 N.Y. App. Div. LEXIS 3675 (N.Y. App. Div. 1st Dep't 1970).

In products liability action for injuries sustained alleging defective design of motorcycle, omission of the word “latent” from the complaint was not a fatal defect and should be ignored under the liberal construction principle of the CPLR. Bolm v Triumph Corp., 41 A.D.2d 54, 341 N.Y.S.2d 846, 1973 N.Y. App. Div. LEXIS 5069 (N.Y. App. Div. 4th Dep't), aff'd, 33 N.Y.2d 151, 350 N.Y.S.2d 644, 305 N.E.2d 769, 1973 N.Y. LEXIS 924 (N.Y. 1973).

Where employee brought action against manufacturer of elevator alleging negligence and breach of warranty and where portions of complaint relating to manufacturer’s alleged breach of warranty in inspection, service, repair and maintenance of elevator were inextricably intertwined with allegations of breach of warranty in the manufacture and installation of elevator, special term properly denied motion of employer, the third-party defendant, to dismiss cause of action of complaint relating to alleged breach of warranty in inspection, service, repair and maintenance of elevator. Coutu v Otis Elevator Co., 58 A.D.2d 131, 395 N.Y.S.2d 754, 1977 N.Y. App. Div.

LEXIS 11842 (N.Y. App. Div. 3d Dep't), app. dismissed, 43 N.Y.2d 714, 401 N.Y.S.2d 208, 372 N.E.2d 42, 1977 N.Y. LEXIS 2516 (N.Y. 1977).

Judgment creditor's cause of action against director of corporate judgment debtor would be dismissed, without prejudice and with leave to replead, where it was alleged only that director was personally liable under Business Corporation Law to corporate debtor for unlawful distributions of corporate assets and that creditor was entitled to satisfy its judgment from director's interest in assets of employee benefit plan, and it appeared from wording that cause of action was grounded on CLS Bus Corp §§ 510 and 719; while § 719 would not apply to such cause, and CLS Bus Corp § 720 does permit action against director by judgment creditor to set aside unlawful conveyance where transferee knew of its unlawfulness, essential elements of § 720 action could not be deemed to have been pleaded even under liberal rules regarding construction of pleadings. Planned Consumer Marketing, Inc. v Coats & Clark, Inc., 127 A.D.2d 355, 513 N.Y.S.2d 417, 1987 N.Y. App. Div. LEXIS 42407 (N.Y. App. Div. 1st Dep't 1987), aff'd, 71 N.Y.2d 442, 527 N.Y.S.2d 185, 522 N.E.2d 30, 1988 N.Y. LEXIS 190 (N.Y. 1988).

In wife's action for divorce based on cruel and inhuman treatment, husband was entitled to new trial based on Supreme Court's error in admitting acts and words outside parameters of complaint, even though husband did not request bill of particulars, since jury's consideration of unpleaded acts of misconduct undermined notice function of CLS CPLR § 3016 and prejudiced substantial right of husband. Milensky v Milensky, 127 A.D.2d 901, 511 N.Y.S.2d 975, 1987 N.Y. App. Div. LEXIS 43402 (N.Y. App. Div. 3d Dep't 1987).

Defects in pleading should be disregarded where supporting affidavit contains facts sufficient to establish valid claim. Mandelblatt v Devon Stores, 132 A.D.2d 162, 521 N.Y.S.2d 672, 1987 N.Y. App. Div. LEXIS 49527 (N.Y. App. Div. 1st Dep't 1987).

Misstatement of defendant's name in summons and complaint as Welbut instead of Welbilt was mere irregularity which in no way affected jurisdiction. Marine Midland Realty Credit Corp. v Welbilt Corp., 145 A.D.2d 84, 537 N.Y.S.2d 669, 1989 N.Y. App. Div. LEXIS 1249 (N.Y. App. Div. 3d Dep't 1989).

Complaint stated cause of action for unjust enrichment where it alleged that defendants received money from their law firm's escrow account, that money was property of escrow depositors (of which plaintiff was one), and that money was payable in equity and in good conscience to and for benefit of escrow depositors. Cohn v Rothman-Goodman Management Corp., 155 A.D.2d 579, 547 N.Y.S.2d 881, 1989 N.Y. App. Div. LEXIS 14373 (N.Y. App. Div. 2d Dep't 1989).

Complaint brought under CLS Agr & M § 121 which arose from Rottweiler's attack on Pekinese was sufficient, even though it failed to specifically allege attack on person, or attack, chasing or worrying of domestic animal, where it made reference to overall attack on 2 small children who were walking Pekinese, and thus placed Rottweiler's owner on notice of event at issue and relief sought. People v Horvath, 205 A.D.2d 927, 613 N.Y.S.2d 721, 1994 N.Y. App. Div. LEXIS 6292 (N.Y. App. Div. 3d Dep't 1994).

Contrary to the trial court's determination, the complaint adequately pled that lawyers failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, and that their negligence was a proximate cause of damages; therefore, the complaint was sufficient to state a cause of action to recover damages for legal malpractice. Feldman v Finkelstein & Partners, LLP, 76 A.D.3d 703, 907 N.Y.S.2d 313, 2010 N.Y. App. Div. LEXIS 6619 (N.Y. App. Div. 2d Dep't 2010), dismissed, 975 N.Y.S.2d 365, 39 Misc. 3d 1222(A), 2013 N.Y. Misc. LEXIS 1850 (N.Y. Sup. Ct. 2013).

The prayer for relief does not determine the sufficiency of the complaint, and a prayer for wrong relief does not require a dismissal for insufficiency so long as plaintiff demonstrates the right to some relief under the facts pleaded. Lehmann v Kingston Plaza, Inc., 44 Misc. 2d 63, 252 N.Y.S.2d 964, 1964 N.Y. Misc. LEXIS 1557 (N.Y. Sup. Ct. 1964).

In a libel action brought against the publisher, the president and executive editor, and the editor of a newspaper there was no reason to require the plaintiff to spell out the act of each defendant, where it was alleged that the "defendants published" and "defendants knew" which sufficiently put each defendant on notice concerning the occurrences intended to be proved. Cabin v Community Newspapers, Inc., 50 Misc. 2d 574, 270 N.Y.S.2d 913, 1966 N.Y. Misc.

LEXIS 1801 (N.Y. Sup. Ct.), aff'd, 27 A.D.2d 543, 275 N.Y.S.2d 396, 1966 N.Y. App. Div. LEXIS 2959 (N.Y. App. Div. 2d Dep't 1966).

Where cause of action pleaded an action for breach of warranty and an action for strict products liability in use of an exercisor, the causes should have been separately pleaded, but such failure was not fatal in determining that the four-year statute of limitations applicable to torts applied and not the three-year statute of limitations applicable to contracts. Simmons v Albany Boys Club, Inc., 80 Misc. 2d 19, 362 N.Y.S.2d 113, 1974 N.Y. Misc. LEXIS 1831 (N.Y. Sup. Ct. 1974).

Although the adult establishments conceded that their as-applied challenge was “inartfully pleaded,” the law was well settled that pleadings were to be construed liberally; during a colloquy, the trial court itself posed the question of what might happen if it decided that several clubs did not have a dominant sexual purpose in their activities, but other clubs did, and the adult establishments specifically raised the issue of an as-applied challenge during the same colloquy. Thus, there was no merit to the contention that the issue was neither raised nor preserved. For The People Theatres of N.Y. Inc. v City of New York, 84 A.D.3d 48, 923 N.Y.S.2d 11, 2011 N.Y. App. Div. LEXIS 2751 (N.Y. App. Div. 1st Dep't 2011).

8. —Law and equity

Under the CPLR equity and law actions no longer are to be distinguished at the pleading stage, so that where a complaint is framed in equity and seeks equitable relief, it will not be dismissed if the facts alleged entitle plaintiff only to legal relief, since the CPLR has effectively merged law and equity actions by removing the prior stumbling blocks thereto; shifting from the requirement that a complaint conform to a “theory of the pleadings” to the requirement that a complaint need only give notice of the transactions intended to be proved and the material elements of the cause of action; and removing the possibility of prejudice to a defendant faced with an equitable complaint which turns out to be a legal action and thereby deprives him of a jury trial, by giving him the right to a jury trial under these circumstances (CPLR 4013). Lane v Mercury Record Corp., 21 A.D.2d 602, 252 N.Y.S.2d 1011, 1964 N.Y. App. Div. LEXIS 3101 (N.Y. App. Div. 1st

Dep't 1964), aff'd, 18 N.Y.2d 889, 276 N.Y.S.2d 626, 223 N.E.2d 35, 1966 N.Y. LEXIS 1006 (N.Y. 1966).

