

CPLR 3211: Court of Appeals Limits Use of Affidavits Where Motion to Dismiss Is Not Converted Into Motion for Summary Judgment

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balancing approach, and did not expressly limit its holding to the specific context of the case.⁴⁰ Rather, the appellate division merely set forth the general rule that an individual who conducts continuous business activity within the state is subject to in personam jurisdiction with respect to causes of action not related to that activity.⁴¹ It is hoped that this holding does not signal an unrestricted extension of the doing business jurisdictional predicate. New York has in the past adhered to a "wise policy . . . [of refraining] from imposing its jurisdiction too easily and unjustly upon nonresident individuals"⁴² It would be unfortunate if the New York courts retreated from this position.

ARTICLE 32—ACCELERATED JUDGMENT

CPLR 3211: Court of Appeals limits use of affidavits where motion to dismiss is not converted into motion for summary judgment.

CPLR 3211(a)(7) permits a party to move for judgment dismissing a complaint if "the pleading fails to state a cause of action."⁴³ Subdivision (c) of CPLR 3211 further provides that upon the hearing of this motion, the parties may submit any evidence that a court could consider on a motion for summary judgment.⁴⁴ Since the submission of an affidavit in support of a motion for summary judgment is mandatory,⁴⁵ the courts have permitted the use of affidavits on a motion to dismiss made pursuant to CPLR 3211(a)(7).⁴⁶ Recently, however, in *Rovello v. Orofino Realty Co.*,⁴⁷ a divided Court

⁴⁰ 52 App. Div. 2d at 440, 384 N.Y.S.2d at 784.

⁴¹ *Id.*

⁴² 85 Misc. 2d at 470, 377 N.Y.S.2d at 367.

⁴³ CPLR 3211(a)(7) provides: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: . . . the pleading fails to state a cause of action"

⁴⁴ CPLR 3211(c) provides: "Upon the hearing of a motion made under subdivision (a) . . . either party may submit any evidence that could properly be considered on a motion for summary judgment"

⁴⁵ CPLR 3212(b) provides in pertinent part: "A motion for summary judgment shall be supported by affidavit"

⁴⁶ In *Rapoport v. Schneider*, 29 N.Y.2d 396, 401, 278 N.E.2d 642, 645, 328 N.Y.S.2d 431, 436 (1972), the Court of Appeals utilized the facts contained in defendant's affidavit in considering a motion to dismiss. For some of the lower court cases in which the court allowed submission of affidavits to support a motion to dismiss, see *Rappaport v. International Playtex Corp.*, 43 App. Div. 2d 393, 352 N.Y.S.2d 241 (3d Dep't 1974); *Hamilton Printing Co. v. Ernest Payne Corp.*, 26 App. Div. 2d 876, 273 N.Y.S.2d 929 (3d Dep't 1966) (mem.); *Epps v. Yonkers Raceway, Inc.*, 21 App. Div. 2d 798, 250 N.Y.S.2d 751 (2d Dep't 1964) (mem.).

⁴⁷ 40 N.Y.2d 633, 357 N.E.2d 970, 389 N.Y.S.2d 314 (per curiam), *rev'g* 51 App. Div. 2d 562, 378 N.Y.S.2d 740 (2d Dep't 1976) (mem.).

of Appeals held that unless a motion made under CPLR 3211(a)(7) is converted into one for summary judgment, affidavits normally may be considered only for the limited purpose of remedying defects in the complaint.⁴⁸

In *Rovello*, plaintiff purchaser sought specific performance of a contract for the sale of stock in a real estate company.⁴⁹ Defendants moved to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action. In support of this motion, defendants submitted affidavits alleging that plaintiff had failed to perform a condition precedent, *viz*, the tender of the required downpayment.⁵⁰ Plaintiff's counsel submitted an affidavit in opposition which tacitly admitted the failure to perform the condition precedent by contending that the nonperformance was either consented to, excusable, or the fault of one of the defendants.⁵¹ The motion to dismiss was denied by the trial court, but subsequently reversed by the appellate division.⁵²

