NY CLS CPLR § 3002

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New York

Consolidated Laws Service **>**

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

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

§ 3002. Actions and relief not barred for inconsistency.

(a) Action against several persons. Where causes of action exist against several persons, the commencement or maintenance of an action against one, or the recovery against one of a judgment which is unsatisfied, shall not be deemed an election of remedies which bars an action against the others.

(b) Action against agent and undisclosed principal. Where causes of action exist against an agent and his undisclosed principal, the commencement or maintenance, after disclosure of the principal, of an action against either, or the recovery of a judgment against either which is unsatisfied, shall not be deemed an election of remedies which bars an action against the other.

(c) Action for conversion and on contract. Where causes of action exist against several persons for the conversion of property and upon express or implied contract, the commencement or maintenance of an action against one, or the recovery against one of a judgment which is unsatisfied, either for the conversion or upon the contract, shall not be deemed an election of remedies which bars an action against the others either for the conversion or upon the contract.

(d) Action on contract and to reform. A judgment denying recovery in an action upon an agreement in writing shall not be deemed to bar an action to reform such agreement and to enforce it as reformed.

(e) Claim for damages and rescission. A claim for damages sustained as a result of fraud or misrepresentation in the inducement of a contract or other transaction, shall not be deemed inconsistent with a claim for rescission or based upon rescission. In an action for rescission or based upon rescission the aggrieved party shall be allowed to obtain complete relief in one action, including rescission, restitution of the benefits, if any, conferred by him as a result of the transaction, and damages to which he is entitled because of such fraud or misrepresentation; but such complete relief shall not include duplication of items of recovery.

(f) Vendee's lien not to depend upon form of action. When relief is sought, in an action or by way of defense or counterclaim, by a vendee under an agreement for the sale or exchange of real property, because of the rescission, failure, invalidity or disaffirmance of such agreement, a vendee's lien upon the property shall not be denied merely because the claim is for rescission, or is based upon the rescission, failure, invalidity or disaffirmance of such agreement.

History

Add, L 1962, ch 308, § 1, eff Sept 1, 1963.

Annotations

Notes

Derivation Notes

Earlier statutes: CPA §§ 112-a to 112-e, 112-h.

Commentary

PRACTICE INSIGHTS:

ELECTION OF REMEDIES MAY NOT BAR PREVIOUSLY OMITTED CLAIM BUT *RES JUDICATA* WILL PRECLUDE ONE THAT MIGHT HAVE BEEN LITIGATED

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INSIGHT

CPLR 3002 purports to mitigate the harsh consequences of common law election of remedies. The statute's subdivisions articulate the most common examples of the kinds of actions in which claims are pleaded alternatively and the consequences of so doing. Because statutes of limitation for available remedies may vary (for example, fraud versus rescission), care should be taken to sue early and broadly enough to take advantage of all available remedies. The problems associated with the common law doctrine of election of remedies (unjust enrichment, double recovery and undue harassment) are now avoided not by preventing the assertion of alternative claims, but by enforcing the *res judicata* aspects of a judgment and satisfaction.

ANALYSIS

Avoid preclusion of claims by pleading alternatively and inconsistently.

In a First Department decision, plaintiffs' decedent had performed services for the defendant law firm, for which plaintiff had sued for an accounting of his interest under a putative partnership agreement. The trial court dismissed, upon a finding of no equity partnership and, on appeal of that decision, was affirmed. The plaintiff thereafter brought an action in contract, breach of good faith and *quantum meruit*.

