

**CPLR 214(6): Three-Year Statute of Limitations Governs Claim of Accountants' Malpractice Notwithstanding the Existence of an Underlying Oral Agreement Between the Parties**

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to his parents were privileged unless the minor defendant was afforded the right to communicate privately or was warned that any overheard utterances may be used against him.

Included among the appellate division cases analyzed is *Adler & Topal, P.C. v. Exclusive Envelope Corp.*, involving the extent to which a plaintiff could invoke the 6-year statute of limitations for breach of contract where his complaint against an accountant sounded essentially in malpractice. Notably, the second department restricted the Court of Appeals' decision in *Sears, Roebuck & Co. v. Enco Associates*, which held the 6-year period applicable when the claim arose from an underlying written agreement. The court distinguished *Sears*, holding that a malpractice claim, arising from a simple oral agreement, was subject to the 3-year statute of limitations.

It is hoped that the cases treated in this issue of *The Survey* will keep the bar abreast of the important recent developments in New York law.

## CIVIL PRACTICE LAW AND RULES

### Article 2—Limitations of Time

*CPLR 214(6): Three-year statute of limitations governs claim of accountants' malpractice notwithstanding the existence of an underlying oral agreement between the parties*

Section 214 of the CPLR requires that malpractice actions, other than claims for medical malpractice, must be commenced within 3 years<sup>1</sup> from the time of their accrual.<sup>2</sup> In determining the

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<sup>1</sup> CPLR 214(6) (McKinney Supp. 1981-1982). In addition to nonmedical malpractice claims, actions to recover for personal injuries or property damage are covered by the 3-year statute of limitations. CPLR 214(4),(5) (McKinney Supp. 1981-1982). Prior to 1877, however, actions to recover for personal injuries and property damage, as well as for breach of contract, were governed by a 6-year limitations period. 1 WK&M ¶ 214.11, at 2-290. It is interesting to note that early common law recognized no fixed period of time for instituting an action. See *Trepuk v. Frank*, 58 App. Div. 2d 556, 557, 396 N.Y.S.2d 18, 18 (1st Dep't 1976), *rev'd on other grounds*, 44 N.Y.2d 723, 376 N.E.2d 924, 405 N.Y.S.2d 452 (1978).

<sup>2</sup> In both medical and nonmedical malpractice claims, the cause of action accrues on the date of the alleged malpractice. See 1 WK&M ¶ 214.18, at 2-305. There are two recognized exceptions to this general rule, however, in medical malpractice cases. CPLR 214-a (McKinney Supp. 1981-1982). First, if the physician commits a wrongful act and continues treatment for the same illness, injury or condition which gave rise to the said act, the action will accrue at the end of the course of treatment. *Id.* Second, if a foreign object is negligently left in a patient's body, the statute of limitations runs from the time the patient could have either discovered the object or have reasonably discovered the object. *Id.* While

proper limitations period governing a particular action,<sup>3</sup> New York courts traditionally have looked to the essence of the action rather than to the plaintiff's asserted theory of liability.<sup>4</sup> Thus, where the alleged wrong sounds essentially in malpractice, courts generally have invoked the 3-year statute of limitations, despite any underlying contractual agreement between the parties.<sup>5</sup> It has become unclear, however, to what extent a plaintiff can assert the existence of an underlying contract to escape the 3-year tort limitation and invoke the 6-year contractual statute of limitations.<sup>6</sup> Recently, in

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the "continuous treatment" theory has been applied successfully to malpractice actions against accountants and architects, *see* *County of Broome v. Vincent J. Smith, Inc.*, 78 Misc. 2d 889, 892, 358 N.Y.S.2d 998, 1002 (Sup. Ct. Broome County 1974) (architect); *Wilkin v. Dana R. Pickup & Co.*, 74 Misc. 2d 1025, 1026, 347 N.Y.S.2d 122, 124 (Sup. Ct. Allegany County 1973) (accountant), courts have not been willing to extend the "foreign object" exception in the nonmedical malpractice context, *see* *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 237 (S.D.N.Y. 1974).