9. —Personal injury and wrongful death

In motorcycle rider's action against manufacturer for severe pelvic and genital injuries allegedly resulting from "parcel grid" attached to cycle's gas tank just in front of saddle, failure of complaint to allege that parcel grid was a latent design defect was not fatal under the liberal provisions of CPLR § 3026. Bolm v Triumph Corp., 33 N.Y.2d 151, 350 N.Y.S.2d 644, 305 N.E.2d 769, 1973 N.Y. LEXIS 924 (N.Y. 1973).

In a personal injury action by a tenant who was injured while using the common stairway in a building then the subject of a foreclosure action against the court-appointed receiver of rents and profits of the building, the tenant's omission from the receiver's title of the words "as receiver" was no more than an irregularity to be disregarded, where the complaint expressly alleged that the receiver was acting in his official capacity. Copeland v Salomon, 56 N.Y.2d 222, 451 N.Y.S.2d 682, 436 N.E.2d 1284, 1982 N.Y. LEXIS 3331 (N.Y. 1982).

Personal injury plaintiffs were not precluded from prosecuting alternate theory of recovery, which was asserted in opposition to defendant's summary judgment motion, on ground that such theory was not pleaded in their complaint or detailed in their bill of particulars since pleadings had given notice of transactions or occurrences intended to be proved, and defendant had not shown that he had been in any way prejudiced. Fried v Seippel, 80 N.Y.2d 32, 587 N.Y.S.2d 247, 599 N.E.2d 651, 1992 N.Y. LEXIS 1538 (N.Y. 1992).

Where defendant's automobile collided with an expressway stanchion killing one passenger and injuring another, and in the ensuing wrongful death action it was asserted the deceased was not "without fault" because he had assumed the risk of riding with defendant who he knew to be intoxicated, and was contributorily negligent since his own drunken condition prevented him from exercising proper care for his own welfare; it was held the first defense constituted an allegation of contributory negligence and that the burden of proof on that issue was on the

defendant. Gilliam v Lee, 32 A.D.2d 1058, 303 N.Y.S.2d 966, 1969 N.Y. App. Div. LEXIS 3268 (N.Y. App. Div. 2d Dep't 1969).

In an action for malpractice against an attorney for failure to initiate suit for personal injuries sustained in a motor vehicle accident within the period of limitations, a complaint was sufficient which fairly apprised the attorney of the malpractice intended to be proved and the material elements of the cause of action, and the failure to specifically allege negligence and freedom from contributory negligence in the underlying accident case did not prejudice the attorney and should be disregarded. Richardson v King, 36 A.D.2d 781, 319 N.Y.S.2d 218, 1971 N.Y. App. Div. LEXIS 4472 (N.Y. App. Div. 3d Dep't 1971).

Third-party complaint which alleged that plaintiffs' failure to timely commence personal injury action was due solely to negligence of their attorney without any negligence, fraud or misrepresentation of defendant contributing thereto and which did not allege any type of contract between defendant and attorney which if proven would require such indemnity, did not state cause of action for indemnification against attorney for any recovery by plaintiffs since such a cause of action must be based upon either express or implied contract for indemnification. Taft v Shaffer Trucking, Inc., 52 A.D.2d 255, 383 N.Y.S.2d 744, 1976 N.Y. App. Div. LEXIS 11990 (N.Y. App. Div. 4th Dep't 1976), app. dismissed, 42 N.Y.2d 974, 1977 N.Y. LEXIS 4341 (N.Y. 1977).

In a negligence action to recover damages for personal injuries, uncontradicted testimony that the infant plaintiff was injured when the defendant struck him in the face with his fist was insufficient to sustain a theory of negligence which was the sole basis of the complaint; furthermore, the pleadings should not have been amended to conform to the proof under CPLR § 3026 by substituting a finding of battery for the negligence theory where the plaintiff's counsel had specifically stated that he intended to offer no proof of any intentional act. Andres v Perry, 81 A.D.2d 848, 438 N.Y.S.2d 852, 1981 N.Y. App. Div. LEXIS 11523 (N.Y. App. Div. 2d Dep't), aff'd, 54 N.Y.2d 795, 443 N.Y.S.2d 610, 427 N.E.2d 769, 1981 N.Y. LEXIS 2713 (N.Y. 1981).

Court erred in denying plaintiffs' motion for leave to serve amended complaint to add cause of action for breach of implied warranty where proposed amendment was based on same facts alleged in original complaint, only different legal theory was asserted which required proof necessarily uniquely intertwined with negligence and strict products liability causes of action, and although discovery had been completed, there was no evidence that delay in seeking to interpose new claim would hinder future discovery or preclude defendants from taking some measure in support of their position. Garrison v Wm. H. Clark Mun. Equip., 239 A.D.2d 742, 657 N.Y.S.2d 477, 1997 N.Y. App. Div. LEXIS 5236 (N.Y. App. Div. 3d Dep't 1997).

Where the claimant in a wrongful death action submitted Limited Letters of Administration, signed and filed April 19, 1966, nunc pro tunc, as of January 22, 1963, which was the date on which the Decree of Administration had been signed by the Surrogate, and in all other respects the claim had been timely filed and there was no prejudice to the State, it was held that Surrogate's act had cured what was in essence only a mere irregularity, since in many counties signing the decree was purely a ministerial act and the Surrogate had the right to enter a decree or order as of a former time. McBride v State, 50 Misc. 2d 192, 270 N.Y.S.2d 237, 1966 N.Y. Misc. LEXIS 1845 (N.Y. Ct. Cl. 1966).

Where plaintiffs were injured in their car when struck by second car and plaintiff husband was further injured when second car was struck by school bus, and plaintiffs sued various defendants including school district and also town, and all defendants cross-claimed for contribution and apportionment of liability, and nonsuit was granted town, which was also released by plaintiffs, and cross claims were severed, cross claims against town remained viable, and town was entitled to develop facts relative to its proportion of any negligence which might be shown against it in litigation of cross claims, and cross claim of town against owner of second car thus also remained viable and not subject to dismissal. Powell v Gates-Chili Cent. School Dist., 82 Misc. 2d 924, 372 N.Y.S.2d 173, 1975 N.Y. Misc. LEXIS 3393 (N.Y. Sup. Ct.), aff'd, 50 A.D.2d 1079, 376 N.Y.S.2d 332, 1975 N.Y. App. Div. LEXIS 12108 (N.Y. App. Div. 4th Dep't 1975).

10. —Real property

In tax certiorari proceeding, error in naming prior owner of property in petition was technical defect that was corrected when written authorization from current owner was filed. Miller v Board of Assessors, 91 N.Y.2d 82, 666 N.Y.S.2d 1012, 689 N.E.2d 906, 1997 N.Y. LEXIS 3718 (N.Y. 1997).

Where condition of mortgage that no building on premises should be removed or demolished without consent of mortgagee was breached, mortgagee was entitled to damages, if any, as consequence of diminution of his security; damages, however, would be limited to difference, if any, between unpaid balance of mortgage loan and value of land in unimproved condition. Brayton v Pappas, 52 A.D.2d 187, 383 N.Y.S.2d 723, 1976 N.Y. App. Div. LEXIS 11976 (N.Y. App. Div. 4th Dep't 1976).