The Appellate Division affirmed dismissal of the second action on res judicata grounds, holding: "Causes of action and grounds for relief may be pleaded in the alternative and are not barred from inconsistency (CPLR 3002). While a partner may not maintain an action at law against another partner in the absence of an accounting …, the law similarly bars recovery in *quantum meruit* unless the contract is found to be unenforceable …. The remedy, as demonstrated by the

complaint in the instant action, is to plead both breach of contract and *quantum meruit* as alternative theories of recovery. It is irrelevant that plaintiff did not raise the contract claim in the earlier action; what is material is that it could have been raised but was not." *Ellis v. Abbey & Ellis*, 294 A.D.2d 168, 170, 742 N.Y.S.2d 225 (1st Dep't), motion for leave to appeal denied, 98 N.Y.2d 612, 749 N.Y.S.2d 3, 778 N.E.2d 554 (2002). *See also BDO Seidman, LLP v. Strategic Resources Corp,* 70 A.D.3d 556, 896 N.Y.S.2d 15 (1st Dep't 2010); *Loheac v. Children's Corner Learning Ctr.,* 51 A.D.3d 476, 857 N.Y.S.2d 143 (1st Dep't 2008); *Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 13 A.D.3d 278, 788 N.Y.S.2d 44 (1st Dep't 2004); *Spasiano v. Provident Mut. Life Ins. Co.*, 2 A.D.3d 1466, 770 N.Y.S.2d 534 (4th Dep't 2003); Loheac v. Children's Corner Learning Ctr., 51 A.D.3d 476, 857 N.Y.S.2d 143 (1st Dep't 2008).

Advisory Committee Notes

Subd (a) through (e) of this section correspond to CPA §§ 112-a through 112-e, respectively; **subd (f)** corresponds to former § 112-h. Those provisions have been placed in the same section because they all deal with the problem of inconsistency. They were all added to the CPA upon recommendation of the Law Revision Commission—§§ 112-a through 112-d in 1939 (see NY Law Rev Comm'n Rep 205-99 (1939), § 112-e in 1941 (see id. at 283–344 (1941) and § 112-h in 1947. See id. at 249-70 (1947).

Notes to Decisions

I.Under CPLR

1.Generally

II.Under Former Civil Practice Laws

2.Generally

3.Application

4.Purpose

5.Pleadings

I. Under CPLR

1. Generally

An action for reformation of shareholder's certificates, certificates of incorporation, and by-laws on grounds of mutual mistake, mistake of the scrivener, and fraud is not barred by res judicata, notwithstanding that in a previous action respondent sought to assert rights pursuant to the documents. Weissman v Friend, 29 A.D.2d 599, 285 N.Y.S.2d 906, 1967 N.Y. App. Div. LEXIS 2736 (N.Y. App. Div. 3d Dep't 1967).

The statute does not apply where the evidence clearly established that the principal was disclosed. Lane v Lawlet Corp., 33 A.D.2d 924, 307 N.Y.S.2d 494, 1970 N.Y. App. Div. LEXIS 5661 (N.Y. App. Div. 2d Dep't 1970), rev'd, 28 N.Y.2d 36, 319 N.Y.S.2d 836, 268 N.E.2d 635, 1971 N.Y. LEXIS 1506 (N.Y. 1971).

Claim for fraudulent inducement of contract which plaintiffs sought to rescind and for money damages was an equitable claim notwithstanding demand for money damages so that, plaintiffs having joined legal and equitable claims, they had waived their right to a jury trial. Montalvo v Netta Realty Corp., 51 A.D.2d 1005, 381 N.Y.S.2d 111, 1976 N.Y. App. Div. LEXIS 11767 (N.Y. App. Div. 2d Dep't 1976).

The merits of plaintiffs' action for rescission of a contract of sale involving an automobile on the ground of fraud were not governed by UCC § 2-608; moreover, in order to recover damages, it was not incumbent upon plaintiffs to establish actual pecuniary loss. Russo v Guardsman Lease Plan, Inc., 82 A.D.2d 801, 439 N.Y.S.2d 214, 1981 N.Y. App. Div. LEXIS 14457 (N.Y. App. Div. 2d Dep't 1981).

In action for damages resulting from alleged misrepresentations by defendants under lease of computer equipment and programming services to plaintiff, summary judgment for defendants

should have been granted where an exchange of correspondence between the parties had mutually rescinded the existing contract and where the plaintiff, at the time of entering into the agreement of rescission, did not reserve the right to assert a claim on the rescinded contract for a previous breach thereof. Can-Am Organic Foods, Ltd. v Philips Business Systems, Inc., 83 A.D.2d 528, 441 N.Y.S.2d 452, 1981 N.Y. App. Div. LEXIS 14817 (N.Y. App. Div. 1st Dep't 1981).