<sup>3</sup> Generally, the purpose of a statute of limitations is to fix a "known and limited time for the commencement of an action," thereby precluding the institution of stale claims. *In re MacDonald v. Reid*, 85 Misc. 2d 291, 295, 380 N.Y.S.2d 510, 514 (Sup. Ct. Westchester County 1976). The expiration of the statute of limitations, however, merely suspends the remedy; it does not destroy the substantive right. *See* *Antoinette K. v. Kenneth L.*, 103 Misc. 2d 1011, 1013, 427 N.Y.S.2d 550, 552 (Family Ct. N.Y. County 1980); *In re Estate of Hoffman*, 107 Misc. 2d 497, 498, 435 N.Y.S.2d 235, 237 (Sur. Ct. Kings County 1980).

<sup>4</sup> *See* *Carr v. Lipshie*, 8 App. Div. 2d 330, 332, 187 N.Y.S.2d 564, 566 (1st Dep't 1959), *aff'd*, 9 N.Y.2d 983, 176 N.E.2d 512, 218 N.Y.S.2d 62 (1961). New York courts, in determining an applicable statute of limitations in suits commenced against various types of professionals, have examined the essence of the action, rather than the plaintiff's asserted ground of recovery. *See, e.g.*, *Paver & Wildfoerster v. Catholic High School Ass'n*, 38 N.Y.2d 669, 674, 345 N.E.2d 565, 568, 382 N.Y.S.2d 22, 24 (1976) (architect); *Calhoun v. Gale*, 29 App. Div. 2d 766, 767, 287 N.Y.S.2d 710, 711 (2d Dep't) (physician), *aff'd*, 23 N.Y.2d 756, 244 N.E.2d 468, 296 N.Y.S.2d 953 (1968).

<sup>5</sup> *See, e.g.*, *Carr v. Lipshie*, 8 App. Div. 2d 330, 332, 187 N.Y.S.2d 564, 567 (1st Dep't 1959), *aff'd*, 9 N.Y.2d 983, 176 N.E.2d 512, 218 N.Y.S.2d 62 (1961); *Wilkin v. Dana R. Pickup & Co.*, 74 Misc. 2d 1025, 1027, 347 N.Y.S.2d 122, 125 (Sup. Ct. Allegany County 1973). In addition to invoking the 3-year statute of limitations for nonmedical malpractice actions, New York courts have applied the 3-year limitations period where the action sounds in negligence, despite any underlying agreement between the litigants. *See, e.g.*, *Webber v. Herkimer & Mohawk St. R.R.*, 109 N.Y. 311, 314-15, 16 N.E. 358, 360 (1888) (contract of carriage not sufficient to allow personal injury action in contract); *Alyssa Originals v. Finkelshtein*, 22 App. Div. 2d 701, 701, 254 N.Y.S.2d 21, 23 (2d Dep't 1964), *aff'd*, 24 N.Y.2d 976, 250 N.E.2d 82, 302 N.Y.S.2d 599 (1969) (tenant's lease not sufficient to allow contract action for property damage).

<sup>6</sup> *See* *Sears, Roebuck & Co. v. Enco Assocs.*, 43 N.Y.2d 389, 396-97, 372 N.E.2d 555, 557, 401 N.Y.S.2d 767, 770 (1977), *modifying* 54 App. Div. 2d 13, 385 N.Y.S.2d 613 (2d Dep't 1976); *Paver & Wildfoerster v. Catholic High School Ass'n*, 38 N.Y.2d 669, 672, 345 N.E.2d 565, 566, 382 N.Y.S.2d 22, 23 (1976). In *Paver*, the plaintiff alleged "breach of contract" for an architect's defective design and faulty supervision of certain architectural work. 38 N.Y.2d at 674, 345 N.E.2d at 567-68, 382 N.Y.S.2d at 24. The Court applied the 6-year contract statute of limitations to the plaintiff's claim, stating that if a claim is "sub-

*Adler & Topal, P.C. v. Exclusive Envelope Corp.*,<sup>7</sup> the Appellate Division, Second Department, held that a corporation's malpractice and simple tort counterclaims against an accounting firm could not be converted into contract claims on the basis of a simple contractual relationship between the parties, and thus, were governed by the 3-year tort statute of limitations.<sup>8</sup>