In an action by a property owner against a city for damages allegedly caused when an underground culvert caved in under the foundation of a building that was being constructed by the plaintiff, the trial court properly awarded damages on certain facts and theories of recovery even though such had not been precisely pled by the plaintiff, where, in the plaintiff's complaint, bill of particulars, and supplemental bill of particulars, the plaintiff had alleged a cause of action based on negligence and breach of a duty to warn of the culvert's existence and had set forth facts upon which recovery could appropriately be granted, and where the plaintiff had alleged that the city owned, operated and controlled the public sewer line which passed beneath his property, that the city had reissued his building permit while failing to warn him of the culvert's existence even though the city's records contained information concerning it, and that the plaintiff relied upon the city's assertions to his detriment so that the city had fair notice of his cause of action and thus suffered no prejudice from any technical defects in the plaintiff's pleadings. Tuffley v Syracuse, 82 A.D.2d 110, 442 N.Y.S.2d 326, 1981 N.Y. App. Div. LEXIS 10949 (N.Y. App. Div. 4th Dep't 1981).

Although plaintiff's complaint in an action to recover the real estate commissions failed to allege that the buyers he asserted to have found were ready and able to buy at a price for which he

was authorized to sell the property, the technical omission was harmless since the complaint was sufficient to give notice of the transactions and occurrences intended to be proved and the material elements of the cause of action relied upon, and was to be construed liberally. Infusino v Pelnik, 45 Misc. 2d 333, 256 N.Y.S.2d 815, 1965 N.Y. Misc. LEXIS 2249 (N.Y. Sup. Ct. 1965).

Plaintiff's failure to allege in his complaint that there was a latent defect or concealed danger on the real property did not render complaint insufficient. Merrick v Murphy, 83 Misc. 2d 39, 371 N.Y.S.2d 97, 1975 N.Y. Misc. LEXIS 2797 (N.Y. Sup. Ct. 1975).

11. —Labor and labor relations

Where complaint by school district requested that teachers' association and its members "be enjoined and commanded to refrain from" any strike activity, and that temporary restraining order and temporary injunction be issued during pendency of action, and where court permitted district to amend complaint to add word "permanent" to prayer for relief, district's application for temporary restraining order and temporary injunction was not fatally defective because it did not rest on underlying application for permanent injunction. Orchard Park Cent. Sch. Dist. v Orchard Park Teachers Ass'n, 50 A.D.2d 462, 378 N.Y.S.2d 511, 1976 N.Y. App. Div. LEXIS 10648 (N.Y. App. Div. 4th Dep't), app. dismissed, 38 N.Y.2d 911, 382 N.Y.S.2d 756, 346 N.E.2d 557, 1976 N.Y. LEXIS 2352 (N.Y. 1976).

Even though employees, in action brought against former employer, contended that their right was created by statute, no substantial right of the defendant was prejudiced by ignoring the reference to the statute; it was a defect which could be ignored; and the mandate of liberal construction of pleadings barred dismissal on that ground. Hirt v New York Automatic Canteen Corp., 58 Misc. 2d 310, 295 N.Y.S.2d 142, 1968 N.Y. Misc. LEXIS 1066 (N.Y. Civ. Ct. 1968).

12. —Business interference

A charge that the defendant lessee of a theater property had conspired with other competing theater owners and concessionaires to destroy the value of the lessor's property as a first rate operating theater stated a valid cause of action in tort and for breach of contract, under liberal rules of construction of pleadings. Albemarle Theatre, Inc. v Bayberry Realty Corp., 27 A.D.2d 172, 277 N.Y.S.2d 505, 1967 N.Y. App. Div. LEXIS 4741 (N.Y. App. Div. 1st Dep't 1967).

Complaint alleging that union distributed circulars which were false and misleading and placed pickets at the doors of retail establishments for the purpose of trying to dissuade the public from buying plaintiff's products and that such action irrevocably damaged the plaintiffs in the conduct of their business stated a cause of action in tort, did not allege an unfair labor practice within the meaning of the Labor Management Relations Act and the state court had jurisdiction. Cheyne v Ferro, 56 Misc. 2d 1010, 290 N.Y.S.2d 813, 1968 N.Y. Misc. LEXIS 1498 (N.Y. Sup. Ct. 1968).

13. Verification

Court should have disregarded technical defect arising from lack of proper verification on tax certiorari petition, where defect was corrected when written authorizations from owners of properties were filed, and no substantial right of respondents was prejudiced as result thereof. Miller v Board of Assessors, 91 N.Y.2d 82, 666 N.Y.S.2d 1012, 689 N.E.2d 906, 1997 N.Y. LEXIS 3718 (N.Y. 1997).

In the absence of a motion for default judgment (CPLR 3215) and in the absence of prejudice to defendant, a court may properly permit an unverified reply to a verified counterclaim to stand. Chisholm-Ryder Co. v Sommer & Sommer, 70 A.D.2d 429, 421 N.Y.S.2d 455, 1979 N.Y. App. Div. LEXIS 12733 (N.Y. App. Div. 4th Dep't 1979).

Court properly dismissed inmate's pro se Article 78 petition that had been sworn before fellow inmate rather than notary public, even though pro se petitions are accorded liberal construction and pleading defects may be ignored, where services of notary public were available at inmate's correctional facility, inmate was frequent litigator who was privy to judicial notice of availability of notary services that had been taken in prior proceedings, and inmate offered no viable reason

for using inmate witness. Salahuddin v Le Fevre, 137 A.D.2d 937, 525 N.Y.S.2d 359, 1988 N.Y. App. Div. LEXIS 1859 (N.Y. App. Div. 3d Dep't 1988).

Omission of date of notary's jurat in affidavit of petitioner's counsel in support of petition to stay arbitration of uninsured motorist claim was technical defect of verification insufficient to warrant denial of petition. Liberty Mut. Ins. Co. v Bohl, 262 A.D.2d 645, 694 N.Y.S.2d 72, 1999 N.Y. App. Div. LEXIS 7663 (N.Y. App. Div. 2d Dep't 1999).

In an action seeking, inter alia, to vacate the conveyance of three parcels of property to a county after tax foreclosure proceedings, the property owner failed to demonstrate that he was substantially prejudiced by an alleged defect in the verification under N.Y. C.P.L.R. § 3026 of the answer. Case v Cayuga County, 60 A.D.3d 1426, 875 N.Y.S.2d 705, 2009 N.Y. App. Div. LEXIS 2174 (N.Y. App. Div. 4th Dep't), app. dismissed, 13 N.Y.3d 770, 886 N.Y.S.2d 869, 915 N.E.2d 1167, 2009 N.Y. LEXIS 3507 (N.Y. 2009).

Defendants' motion to dismiss was properly denied because plaintiffs' complaint, as amplified by plaintiffs' evidentiary submissions, sufficiently alleged causes of action for IIED and defamation as plaintiffs alleged that defendants attempted to have the police remove them by falsely claiming that plaintiffs recently had moved in without their permission; disconnecting the lights, the refrigerator, and the gas to the kitchen; removing the bathroom door and turning off the heat and hot water in the bathroom; performing demolition in and above the apartment; and making false reports to the police and the New York State Child Abuse and Maltreatment Register. Solis v Aguilar, 206 A.D.3d 684, 170 N.Y.S.3d 139, 2022 N.Y. App. Div. LEXIS 3420 (N.Y. App. Div. 2d Dep't 2022).

A complaint, defectively verified, will not be dismissed if a substantial right of a party is not prejudiced. Capital Newspapers Div.-- Hearst Corp. v Vanderbilt, 44 Misc. 2d 542, 254 N.Y.S.2d 309, 1964 N.Y. Misc. LEXIS 1245 (N.Y. Sup. Ct. 1964).

Where defendant's answer was not fully and properly verified, the defect would nevertheless be ignored where plaintiff did not show prejudice to a substantial right. Kreiling v Jayne Estates, Inc., 51 Misc. 2d 895, 274 N.Y.S.2d 291, 1966 N.Y. Misc. LEXIS 1420 (N.Y. Sup. Ct. 1966).

Verification is part of a pleading and is subject, as any other part, to rule stating that pleading shall be liberally construed and that defect shall be ignored if a substantial right of a party is not prejudiced. State v McMahon, 78 Misc. 2d 388, 356 N.Y.S.2d 933, 1974 N.Y. Misc. LEXIS 1411 (N.Y. Sup. Ct. 1974).

Unverified answer which was filed by defendant, who had been charged with forging two state lottery tickets, in response to State's verified complaint seeking to recover balance due on tickets after it had recouped part thereof was adequate for purpose of framing issues to be tried and did not prejudice State. State v McMahon, 78 Misc. 2d 388, 356 N.Y.S.2d 933, 1974 N.Y. Misc. LEXIS 1411 (N.Y. Sup. Ct. 1974).