In a personal injury action against an ice cream store to recover for injuries sustained when plaintiff tripped on a coaming between the sidewalk and the entrance to the store, the trial court erred in directing a verdict for defendant, where the fact that plaintiff had commenced a separate suit against the city did not justify the court's conclusion that as a matter of law plaintiff had fallen on the sidewalk, which was not under defendant's control, where plaintiff was entitled to every favorable inference that could reasonably be drawn from the evidence and was entitled to assert inconsistent causes of action in separate lawsuits, where it would not have been utterly irrational for the jury to have found that the dangerous condition existed on defendant's property, and where plaintiff adequately raised the issue of whether defendant met the reasonable person standard of care for property owners. Pontiatowski v Baskin-Robbins, 91 A.D.2d 1035, 458 N.Y.S.2d 629, 1983 N.Y. App. Div. LEXIS 16360 (N.Y. App. Div. 2d Dep't 1983).

In an action for reformation of an employment contract based on mutual mistake in failing to include in the written contract a clause limiting employment to the New York area, the trial court erred in dismissing the complaint on the basis of the Statute of Frauds, since the Statute of Frauds would not bar reformation of the written contract. Katz v American Technical Industries, Inc., 96 A.D.2d 932, 466 N.Y.S.2d 378, 1983 N.Y. App. Div. LEXIS 19568 (N.Y. App. Div. 2d Dep't 1983).

Maker of promissory note as accommodation to business associate (principal debtor) was not entitled to tolling of interest while creditors, in their suit on note, pursued out-of-state action against principal debtor, where insufficient evidence existed to support maker's contention that creditors repudiated note by electing to proceed in out-of-state action; doctrine of election of

remedies was inapplicable since suit against either one or both maker and principal debtor was clearly permissible. Beswick v Weiss, 126 A.D.2d 854, 510 N.Y.S.2d 777, 1987 N.Y. App. Div. LEXIS 41982 (N.Y. App. Div. 3d Dep't 1987).

It is appropriate for plaintiff to advance different theories of recovery, regardless of their incompatibility, and such inconsistent pleadings are not deemed to be admissions. Perkins v Volpe, 146 A.D.2d 617, 536 N.Y.S.2d 845, 1989 N.Y. App. Div. LEXIS 421 (N.Y. App. Div. 2d Dep't), app. dismissed, 74 N.Y.2d 791, 545 N.Y.S.2d 106, 543 N.E.2d 749, 1989 N.Y. LEXIS 937 (N.Y. 1989).

Wife’s action for breach of employment contract and quantum meruit was not barred by doctrine of election of remedies, even though she had also commenced action for divorce and equitable distribution against husband, who was sole shareholder of corporate defendant in contract action and also named defendant therein, since 2 actions did not involve exactly same parties, were based on different causes of action, and sought different relief. Kelley v Galina-Bouquet, Inc., 155 A.D.2d 96, 552 N.Y.S.2d 305, 1990 N.Y. App. Div. LEXIS 2883 (N.Y. App. Div. 1st Dep't 1990).

In severed actions to recover cost of building materials from corporate and individual defendants, unsatisfied default judgment against corporate party did not bar claim against individual defendant, nor did collateral estoppel apply in bar of that claim, where there had been no adjudication that materials were purchased by corporate defendant only; judgment on allegation that corporate defendant purchased materials was not necessarily inconsistent with claim that individual defendant also purchased materials. Collins Lumber Corp. v Ethier, 157 A.D.2d 1022, 550 N.Y.S.2d 509, 1990 N.Y. App. Div. LEXIS 586 (N.Y. App. Div. 3d Dep't 1990).