In *Adler*, the plaintiff-accounting firm performed a variety of services for the defendant-corporation between 1972 and July 31, 1976.<sup>9</sup> On December 4, 1979, the accounting firm sued its former client to recover amounts overdue.<sup>10</sup> In its answer, the corporation denied liability and set forth three counterclaims, alleging the firm's negligent performance of accounting services and the firm's unlawful conversion of the defendant's property and the firm's breach of contract in failing to exercise ordinary care.<sup>11</sup> Relying

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stantially related" to matters encompassed by the substantive agreement, it is immaterial, in applying the statute of limitations, whether it lies in contract or tort. *Id.* at 676, 345 N.E.2d at 569, 382 N.Y.S.2d at 26. Hence, the claim against the architect, though legally cognizable in either contract or malpractice, was timely since it was asserted within the 6-year period of limitations. *Id.* Beyond its narrow holding, however, the Court of Appeals, in dictum, suggested that the question of the applicable statute of limitations should turn upon whether the claim is for personal injury or property damage. *Id.* at 675, 345 N.E.2d at 568, 382 N.Y.S.2d at 25. While the Court recognized that personal injury claims sound "essentially in tort," it nevertheless stated that "when the action is one for damages to property or pecuniary interests only, where there is a contractual agreement between the parties, the general tendency has been to allow the plaintiff to elect to sue in contract or tort, as he sees fit." *Id.* Commentators have noted that the adoption of this dictum would result in the application of the 6-year period of limitations to nonmedical malpractice actions where the claim is for property or pecuniary damage. See 1 WK&M ¶ 214.22a, at 2-312.

In *Sears*, the plaintiff brought a breach of contract action, alleging the defendant-architect's lack of professional care in the performance of contracted-for services, more than 3 but less than 6 years after the architect completed work. 54 App. Div. 2d at 15, 385 N.Y.S.2d at 614. Relying upon its decision in *Paver*, the Court of Appeals held that the architect's obligations to the plaintiff arose out of the contractual relationship between the parties, regardless of how the plaintiff framed its cause of action. 43 N.Y.2d at 396, 372 N.E.2d at 558, 401 N.Y.S.2d at 770. Thus, the Court concluded, the 6-year contract statute of limitations was applicable to the plaintiff's claim. *Id.* at 395, 372 N.E.2d at 558, 401 N.Y.S.2d at 770; see CPLR 213(2).

<sup>7</sup> 84 App. Div. 2d 365, 446 N.Y.S.2d 337 (2d Dep't 1982).

<sup>8</sup> *Id.* at 367, 446 N.Y.S.2d at 339.

<sup>9</sup> *Id.* at 365, 446 N.Y.S.2d at 338.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 366, 446 N.Y.S.2d at 338. The corporation alleged that the accountants had neglected to prepare or maintain and certify certain books, records and tax returns, thereby causing the corporation to suffer penalties, interest, and a loss of tax refunds. *Id.* A breach of contract claim lodged by the corporation alleged that the accounting firm failed to file tax returns and furnish the corporation with financial, accounting, and tax materials. *Id.* The third counterclaim asserted by the defendant alleged that the plaintiff converted the corporation's books and records. *Id.*

upon the Court of Appeals decision in *Sears, Roebuck & Co. v. Enco Associates*,<sup>12</sup> the corporation maintained that since its claims arose from the underlying oral contract with the accounting firm, the 6-year contract statute of limitations should be applied.<sup>13</sup> Seeking to amend its reply so as to allege the expiration of the tort statute of limitations,<sup>14</sup> the accounting firm contended that the defendant's claims sounded in malpractice and simple tort, thereby requiring application of the 3-year limitations period.<sup>15</sup> The Supreme Court, Special Term, however, refused to allow the plaintiff-firm to amend its reply to any of the counterclaims asserted by the corporation.<sup>16</sup>

In a unanimous decision, the Appellate Division, Second Department, reversed, granting the accountants' motion for leave to amend and for partial summary judgment.<sup>17</sup> Justice Thompson, writing for the court, reasoned that while virtually all accountant-client relationships rest upon "some sort of bare bones agreement," the simple oral contract involved in this case could not convert an ordinary malpractice claim, which had its genesis in negligence, to a contract claim.<sup>18</sup> To reach a contrary holding, the court stated, practically would defeat the purpose of CPLR 214.<sup>19</sup> Furthermore, after observing that *Sears* involved "a detailed written agreement which provided for specific and sophisticated services,"<sup>20</sup> Justice Thompson concluded that the ruling in *Sears* should not govern the circumstances in the present case.<sup>21</sup>

It is submitted that the *Adler* Court erred in making the ap-

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<sup>12</sup> 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977); see *supra* note 6.

