

# CPLR 203(c): Revival of Landlord's Time-Barred Counterclaim for Reformation of Lease Denied in Action by Tenant for Recovery of Rent Overpayment

St. John's Law Review

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### Recommended Citation

St. John's Law Review (1977) "CPLR 203(c): Revival of Landlord's Time-Barred Counterclaim for Reformation of Lease Denied in Action by Tenant for Recovery of Rent Overpayment," *St. John's Law Review*: Vol. 51 : No. 3 , Article 6.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol51/iss3/6>

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may be considered only for the limited purpose of remedying defects in the complaint. *The Survey* also discusses *In re Agioritis*, wherein the Court held that a change in either the depository bank or the beneficiary of a Totten trust is sufficient to create a "new deposit," and hence, a testamentary substitute subject to the surviving spouse's right of election. Consideration is also given to the Court of Appeals' reaffirmation in *People v. Cassidy* of the "merger doctrine" with respect to prosecutions for kidnapping in the second degree.

As in the past, this issue of *The Survey* also discusses several significant decisions of the lower New York courts. With our discussion of these cases, it is hoped that *The Survey* will keep the practitioner abreast of significant developments in New York practice.

#### ARTICLE 2—LIMITATIONS OF TIME

*CPLR 203(c): Revival of landlord's time-barred counterclaim for reformation of lease denied in action by tenant for recovery of rent overpayment.*

CPLR 203(c) codifies the doctrine of equitable recoupment, permitting the assertion of a defense or counterclaim which arose from the same transaction, occurrence, or series of transactions or occurrences as a claim asserted in a complaint, even if the defense or counterclaim was time-barred at the commencement of the action.<sup>1</sup> Despite a commentator's suggestion that the "same transaction or occurrence" proviso be broadly construed,<sup>2</sup> recently, the Court of Appeals, in *SCM Corp. v. Fisher Park Lane Co.*,<sup>3</sup> held that a landlord's counterclaim for reformation of the lease agreement,

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<sup>1</sup> CPLR 203(c) provides in pertinent part:

A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.

The doctrine of equitable recoupment operates not as a basis for "affirmative relief against [the] plaintiff, by way of counterclaim, for any balance proven in . . . [the] defendant's favor," but rather serves "only . . . to abate, in whole or in part, [the] plaintiff's demand." *Title Guar. & Trust Co. v. Hicks*, 283 App. Div. 723, 724, 127 N.Y.S.2d 340, 342 (2d Dep't 1954) (mem.); see *Maders v. Lawrence*, 49 Hun 360, 2 N.Y.S. 159 (3d Dep't 1888); *Herbert v. Day*, 33 Hun 461, 15 Abb. N. Cas. 172 (N.Y. 1st Dep't 1884); *First Nat'l City Bank v. Drake*, 170 N.Y.L.J. 62, Sept. 27, 1973, at 17, col. 6 (N.Y.C. Civ. Ct. N.Y. County).

<sup>2</sup> See 1 WK&M ¶ 203.25, at 2-86.

<sup>3</sup> 40 N.Y.2d 788, 358 N.E.2d 1024, 390 N.Y.S.2d 398, *aff'g* 53 App. Div. 2d 595, 385 N.Y.S.2d 79 (1st Dep't 1976) (mem.).

asserted in an action by the tenant for recovery of overpayment of rent, did not arise "from the transactions, occurrences, or series of transactions or occurrences" upon which the tenant's claim for overpayment depended.

The parties in *SCM* entered into an agreement in 1966 in which the tenant leased several floors of a commercial building for a 50-year term. The lease provided for a fixed rental, subject to certain annual adjustments. The agreement further provided that the parties would submit to arbitration any disputes arising from the adjustment provision of the lease.<sup>4</sup> After entering the premises, the tenant received notice each year of a rent escalation due to an increase in either taxes or operating expenses. These payments were made without objection until the latter part of 1973.<sup>5</sup> On February 15, 1974, the tenant served a demand for arbitration, claiming that the landlord's calculation of the yearly adjustments had been improper. In his amended answer, the landlord sought to have the lease rewritten by the arbitrators so as to raise the annual rent adjustments.<sup>6</sup> The tenant then instituted the present proceeding, seeking to stay arbitration of the claim for reformation. The application for the stay was based on CPLR 7502(b), which authorizes a stay of arbitration if "the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court . . . ." The tenant asserted that the reformation was barred by the

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<sup>4</sup> 40 N.Y.2d at 789, 358 N.E.2d at 1026, 390 N.Y.S.2d at 400.