Defendant cemetery owner was not entitled to dismissal of breach of contract claim based on lack of privity, on ground that plaintiff’s contract was with Roman Catholic Diocese (which operated defendant and other cemeteries), where defendant was estopped as matter of law from denying that Diocese was its agent for purpose of contracting for work performed by plaintiff and, as undisclosed principal, it could be sued directly without joining Diocese. Durante

Bros. Constr. Corp. v St. John's Cemetery, 285 A.D.2d 578, 729 N.Y.S.2d 40, 2001 N.Y. App. Div. LEXIS 7589 (N.Y. App. Div. 2d Dep't 2001), app. denied, 97 N.Y.2d 611, 742 N.Y.S.2d 604, 769 N.E.2d 351, 2002 N.Y. LEXIS 627 (N.Y. 2002).

Decedent's representative was barred from suing a law firm on claims for breach of contract, breach of the covenant of good faith and fair dealing, and quantum meruit because those claims could have been raised in an earlier lawsuit the representative filed against the law firm which claimed recovery on the theory that the decedent was a partner in the law firm, but they were not asserted in that suit. Ellis v Abbey & Ellis, 294 A.D.2d 168, 742 N.Y.S.2d 225, 2002 N.Y. App. Div. LEXIS 4956 (N.Y. App. Div. 1st Dep't), app. denied, 98 N.Y.2d 612, 749 N.Y.S.2d 3, 778 N.E.2d 554, 2002 N.Y. LEXIS 2303 (N.Y. 2002).

Application of res judicata did not depend upon whether a judgment against a joint tortfeasor had been satisfied because it was only under the doctrine of election of remedies, which had not been invoked, that the satisfaction of a judgment against one tortfeasor discharged all joint tortfeasors from liability to a plaintiff. Spasiano v Provident Mut. Life Ins. Co., 2 A.D.3d 1466, 770 N.Y.S.2d 534, 2003 N.Y. App. Div. LEXIS 14293 (N.Y. App. Div. 4th Dep't 2003).

President of a restaurant corporation who signed a brokerage agreement acted as an agent for the corporation, which was an undisclosed principal, and both the president and the corporation were liable for a commission which the broker was owed under the agreement. J.P. Endeavors v Dushaj, 8 A.D.3d 440, 778 N.Y.S.2d 531, 2004 N.Y. App. Div. LEXIS 8449 (N.Y. App. Div. 2d Dep't 2004).

Where defendant, in suit for balance due on sale of boat, sought equitable as well as legal relief in his counterclaim and in his ad damnum clause by setting out a cause of action for rescission based on false and fraudulent representations by the plaintiff, defendant by joining an equitable counterclaim based on the same transaction with other counterclaims may, even unwillingly, waive his right to a jury trial. Clark v Garth, 67 Misc. 2d 473, 323 N.Y.S.2d 890, 1971 N.Y. Misc. LEXIS 1365 (N.Y. County Ct. 1971).

Since the decision in Dole v Dow Chemical Co., 30 NY2d 143, 331 NYS2d 382, 282 NE2d 288, a release of one-third-party defendant by a plaintiff does not operate as a complete and full defense to third-party actions to establish the percentage of fault, if any, between alleged tortfeasors and does not bar or limit the adjudication of the respective liabilities of joint tortfeasors. Michelucci v Bennett, 73 Misc. 2d 621, 341 N.Y.S.2d 837, 1973 N.Y. Misc. LEXIS 2106 (N.Y. Sup. Ct. 1973).

Although a conversion action (Uniform Commercial Code, § 3-419, subd [1], par [c]) based on defendant bank's cashing of forged checks drawn on plaintiff's account is time-barred under the three-year time limitation (CPLR 214), a breach of contract action based upon defendant's withdrawal of plaintiff's funds without permission or consent of plaintiff is timely within the applicable six-year Statute of Limitations (CPLR 213, subd 2) since plaintiff need not be put to the task of electing the conversion action (CPLR 3002, subd [c]) to the preclusion of the contract action. American Home Assurance Co. v Scarsdale Nat'l Bank & Trust Co., 96 Misc. 2d 715, 409 N.Y.S.2d 608, 1978 N.Y. Misc. LEXIS 2669 (N.Y. County Ct. 1978).

