

# Civil Court Act's 'Commence by Service' Provision Unconstitutionally Treats Litigants Unequally

**R**ICHMOND PAIN MANAGEMENT, P.C. v. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. — "The answer my friend is blowin' in the wind. The answer is blowin' in the wind."

We all are familiar with this refrain from Bob Dylan's 1960's protest song. Unfortunately it has become the cry of too many litigants in New York City's Civil Court. Currently before the Court are three motions made by defendant State Farm Mutual Automobile Insurance Company. In each motion the defendants sought to compel the plaintiff, Richmond Pain Management, P.C. as assignee of Kenneth Bevel (40049/03); as assignee of Clifford Whaley (40050/03); and as assignee of Lorna Sterling (40051/03) to provide discovery previously requested and to reimburse the defendant the \$45.00 defendant had to expend in each action to purchase an index number. The discovery issues were resolved by a "so ordered" stipulation in each action. The defendant however insisted on submitting the issue of its entitlement to be reimbursed the \$45.00 to the Court for decision.

The Court is left to decide the rather novel issue of whether or not a defendant who purchases an index number in Civil Court can recover that money either by making a motion or in a judgment issued at the end of the litigation.

The civil action part of the Civil Court, like some other courts of limited jurisdiction, retains a system for commencement of an action that is a relic of days gone by. The civil action part is governed by a "commence by service" statute, Civil Court Act Article 4. Not only is this system in conflict with "commence by filing" as provided in CPLR 304, it is also not in conformity with how in Civil Court a summary proceeding is commenced in the landlord-tenant part or a small claims action is started in that part. To commence a suit in either of these parts requires the litigant to purchase an index number from the clerk of the court. More importantly, when a self-represented litigant wants to commence an action, CCA 401(a) requires the clerk to issue the summons if "the plaintiff appears without an attorney" and collect the appropriate fee.

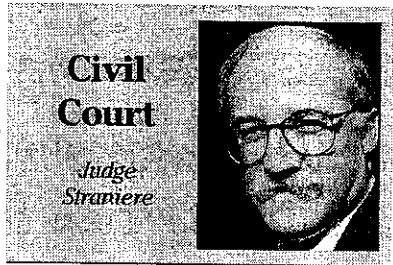
When the CPLR was amended to cover actions commenced in the Supreme and County Court, §400 was added to the Civil Court Act to specifically preclude the Civil Court from the commence by filing provisions and preserve the out-dated system of commencement by service. This was done even though the civil jurisdiction of the County Court and Civil Court are practically identical (NY State Constitution Article 6 §11 and 15). CCA 400 also provides that "a special proceeding is commenced by service of a notice of petition or order to

show cause." The implication of CCA 400 in regard to special proceedings, which are governed by CPLR Article 4, is that they too are commenced by service. However, that contradicts CCA 401 (c) which requires the notice of petition and petition in a summary proceeding to be issued by the Court. This sentence probably should read "a special proceeding, other than a summary proceeding commenced under CCA 204" since summary proceedings are currently commenced by filing the notice of petition and petition with the clerk (CCA 401 (c)).

This case points out the serious deficiency in retaining the current commencement by service system in the Civil Court. CCA 401(b) requires that any summons issued contain language that directs the defendant to file an answer with the clerk within 20 days if personally delivered to the defendant in the city of New York, and if served by a means other than personal delivery within the city if New York the defendant must file an answer within thirty days of the plaintiff filing proof of service with the clerk (CCA 402). Meanwhile CCA 409 requires the plaintiff to file a copy of the summons with proof of service with the clerk within fourteen days after service is made within the city of New York regardless of how it was served. This procedure is seemingly not that complicated. However, this is when theory and practice collide.

For instance, defendant is served on March 1 and on March 2 within the time set forth in the summons, files an answer as directed by the summons. The answer is received by the clerk who determines that there is no index number for the action since the plaintiff has not filed the summons. If the answer is personally delivered to the clerk and the clerk checks the filings immediately, perhaps the defendant can be told to hold onto the answer and file it later after the plaintiff comes in and files the summons. This of course punishes the diligent defendant and may require multiple trips to the courthouse for the defendant to protect his or her rights. What if the answer was filed by mail or the clerk accepts the in person filing of the answer and only later determines no index number has been

