NY CLS CPLR R 4015

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New York

Consolidated Laws Service

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

Article 40 Trial Generally (§§ 4001 — 4019)

R 4015. Time for motion for referee or advisory jury

A motion for trial by a referee or an advisory jury shall be made within twenty days after note of issue is filed, except where the issue to be tried arises on a motion or pursuant to a judgment.

History

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

Annotations

Notes

Prior Law:

Earlier rules: RCP 157; Gen Rules Pr 31, in part.

Advisory Committee Notes:

RCP 157 required that a motion for jury trial of specific questions pursuant to CPA § 430 (i. e., an advisory jury trial) be made within twenty days after issue is joined. The limitation in this rule also applies to a motion for a reference; under former law no time was set for such a motion.

R 4015. Time for motion for referee or advisory jury

The time limitation is not applicable where a request is made for trial by referee or advisory jury of an issue arising on a motion or an issue required to be tried pursuant to interlocutory or final judgment because the fact that trial is required may become known before or long after a note of issue is filed. The court may act on its own initiative or a request of a party. See CPLR rule 4212.

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I. Under Former Civil Practice Laws

A. In General

1. Generally

RCP 157 applied to an action to foreclose a mechanic's lien where defendant demanded affirmative judgment on a counterclaim. Arnot v Nevins, 44 A.D. 61, 60 N.Y.S. 401, 6 N.Y. Ann. Cas. 250, 1899 N.Y. App. Div. LEXIS 2179 (N.Y. App. Div. 1899).

The court was not precluded from seeking the judgment of the jury upon issues arising in an action by the fact that the parties had failed to proceed as required by RCP 157. Moss v Burnham, 50 A.D. 301, 63 N.Y.S. 947, 1900 N.Y. App. Div. LEXIS 975 (N.Y. App. Div. 1900).

RCP 157 applied to an action to foreclose a mortgage in which defendant interposed a legal counterclaim. Manhattan Life Ins. Co. v Hammerstein Opera Co., 184 A.D. 440, 171 N.Y.S. 678, 1918 N.Y. App. Div. LEXIS 6099 (N.Y. App. Div. 1918).

RCP 157 applied to a suit in equity to recover certain capital stock contracted to be delivered where defendant interposed legal counterclaims. Maag v Maag Gear Co., 193 A.D. 759, 184 N.Y.S. 630, 1920 N.Y. App. Div. LEXIS 5643 (N.Y. App. Div. 1920).

RCP 157, limiting time for framing issues, applied only where jury trial was discretionary. People v System Properties, Inc., 267 A.D. 666, 47 N.Y.S.2d 894, 1944 N.Y. App. Div. LEXIS 4799 (N.Y. App. Div.), reh'g denied, 268 A.D. 804, 48 N.Y.S.2d 630, 1944 N.Y. App. Div. LEXIS 3555 (N.Y. App. Div. 1944), rev'd, 293 N.Y. 440, 57 N.E.2d 750, 293 N.Y. (N.Y.S.) 440, 1944 N.Y. LEXIS 1288 (N.Y. 1944).

In equitable action to dissolve partnership, trial by jury of matters raised by affirmative defense and by reply was not merited. Scherer v Scherer, 121 N.Y.S.2d 810, 1953 N.Y. Misc. LEXIS 1791 (N.Y. Sup. Ct. 1953).

2. Purpose of rule

The object of RCP 157 was to prevent an application to frame issues to be tried by a jury upon the eve of the trial, thereby causing delay and additional expense. Ellensohn v Keyes, 6 A.D. 601, 39 N.Y.S. 774, 1896 N.Y. App. Div. LEXIS 2034 (N.Y. App. Div.), app. dismissed, 151 N.Y. 641, 45 N.E. 1131, 151 N.Y. (N.Y.S.) 641, 1896 N.Y. LEXIS 931 (N.Y. 1896).

3. Surrogate's court

As to application of RCP 157 to proceedings in surrogate's court, see In re Plate's Will, 156 N.Y.S. 999, 93 Misc. 423, 1916 N.Y. Misc. LEXIS 1138 (N.Y. Sur. Ct. 1916).

4. Matrimonial action

RCP 157 was unconstitutional when applied to a trial by jury of the issues of adultery in an action for absolute divorce. Moot v Moot, 214 N.Y. 204, 108 N.E. 424, 214 N.Y. (N.Y.S.) 204, 1915 N.Y. LEXIS 1224 (N.Y. 1915).

RCP 157 was inapplicable to annulment action. Sefranka v Sefranka, 74 N.Y.S.2d 516, 190 Misc. 539, 1947 N.Y. Misc. LEXIS 3279 (N.Y. Sup. Ct. 1947).

5. Attorney's lien

Since proceedings to try and enforce attorney's lien are special, motion to frame issues was denied; transfer of funds sought to be reached, enjoined, and matter referred to referee to take testimony. In re Podell, 245 N.Y.S. 28, 138 Misc. 6, 1930 N.Y. Misc. LEXIS 1563 (N.Y. Sup. Ct. 1930).

B. Procedure

6. Generally

Where there are no issues of fact arising on the complaint and the only issues of fact are those arising on the counterclaim, the defendant may notice such issues for trial at the trial term without having them settled. Herb v Metropolitan Hospital & Dispensary, 80 A.D. 145, 80 N.Y.S. 552, 12 N.Y. Ann. Cas. 415, 1903 N.Y. App. Div. LEXIS 528 (N.Y. App. Div. 1903).

On foreclosure of a purchase money mortgage where complaint demanded a deficiency judgment, defendant's counterclaims for breach of warranty of quiet enjoyment, fraudulent misrepresentations as to title, and eviction were triable by a jury under CPA §§ 424 (§ 3019(f) herein), 425 (§ 4101 herein), 429 (§ 4102(b) herein), without proceeding under this rule. Fout v Wolfe, 231 A.D. 11, 245 N.Y.S. 505, 1930 N.Y. App. Div. LEXIS 6987 (N.Y. App. Div. 1930).

