St. John's Law Review

Volume 62, Fall 1987, Number 1 Article 12

CPLR 3211(e): When the Defendant Moves to Dismiss the Complaint Without Including a Personal Jurisdiction Objection under CPLR 3211(a), and the Plaintiff Amends the Complaint, the Defendant May Not Include that Objection in an Answer to the Amended Complaint; the Objection is Waived

Leanne Sinclair Jacobs

could be effectively balanced with the party's right to a jury trial and the state's interest in a manageable forum for suits against the sovereign.

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CIVIL PRACTICE LAW AND RULES

CPLR 3211(e): When the defendant moves to dismiss the complaint without including a personal jurisdiction objection under CPLR 3211(a), and the plaintiff amends the complaint, the defendant may not include that objection in an answer to the amended complaint; the objection is waived

CPLR 3211[1] is the primary vehicle by which a party to a lawsuit may move for pre-trial dismissal of a cause of action or a defense.[2] CPLR 3211(a) specifies the grounds upon which a motion to dismiss a cause of action may be made,[3] while the mechanical re-

solution.

[1] Under CPLR 3211, any party to a lawsuit may move to dismiss any cause of action or defense, asserted against it in a complaint, counterclaim, cross-claim, third-party complaint, or any responsive pleading. *See* SIEGEL § 257, at 317; H. WACHTELL & T. MIRVIS, NEW YORK PRACTICE UNDER THE CPLR 270-71 (6th ed. 1986) [hereinafter WACHTELL & MIRVIS]; J. WEINSTEIN, H. KORN & A. MILLER, CPLR MANUAL § 21.02, at 21-4 (rev. ed. 1987) [hereinafter CPLR MANUAL]; 4 WK&M ¶ 3211.01, at 32.17. CPLR 3211(a) is most often used by defendants against plaintiffs, but plaintiffs may also use it. *See* SIEGEL § 257, at 317; CPLR 3211, commentary at 56 (McKinney 1974). Plaintiffs may move to dismiss one or more defenses on the ground that a defense is not stated or has no merit. *See* CPLR 3211(b) (McKinney 1974).

[2] *See* CPLR 3211 (b) (McKinney 1974). A party may interpose his 3211 objection either through a pre-answer motion to dismiss or by including it as an affirmative defense in his answer. *See* CPLR 3211(e) (McKinney 1974). *See also* Gager v. White, 53 N.Y.2d 475, 488, 425 N.E.2d 851, 856, 442 N.Y.S.2d 463, 468 (1981) (failure to raise objection by prescribed methods results in waiver); Bides v. Abraham & Strauss Div. of Federated Dep't Stores, 33 App. Div. 2d 569, 569, 305 N.Y.S.2d 336, 338 (2d Dep't 1969) (failure to raise jurisdiction in answer to cross complaint resulted in personal jurisdiction though service of summons was lacking); Gazerwitz v. Adrian, 28 App. Div. 2d 556, 557, 280 N.Y.S.2d 233, 234 (2d Dep't 1967) (jurisdictional objection may properly be raised by motion to dismiss or in the answer).

[3] CPLR 3211(a) (McKinney 1974). Rule 3211(a) states in pertinent part:

> [a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
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> . . . .
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> 7. the pleading fails to state a cause of action; or

quirements for making such a motion are found in CPLR 3211(e).[4] The requirements of subdivision (e) are of particular importance when making a motion to dismiss for lack of personal jurisdiction.[5] Under subdivision (e), a defendant who makes a motion to dismiss pursuant to subdivision (a) waives[6] the defense of lack of personal

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8. the court has not jurisdiction of the person of the defendant; or
9. the court has not jurisdiction in an action where service was made under section 314 or 315. . . .

Id.

[4] CPLR 3211(e) (McKinney 1974). Subdivision (e) states, in pertinent part:

> At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. . . . An objection based upon a ground specified in paragraphs eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he does not raise such objection in the responsive pleading. . . .

Id.

[5] *See* CPLR 3211, commentary at 62 (McKinney 1974) (objections to lack of personal or *in rem* jurisdiction are singled out for special treatment by 3211(e)); CPLR MANUAL, *supra* note 1, § 21.04, at 21-15 (rules regarding waiver of objections to personal, *in rem* and *quasi in rem* jurisdiction are more stringent than those governing all the other waivable objections).