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purchased? Invariably after the clerks check the filing and learn there is no index number, the answer is held in the clerk's office and as summonses are filed by the plaintiff, the clerk will often attempt to check and see if an answer has been filed. A number of times a match can be made. The problem of course is when the answer is received prior to the plaintiff purchasing an index number; the plaintiff finally purchases an index number and files the summons and proof of service as required by statute; a court file is created and the clerk cannot subsequently locate the filed answer from among hundreds if not thousands of other filed answers. In these cases, a default judgment may be entered against a defendant who timely filed an answer. The judgment might not be discovered until the defendant tries to obtain credit, purchase a house or buy a car. The Court will then be entertaining a motion to vacate a wrongfully entered default judgment against the defendant and possibly have to lift restraining orders and executions. All this is a waste of judicial and legal resources and imperils the rights of diligent defendants.

The Office of Court Administration has proposed eliminating commencement by filing in the Civil Court, District Courts and City Courts. In support of the change in the statute OCA pointed out: "Aside from the expenditure of time and resources, the current system causes a financial toll. The clerks' futile searches for filed summonses are expenditures of time for which there is no revenue stream in return... A further concern is that the summonses are being served but intentionally not filed in an effort to harass or frighten defendants. Requiring that an index number be purchased before the service of papers would generate revenue, conserve clerks' time, and protect defendants from untoward use of the suit commencement system..."

What further complicates these matters are the tens of thousands of "no-fault" reimbursement cases filed under the Insurance Law presently flooding the court system. The plaintiffs in hundreds of these cases, as in this case, may be the same medical service provider while the defendant is the

plaintiff for the late filing of the summons and then give notice to the defendant and an additional opportunity to answer. However, even in this scenario, why would the defendant think it necessary to re-file an answer, since the defendant would not necessarily know that the answer previously submitted was not linked by the clerk to the proper summons.

The current system suffers too many constitutional problems to continue in effect. It must be replaced. "Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question... (T)he right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals... (S)o too a cost requirement, valid on its face, may offend a particular party's opportunity to be heard... the State owes to each individual that process, which in light of the values of a free society, can be characterized as due" (Boddie v. Connecticut, 401 US 371; (1971)

B. Is the Defendant Entitled to Reimbursement?

In order to protect its rights, the defendant in these three actions purchased the index number so it could file an answer or otherwise move to take steps to protect its legal interests. In none of these cases did the plaintiff purchase an index number. In each case defendant waited thirty days after service of the process to file an answer and at that time learned that no index number was purchased. The defendant then expended \$45.00 on each case in order to file its answer. CCA 1911 requires that the clerk collect as a court fee \$45.00 upon the issuance of a summons (CCA 1911(a)) or upon the filing of a summons with proof of service or upon filing of the first paper in that county in any action (CCA 1911(b)). There does not appear to be any statutory or case law dealing specifically with the issue of whether the defendant can recover the \$45.00 when it and not the plaintiff files the first paper.

CCA 1906 provides as follows: "Costs allowed by Court. The

same carrier. An additional problem is that the plaintiff may be the assignee of benefits from the same patient on more than one claim against the same defendant. So even if the clerk matches the parties based on the names from the caption, the complaint and answer may not coincide as the provider may have delivered service on more than one occasion to a particular insured. Why should the clerk of the court be burdened with matching the correct complaint to the correct answer as if it were some huge game of "Concentration?" Especially when the plaintiff is the party that caused the situation. The court system is becoming the uncompensated servant for some attorneys' collection practices. This is not in the job description.