7. Time of motion

Date of issue having been previously fixed another date could not be previously fixed another date could not be utilized on motion hereunder. Motion was not timely made. Murray v Rubel Coal & Ice Corp., 234 A.D. 895, 254 N.Y.S. 372, 1931 N.Y. App. Div. LEXIS 11093 (N.Y. App. Div. 1931).

Where a right to a jury trial is discretionary, motion therefor must be made within twenty days after issue is joined. Murray v Rubel Coal & Ice Corp., 234 A.D. 895, 254 N.Y.S. 372, 1931 N.Y. App. Div. LEXIS 11093 (N.Y. App. Div. 1931).

Where more than twenty days elapsed since joinder of issue, plaintiff was prevented, under RCP 157, from making an application to frame issues in equity suit and obtain advisory verdict thereon. Auerbach v Chase Nat'l Bank, 251 A.D. 543, 296 N.Y.S. 487, 1937 N.Y. App. Div. LEXIS 6993 (N.Y. App. Div. 1937).

Motion for jury trial of issues in action for separation was denied, where it was not made within time limited by RCP 157. Gramling v Gramling, 80 N.Y.S.2d 387, 192 Misc. 285, 1948 N.Y. Misc. LEXIS 2564 (N.Y. Sup. Ct. 1948).

Application for jury trial of action to foreclose chattel mortgage must be made within twenty days after joinder of issue, else motion will be denied. Heyman v Felice, 103 N.Y.S.2d 287, 199 Misc. 619, 1951 N.Y. Misc. LEXIS 1613 (N.Y. Sup. Ct. 1951).

In action for mortgage foreclosure where defense of usury was raised by answer, defendants' motion for jury trial was denied where motion was not made within 20 days after issue was joined. Furber v Sidell, 6 Misc. 2d 554, 164 N.Y.S.2d 616, 1957 N.Y. Misc. LEXIS 2931 (N.Y. County Ct. 1957).

Plaintiff waived her right to apply for jury trial as a matter of discretion by failing to make motion therefor until six months after joinder of issue. Kopp v Wolf, 17 Misc. 2d 763, 187 N.Y.S.2d 882, 1959 N.Y. Misc. LEXIS 3834 (N.Y. Sup. Ct. 1959).

8. —Permitting application after default

Where a party allowed more than the period permitted by RCP 157 to elapse before giving notice of application, the court was formerly held to have power upon proper facts to open the default and allow the application to be made; but facts had to be shown to excuse the neglect to apply within the prescribed time. Ellensohn v Keyes, 6 A.D. 601, 39 N.Y.S. 774, 1896 N.Y. App. Div. LEXIS 2034 (N.Y. App. Div.), app. dismissed, 151 N.Y. 641, 45 N.E. 1131, 151 N.Y. (N.Y.S.) 641, 1896 N.Y. LEXIS 931 (N.Y. 1896).

9. Jury trial of right not included

Excluded the trial of an issue as to which the party had a right to a jury trial, but possibly was to be read in connection with former CPA § 423. Metropolitan Life Ins. Co. v Harry Gillman & Sons, 242 N.Y.S. 118, 137 Misc. 18, 1930 N.Y. Misc. LEXIS 1274 (N.Y. Sup. Ct. 1930).

10. Necessity of framing questions

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Where remaining issues are wholly of fact, a jury may be impaneled without framing questions

for the jury. Metropolitan Life Ins. Co. v Harry Gillman & Sons, 242 N.Y.S. 118, 137 Misc. 18,

1930 N.Y. Misc. LEXIS 1274 (N.Y. Sup. Ct. 1930).

11. Remedy where issues improperly framed

Where defendant in an equity action obtained at Special Term an order framing issues for trial

by jury and such issues came on for trial at the Trial Term, defendant could not, after plaintiff

had put in his proof and rested, have the issues withdrawn from the jury, on the ground that they

were improperly framed, and have the case sent back to the Special Term for trial; if there was

anything wrong with the questions as framed, application to resettle the order, to reframe the

issues, or to vacate the order, should have been made to the Special Term. Butler v Morris, 209

A.D. 646, 205 N.Y.S. 251, 1924 N.Y. App. Div. LEXIS 8702 (N.Y. App. Div. 1924).

12. Review

While application to frame issues made after the elapsing of the period provided by RCP 157

was addressed to the discretion of the court, an order made upon such application was

reviewable by the appellate division and might be set aside when abuse of such discretion

appeared. Ellensohn v Keyes, 6 A.D. 601, 39 N.Y.S. 774, 1896 N.Y. App. Div. LEXIS 2034 (N.Y.

App. Div.), app. dismissed, 151 N.Y. 641, 45 N.E. 1131, 151 N.Y. (N.Y.S.) 641, 1896 N.Y.

LEXIS 931 (N.Y. 1896).

Research References & Practice Aids

Cross References:

This rule referred to in Rule 4212.

Advisory jury; referee to report, CLS CPLR Rule 4212.

Jurisprudences:

73A NY Jur 2d Jury § 121. .

92 NY Jur 2d References § 18. .

105 NY Jur 2d Trial § 571. .

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4015, Time for Motion for Referee or Advisory Jury.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 36.10.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 23.04. Trial by the court.

Matthew Bender's New York Practice Guides:

1 New York Practice Guide: Probate and Estate Administration § 11.13.

Annotations:

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time. 32 ALR4th 840.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 4015:1.

2 Medina's Bostwick Practice Manual (Matthew Bender), Forms 18:101 et seq .(trial generally).

Hierarchy Notes:

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