Where a mother commenced a personal injury action on behalf of her infant son arising from an automobile accident in which infant was a passenger in the vehicle driven by his mother and in which judgment was rendered in the liability phase of the action finding the mother partially liable, it was permissible for the infant to wait until after the liability verdict was returned before commencing an action against his mother; the commencement or maintenance of an action by one possessed of causes of action against several persons, against one of those persons, does not bar an action against the others under CPLR § 3002(a). Fugnitto v Fugnitto, 113 Misc. 2d 666, 452 N.Y.S.2d 976, 1982 N.Y. Misc. LEXIS 3359 (N.Y. App. Term 1982).

Under CPLR § 3002, subd c, decision to file claim against bankrupt's estate does not preclude effort to hold co-debtor responsible. Fuller v Fasig-Tipton Co., 587 F.2d 103, 1978 U.S. App. LEXIS 7838 (2d Cir. N.Y. 1978).

Principals' filing of claim in bankruptcy against agent did not amount to election of remedies or estoppel precluding principals from pursuing action against corporate auctioneer which set off

personal debt of agent to it before turning over proceeds from sale of horses to agent. Fuller v Fasig-Tipton Co., 587 F.2d 103, 1978 U.S. App. LEXIS 7838 (2d Cir. N.Y. 1978).

Lessor was entitled to elect contractual remedy to recover damages for loss of furnishings which were found missing from leased residence, and to be governed by 6-year contractual statute of limitations rather than 3-year limitation period for conversion action, since lessee's liability "had its genesis" in contractual relationship in form of lease. Walling v Holman, 858 F.2d 79, 1988 U.S. App. LEXIS 12782 (2d Cir. N.Y. 1988), cert. denied, 489 U.S. 1082, 109 S. Ct. 1538, 103 L. Ed. 2d 842, 1989 U.S. LEXIS 1473 (U.S. 1989).

Endeavoring to enforce one's right to damages under valid contract that expressly governs subject at issue is simply irreconcilable with rescinding or "unmaking" it from beginning and suing in quantum meruit; because plaintiff "chose not to rescind the agreement," his recovery was limited by terms of his express contract. Reilly v NatWest Mkts. Group Inc., 181 F.3d 253, 1999 U.S. App. LEXIS 13409 (2d Cir. N.Y. 1999), cert. denied, 528 U.S. 1119, 120 S. Ct. 940, 145 L. Ed. 2d 818, 2000 U.S. LEXIS 620 (U.S. 2000).

Unpublished decision: Under N.Y. C.P.L.R. § 3002(c), New York's "election of remedies" statute, plaintiff company was not prohibited from asserting both a breach of contract claim as to defendant contractor and conversion and unjust enrichment claims against the defendants other than defendant contractor, and a jury's findings on the special verdict form expressly stated that there was no overlap of damages. Since a consistent view of the verdicts was available, as plaintiff alleged sufficient damages in both categories—conversion and breach of contract—to allow the jury's award not to overlap, the jury's verdict as to the conversion and unjust enrichment claims was affirmed. Air China, Ltd. v Kopf, 473 Fed. Appx. 45, 2012 U.S. App. LEXIS 6901 (2d Cir. N.Y. 2012).

Unpublished decision: Because N.Y. C.P.L.R. § 3002 allowed the district court discretion as to the precise moment when a litigant was required to elect among inconsistent remedies, no legal error undermined the district court's exercise of its discretion during the second day of trial in a

contract dispute in requiring plaintiff to elect its theory of damages. Am. Underground Eng'g, Inc. v City of Syracuse, 526 Fed. Appx. 37, 2013 U.S. App. LEXIS 11134 (2d Cir. N.Y. 2013).

CPLR 3002 allows inconsistent claims to be asserted under New York law. Twentieth Century-Fox Film Corp. v National Publishers, Inc., 294 F. Supp. 10, 1968 U.S. Dist. LEXIS 12372 (S.D.N.Y. 1968).

Ordinarily the mere institution of a law suit asserting a claim based on one theory, or seeking one type of relief, does not constitute a binding election prohibiting assertion of alternative or inconsistent claims or remedies in the same or another action. Twentieth Century-Fox Film Corp. v National Publishers, Inc., 294 F. Supp. 10, 1968 U.S. Dist. LEXIS 12372 (S.D.N.Y. 1968).