Even if complaint was properly verified, entry of default judgment following receipt of unverified answer was unauthorized where complainant failed to notify defendant that it elected to treat the answer as a nullity. Bambergers Div. of R. H. Macy Co. v Smith, 91 Misc. 2d 856, 398 N.Y.S.2d 945, 1977 N.Y. Misc. LEXIS 2431 (N.Y. County Ct. 1977).

Petition to invalidate a nomination was properly verified, and citizens failed to allege that they suffered any prejudice if the alleged defect was ignored pursuant to the rule. Matter of Jacobi v Murray, 58 Misc. 3d 319, 66 N.Y.S.3d 809, 2017 N.Y. Misc. LEXIS 3970 (N.Y. Sup. Ct. 2017).

II. Under Former Civil Practice Laws

A. In General

14. Generally

The law does not presume that a party's pleadings are less strong than the facts of the case will warrant; nor assume in favor of a party anything he has not averred. Cruger v Hudson R. R. Co., 12 N.Y. 190, 12 N.Y. (N.Y.S.) 190, 1854 N.Y. LEXIS 121 (N.Y. 1854).

The summons only serves to bring the party into court, but does not aid in the interpretation of the pleadings. The demand for judgment and the summons may be consulted to ascertain which of two actions was intended by pleader. See Graves v Waite, 59 N.Y. 156, 59 N.Y. (N.Y.S.) 156, 1874 N.Y. LEXIS 396 (N.Y. 1874).

CPA § 241 (Rule 3014 herein) was to be read with CPA § 275. Morgenstern v Cohon, 2 N.Y.2d 302, 160 N.Y.S.2d 633, 141 N.E.2d 314, 1957 N.Y. LEXIS 1205 (N.Y. 1957).

There is no practice which permits a party to apply at special term for a construction of the pleadings which shall be binding upon the judge who tries the case upon the issues of fact. Bolognesi v Hirzel, 58 A.D. 530, 69 N.Y.S. 534, 1901 N.Y. App. Div. LEXIS 3026 (N.Y. App. Div. 1901).

The title, allegations and demand of a complaint against an assignee for creditors are to be considered as a whole in order to determine whether the defendant is sued in his representative capacity. Standard Audit Co. v Robotham, 115 N.Y.S. 152, 62 Misc. 466, 1909 N.Y. Misc. LEXIS 574 (N.Y. App. Term 1909).

The allegations in the body of the complaint control the title. Christy v Libby, 35 How. Pr. 119, 1867 N.Y. Misc. LEXIS 293 (N.Y.C.P. Dec. 1, 1867), aff'd, 5 Abb. Pr. (n.s.) 192, 1869 N.Y. Misc. LEXIS 32 (N.Y.C.P. 1869), aff'd, (N.Y.C.P.).

The character of the action is to be determined by an analysis of the averments in the complaint and of the relief demanded. McDonough v Dillingham, 43 Hun 493, 7 N.Y. St. 137 (N.Y.).

15. Sufficiency of complaint

An averment that defendants converted and disposed of a note to their own use is good. Decker v Mathews, 12 N.Y. 313, 12 N.Y. (N.Y.S.) 313, 1855 N.Y. LEXIS 14 (N.Y. 1855).

Rule as to liberal construction of pleadings applied. Graham v Buffalo General Laundries Corp., 261 N.Y. 165, 184 N.E. 746, 261 N.Y. (N.Y.S.) 165, 1933 N.Y. LEXIS 1528 (N.Y. 1933).

Allegations of complaint must be liberally construed, and where court cannot say as matter of law that upon no theory of proof could recovery be predicated, complaint will not be dismissed. Curren v O'Connor, 304 N.Y. 515, 109 N.E.2d 605, 304 N.Y. (N.Y.S.) 515, 1952 N.Y. LEXIS 721 (N.Y. 1952).

In action by inventor against patent attorney, complaint sufficiently charged negligence, breach of implied contract and constructive fraud. Dulberg v Mock, 1 N.Y.2d 54, 150 N.Y.S.2d 180, 133 N.E.2d 695, 1956 N.Y. LEXIS 982 (N.Y. 1956).

A distinction must be made between the permissible practice of saving an ineptly worded pleading by construing it liberally, and the impermissible practice of supplying elements essential to the cause of action under the guise of construction. Drug Research Corp. v Curtis Publishing Co., 7 N.Y.2d 435, 199 N.Y.S.2d 33, 166 N.E.2d 319, 1960 N.Y. LEXIS 1398 (N.Y. 1960).

Pleading as evidence of admission by plaintiff when verified by attorney for corporation plaintiff. Standard Oil Co. v Siraco, 226 A.D. 266, 235 N.Y.S. 1, 1929 N.Y. App. Div. LEXIS 8700 (N.Y. App. Div. 1929).

Lack of precision and certainty does not render a pleading insufficient. Dwyer v Corrugated Paper Products Co., 141 N.Y.S. 240, 80 Misc. 412, 1913 N.Y. Misc. LEXIS 1051 (N.Y. App. Term 1913).

Pleading when challenged for legal insufficiency must be construed broadly and liberally. December v Victory Carriers, Inc., 6 Misc. 2d 167, 159 N.Y.S.2d 1006, 1957 N.Y. Misc. LEXIS 3640 (N.Y. Sup. Ct. 1957).

Under CPA § 275, a complaint had to be liberally construed and where a course of action inartistically drawn alleged sufficient facts constituting a prima facie tort, such complaint could not be dismissed. Kaplan v K. Ginsburg, Inc., 8 Misc. 2d 724, 168 N.Y.S.2d 192, 1957 N.Y. Misc. LEXIS 2381 (N.Y. Sup. Ct. 1957).

A complaint and bill of particulars taken together are sufficient where in an action to recover an excess of duties paid a collector of customs, the complaint alleged that the payment was made under protest and the bill of particulars showed that such protest had been made as required by U. S. Rev. St., § 3011. Muser v Robertson, 17 F. 500, 1883 U.S. App. LEXIS 2284 (C.C.D.N.Y. 1883).

Averments which sufficiently point out the nature of the pleader's claim are sufficient if under them, upon a trial of the issues, he would be entitled to give all the necessary evidence to establish the claim. Berney v Drexel, 33 Hun 34 (N.Y.), reh'g denied, 33 Hun 419 (N.Y.).

16. Implication and intendment

Where complaint is challenged as to sufficiency on its face relevant allegations of fact must be accepted as true and reasonable inferences drawn therefrom. St. Regis Tribe of Mohawk Indians v State, 5 N.Y.2d 24, 177 N.Y.S.2d 289, 152 N.E.2d 411, 1958 N.Y. LEXIS 843 (N.Y. 1958), reh'g denied, 5 N.Y.2d 793, 1958 N.Y. LEXIS 1688 (N.Y. 1958), cert. denied, 359 U.S. 910, 79 S. Ct. 586, 3 L. Ed. 2d 573, 1959 U.S. LEXIS 1538 (U.S. 1959).

A pleading will be deemed to allege what can be implied by fair and reasonable intendment. Acker, Merrall & Condit v Richards, 63 A.D. 305, 71 N.Y.S. 929, 1901 N.Y. App. Div. LEXIS 1602 (N.Y. App. Div. 1901).

Upon objection to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action, the question is not whether it contains redundant or irrelevant matter but whether it contains averments which go to make up a complete cause of action; every intendment and inference which can be derived from the complaint must be used to sustain it.

Budd v Howard Thomas Co., 81 N.Y.S. 152, 40 Misc. 52, 1903 N.Y. Misc. LEXIS 90 (N.Y. Sup. Ct. 1903).

On motion to dismiss complaint, all its allegations are deemed to be true, and every intendment and fair inference must be accorded to pleading. Peters v Baron, 120 N.Y.S.2d 281, 204 Misc. 422, 1953 N.Y. Misc. LEXIS 1615 (N.Y. Sup. Ct. 1953).

A complaint attacked for insufficiency must be liberally construed, and every fair inference resolved in its favor however imperfectly, informally or illogically the facts may be stated. Katz v Grand Union Co., 4 Misc. 2d 288, 155 N.Y.S.2d 811, 1956 N.Y. Misc. LEXIS 1602 (N.Y. Sup. Ct. 1956).