#### LEGAL ISSUES:

##### A. Is the Current System Constitutional?

As outlined above, CCA 400 excluded the Civil Court from the application of the commencement by filing statute of the CPLR. On their face CCA 400 and CCA 409 appear to be constitutional. However, it is apparent that in the implementation of the Civil Court's commencement by service rules, due process and equal protection rights of individuals are being violated. In regard to civil actions, the statute permits lawyers to issue and serve summons without first purchasing an index number, while at the same time requiring a self-represented plaintiff to expend that money. The statute creates two classes of litigants potentially seeking the same relief with the criteria being the financial ability to retain an attorney. An individual who can afford to retain counsel can issue a summons and perhaps collect money due and owing merely by serving the process on the defendant, while a person too poor or for any other reason unable to retain counsel, such as the amount being sought not warranting the hiring of a lawyer, cannot use the threat of suit to collect the debt; that person must actually commence the suit and expend \$45.00 for the suit. A credit card company, commercial collection agencies or other business that provides a large volume of litigation to an attorney obtains a benefit that an individual self-represented plaintiff does not get from the court system. Likewise, the defendant in the self-represented plaintiff commenced suit is incurring court costs that have to be reimbursed to the plaintiff that a represented person or entity might not have to pay. Considering that landlord-tenant summary proceedings and small claims actions both require the prepaying for an index number to commence a law suit, it can only be concluded that the statute as written and the system and practice it engendered create two classes of litigants in the Civil Court civil actions: paying and non-paying customers. This is a clear violation of the equal protection clause of the New York State Constitution Article 1 §11. There is no reasonable or rational basis for such a distinction, especially when there exists a system used in all other parts of the Civil Court and in the Supreme and County Courts which eliminates these differences. This is an example as to why the New York Court system may be "unified" but not "uniform."

It is also apparent that the current system violates the due process clause of the New York State Constitution, Article 1 §6. The prevailing arrangement punishes a defendant who complies with the statute, takes steps to protect his or her rights and timely files an answer, while at the same time it may potentially reward a procrastinating plaintiff who does not immediately purchase an index number or who in an even worse case, purchases it after the statutory fourteen day period. The plaintiff who actually files the summons with proof of service after fourteen days must make a tunc pro tunc appli-

Court may in its discretion impose costs not exceeding fifty dollars in the following cases: (a) Upon granting or denying a motion...." Since defendant was required to make a motion to compel the plaintiff to comply with discovery demands and to pay the filing fee, the Court in its discretion could award the defendant "costs" involved in making the motion. But is a filing fee a legitimate "cost?"

CCA 1908 permits a prevailing party or a party to whom costs are awarded to recover "disbursements." All fees paid to the clerk are recoverable as a disbursement (CCA 1908(a)). Under this statute, the defendant, if a prevailing party, could recover as a disbursement the filing fee that it paid to the clerk. The question remains, can the defendant collect the filing fee at this stage of the litigation, that is, before there is a final judgment on the merits.

If the plaintiff bought the index number and prevailed in the suit, the plaintiff would recover the expense as a taxable disbursement under the statute. If the defendant prevailed, the issue would be moot since the defendant did not incur the expense, there would be no money to recover. If the defendant purchased the index number, and the defendant prevailed, the defendant would recover the filing fee. If the defendant purchased the index number and the plaintiff prevailed, the plaintiff would not be able to recover the fee since the plaintiff did not expend the money initially. Since the plaintiff was the one who instituted the suit, the plaintiff would be obtaining a benefit because the defendant purchased the index number in the action and in doing so, permitted the plaintiff to continue the case. There is something inherently unfair in requiring the defendant to subsidize the plaintiff's cause of action out of a necessity to protect the defendant's rights. The Court could award the defendant the \$45.00 by labeling it as a reasonable cost to be awarded for the motion; however, that would not deal with the underlying issue of the plaintiffs using the Civil Court as its collection agency by filing suits and not purchasing index numbers. As a matter of public policy and to prevent plaintiffs from abusing the system, the defendant is entitled to be reimbursed at this stage of the litigation.

#### Conclusion:

Defendant's motion in each action is granted to the extent that the plaintiff is directed to reimburse defendant the sum of \$45.00 in each of these actions. Defendant's application for sanctions of \$100.00 on each cause of action is dismissed. If plaintiff continues this practice in the future, the Court will consider entertaining an application for sanctions. If plaintiff's counsel is not being compensated sufficiently by his clients, then he either should not take the cases or re-negotiate his compensation schedule with them.

Since a consumer is not involved as a litigant, the Court does not address the issue of whether if it is shown that a plaintiff had a continuous pattern of not filing or late filing summonses, would such a pattern constitute a "deceptive business practice" under General Business Law 349.

The foregoing constitutes the decision and order of the Court.

Court Attorney to notify both sides of this Decision/Order.

(1) Novel is being used in the sense of unique rather than a reference to a tome by Tolstoy.

(2) It should also be noted that a name change application in Civil Court requires a filing fee of \$65.00. This is another proceeding that is primarily commenced by self-represented individuals. Although CPLR Article 11 provides for access to the courts by persons who qualify as "poor persons" this protection is not relevant to the issues of this case involving two classes of applicants to the Civil Court. ■