II. Under Former Civil Practice Laws

2. Generally

In action for money received based upon executed rescission involving sale of mortgage certificates by defendant to plaintiff's intestate, where complaint showed that intestate had been wronged by defendant's fraud and that some remedy therefor was open to plaintiff, though present action was barred by limitations and defendant was entitled to dismissal of complaint as pleaded, court should grant plaintiff leave to amend complaint on proper terms. Fitzgerald v Title Guarantee & Trust Co., 290 N.Y. 376, 49 N.E.2d 489, 290 N.Y. (N.Y.S.) 376, 1943 N.Y. LEXIS 1091 (N.Y. 1943).

Action by drawer of check against corporate payee after it became organized was not inconsistent with later action against drawer's bank for paying check to nonexistent payee. International Aircraft Trading Co. v Manufacturers Trust Co., 297 N.Y. 285, 79 N.E.2d 249, 297 N.Y. (N.Y.S.) 285, 1948 N.Y. LEXIS 836 (N.Y. 1948).

Satisfaction of a judgment recovered against one joint tortfeasor operates as a discharge for all. McTigue v Levy, 260 A.D. 928, 23 N.Y.S.2d 114, 1940 N.Y. App. Div. LEXIS 5494 (N.Y. App. Div. 1940).

Doctrine of election represents harsh and arbitrary principle, designed only to prevent vexatious delay, and applies only where there has been irrevocable election. Strong v Reeves, 280 A.D. 301, 114 N.Y.S.2d 97, 1952 N.Y. App. Div. LEXIS 3460 (N.Y. App. Div. 1952), aff'd, 306 N.Y. 666, 116 N.E.2d 497, 306 N.Y. (N.Y.S.) 666, 1953 N.Y. LEXIS 941 (N.Y. 1953).

Where bankruptcy court disclaimed jurisdiction to reform release and two satisfactions of judgments, action in state court to reform such release and satisfactions was not barred thereby. Scheer v Nething, 282 A.D. 737, 122 N.Y.S.2d 270, 1953 N.Y. App. Div. LEXIS 4834 (N.Y. App. Div. 1953).

Where both husband and wife took part in negotiations to sell realty owned by her, but brokers did not know that she was sole owner prior to commencement of their action for commissions, trial judge was not required to hold that husband, during negotiations, acted as agent for disclosed principal, and doctrine of election of remedies did not require plaintiffs to proceed to judgment against husband or wife. Cook v Weir, 2 A.D.2d 680, 152 N.Y.S.2d 590, 1956 N.Y. App. Div. LEXIS 5128 (N.Y. App. Div. 2d Dep't 1956).

Where both husband and wife took part in negotiations to sell realty owned by her, but brokers did not know that she was sole owner prior to commencement of their action for commissions, trial judge was not required to hold that husband, during negotiations, acted as agent for disclosed principal, and doctrine of election of remedies did not require plaintiff to proceed to judgment against husband or wife. Cook v Weir, 2 A.D.2d 680, 152 N.Y.S.2d 590, 1956 N.Y. App. Div. LEXIS 5128 (N.Y. App. Div. 2d Dep't 1956).

The Legislature, by the enactment of CPA § 112-d did not intend to abolish the doctrine of res judicata. Falkowski v Metropolitan Life Ins. Co., 25 N.Y.S.2d 474, 175 Misc. 878, 1941 N.Y. Misc. LEXIS 1462 (N.Y. Sup. Ct. 1941).

Action by insurer for damages for fraudulent representations as to amount of premiums by concealing number of employees was not to bar action for conspiracy to defraud plaintiff of earned insurance premiums against original defendant and transferee of its assets. Lumber Mut. Casualty Ins. Co. v Friedman, 28 N.Y.S.2d 506, 176 Misc. 703, 1941 N.Y. Misc. LEXIS 1914 (N.Y. Sup. Ct. 1941).

Actions for annulment of marriage and for damages for fraud may be joined. Lee v Lee, 57 N.Y.S.2d 97, 184 Misc. 686, 1945 N.Y. Misc. LEXIS 2171 (N.Y. Sup. Ct. 1945).