A motion to dismiss a complaint tests only the sufficiency of the complaint for the purpose of the motion, and the facts alleged in the complaint are deemed admitted by the defendant and the complaint must be given the benefit of the most favorable inferences which may be drawn from the facts pleaded. Pilinko v Merlau, 10 Misc. 2d 63, 171 N.Y.S.2d 718, 1958 N.Y. Misc. LEXIS 3681 (N.Y. Sup. Ct.), rev'd, 7 A.D.2d 617, 179 N.Y.S.2d 136, 1958 N.Y. App. Div. LEXIS 4588 (N.Y. App. Div. 4th Dep't 1958).

Every intendment and fair inference is in favor of pleading. In re Schmidt's Estate, 33 N.Y.S.2d 341, 1942 N.Y. Misc. LEXIS 1361 (N.Y. Sup. Ct. 1942).

Where counterclaim for use and occupation, when liberally construed was susceptible of interpretation that it requested judgment for “fair rental value of $600”, rent reserved in lease, should have been accepted as reasonable value of use and occupation in absence of other proof. Agnelly v Wakes, 140 N.Y.S.2d 381, 1955 N.Y. Misc. LEXIS 3136 (N.Y. App. Term 1955).

17. Construction in aid of jurisdiction

Complaint should be given such construction as will bring its demands within scope of state court’s jurisdiction, especially actions in supreme court. Condon v Associated Hospital Service, 287 N.Y. 411, 40 N.E.2d 230, 287 N.Y. (N.Y.S.) 411, 1942 N.Y. LEXIS 1074 (N.Y. 1942).

18. Construction during trial or new trial

The rule that a complaint is to be liberally construed in favor of the pleader is especially applicable where its insufficiency is attacked for the first time upon a new trial had after a former trial upon the merits when the objection was not taken. Wright v United Traction Co., 131 A.D. 356, 115 N.Y.S. 630, 1909 N.Y. App. Div. LEXIS 816 (N.Y. App. Div. 1909).

Where defendant is sufficiently apprised of the issue tendered and has made answer thereto and delayed until case is called for trial and then challenged the sufficiency of the complaint by motion, court will give full force and effect to the rule that allegations must be liberally construed with view to substantial justice. Queen v Benesch, 191 A.D. 83, 180 N.Y.S. 856, 1920 N.Y. App. Div. LEXIS 4662 (N.Y. App. Div. 1920).

After verdict, and on new trial, pleadings should be upheld unless defendants were surprised or misled by them, to which attention was called on the trial by a suitable objection. Foster v De Paolo, 188 N.Y.S. 746, 1921 N.Y. Misc. LEXIS 1414 (N.Y. Sup. Ct. 1921), aff'd, 202 A.D. 826, 194 N.Y.S. 934, 1922 N.Y. App. Div. LEXIS 5996 (N.Y. App. Div. 1922).

Where a complaint so far stated a cause of action that there was sufficient to show for what the action was brought, and the defendants answered and came to trial and there for the first time raised the objection of its insufficiency, the error being one which in no way misled or prejudiced the defendants upon the trial, the allowance of an amendment of the complaint so as to make it sufficient is not only within the power of the court but its imperative duty. Buck v Barker, 5 N.Y. St. 826.

19. Construction on appeal

On appeal from judgment dismissing complaint for insufficiency, inquiry of Court of Appeals is whether pleading, liberally construed, states, in some recognizable form, cause of action known to law; if in any aspect upon facts stated plaintiff is entitled to recovery pleading is good. Howard

Stores Corp. v Pope, 1 N.Y.2d 110, 150 N.Y.S.2d 792, 134 N.E.2d 63, 1956 N.Y. LEXIS 950 (N.Y. 1956).

On appeal the plaintiff will have the benefit of every fair inference drawn from the language of the complaint. Crosby v Fowler, 222 A.D. 619, 226 N.Y.S. 557, 1928 N.Y. App. Div. LEXIS 8124 (N.Y. App. Div. 1928).

20. Limits generally to rule of liberal construction

Notwithstanding the liberal rule of construction applied to pleadings under the Code, the principle still remains that the judgment to be rendered by any court must be according to the pleading and the proof. Where a complaint states a cause of action ex delicto it is not competent at the trial to convert it into one ex contractu. Neudecker v Kohlberg, 81 N.Y. 296, 81 N.Y. (N.Y.S.) 296, 1880 N.Y. LEXIS 240 (N.Y. 1880).

While pleadings must be liberally construed with a view to substantial justice between the parties, ultimate facts and not legal conclusions must be pleaded. Swacker v Moody, 5 A.D.2d 836, 170 N.Y.S.2d 576, 1958 N.Y. App. Div. LEXIS 7071 (N.Y. App. Div. 2d Dep't 1958).

A plaintiff is not required to prove his cause of action in his complaint but he must allege sufficient facts rather than conclusions and the court may not supply missing elements in order to hold the complaint good even though the courts endeavor to give liberal construction to pleadings. Williams & Co. v Collins, Tuttle & Co., 6 A.D.2d 302, 176 N.Y.S.2d 99, 1958 N.Y. App. Div. LEXIS 5297 (N.Y. App. Div. 1st Dep't 1958), app. denied, 6 A.D.2d 1006, 178 N.Y.S.2d 212, 1958 N.Y. App. Div. LEXIS 4824 (N.Y. App. Div. 1st Dep't 1958), app. denied, 5 N.Y.2d 710, 1959 N.Y. LEXIS 1979 (N.Y. 1959).

Where a complaint is insufficient upon the theory explicitly pleaded, the court should not attempt to sustain it upon a theory expressly disclaimed and where cause of action alleged is a derivative one in the right of the corporation and where the action is brought in a representative capacity in the right of individual stockholders, it must be dismissed. Gilbert v Burnside, 6 A.D.2d

834, 175 N.Y.S.2d 989, 1958 N.Y. App. Div. LEXIS 5352 (N.Y. App. Div. 2d Dep't 1958), dismissed in part, 197 N.Y.S.2d 623, 1959 N.Y. Misc. LEXIS 4599 (N.Y. Sup. Ct. 1959).

Complaint cannot be aided by photostatic copy of paper attached. Bernofsky v Rabinowitz, 77 N.Y.S.2d 608, 191 Misc. 382, 1947 N.Y. Misc. LEXIS 3717 (N.Y. Sup. Ct. 1947).

A plaintiff may not defeat the defendant’s motion for summary judgment by showing a good cause of action on a differently stated complaint. Kleet v James, 4 Misc. 2d 645, 147 N.Y.S.2d 216, 1955 N.Y. Misc. LEXIS 2255 (N.Y. Sup. Ct. 1955).

Where contract sued upon is executory in part, before plaintiff may sue for its breach, he must show absolute repudiation by language or act making it futile for him to proceed, and allegations to such effect are matters of substance which cannot be overlooked under guise of liberal construction. Spice v Ruby Brokerage Service, Inc., 153 N.Y.S.2d 807, 1956 N.Y. Misc. LEXIS 2533 (N.Y. Sup. Ct. 1956).

21. —Application to matters of form not substance

CPA § 275 applied only to matters of form. Clark v Dillon, 97 N.Y. 370, 97 N.Y. (N.Y.S.) 370, 1884 N.Y. LEXIS 183 (N.Y. 1884).

The former settled rule to construe pleadings most strongly against the pleader is still the rule except as to matters of form, in which case the law now requires them to be construed with a view to substantial justice. Clark v Dillon, 97 N.Y. 370, 97 N.Y. (N.Y.S.) 370, 1884 N.Y. LEXIS 183 (N.Y. 1884).

Although an answer is frivolous, yet if it contain a general denial an issue is raised and the defendant is entitled to trial of such issues. Maccarone v Hayes, 85 A.D. 41, 82 N.Y.S. 1005, 1903 N.Y. App. Div. LEXIS 2047 (N.Y. App. Div. 1903).