<sup>13</sup> 84 App. Div. 2d at 366, 446 N.Y.S.2d at 338.

<sup>14</sup> *Id.* In addition to asserting the expiration of the 3-year limitations period, the accountants sought partial summary judgment against the corporation under section 203(c) of the CPLR. *Id.* Prior to the enactment of that section, a defendant was barred from alleging a tort counterclaim when the plaintiff's contract action was brought between 3 and 6 years of the action's accrual. See CPLR 203(c), commentary at 119 (1972). Although section 203 allows a defendant to assert an otherwise time-barred tort claim, his recovery may not exceed the amount awarded to the plaintiff on the complaint. See *id.*

<sup>15</sup> 84 App. Div. 2d at 366, 446 N.Y.S.2d at 338.

<sup>16</sup> *Id.* at 367, 446 N.Y.S.2d at 339.

<sup>17</sup> *Id.* at 368, 446 N.Y.S.2d at 339.

<sup>18</sup> *Id.* at 367, 446 N.Y.S.2d at 339.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* In *Sears*, the parties entered into a contract whereby the architect was to design and supervise the construction of a series of department store ramps. 43 N.Y.2d at 393, 372 N.E.2d at 556, 401 N.Y.S.2d at 769. The contract also called for mechanical and electrical engineering services. *Id.*

<sup>21</sup> 84 App. Div. 2d at 368, 446 N.Y.S.2d at 339.

plicable limitations period dependent upon the form of agreement entered into by the parties, rather than upon the question whether such contract gave rise to the malpractice claim. As *Sears* clearly suggests, where the alleged liability of the professional has its genesis in the contractual relationship between the parties, the cause of action should be governed by the 6-year contract statute of limitations.<sup>22</sup> Moreover, the only possible distinction between a "bare bones agreement" and a "specific, written" contract may be that, as a matter of preserving evidence, the oral agreement is more suitable to a shorter statute of limitations.<sup>23</sup> Yet, this reasoning is inconsistent with the fact that the contract statute of limitations is 6 years regardless of whether the agreement is oral or written.<sup>24</sup>

It appears, therefore, that a malpractice claim, involving property or pecuniary damage and based upon an underlying contractual relationship, should be governed by the 6-year limitations period.<sup>25</sup> Indeed, under these circumstances,<sup>26</sup> the type of proof

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<sup>22</sup> See *Sears, Roebuck & Co. v. Enco Assocs.*, 43 N.Y.2d 389, 395, 372 N.E.2d 555, 558, 401 N.Y.S.2d 767, 770 (1977). The *Sears* Court stated:

All obligations of the architects here, whether verbalized as in tort for professional malpractice or as in contract for nonperformance of particular provisions of the contract, arose out of the contractual relationship of the parties—i.e., absent the contract between them, no services would have been performed and thus there would have been no claims. It should make no difference then how the asserted liability is classified or described, or whether it is said that, although not expressed, an agreement to exercise due care in the performance of the agreed services is to be implied.

*Id.* at 396, 372 N.E.2d at 558, 401 N.Y.S.2d at 770-71.

<sup>23</sup> Statutes of limitations attempt to strike a balance between one party's right to enforce a valid claim and another party's right to be confronted with that claim before it becomes stale and before proof is rendered unavailable. See *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 390 (1868); *Connell v. Hayden*, 83 App. Div. 2d 30, 41, 443 N.Y.S.2d 383, 393 (2d Dep't 1981); *Commissioner of Social Servs. v. Oliver P.*, 97 Misc. 2d 957, 962, 412 N.Y.S.2d 987, 991 (Family Ct. Kings County 1979). See generally 63 HARV. L. REV. 1177, 1185 (1950) (examining the purpose of statutes of limitations in light of a defendant's peace of mind and expectations). Several jurisdictions have altered their statutes of limitations so as to account for the difficulty in preserving evidence when oral contracts are at issue. See, e.g., CAL. CIV. PRO. CODE §§ 337(1), 339 (Deering Supp. 1982) (establishing a 4-year limitations period for written contracts and a 2-year limitations period for oral contracts).