In action to declare tax deed invalid or to recover money damages, property owner did not affirm validity of tax deed. Seafire, Inc. v Ackerson, 76 N.Y.S.2d 805, 193 Misc. 965, 1947 N.Y. Misc. LEXIS 3640 (N.Y. Sup. Ct. 1947), aff'd, 275 A.D. 717, 87 N.Y.S.2d 438, 1949 N.Y. App. Div. LEXIS 4180 (N.Y. App. Div. 1949).

Rescission and damages may be recovered for fraudulent concealment by lessor of defective condition of premises. Looney v Smith, 96 N.Y.S.2d 607, 198 Misc. 99, 1950 N.Y. Misc. LEXIS 1578 (N.Y. Sup. Ct. 1950).

Where plaintiff induced by fraud to enter into bigamous marriage, plaintiff has no legal option or election of remedies to affirm or rescind bigamous marriage, since it was void ab initio, and her action for damages is maintainable. Friedman v Libin, 4 Misc. 2d 248, 157 N.Y.S.2d 474, 1956 N.Y. Misc. LEXIS 1383 (N.Y. Sup. Ct. 1956), aff'd, 3 A.D.2d 827, 161 N.Y.S.2d 826, 1957 N.Y. App. Div. LEXIS 5844 (N.Y. App. Div. 1st Dep't 1957).

Plaintiff cannot maintain conversion of chattels against some defendants and at same time proceed against them and others to foreclose lien thereon. Lozea v Schneeweiss, 30 N.Y.S.2d 405, 1941 N.Y. Misc. LEXIS 2279 (N.Y. App. Term 1941).

Inclusion in complaint of causes of action for damages does not affect or destroy causes of action to rescind agreements for their breach, nor constitute concession or waiver of right to prosecute them and obtain equitable relief sought. Application of Jacoby, 33 N.Y.S.2d 621, 1942 N.Y. Misc. LEXIS 1405 (N.Y. Sup. Ct. 1942).

No judgment may be obtained for purchase price, plus interest and damages, with provision for cancellation if judgment is not paid in reasonable time after entry. Leonor v Ingenio Porvenir C. Por A., 34 N.Y.S.2d 705, 1942 N.Y. Misc. LEXIS 1557 (N.Y. Sup. Ct. 1942).

Infant's action to rescind contract to buy horse and recover purchase price was construed as action at law for price and damages. Holman v Hudson, 67 N.Y.S.2d 615, 1946 N.Y. Misc. LEXIS 3289 (N.Y. Sup. Ct. 1946).

In absence of estoppel, liability on contract may be not only that of agent but of disclosed principal as well, and there is no election until judgment is actually satisfied. Grodsky v Bernstein, 135 N.Y.S.2d 897, 1954 N.Y. Misc. LEXIS 3079 (N.Y. County Ct. 1954).

In action under CPA § 112-e, defendant had three remedies available, all of which apparently in some form could be encompassed in single action. Brevoort, Inc. v Meredith, 154 N.Y.S.2d 398 (N.Y. Mun. Ct. 1956).

3. Application

Judgment in action on life insurance policy barred action to reform policy and to correct policy application by changing insured's answers to health questions, where all allegations in new pleading were fully litigated. Falkowski v Metropolitan Life Ins. Co., 25 N.Y.S.2d 474, 175 Misc. 878, 1941 N.Y. Misc. LEXIS 1462 (N.Y. Sup. Ct. 1941).

Judgment against plaintiff in her action claiming full title to premises by right of survivorship under alleged joint tenancy deed, whereas parties were not married, did not bar her later action to reform deed. Petchanuk v Mohlsick, 134 N.Y.S.2d 1, 206 Misc. 39, 1954 N.Y. Misc. LEXIS 2470 (N.Y. Sup. Ct. 1954).

Where automobile liability policy did not cover driver as orally represented by insurer's agent, administrator may sue to reform policy even after obtaining judgment against driver. Ireland v Firemen's Fund Indem. Co., 115 N.Y.S.2d 762, 1951 N.Y. Misc. LEXIS 2150 (N.Y. Sup. Ct.