<sup>5</sup> The lease commenced on February 28, 1968. *Id.* Thereafter, on August 6, 1969, the tenant was apprised of a rent escalation resulting from an increase in taxes for the 1969-1970 tax year. Another increase, due to a rise in operating expenses during the 1969 fiscal year, was imposed on September 11, 1970. Further increments, imposed in subsequent years as a consequence of increases in taxes and operating expenses, were paid by the tenant until the 1972 expense increases and 1972-1974 tax increases became due.

<sup>6</sup> *Id.* at 790, 358 N.E.2d at 1026, 390 N.Y.S.2d at 400-01. The claim for reformation was predicated upon mutual mistake. The landlord maintained that the parties had intended that the tenant would pay for the building's electrical expenses which were attributable to the tenant's own consumption. Brief for Respondent-Appellant at 8-9, *SCM Corp. v. Fisher Park Lane Co.*, 40 N.Y.2d 788, 358 N.E.2d 1024, 390 N.Y.S.2d 398 (1976). In his answer, the landlord designated this claim for reformation as a "Fifth Defense." *Id.* As Judge Jones noted, however, this characterization was improper:

What the landlord asserts in this present instance is not a defense — that is, a bar to the claim asserted by the tenant — but is in the nature of a counterclaim, *i.e.*, a statement of circumstances which in and of themselves may form the basis of an adjudication of affirmative relief in favor of the landlord on its claim, irrespective of the tenant's success or failure on the latter's cause of action.

40 N.Y.2d at 791, 358 N.E.2d at 1027, 390 N.Y.S.2d at 401. See generally *President & Directors of the Manhattan Co. v. Cocheo*, 256 App. Div. 560, 10 N.Y.S.2d 770 (2d Dep't 1939).

<sup>7</sup> CPLR 7502(b). Pursuant to CPLR 7503(b) a party may make an application to stay arbitration on the ground that the claim sought to be arbitrated is barred by 7502(b).

applicable 6-year statute of limitations since the claim was not asserted until nearly 10 years after execution of the lease.<sup>8</sup> The landlord contended, however, that section 203(c) enabled it to assert the otherwise time-barred claim for reformation to the extent of the tenant's demand for recovery of its alleged overpayment.

Rejecting the landlord's contention, Judge Jones, writing for a divided Court of Appeals, held that the claim for reformation was time-barred.<sup>9</sup> The *SCM* Court reasoned that the tenant's claim of alleged rent overpayment was predicated on the landlord's acts of computing and assessing the escalations subsequent to the execution of the lease, whereas the landlord's claim for reformation was based upon the intention of the parties prior to and at the moment of execution of the lease agreement itself.<sup>10</sup> Hence, Judge Jones found that the landlord's counterclaim did not satisfy the 203(c) requirement that it arise from the same "transactions, occurrences, or series of transactions or occurrences" upon which the tenant's claim depended. Since the landlord would have been time-barred from asserting the claim for reformation of the 1966 agreement in a law action in 1974, and, because the action was not revived pursuant to CPLR 203(c), the majority concluded that arbitration of the landlord's claim had been properly stayed.<sup>11</sup>

Judge Cooke, in a dissenting opinion in which Judge Gabrielli concurred, characterized the majority's application of the same "transaction or occurrence" test as "too narrow" and argued that the language of the statute should be construed in a more liberal fashion.<sup>12</sup> Declaring that both claims arose from the same transac-

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<sup>8</sup> 40 N.Y.2d at 790, 358 N.E.2d at 1026, 390 N.Y.S.2d at 401. If the landlord was to seek reformation of the lease agreement in a judicial proceeding, the action would be barred by the residuary 6-year limitation prescribed by CPLR 213(1). Relying upon *Bartlett v. Judd*, 21 N.Y. 199 (1860), the landlord argued that an equitable defense such as reformation is never barred by a statute of limitations. The Court of Appeals summarily disposed of this contention, however, finding that the landlord's assertion was a counterclaim rather than a defense. 40 N.Y.2d at 791, 358 N.E.2d at 1027, 390 N.Y.S.2d at 401.