Material allegations of a complaint are not put in issue by inconsistent allegations in the answer, even though the intention to deny them is plainly inferable or to be implied from the inconsistent

allegations, as denials are not liberally construed. Pullen v Seaboard Trading Co., 165 A.D. 117, 150 N.Y.S. 719, 1914 N.Y. App. Div. LEXIS 9353 (N.Y. App. Div. 1914).

Where a material statement in the pleading is susceptible of two or more different meanings that which is most unfavorable to the pleader must be accepted as the one intended. Farrell v Amberg, 28 N.Y.S. 564, 8 Misc. 220, 1894 N.Y. Misc. LEXIS 425 (N.Y.C.P. 1894), aff'd, 151 N.Y. 670, 46 N.E. 1146, 151 N.Y. (N.Y.S.) 670, 1897 N.Y. LEXIS 917 (N.Y. 1897).

The rule of liberal construction applies only to matters of form and has no application to the fundamental requisites of a cause of action, and was not intended to change the rule that a complaint must contain a plain and concise statement of facts constituting the cause of action without unnecessary repetition. Maylender v Fulton County Gas & Electric Co., 227 N.Y.S. 209, 131 Misc. 514, 1928 N.Y. Misc. LEXIS 719 (N.Y. Sup. Ct. 1928).

The doctrine of liberal construction cannot be used as substitute for matters of substance. Schreck v Schreck, 128 N.Y.S.2d 840, 205 Misc. 703, 1954 N.Y. Misc. LEXIS 2335 (N.Y. Sup. Ct. 1954).

22. Ambiguity

When a matter is capable of different meanings that shall be taken, if reasonable, which will support the pleading. 7 N.Y. 476.

An ambiguous expression will be construed against the party using it. Bunge v Koop, 48 N.Y. 225, 48 N.Y. (N.Y.S.) 225, 1872 N.Y. LEXIS 280 (N.Y. 1872).

23. Conclusions

Conclusions of law averred without facts to warrant them are disregarded. See Garr v Selden, 4 N.Y. 91, 4 N.Y. (N.Y.S.) 91, 1850 N.Y. LEXIS 66 (N.Y. 1850).

Facts admitted at variance with a legal conclusion alleged will cause the latter to be disregarded. 8 N.Y. 228.

Complaint, lacking factual allegations, was insufficient. Spitzer v Spitzer, 77 N.Y.S.2d 279, 191 Misc. 343, 1947 N.Y. Misc. LEXIS 3688 (N.Y. Sup. Ct. 1947), aff'd, 274 A.D. 806, 81 N.Y.S.2d 155, 1948 N.Y. App. Div. LEXIS 3447 (N.Y. App. Div. 1948).

Conclusory statements cannot be utilized to supply material facts by inference. Reid v Long Island Bond & Mortg. Guarantee Co., 98 N.Y.S.2d 739, 198 Misc. 460, 1949 N.Y. Misc. LEXIS 3227 (N.Y. Sup. Ct. 1949), aff'd, 277 A.D. 888, 98 N.Y.S.2d 389 (N.Y. App. Div. 1950).

CPA § 275 did not serve as substitute for allegations of facts necessary to state cause of action. Berkowitz v Wilson, 118 N.Y.S.2d 291, 1952 N.Y. Misc. LEXIS 2147 (N.Y. Sup. Ct. 1952), aff'd, 282 A.D. 875, 124 N.Y.S.2d 718, 1953 N.Y. App. Div. LEXIS 5296 (N.Y. App. Div. 1953).

Doctrine of liberal construction does not authorize court to infer material and necessary facts from conclusory allegations of law. Prouty v Nichols, 123 N.Y.S.2d 789, 1953 N.Y. Misc. LEXIS 2040 (N.Y. Sup. Ct.), aff'd, 282 A.D. 962, 126 N.Y.S.2d 199, 1953 N.Y. App. Div. LEXIS 5576 (N.Y. App. Div. 1953).

24. Allegations of time

In general, allegations refer to the time when the pleading is verified or served and not to the time when the cause of action accrued or the action was commenced unless otherwise averred. Prindle v Caruthers, 15 N.Y. 425, 15 N.Y. (N.Y.S.) 425, 1857 N.Y. LEXIS 20 (N.Y. 1857).

25. Separately stating and numbering

Allegations allowed to stand as counterclaim though not separately stated. Loew v McInerney, 159 A.D. 513, 144 N.Y.S. 546, 1913 N.Y. App. Div. LEXIS 8174 (N.Y. App. Div.), reh'g denied, 160 A.D. 902, 144 N.Y.S. 1126, 1913 N.Y. App. Div. LEXIS 8558 (N.Y. App. Div. 1913).

If statement of facts in complaint is such that there might be two distinct causes of action stated, and such was the purpose of the complaint, defendant is entitled to have each cause of action separately stated and numbered. Stabilimento Metallurgico Ligure v Joseph, 189 A.D. 173, 178 N.Y.S. 241, 1919 N.Y. App. Div. LEXIS 4621 (N.Y. App. Div. 1919).

B. Particular Applications

26. Particular words and phrases

That one was appointed to collect money and that no personal demand was made by him does not imply that no personal demand was made by any other person authorized to collect. 8 N.Y. 120.

That a written instrument was made implies delivery. Prindle v Caruthers, 15 N.Y. 425, 15 N.Y. (N.Y.S.) 425, 1857 N.Y. LEXIS 20 (N.Y. 1857).

An answer denying that plaintiff without any fault or want of care fell into a ditch, as was alleged, put in issue the falling and the exercise of proper care. Wall v Buffalo Water Works Co., 18 N.Y. 119, 18 N.Y. (N.Y.S.) 119, 1858 N.Y. LEXIS 116 (N.Y. 1858).

“Executed” implies that the deed was signed, sealed and delivered. Thorp v Keokuk Coal Co., 48 N.Y. 253, 48 N.Y. (N.Y.S.) 253, 1872 N.Y. LEXIS 284 (N.Y. 1872).

Where a word used in a pleading has two different meanings, one the result of judicial or statutory definition, the other of inaccurate popular use, the latter can only be adopted in construing the pleading where it plainly appears from other averments or the whole tenor of the pleading that such was the sense in which it was employed. Cook v Warren, 88 N.Y. 37, 88 N.Y. (N.Y.S.) 37, 1882 N.Y. LEXIS 68 (N.Y. 1882).

Allegation that plaintiff produced one “able” to execute a lease was construed as sufficient allegation of financial ability. Harrity v Steers, 195 A.D. 11, 185 N.Y.S. 704, 1921 N.Y. App. Div.

LEXIS 4687 (N.Y. App. Div.), reh'g denied, 196 A.D. 898, 186 N.Y.S. 941, 1921 N.Y. App. Div. LEXIS 5804 (N.Y. App. Div. 1921).

Complaint alleging that defendant's action against plaintiff was dismissed on merits, with "consent of defendant," need not allege negatively that such consent had not been procured by compromise or inducement. Louvad Realty Corp. v Anfang, 267 A.D. 567, 47 N.Y.S.2d 420, 1944 N.Y. App. Div. LEXIS 4778 (N.Y. App. Div. 1944).

Complaint alleging that defendant asked plaintiff "to marry him within a reasonable time thereafter, and plaintiff then agreed to marry said defendant within a reasonable time thereafter," sufficiently stated mutuality of promises. Lainfiesta v Sturges, 176 N.Y.S. 577, 107 Misc. 458, 1919 N.Y. Misc. LEXIS 953 (N.Y. Sup. Ct. 1919).

Complaint alleging breach of executory accord that defendant's offer was "duly entered upon minutes of defendant association," was sufficient as pleading necessary writing. Harbater v Congregation Beth Israel, Inc., 119 N.Y.S.2d 700, 204 Misc. 83, 1953 N.Y. Misc. LEXIS 1570 (N.Y. Sup. Ct. 1953).

Bill of particulars, stating that train was partially stopped, was construed to mean "moving very slowly." Feil v Long Island R. Co., 81 N.Y.S.2d 803, 1948 N.Y. Misc. LEXIS 2959 (N.Y. Sup. Ct. 1948).

"Agreed" in a complaint implies a lawful agreement. Stearns v St. Louis & S. F. R. Co., 4 N.Y. St. 715.