A motion to dismiss based on defendant's objection to personal jurisdiction was previously accorded special treatment under the former Rules of Civil Practice 106 and 107, and section 237-a of the former Civil Practice Act. *See* 4 WK&M ¶ 3211.12, at 32-57. Under section 237-a, a defendant objected to a court's personal jurisdiction by means of a special appearance. *Id.* ¶ 3211.11, at 32-57. The special appearance was a judicially created device which had been in existence for one hundred years without express statutory authority. *See* Colbert v. International Sec. Bureau, Inc., 79 App. Div. 2d 448, 459, 437 N.Y.S.2d 360, 367-68 (2d Dep't 1981).

Under the CPLR, which replaced the former Civil Practice Act on September 1, 1963, New York eliminated the need for a special appearance. *See* McEneney, *Motion Practice Under the CPLR*, 9 N.Y. LAW FORUM 317 (1963). Defendants now object to a court's personal jurisdiction in a pre-answer motion or in their responsive pleading. *See Colbert*, 79 App. Div. 2d at 461, 437 N.Y.S.2d at 368; *see also* Homberger & Laufer, *Appearance & Jurisdictional Motions in New York*, 14 BUFFALO L. REV. 374, 384 (1964) (defendant preserves jurisdictional objection by raising it in pre-answer motion or in the answer). The defendant may base his objection on the ground that the process or its service was insufficient or that the defendant is not a person subject to the personal jurisdiction of the court. *See* CPLR 3211 (a) (McKinney 1974); *see generally* CPLR 3211, commentary at 34-35 (McKinney 1974) (discussion of possible defects in personal jurisdiction).

[6] Although the term "waiver" may signify an "intentional relinquishment" of a right, *see* Byer v. City of New York, 50 App. Div. 2d 771, 771, 377 N.Y.S.2d 52, 52 (1st Dep't 1975), it is frequently used to denote a number of concepts. For the purposes of CPLR 3211(e), "it is used to state a rule regarding loss of the right to assert any of the enumerated objections except the 'non-waivable' ones." 4 WK&M ¶ 3211.03, at 32-25.

The concept of waiver of jurisdictional objections originated in the common-law rule that "[a] voluntary general appearance of the defendant is equivalent to personal service of the summons upon him." Pacilio v. Scarpati, 165 Misc. 586, 588, 300 N.Y.S. 473, 477 (Sup.

jurisdiction if the original motion does not include that objection.[7] Recently, in *Addesso v. Shemtob*,[8] the Court of Appeals held that under CPLR 3211(e) the defendants had waived the right to include the defense of lack of personal jurisdiction in their answer to the amended complaint because they had not raised the defense in their earlier CPLR 3211(a) motion.[9]

In *Addesso*, the plaintiff had contracted to buy real property from the defendants.[10] The contract of sale required that the defendants discharge their $70,000 mortgage by the time of the closing.[11] When the defendants failed to discharge their mortgage as required, the plaintiffs sued for specific performance of the contract.[12] Prior to answering, the defendant moved under CPLR 3211(a)(7)[13] to dismiss the complaint for failure to state a cause of action.[14] The plaintiff then served the defendants with an amended complaint within twenty days of service of the original complaint.[15]

Ct. Albany County 1964) (quoting § 237 of former CPA). An appearance acted to cure defects of both basis of jurisdiction and notice. *See* 4 WK&M ¶ 3211.03, at 32-25. However, under the CPLR, an appearance confers jurisdiction only if objections to personal or *in rem* jurisdiction are not interposed according to the instructions of CPLR 3211(e). *Id.* A defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer. *See* CPLR 320(a) (McKinney 1974).

[7] CPLR 3211(e) (McKinney 1974). *See, e.g.*, Competello v. Giordano, 51 N.Y.2d 904, 905, 415 N.E.2d 965, 965, 434 N.Y.S.2d 976, 977 (1980) (defendant waived defense because motion to dismiss had not included jurisdictional objection); Russell v. Arthur Trask Co., 125 App. Div. 2d 136, 138, 512 N.Y.S.2d 575, 577 (3d Dep't 1987) (objection to personal jurisdiction waived if party moves to dismiss pursuant to CPLR 3211(a) and fails to raise such objection); Montcalm Publishing Corp. v. Pustorino, 125 App. Div. 2d 188, 189, 508 N.Y.S.2d 455, 456 (1st Dep't 1986) (objection to jurisdiction waived when motion to dismiss was made prior to answering amended complaint without including jurisdictional objection even though such objection was included in original complaint). *See also* 4 WK&M ¶ 3211.03, at 32-23; *id.* ¶ 3211.04, at 32-29 (1987) (objections to personal or *in rem* jurisdiction waived if party moves on any grounds enumerated in CPLR 3211(a) without raising such objections); Farrell, *Civil Practice, Survey of New York Law*, 31 SYRACUSE L. REV. 15, 29 (1980) (defendant may waive well-founded objection to jurisdiction by failing to preserve it in a pre-answer motion or by omitting the defense of lack of jurisdiction from the answer if no such motion is made).