<sup>9</sup> 40 N.Y.2d at 789, 358 N.E.2d at 1026, 390 N.Y.S.2d at 400. Judge Fuchsberg, in a separate opinion, concurred in the result, but disagreed with the majority's indication that reformation is an arbitral issue. See note 12 *infra*. Judge Cooke, joined by Judge Gabrielli, dissented and voted to reverse on the ground that the statute of limitations should not be held to bar the landlord's counterclaim. 40 N.Y.2d at 795, 358 N.E.2d at 1030, 390 N.Y.S.2d at 404 (Cooke, J., dissenting).

<sup>10</sup> *Id.* at 791, 358 N.E.2d at 1027, 390 N.Y.S.2d at 401.

<sup>11</sup> 40 N.Y.2d at 791-92, 358 N.E.2d at 1027, 390 N.Y.S.2d at 402. As succinctly stated by Judge Jones, "[t]he tenant's claim relates to performance under the contract; the landlord's relates to the negotiation and articulation of the agreement made between the parties prior to its execution." *Id.* at 792, 358 N.E.2d at 1027, 390 N.Y.S.2d at 402.

<sup>12</sup> *Id.* at 792, 358 N.E.2d at 1030, 390 N.Y.S.2d at 405. The Court also expressed the view that arbitrators have the power under a broad arbitration clause to grant relief in the nature

tion, *viz*, the negotiation of the terms of the lease and the intention of the parties at the time of its negotiation, the dissenters posited that the landlord's claim was actually one for equitable recoupment which, if valid, should be allowed to the extent of the tenant's claim in the arbitration proceeding.<sup>13</sup>

It is submitted that the Court's application of the same "transaction or occurrence" test to the facts in *SCM* accurately implements the language of CPLR 203(c). While "in a most general sense both [claims] might be said to be associated with the lease,"<sup>14</sup> closer scrutiny of the underlying facts reveals that the landlord's claim presents issues distinctly different from those raised by the tenant's complaint.<sup>15</sup> Thus, it is suggested that the Court was reasonable in finding that the transactional requirement was not satisfied.<sup>16</sup> The dissent's warning against an overly restrictive con-

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of reformation by rewriting provisions of the lease. *Id.* at 789, 358 N.E.2d at 1026, 390 N.Y.S.2d at 400 (dictum). In considering this issue, the Court took note of the arbitration clause that the parties had included in the lease which provided that "[i]f there be any dispute between Landlord [Fisher] and Tenant [SCM] with respect to the provisions . . . [concerning yearly increases,] the issue shall be *expeditiously* submitted to the American Arbitration Association for determination . . ." Brief for Respondent-Appellant at 4-5, *SCM Corp. v. Fisher Park Lane Co.*, 40 N.Y.2d 788, 358 N.E.2d 1024, 390 N.Y.S.2d 398 (1976) (emphasis in original). In turn, the rules of the American Arbitration Association expressly authorize an arbitrator to "grant any remedy or relief which he deems just and equitable . . ." AM. ARB. ASS'N COMM. R. 42 (1977). Reasoning that the landlord's claim for reformation falls clearly within the scope of the parties' agreement to arbitrate "any dispute" relating to the rent escalation provision of the lease and, further, that it is the function of arbitrators to "fashion the remedy appropriate to the wrong," *Paver & Wildfoerster v. Catholic High School Ass'n*, 38 N.Y.2d 669, 677, 345 N.E.2d 565, 569, 382 N.Y.S.2d 22, 26 (1976), the majority concluded that an arbitrator could grant the remedy of reformation. Judge Fuchsberg, while concurring in the majority's decision to stay arbitration, stated that since the parties had not expressly conferred upon the arbitrators the authority to rewrite the contract, reformatory relief was outside the scope of the arbitrators' power. 40 N.Y.2d at 794-95, 358 N.E.2d at 1029-30, 390 N.Y.S.2d at 403-04 (Fuchsberg, J., concurring).