<sup>24</sup> CPLR 213(2) (1979).

<sup>25</sup> See *Sears, Roebuck & Co. v. Enco Assocs.*, 43 N.Y.2d 389, 397, 372 N.E.2d 555, 559, 401 N.Y.S.2d 767, 772 (1977); *Naetzker v. Brocton Central School Dist.*, 41 N.Y.2d 929, 930, 363 N.E.2d 351, 352, 394 N.Y.S.2d 627, 627 (1977); *Paver & Wildfoerster v. Catholic High School Ass'n*, 38 N.Y.2d 669, 676, 345 N.E.2d 565, 569, 382 N.Y.S.2d 22, 26 (1976). While prior cases have held that the court should look to the "essence" of the action when determining the applicable statute of limitations, see, e.g., *Carr v. Lipshie*, 8 App. Div. 2d 330, 332, 187 N.Y.S.2d 564, 566 (1st Dep't 1959), *aff'd*, 9 N.Y.2d 983, 176 N.E.2d 512, 218

necessary to establish a prima facie case will remain substantially unchanged irrespective of whether the claim sounds in tort or contract.<sup>27</sup> Furthermore, it is suggested that any concern regarding the existence of overlapping statutes of limitations is misplaced. Since the plaintiff who brings a malpractice action in reliance upon the 6-year contract statute of limitations is limited to a recovery of contractual damages, in reality it is not the same action that could have been instituted before the expiration of the 3-year tort limitations period.<sup>28</sup> Until the Court of Appeals clarifies precisely the ex-

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N.Y.S.2d 62 (1961); *Wilkin v. Dana R. Pickup & Co.*, 74 Misc. 2d 1025, 1027, 347 N.Y.S.2d 122, 125 (Sup. Ct. Allegany County 1973), these cases are distinguishable because they involved personal injury actions. It is submitted that personal injury actions should not be governed by the 6-year contract statute of limitations, even if they arise from an underlying contract between the parties, since the nature and extent of such injuries would be difficult to ascertain. Indeed, the trend toward shortening the limitations period for personal injury actions is reflected in section 214-a of the CPLR, which reduced the time within which medical malpractice actions could be commenced. *See* CPLR 214-a (1979) (2½-year limitation period for medical malpractice actions). Prior to the enactment of that section, an action to recover damages for medical malpractice was governed by the 3-year limitation period of section 214 of the CPLR. *See* 1 WK&M ¶ 214-a.02, at 2-316. It should be noted, however, that an action for personal injuries will lie in contract if a specific result has been promised. *See* *Robins v. Finestone*, 308 N.Y. 543, 546, 127 N.E.2d 330, 331 (1955); *cf.* *Martin v. Julius Dierck Equip. Co.*, 43 N.Y.2d 583, 589-90, 374 N.E.2d 97, 100-01, 403 N.Y.S.2d 185, 188 (1978) (plaintiff, not in privity with the seller of a product alleged to have caused personal injury, only possesses a cause of action in negligence or strict products liability, rather than in breach of warranty).

<sup>26</sup> In *Paver & Wildfoerster v. Catholic High School Ass'n*, 38 N.Y.2d 669, 345 N.E.2d 565, 382 N.Y.S.2d 22 (1976), *see supra* note 6, the Court of Appeals recognized that "contracts and torts are not contained in the natural order but are the products of the faltering legal grammar that men apply to the facts of life in order to make them tractable to verbalized rules." 38 N.Y.2d at 678, 345 N.E.2d at 570, 382 N.Y.S.2d at 27.

<sup>27</sup> In *Sears*, the Court of Appeals recognized that, in a case where the malpractice arises from an underlying contract between the litigants, it would be appropriate to accept evidence of the professional's failure to use reasonable care in the performance of his or her obligations under the contract. *Sears, Roebuck & Co. v. Enco Assocs.*, 43 N.Y.2d 389, 396, 372 N.E.2d 555, 558, 401 N.Y.S.2d 767, 771 (1977).