[8] 70 N.Y.2d 689, 512 N.E.2d 314, 518 N.Y.S.2d 793 (1987).

[9] *Id.* at 690, 512 N.E.2d at 315, 518 N.Y.S.2d at 794.

[10] Addesso v. Shemtob, 122 App. Div. 2d 754, 754, 505 N.Y.S.2d 642, 642 (2d Dep't 1986), *aff'd*, 70 N.Y.2d 689, 512 N.E.2d 314, 518 N.Y.S.2d 793 (1987).

[11] *Id.* at 754, 505 N.Y.S.2d at 642. At the time of closing, the deed to the property was to be delivered to the plaintiff with marketable title free of all encumbrances. *Id.*

[12] *Id.*

[13] *See supra* note 3 for the text of this provision.

[14] Addesso v. Shemtob, 70 N.Y.2d 689, 690, 512 N.E.2d 314, 315, 518 N.Y.S.2d 793, 794 (1987).

[15] *Id.* CPLR 3025(a) states that "[a] party may amend his pleading once without leave

In their answer to the amended complaint, the defendants claimed that the summons and the original complaint were not properly served and raised the affirmative defense that the court lacked personal jurisdiction over them.[16] The Supreme Court, Westchester County, held that under CPLR 3211(e) the defendants had waived the defense of lack of personal jurisdiction because they had failed to raise it in their previous CPLR 3211(a) motion.[17] The Appellate Division, Second Department, unanimously affirmed.[18]

The Court of Appeals, in an unsigned memorandum decision, affirmed the judgment of the Appellate Division.[19] The court quoted CPLR 3211(e) and held that the defense of lack of personal jurisdiction "is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection."[20] The court reasoned that CPLR 3211(e) required the defendants to state the basis for their objection to personal jurisdiction, "improper service of the summons and the original complaint," in the earlier CPLR 3211(a) motion to dismiss.[21] The court also stated that, in light of the plain language found in CPLR 3211(e), there was no reason to make an exception in this particular case where the jurisdictional defect was raised in an amended pleading "made as of right in response to a complaint amended as of right by [the]

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of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." *See* CPLR 3025(a) (McKinney 1974).

[16] *Addesso*, 70 N.Y.2d at 690, 512 N.E.2d at 315, 518 N.Y.S.2d at 794. *See* CPLR 3211(a)(8).

[17] *Addesso*, 70 N.Y.2d at 690, 512 N.E.2d at 315, 518 N.Y.S.2d at 794. The supreme court also granted the plaintiff's motion for summary judgment and directed specific performance of the contract. *See* Addesso v. Shemtob, 122 App. Div. 2d 754, 754, 505 N.Y.S.2d 642, 642 (2d Dep't 1986).

[18] *Id.* The appellate division found that there was nothing preventing the defendants from performing the contract and concluded that the supreme court's order of specific performance was valid. *Id.* at 755, 505 N.Y.S.2d at 642. The court went on to state that the defendant's claim of lack of personal jurisdiction was without merit. *Id.*

[19] *Addesso*, 70 N.Y.2d at 690, 512 N.E.2d at 315, 518 N.Y.S.2d at 794. The Court of Appeals did not address any issue other than the defendants' objection to personal jurisdiction. *See id.*

[20] *Id. See also* Competello v. Giordano, 51 N.Y.2d 904, 905, 415 N.E.2d 965, 965, 434 N.Y.S.2d 976, 977 (1980) (affirmative defense of lack of personal jurisdiction is waived by making motion under CPLR 3211(a) and not including such jurisdictional objection); Dominion of Canada Gen. Ins. Co. v. Pierson, 27 App. Div. 2d 484, 486-87, 280 N.Y.S.2d 296, 299 (3d Dep't 1967) (defendant waived right of personal jurisdiction objection by making motion under CPLR 3211(a)(5) without including it).