The allegation that defendants subscribed to so much stock implies that they were the owners thereof. Oswego & Syracuse Plank Road Co. v Rust, 5 How. Pr. 390, 1850 N.Y. Misc. LEXIS 119 (N.Y. Sup. Ct. Nov. 1, 1850).

27. Agency or authority

Proof of ratification sustains an allegation of authority. Hoyt v Thompson's Ex'r, 19 N.Y. 207, 19 N.Y. (N.Y.S.) 207, 1859 N.Y. LEXIS 25 (N.Y. 1859).

Complaint held proper subject for liberal construction with respect to nature of agency assumed by trust company in receiving bills of exchange from owner. Columbia Overseas Corp. v Banco Nacional Ultramarino, 198 A.D. 699, 191 N.Y.S. 85, 1921 N.Y. App. Div. LEXIS 8165 (N.Y. App. Div. 1921).

28. Agreements, identification of

In action for alimony arrears, defendant's contention that complaint was defective as not alleging that separation agreement referred to by reference in divorce decree was same as that referred to in complaint, was without substance. Ohmeis v Schatzkin, 86 N.Y.S.2d 68, 1948 N.Y. Misc. LEXIS 3878 (N.Y. Sup. Ct. 1948).

29. Confidential relationship

In action on note, defense that it was obtained by false representations of plaintiff who was then defendant's partner, was liberally construed to show confidential relationship between partners, and was sufficient. Zacher v Bogie, 84 N.Y.S.2d 404, 1948 N.Y. Misc. LEXIS 3589 (N.Y. Sup. Ct. 1948).

30. Constitutionality

Rule of liberal construction was applied to complaint claimed to attack constitutionality of article 16-A of the Agricultural and Markets Law. Rueffer v Department of Agriculture & Markets, 299 N.Y.S. 606, 164 Misc. 803, 1937 N.Y. Misc. LEXIS 1860 (N.Y. Sup. Ct. 1937).

Complaint for judgment declaring zoning ordinance unconstitutional as to plaintiff's realty was sufficient, though plaintiff was not entitled to declaration of rights claimed in pleading. Idlehour

Artists Colony, Inc. v Duryea, 89 N.Y.S.2d 180, 1949 N.Y. Misc. LEXIS 2238 (N.Y. Sup. Ct. 1949).

31. Contempt petition

Petition to adjudge petitioner guilty of criminal contempt must be liberally construed. McDonald v Colden, 41 N.Y.S.2d 323, 181 Misc. 407, 1943 N.Y. Misc. LEXIS 1822 (N.Y. Sup. Ct. 1943), aff'd, 267 A.D. 881, 46 N.Y.S.2d 467, 1944 N.Y. App. Div. LEXIS 5291 (N.Y. App. Div. 1944).

32. Contracts generally

Answer pleading that plaintiff had failed to request or demand of engineers as to the value and amount of extra work in accordance with the terms of a contract. Held, to plead plaintiff's noncompliance with an essential condition precedent. National Contracting Co. v Hudson River Water Power Co., 170 N.Y. 439, 63 N.E. 450, 170 N.Y. (N.Y.S.) 439, 1902 N.Y. LEXIS 1077 (N.Y. 1902).

Answer in action on contract, considered. Plass v Weil, 81 N.Y.S. 299, 39 Misc. 777, 1902 N.Y. Misc. LEXIS 705 (N.Y. App. Term 1902).

Complaint in action for furnishing of light and power held sufficient. Kips Bay Brewing & Malting Co. v J. H. Tooker Printing Co., 176 N.Y.S. 65 (N.Y. App. Term 1919).

33. —Anticipatory breach

In action on contract executory in part, plaintiff, suing for breach, must allege absolute repudiation by language or act making it futile for him to proceed. Didier v MacFadden Publications, Inc., 299 N.Y. 49, 85 N.E.2d 612, 299 N.Y. (N.Y.S.) 49, 1949 N.Y. LEXIS 983 (N.Y. 1949).

34. —Money lent or due

Allegations that plaintiff lent a sum of money to defendant, and that defendant is justly indebted to plaintiff in such amount are sufficient to state cause of action against objection that there is no allegation as to when loan was made, or when it was to be repaid, since “lent” imports a promise and obligation to pay; “justly indebted” imports nonpayment; and in the absence of an agreed time for repayment, it is assumed that the debt is payable on demand, and the buying of the action may constitute such demand. Minevitch v Puleo, 9 A.D.2d 285, 193 N.Y.S.2d 833, 1959 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 1st Dep't 1959).

In action for money lent, defendant may counterclaim on joint agreement by plaintiff and another with defendant to pay for legal services, though cross-claim was mislabeled third-party complaint. Hirsch v Schiffman, 101 N.Y.S.2d 913, 199 Misc. 883, 1950 N.Y. Misc. LEXIS 2357 (N.Y. Sup. Ct. 1950).

New York City Court complaint, alleging receipt of approximately $2000 of nearly $5000 due and demanding judgment for $3000, was sufficient. Latimer v Barker Bros. Painting Corp., 68 N.Y.S.2d 726, 1947 N.Y. Misc. LEXIS 2135 (N.Y. City Ct. 1947).

35. —Services rendered

Complaint for services rendered to and accepted by defendant to his profit, was sufficient as quantum meruit. Bialostok v Wolfer, 77 N.Y.S.2d 222, 191 Misc. 385, 1947 N.Y. Misc. LEXIS 3681 (N.Y. Sup. Ct. 1947).

36. Declaratory judgment

Complaint in action for declaratory judgment dismissed for insufficiency. Union Trust Co. v Main & South Streets Holding Corp., 245 A.D. 369, 282 N.Y.S. 428, 1935 N.Y. App. Div. LEXIS 10306 (N.Y. App. Div. 1935).

Complaint in action for declaratory judgment liberally construed in view of facts showing an uncertain or undisputed jural relation as to the obligations of the parties. Union Trust Co. v Kaplan, 247 A.D. 588, 288 N.Y.S. 288, 1936 N.Y. App. Div. LEXIS 8327 (N.Y. App. Div. 1936).

Complaint in action for declaratory judgment liberally construed. Kelley v Prudence Co., 259 N.Y.S. 59, 144 Misc. 651, 1932 N.Y. Misc. LEXIS 1192 (N.Y. Sup. Ct. 1932).

37. Fraud

Facts admitted which show a transaction was fraudulent prevailed against a positive denial of fraud. 10 N.Y. 189.

Allegation that tenant surrendered rented premises in reliance on OPA certificate fraudulently obtained by landlord, sustained action for damages. Bernofsky v Rabinowitz, 77 N.Y.S.2d 608, 191 Misc. 382, 1947 N.Y. Misc. LEXIS 3717 (N.Y. Sup. Ct. 1947).

Complaint alleging that defendant induced plaintiff to agree to indemnify insurer for loss on forfeiture of bail bond to release accused already released, stated cause of action. D'Alessandra v Manufacturers Cas. Ins. Co., 106 N.Y.S.2d 564, 1951 N.Y. Misc. LEXIS 2121 (N.Y. Sup. Ct. 1951).

38. Injunction

Allegations as to promise of defendant to construct park on designated parcel of land and that park would be for exclusive use of residents of area, together with allegation of breach of contract and wrongful participation by codefendants, were sufficient to state cause of action for judgment restraining defendants from selling property in violation of such agreement. Lifshey v Homer Harman, Inc., 137 N.Y.S.2d 59, 1954 N.Y. Misc. LEXIS 3574 (N.Y. Sup. Ct. 1954).

39. Insurance

Proof that there was no force pump on insured premises is admissible under an allegation that there was a warranty in the application that the building contained one, and that it had been removed. McComber v Granite Ins. Co., 15 N.Y. 495, 15 N.Y. (N.Y.S.) 495, 1857 N.Y. LEXIS 30 (N.Y. 1857).

40. Landlord and tenant

Tenant’s complaint for damages, based on facts arising before effective date of § 1444-a, was insufficient. Vanderporten v Slutsky, 94 N.Y.S.2d 498, 196 Misc. 891, 1949 N.Y. Misc. LEXIS 3101 (N.Y. Sup. Ct. 1949).