<sup>13</sup> 40 N.Y.2d at 796, 358 N.E.2d at 1030, 390 N.Y.S.2d at 405 (Cooke, J., dissenting). With respect to the statement of the majority that the tenant's claim relates to "performance under the contract," while the landlord's claim relates to "negotiation and articulation . . . prior to its execution," the dissent countered that "[i]t is precisely this type of conceptualism that CPLR 203 (subd. [c]) was intended to eliminate." *Id.* Some authorities indicate, however, that the statute was intended to eliminate the inequities resulting from judicial reluctance to permit interposition of a tort claim as a recoupment against a contract claim under the CPA. *See Chevron Oil Co. v. Atlas Oil Co.*, 28 App. Div. 2d 644, 280 N.Y.S.2d 731 (4th Dep't 1967) (mem.); CPLR 203, commentary at 119 (McKinney 1972); 1 WK&M ¶ 203.25.

<sup>14</sup> 40 N.Y.2d at 796, 358 N.E.2d at 1030, 390 N.Y.S.2d at 405 (Cooke, J., dissenting). In support of his contention that the landlord's counterclaim arose from the same series of transactions or occurrences as the tenant's claim, Judge Cooke offered the following view of the facts: "The tenant's claims relate to whether the landlord computed additional rent in accordance with the lease; the landlord's counterclaim relates to the question of what were the correct percentages to be used in computing such rent." *Id.*

<sup>15</sup> *Id.* at 792, 358 N.E.2d at 1027, 390 N.Y.S.2d at 402.

<sup>16</sup> CPLR 203(e), which permits a claim in an amended pleading to relate back to the date

struction of CPLR 203(c) should not, however, go unheeded; nor, it is submitted, should the majority's approach be interpreted as indicative of a judicial narrowing of the equitable recoupment doctrine. The significance of the *SCM* decision lies in the method of analysis utilized by the Court in determining the applicability of section 203(c): careful scrutiny of all facets of the claims, defenses, and counterclaims asserted by the opposing litigants.

### ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

*CPLR 301: Application of the "doing business" predicate to acquire in personam jurisdiction over nonresident individuals.*

CPLR 301 preserves the predicates for the exercise of in personam jurisdiction that were recognized under pre-CPLR law.<sup>17</sup> One such predicate, the "doing business" test, permits the exercise of jurisdiction over nondomiciliaries engaged in a continuous and systematic course of business within the state in actions not associated with that party's New York operations.<sup>18</sup> Previously, this jurisdictional predicate had been applied only to foreign corporations.<sup>19</sup>

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of the original pleading, also contains the "transaction or occurrence" language found in § 203(c). See 1 WK&M ¶ 203.25, at 2-86. In determining the applicability of 203(e), courts appear to focus on the facts underlying the claims rather than the legal theories upon which the causes of action are founded. See, e.g., *Town Bd. v. National Sur. Corp.*, 53 Misc. 2d 23, 277 N.Y.S.2d 872 (Sup. Ct. Sullivan County 1967), *aff'd mem.*, 29 App. Div. 2d 726, 286 N.Y.S.2d 122 (3d Dep't 1968). The *SCM* Court, in reasoning that the facts underlying the landlord's claim related to mutual mistake while the facts inherent in the tenant's claim pertained to improper mathematical assessments, see text accompanying note 10 *supra*, seemingly employed an "emphasis of the facts" mode of analysis similar to the test employed under § 203(e).

<sup>17</sup> CPLR 301 provides: "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."

<sup>18</sup> See *The Biannual Survey*, 39 ST. JOHN'S L. REV. 406, 413 (1965). The doing business predicate evolved out of decisional law. It first surfaced in New York in *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917) (Cardozo, J.), wherein the Court held that a corporation which does business in New York "with a fair measure of permanence and continuity . . . is within the jurisdiction of our courts" regardless of the origin of the cause of action. *Id.* at 267, 115 N.E. at 917. See generally Prashker, *Service of Summons on Non-Resident Natural Persons Doing Business in New York*, 15 ST. JOHN'S L. REV. 1, 18-19 (1940)[hereinafter cited as Prashker].

<sup>19</sup> See, e.g., *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317 (2d Cir. 1964); *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965); *Curran v. Rouse Transp. Corp.*, 42 Misc. 2d 1055, 249 N.Y.S.2d 718 (Sup. Ct. Queens County 1964). In *Curran* the court refused to extend the doing business test to nonresident individuals. *Id.* at 1058, 249 N.Y.S.2d at 721. A federal tribunal, however, in *Erving v. Virginia Squires Basketball Club*, 349 F. Supp. 709 (E.D.N.Y. 1972), applied the test to a partnership without discussing the fact that it previously had been applied only to corporations. *Id.* at 712-15.