[21] *Addesso*, 70 N.Y.2d at 690, 512 N.E.2d at 315, 518 N.Y.S.2d at 794.

plaintiff."[22]

The decision in *Addesso* serves as an additional warning to drafters of pleadings that strict compliance with the requirements of CPLR 3211(e) is expected and that noncompliance will be fatal to a motion to dismiss for lack of personal jurisdiction.[23] However, such a seemingly inflexible view towards the rule is not inconsistent with the purpose of this subdivision.[24] The instructions for paragraphs eight and nine of subdivision (a) are "designed to enable the court to determine any issue of jurisdiction over the person . . . before it is required to determine any issue reaching the merits of the case."[25] By compelling a defendant to raise jurisdictional objections before or together with other objections, subdivision (e) prevents a determination going to the merits in a case where a lack of jurisdiction over the defendant would later require

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[22] *Id. But see* Russell v. Arthur Trask Co., 125 App. Div. 2d 136, 138, 512 N.Y.S.2d 575, 577 (3d Dep't 1987) (though motion is "made" when notice is served, court may allow moving party to supplement motion to dismiss to include lack of personal jurisdiction at any time prior to determination of motion); Naccarato v. Kot, 124 App. Div. 2d 365, 366, 507 N.Y.S.2d 308, 310 (3d Dep't 1986) (amendment to pleading made as of right may contain objection to personal jurisdiction since such amendment relates back in time to original pleading); Britt v. Freidus, 95 App. Div. 2d 751, 752, 464 N.Y.S.2d 193, 193 (1st Dep't 1983) (answer amended as of right may interpose a defense of lack of personal jurisdiction, even though original answer did not); Solarino v. Noble, 55 Misc. 2d 429, 430, 286 N.Y.S.2d 71, 71 (Sup. Ct. N.Y. County 1967) (where defendant initially raised defense of lack of personal jurisdiction in amended answer, served as of right two days after service of original answer, and plaintiff not prejudiced, defense deemed not waived); Blatz v. Benschine, 53 Misc. 2d 352, 354, 278 N.Y.S.2d 533, 536 (Sup. Ct. Queens County 1967) (defendant did not waive objection to personal jurisdiction when he interposed objection for first time in amended answer, made as of right in response to plaintiff's amended complaint, since an amendment relates back to service of original pleading). Given the *Addesso* court's holding, the continued validity of cases such as *Russell*, *Naccarato*, *Britt*, *Blatz* and *Solarino* is questionable. *See Addesso*, 70 N.Y.2d at 690, 512 N.E.2d at 315, 518 N.YS.2d at 794 (no reason to depart from statute's plain language even though jurisdictional defect was asserted in pleading amended as of right).

[23] *See* Siegel, *Door Opened for Sanctions*, N.Y.L.J., Sept. 28, 1987, at S-24, col. 3.

[24] See *supra* note 4 for text of CPLR 3211(e).

[25] ELEVENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1965), *reprinted in* [1965] McKinney's Session Laws 1980 [hereinafter JUDICIAL CONFERENCE ON THE CPLR]; *see also* 4 WK&M ¶ 3211.04, at 32-28 to -29 (1987) (such an approach avoids res judicata). The Court of Appeals has held that the purpose of subdivision (e)'s waiver provision "is to prevent the defendant from wasting both the 'court's or the plaintiff's time on any 3211 motion on any ground at all unless on that motion he joins his jurisdictional ground.' " Competello v. Giordano, 51 N.Y.2d 904, 905, 415 N.E.2d 965, 965, 434 N.Y.S.2d 976, 977 (1980) (quoting CPLR 3211, commentary at 63 (McKinney 1974)); Osserman v. Osserman, 92 App. Div. 2d 932, 933, 460 N.Y.S.2d 355, 357 (2d Dep't 1983) (same). The purpose articulated in the Judicial Report on the CPLR and the holdings in *Competello* and *Osserman* are consistent with the traditional policy of disposing of jurisdictional defenses before considering defenses going to the merits. *See* JUDICIAL CONFERENCE ON THE CPLR, *supra* at 1979.

dismissal.[26] These legislative purposes parallel those of Rule 12(h)(1) of the Federal Rules of Civil Procedure,[27] on which CPLR 3211(e) is modeled.[28] Rule 12 is intended to eliminate unnecessary delays at the pleading stage of a case by preventing the piecemeal consideration of pre-trial motions.[29] Notwithstanding the fact that the defendant interposed his jurisdictional defense in an amended answer made as of right,[30] it is submitted that a contrary holding in *Addesso* would have frustrated the legislative purpose of subdivision (e). Judicial expediency would be thwarted if a court had to consider the merits of the plaintiff's complaint and if the plaintiff had to bear the burden and expense of serving an amended answer to meet the defendant's original objection—only to have the matter later dismissed by a jurisdictional objection which could have just as easily been raised at the outset.[31]