Complaint by tenants to restrain landlord from recovering possession of leased premises, because tenant had permitted Negroes to use premises, was insufficient. Novick v Levitt & Sons, Inc., 108 N.Y.S.2d 615, 200 Misc. 694, 1951 N.Y. Misc. LEXIS 2562 (N.Y. Sup. Ct.), aff'd, 279 A.D. 617, 107 N.Y.S.2d 1016, 1951 N.Y. App. Div. LEXIS 3204 (N.Y. App. Div. 1951).

41. Libel and slander

Rule of liberal construction applied to answer in libel which pleaded separate partial defenses in mitigation of damages, and in which facts were set forth in separate numbered paragraphs, which were construed together. Goodrow v Press Co., 233 A.D. 41, 251 N.Y.S. 364, 1931 N.Y. App. Div. LEXIS 11194 (N.Y. App. Div. 1931).

Complaint in defamation action which failed to set forth exact defamatory language was insufficient and could not be saved from dismissal by invoking the rule of liberal construction of pleadings. Ginsberg v Farmers Nat'l Bank, 20 Misc. 2d 874, 195 N.Y.S.2d 481, 1959 N.Y. Misc. LEXIS 2643 (N.Y. Sup. Ct. 1959).

42. Malicious mischief

In action for malicious prosecution, allegation that plaintiff was arraigned and tried before city judge was not construed as meaning exclusively that plaintiff was held for trial after magistrate had examined into facts. Loftus v Columbia Ribbon & Carbon Mfg. Co., 275 A.D. 839, 88 N.Y.S.2d 289, 1949 N.Y. App. Div. LEXIS 4721 (N.Y. App. Div. 1949).

43. Partnership

That defendants traded under a certain partnership name and duly indorsed a note by their said name sufficiently avers the partnership. Anable v Conklin, 25 N.Y. 470, 25 N.Y. (N.Y.S.) 470, 1862 N.Y. LEXIS 155 (N.Y. 1862).

A complaint stating a promissory note, whereby the maker promised to pay the defendants named, “trading and doing business under the partnership name or firm of C. I. & Co.,” and that “said note was duly indorsed by said defendants by their said partnership name,” sufficiently avers the partnership; an answer, denying “The indorsement in the complaint alleged,” does not put the partnership in issue. Anable v Conklin, 25 N.Y. 470, 25 N.Y. (N.Y.S.) 470, 1862 N.Y. LEXIS 155 (N.Y. 1862).

Complaint in action by one partner against copartners based on fraudulent concealment of knowledge acquired in partnership business, inducing forfeiture by agreement of rights as a participant in certain copartnership business, held to state a cause of action. Guggenheim v Guggenheim, 159 N.Y.S. 333, 95 Misc. 332, 1916 N.Y. Misc. LEXIS 1080 (N.Y. Sup. Ct. 1916).

44. Penalties

A person seeking to maintain an action for a statutory penalty must state every fact required to enable the court to judge whether he has a cause of action under the statute; in such an action the pleadings are strictly construed. Ithaca Fire Dep't v Rice, 108 A.D. 100, 95 N.Y.S. 464, 1905 N.Y. App. Div. LEXIS 3122 (N.Y. App. Div. 1905).

Pleadings in an action for a statutory penalty are strictly construed. People v Clark, 140 A.D. 150, 124 N.Y.S. 1023, 1910 N.Y. App. Div. LEXIS 2884 (N.Y. App. Div. 1910).

45. Personal injuries, negligence

Courts are liberal as to sufficiency of complaints in negligence actions, particularly in absence of a request for a bill of particulars. Curren v O'Connor, 304 N.Y. 515, 109 N.E.2d 605, 304 N.Y. (N.Y.S.) 515, 1952 N.Y. LEXIS 721 (N.Y. 1952).

Complaint by social guest for personal injuries from slipping on polished floor of host's home was sufficient, where it was possible that guest might be able to submit evidence entitling him to recover. Curren v O'Connor, 304 N.Y. 515, 109 N.E.2d 605, 304 N.Y. (N.Y.S.) 515, 1952 N.Y. LEXIS 721 (N.Y. 1952).

An answer in action for negligence containing affirmative statement of facts showing contributory negligence, discussed. Donovan v Main, 74 A.D. 44, 77 N.Y.S. 229, 11 N.Y. Ann. Cas. 180, 1902 N.Y. App. Div. LEXIS 1782 (N.Y. App. Div. 1902).

An allegation that the defendant knew his horse to be nervous, highspirited and unaccustomed to cars may be treated, not as ground of recovery, but as stating a circumstance tending to show the negligence of the defendant. West v Woodruff, 112 A.D. 133, 97 N.Y.S. 1054, 1906 N.Y. App. Div. LEXIS 617 (N.Y. App. Div. 1906).

Where complaint alleged that plaintiff's ward was rendered permanently incompetent by injury, evidence of insanity was competent, and a hypothetical question could be asked an expert witness. Peck v Burdick & Son, 166 A.D. 362, 151 N.Y.S. 996, 1915 N.Y. App. Div. LEXIS 6619 (N.Y. App. Div. 1915), aff'd, 223 N.Y. 539, 119 N.E. 1064, 223 N.Y. (N.Y.S.) 539, 1918 N.Y. LEXIS 1231 (N.Y. 1918).

Rule applied to complaint, in action to recover for personal injuries, to admit evidence that plaintiff was engaged on maritime contract and therefore his employment was not under

Workmen's Compensation Act. Newman v Robins Dry Dock & Repair Co., 201 A.D. 861, 193 N.Y.S. 59, 1922 N.Y. App. Div. LEXIS 6722 (N.Y. App. Div. 1922).

In action for personal injuries from defective sidewalk, cross-complaint by defendant tenant that defendant abutting owner “may be liable for all or part” of plaintiff’s claim held to allege claim of liability over on part of active wrongdoer to one guilty, if at all, of passive negligence. Seltzer v Rosenberg, 101 N.Y.S.2d 738, 199 Misc. 4, 1950 N.Y. Misc. LEXIS 2326 (N.Y. Sup. Ct.), aff'd, 277 A.D. 1138, 101 N.Y.S.2d 940, 1950 N.Y. App. Div. LEXIS 4756 (N.Y. App. Div. 1950).

46. Unjust enrichment

Complaint for restitution for unjust enrichment of defendants during continuance of injunctions and stays issued by court, held sufficient. Ward v Feltman, 273 A.D. 1025, 79 N.Y.S.2d 375, 1948 N.Y. App. Div. LEXIS 5839 (N.Y. App. Div. 1948).

47. Usury

Construction of answer of usury is according to the rule of pleading setting up any other defenses. Lewis v Barton, 106 N.Y. 70, 12 N.E. 437, 106 N.Y. (N.Y.S.) 70, 8 N.Y. St. 546, 1887 N.Y. LEXIS 859 (N.Y. 1887).

48. Vendor and vendee

Rule of liberal construction applied in vendor’s action to compel specific performance by purchaser of covenant to pay note secured by mortgage on the real estate sold. Woodruff v Germansky, 233 N.Y. 365, 135 N.E. 601, 233 N.Y. (N.Y.S.) 365, 1922 N.Y. LEXIS 884 (N.Y. 1922).

49. Wrongful death

Applied to complaint in action to recover damages for death alleged to have been caused by malpractice of physician. Griffin v Bles, 202 A.D. 443, 195 N.Y.S. 654, 1922 N.Y. App. Div. LEXIS 4910 (N.Y. App. Div. 1922).

Research References & Practice Aids

Federal Aspects:

Construction of pleadings, USCS Court Rules, Federal Rules of Civil Procedure, Rule 8(f).

Jurisprudences:

84 NY Jur 2d Pleading §§ 32, 49, 60, 63, 106, 140, 258, 273, 284, 327, 332.

61A Am Jur 2d, Pleading §§ 80., 81., 87.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 3026, Construction.

2 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 19.06.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 33.01.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 19.06. Form and content of pleadings — in general.

CPLR Manual § 19.07. Rules governing drafting of pleadings.

Texts:

2 Bergman on New York Mortgage Foreclosures (Matthew Bender) § 16.04.

Gerrard, Ruzow, Weinberg, Environmental Impact Review in New York (Matthew Bender) § 7.10.

Hierarchy Notes:

NY CLS CPLR, Art. 30

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