1951), aff'd, 281 A.D. 1007, 121 N.Y.S.2d 364, 1953 N.Y. App. Div. LEXIS 4075 (N.Y. App. Div. 1953).

Unsuccessful action to establish full title to premises by right of survivorship under joint tenancy deed did not bar action to reform deed. Petchanuk v Mohlsick, 130 N.Y.S.2d 537, 1954 N.Y. Misc. LEXIS 2064 (N.Y. Sup. Ct. 1954).

4. Purpose

The purpose of CPA § 112-e was to enable aggrieved party to obtain complete relief in rescission action and to overcome doctrine of election of remedies under which actions for rescission and those for damages based on fraud in inducing contract or other transaction were considered to be mutually exclusive. Fitzgerald v Title Guarantee & Trust Co., 290 N.Y. 376, 49 N.E.2d 489, 290 N.Y. (N.Y.S.) 376, 1943 N.Y. LEXIS 1091 (N.Y. 1943).

Purpose of amendment of CPA § 112-e was to enable aggrieved party to obtain complete relief in rescission action and to overcome doctrine of election of remedies. Brevoort, Inc. v Meredith, 161 N.Y.S.2d 236 (N.Y. Mun. Ct. 1956).

5. Pleadings

Complaint for return of consideration paid and for damages recoverable in action based on prior rescission, must allege that contract has been rescinded. Campel v Carrier, 277 A.D. 772, 97 N.Y.S.2d 1, 1950 N.Y. App. Div. LEXIS 3262 (N.Y. App. Div. 1950).

Complaint for rescission of contract fraudulently induced was sufficient, as claims for both rescission and damages are consistent. Delgaudio v Casey, 68 N.Y.S.2d 629, 1947 N.Y. Misc. LEXIS 2106 (N.Y. Sup. Ct. 1947).

Research References & Practice Aids

Federal Aspects:

Service and filing of pleadings and other papers where numerous defendants are involved, Rule 5(c) of the Federal Rules of Civil Procedure, USCS Court Rules.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 3002, Actions and Relief Not Barred for Inconsistency.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 6.01. Joinder of claims and consolidation of actions; joint trials.

CPLR Manual § 19.03. Election of remedies.

CPLR Manual § 25.01. Former adjudication (res judicata) and related concepts in general.

Matthew Bender's New York Practice Guides:

1 New York Practice Guide: Real Estate § 2.11.

Warren's Weed New York Real Property:

Warren's Weed: New York Real Property § 3.26.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 3002:1 et seq.

LexisNexis Forms FORM 75-CPLR 3002:1.— CPLR 3002(a) Defense That Judgment Against One of Several Debtors Satisfied.

LexisNexis Forms FORM 75-CPLR 3002:2.— CPLR 3002(b) Defense in Action Against Undisclosed Principal That Judgment Against Agent Has Been Satisfied.

LexisNexis Forms FORM 75-CPLR 3002:3.— CPLR 3002(c) Defense in Action for Conversion That Judgment Obtained and Satisfied in Action on Contract.

LexisNexis Forms FORM 75-CPLR 3002:4.— 3002(d) Defense in Action to Reform Policy of Insurance That Judgment on the Policy Was Given in Favor of Plaintiff (Res Judicata).

LexisNexis Forms FORM 75-CPLR 3002:5.— 3002(e) Complaint in Action for Damages and Rescission of Purchase of Real Property on Ground of Fraud.

LexisNexis Forms FORM 75-CPLR 3002:6.— CPLR 3002(e) Complaint in Action for Damages and for Rescission of Contract of Sale of Automobile on Ground of Fraud.

LexisNexis Forms FORM 75-CPLR 3002:7.— CPLR 3002(f) Complaint in Action for Rescission of Contract of Sale of Real Property on Ground of Fraud and to Foreclose Vendee's Lien.

1 Medina's Bostwick Practice Manual (Matthew Bender), Forms 14:101 et seq. (remedies and pleadings).

Hierarchy Notes:

NY CLS CPLR, Art. 30