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[26] *See id.* WACHTELL & MIRVIS, *supra* note 1, at 87 (same). If a ruling for the plaintiff on the merits was subsequently dismissed because of the defendant's jurisdictional objections, any subsequent action between the parties on the same cause of action would pose *res judicata* problems. *See* JUDICIAL CONFERENCE ON THE CPLR, *supra* note 25, at 1979. However, it is unclear whether a court would allow a relitigation of the same defense on the merits on the ground that the determination in the first action was void because the judgment was rendered by a court without jurisdiction over a party. *Id.* By requiring that jurisdictional questions be resolved before reaching the merits of a case, this particular problem is solved. *Id. See also* CPLR MANUAL, *supra* note 1, § 21.04, at 21-16 (determination of jurisdictional questions first avoids problems of res judicata).

[27] FED. R. CIV. P. 12(h)(1). Rule 12(h)(1) states that:

> A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived . . . (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Id.

[28] Siegel, *supra* note 23, at S-24, col. 2.

[29] Rauch v. Day & Night Mfg. Corp., 576 F.2d 697, 701 (6th Cir. 1978). *See* Murty v. Aga Khan, 92 F.R.D. 478, 482 (E.D.N.Y. 1981) (considering first the most easily decided dispositive motion not directed to the merits furthers policy against unnecessary motions); Sadler v. Pennsylvania Refining Co., 33 F. Supp. 414, 415 (D.S.C. 1940) (rule provides for quick presentation both of objections and of defenses and avoids delay incident to successive motions); E.I. du Pont de Nemours & Co. v. Dupont Textile Mills, Inc., 26 F. Supp. 236, 236 (D. Pa. 1939) (rule's purpose is to expedite and simplify proceedings).

[30] Addesso v. Shemtob, 70 N.Y.2d 689, 690, 512 N.E.2d 314, 315, 518 N.Y.S.2d 793, 794 (1987).

[31] In *Addesso*, the court had to consider a complaint, a motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) and an amended complaint before the defendants finally objected to personal jurisdiction in their answer to the amended complaint. *See id.* This "piecemeal consideration" of motions is contrary to the purpose of the waiver provision of CPLR 3211(e). *See supra* note 25.

Once waived, the defense of lack of personal jurisdiction cannot be revived by a permissive amendment to the answer. CPLR MANUAL, *supra* note 1, § 21.04, at 21-16. *See, e.g.*, Kukulka v. Millard Fillmore Suburban Hosp., 106 App. Div. 2d 886, 483 N.Y.S.2d 507 (4th

It is further suggested that the holding of *Addesso* is not unduly harsh in light of the Court of Appeals' decision in *Markoff v. South Nassau Community Hospital.*[32] The *Markoff* court held that when an action is dismissed for lack of personal jurisdiction due to a defect in service,[33] it has not been "commenced" for purposes of CPLR 205(a)[34] and the statute's six-month extension of the statute of limitations is inapplicable.[35] Consequently, if a defendant were allowed to raise for the first time in an amended answer the affirmative defense of lack of personal jurisdiction after having omitted this objection from an earlier CPLR 3211(a) mo-

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Dep't 1984) (defendant who interposed answer generally denying plaintiff's allegations could not raise issue of personal jurisdiction in amended answer); Keary v. Great Atl. & Pac. Tea Co., 96 App. Div. 2d 499, 465 N.Y.S.2d 518 (1st Dep't 1983) (affirmative defense of lack of personal jurisdiction deemed waived when included in defendant's original answer but omitted from amended answer); Wahrhaftig v. Space Design Group, 29 App. Div. 2d 699, 286 N.Y.S.2d 442 (3d Dep't 1968) (defendant's objection to personal jurisdiction in amended answer was untimely since it was not made "before service of responsive pleading").

[32] 61 N.Y.2d 283, 461 N.E.2d 1253, 473 N.Y.S.2d 766 (1984).

[33] *Id.* at 288, 461 N.E.2d at 1255, 473 N.Y.S.2d at 768. The court reasoned that an action is "commenced" only when there has been the service of a summons that complies with the requirements of the CPLR. *Id.* Therefore, any defect in the service will not "commence" an action, notwithstanding the fact that a defendant receives actual notice of the action. *Id.*

[34] CPLR 205(a) (McKinney Supp. 1988). Section 205(a) states:

> If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action.

Id.