<sup>28</sup> *See id.* at 397, 372 N.E.2d at 558, 401 N.Y.S.2d at 771. It is submitted that the legislative design of section 214 of the CPLR does not preclude a malpractice action from being governed by the 6-year statute of limitations. When the section was being drafted, subdivision 6, which provides that a 3-year limitations period will govern actions alleging nonmedical malpractice, "was added on the suggestion that malpractice involving property damage—e.g., against an accountant—may be based on a contract theory and would otherwise be governed by the 6-year provision unless specific reference was made." *See* SIXTH REP. 93. Subsequently, however, the legislature refused to adopt a recommendation of the Law Revision Commission which suggested that section 214(6) be worded explicitly to refer to "[a]n action to recover damages for malpractice, whether based on tort, contract or any other theory." Recommendation of the Law Revision Commission to the Legislature Relating to the Statute of Limitations in Malpractice Actions, [1962] N.Y. LAW REV. COMM'N REP. 231, 232. Thus, it is submitted that the legislature's failure to adopt this language,

tent to which an underlying contract will impact upon the limitations period, however, there will continue to be confusion regarding the statute of limitations applicable to such claims.

*Edward Kelly*

### Article 32—Accelerated Judgment

*CPLR 3211: Defendant's assertion of cross-claim against codefendant constitutes a waiver of his jurisdictional objection to that codefendant's subsequent cross-claim*

Before a state may subject a nondomiciliary to its judicial processes, there must exist a predicate for jurisdiction.<sup>29</sup> In New York, a party may attack the adequacy of the predicate by asserting his jurisdictional defense either in a motion to dismiss the cause of action or in the responsive pleading.<sup>30</sup> It has been held

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which adoption would have resulted in a 3-year period of limitations for malpractice actions based on contract, indicates that a malpractice action arising from a contractual arrangement may be brought within the 6-year statute of limitations.

<sup>29</sup> See SIEGEL § 58, at 59; Homburger & Laufer, *Appearance and Jurisdictional Motions in New York*, 14 BUFFALO L. REV. 374, 374 (1964); Lacy, *Personal Jurisdiction and Service of Summons After Shaffer v. Heitner*, 57 OR. L. REV. 505, 509 (1978); Note: *Article III of the New York Civil Practice Law and Rules: Jurisdiction, Services and Appearance*, 37 ST. JOHN'S L. REV. 285, 320-28 (1963). In New York, personal jurisdiction may be obtained over a nondomiciliary defendant if he is served with process somewhere within the state. SIEGEL § 59, at 60; see *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878) (judgment in Oregon state court held void for want of personal service of process on a nondomiciliary), *overruled on other grounds in Shaffer v. Heitner*, 433 U.S. 186 (1977). An independent basis for in personam jurisdiction must be established in instances where a nondomiciled defendant is served with process outside the State of New York. See CPLR 301, 302, 313 (1972). If the summons is served incorrectly upon the defendant within New York, the constitutional predicate for jurisdiction nevertheless may be satisfied by an appearance on the part of the defendant, since such appearance constitutes a waiver of the jurisdictional defense unless the defendant reserves an objection to jurisdiction. See CPLR 320(b) (1972); Homburger & Laufer, *supra*, at 375; SECOND ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1964), in TENTH ANN. REP. N.Y. JUD. CONFERENCE 334-35 (1965); see also *Legislation: CPLR—Appearances*, 31 BROOKLYN L. REV. 133, 134 (1964).

<sup>30</sup> See *Ranz v. Sposato*, 106 Misc.2d 156, 156, 431 N.Y.S.2d 239, 239 (Sup. Ct. N.Y. County 1980). Section 3211(e) of the CPLR provides that an objection based upon lack of jurisdiction "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." CPLR 3211(e) (1970). Thus, a party who makes a 3211(a) motion, but fails to challenge the court's in personam jurisdiction, appears generally and waives any such objection. *Roseman v. McAvoy*, 92 Misc.2d 1063, 1064, 401 N.Y.S.2d 988, 989; (N.Y.C. Civ. Ct. N.Y. County 1978); *Suriano v. Hosie*, 59 Misc.2d 973, 974, 302 N.Y.S.2d 215, 216 (Dist. Ct. Nassau County 1969). In addition, if no motion under 3211(a) is made, a defendant who neglects to raise a jurisdictional objection in his answer is said to appear, thereby waiving the right to challenge personal jurisdiction.