[35] *Markoff*, 61 N.Y.2d at 288, 461 N.E.2d at 1255, 473 N.Y.S.2d at 768.

The holding in *Markoff* broadened the common-law exception to the six-month extension set forth in CPLR 205(a), which previously precluded application of the extension only if the first suit was terminated for lack of personal jurisdiction over the defendant due to a complete failure to serve process on him. *See* SIEGEL § 52, at 54. Prior to *Markoff*, if the defendant was served and received actual notice of the action, but the action was dismissed due to a technical flaw in the service, the action was deemed "commenced" for purposes of CPLR 205(a) and the plaintiff received the benefit of the tolling provision. *See* Amato v. Svedi, 35 App. Div. 2d 672, 672, 315 N.Y.S.2d 63, 64-65 (2d Dep't 1970); *see also* SIEGEL § 52, at 54 (loss of six month extension makes "want-of-jurisdiction dismissal . . . disastrous to plaintiffs").

Where the defendant had not been served with process, the inapplicability of the tolling provision had long been established. *See* Erickson v. Macy, 236 N.Y. 412, 415, 140 N.E. 938, 939 (1923). After *Markoff*, however, the plaintiff is denied the benefit of rule 205(a)'s extension when the action is dismissed for lack of personal jurisdiction, no matter what the objection was based upon. *See* SIEGEL § 52, at 21 (Supp. 1987).

tion, the defendant could raise this jurisdictional objection after the statute of limitations had run and thereby deprive the plaintiff of an opportunity of bringing a timely action.[36]

By issuing such a strong statement to practitioners, the *Addesso* court has furthered the purpose of CPLR 3211(e)'s mandate —promoting judicial efficiency in the disposition of issues. Additionally, the decision diminishes the likelihood that defendants will be able to cause unnecessary delays which could preclude plaintiffs from bringing meritorious claims.

Leanne Sinclair Jacobs

CPLR 4317(b): Equitable distribution of marital assets is not a proper subject for a compulsory reference

Article 43 of the CPLR enunciates the procedures governing a trial conducted by a referee[1] or a judicial hearing officer.[2] These

[36] *See generally* Siegel, *supra* note 23, at S-24, col. 1. In his article, Professor Siegel explains the interplay between defects in summons service, statutes of limitations, and *Markoff's* interpretation of CPLR 205(a) and how these three factors can affect a plaintiff's ability to pursue a cause of action. *Id.* The first factor is the dismissal of the action because of defective service—as was the case in *Addesso*. *Id.* The second factor occurs when the statute of limitations has already run at the time of such dismissal. *Id.* The third factor is the decision in *Markoff* holding that CPLR 205(a)'s six month extension of the statute of limitations does not apply when the action is dismissed due to lack of personal jurisdiction. *Id.* When these three factors occur together, the plaintiff is precluded from proceeding with the action. *Id.*

[1] CPLR art. 43 (McKinney 1963). The CPLR provides for three modes of trial practice: trial by jury, trial by a judge, and trial by a referee. *See* SIEGEL § 379, at 492. The authority of the courts to appoint a referee is contained in CPLR section 4001. CPLR 4001 (McKinney 1963). Only attorneys admitted to practice in New York may be designated as referees. CPLR 4312(1) (McKinney 1963). The referee must conduct a "trial in the same manner as a court trying an issue without a jury," CPLR 4318 (McKinney Supp. 1988), and the decision of the referee is accorded the same authority as the decision of a court. CPLR 4319 (McKinney 1963). *See* Lipton v. Lipton, 128 Misc. 2d 528, 534, 489 N.Y.S.2d 994, 999 (Sup. Ct. Nassau County 1985) (determination of referee or judicial hearing officer is as binding as supreme court justices'); *aff'd*, 119 App. Div. 2d 809, 501 N.Y.S.2d 437 (2d Dep't 1986) Buxbaum v. Buxbaum, 118 Misc. 2d 348, 350, 460 N.Y.S.2d 414, 416 (Sup. Ct. Spec. T. N.Y. County 1983) (decision of referee accorded same treatment as decision of justice of coordinate jurisdiction); 4 WK&M ¶ 4319.01, at 43-55 (1987) (referee's decision stands as a court decision).

[2] CPLR 4301 (McKinney Supp. 1987). A 1983 amendment to section 4301 provides that, for the purposes of article 43, the term "referee" shall include a "judicial hearing officer." Ch. 840, § 4, [1983] N.Y. Laws 1601. A judicial hearing officer is defined as a former