In concluding that the trial court had correctly denied the motion, the *Rovello* Court noted the procedural distinction between the motion for summary judgment and the motion to dismiss for failure to state a cause of action.⁵³ The former requires the disclosure of all evidence pertaining to the issues in dispute, the Court stated, while the latter permits the plaintiff to stand on his pleading.⁵⁴ Where the motion to dismiss for failure to state a cause of action is converted to one for summary judgment, however, the plaintiff must make an evidentiary showing or suffer summary judgment.⁵⁵ Focusing upon

⁴⁸ 40 N.Y.2d at 636, 357 N.E.2d at 972, 389 N.Y.S.2d at 316.

⁴⁹ *Id.* at 633, 357 N.E.2d at 971, 389 N.Y.S.2d at 315.

⁵⁰ The plaintiff is not required to plead conditions precedent to the contract in his complaint. The defendant must raise the issue specifically. CPLR 3015(a). Once the defendant has raised the issue, the plaintiff has the burden of proof on the issue. *See* CPLR 3015, commentary at 58 (McKinney 1974).

⁵¹ In the agreement, the plaintiff was to tender a downpayment of \$5,700 within 16 months of the agreement. No payment was made until after 3 years had passed and then the amount tendered was only \$1,870. For this failure to meet the condition, the plaintiff offered, alternatively, three excuses: First, the untimely death of his partner (the death having occurred after the 16-month period had elapsed); second, his own absence from the jurisdiction during the period (although by his admission this was only 22 1/2% of the time); and third, that defendant consented to an extension of time. 40 N.Y.2d at 637-38, 357 N.E.2d at 973-74, 389 N.Y.S.2d at 317-18 (Wachtler, J., dissenting).

⁵² 51 App. Div. 2d 562, 378 N.Y.S.2d 740.

⁵³ 40 N.Y.2d at 635, 357 N.E.2d at 972, 389 N.Y.S.2d at 316.

⁵⁴ *Id.*

⁵⁵ CPLR 3211(c) provides that the court, in its discretion, may convert the motion to dismiss to a motion for summary judgment. If it does, the general summary judgment requirements of CPLR 3212 are brought to bear for the disposition of the motion. If the motion is then granted the judgment is generally entitled to full *res judicata* effect. *See* CPLR 3211, commentary at 74 (McKinney 1970).

this distinction, the *Rovello* Court emphasized the importance of CPLR 3211(c) which provides that where the court treats a rule 3211(a)(7) motion as one for summary judgment, the parties must be given adequate notice.⁵⁶ Since notice need not be given where the court does not convert the motion, the *Rovello* Court determined that in that instance submitted affidavits were not to be examined for evidentiary support.⁵⁷ Instead, the Court stated that, in general, affidavits which accompany a CPLR 3211(a)(7) motion may be received only for the limited purpose of remedying defects in the pleading.⁵⁸ The Court of Appeals did acknowledge, however, that in rare instances where defendant's or plaintiff's affidavits "establish conclusively that plaintiff has no cause of action," the affidavits may be used to support a dismissal.⁵⁹

Judge Wachtler, writing for the dissent, asserted that the majority had abrogated the statute and revitalized the common law demurrer.⁶⁰ The dissent noted that a motion made pursuant to CPLR 3211(a)(7) is designed to ensure not only that a plaintiff states a cause of action, but also that he has one.⁶¹ Toward this end, Judge Wachtler stated, rule 3211(a) permits both parties to submit any evidence which a court could consider on a motion for summary judgment. Construing this provision as allowing a court to look beyond the face of the complaint, the dissent concluded that the parties are free to make an evidentiary showing on the disputed issues by submitting supporting affidavits.⁶² The dissent lamented, however, that "the majority's decision makes it an empty exercise for the defendant to do so."⁶³

⁵⁶ 40 N.Y.2d at 635, 357 N.E.2d at 972, 389 N.Y.S.2d at 316.

⁵⁷ *Id.*

⁵⁸ *Id.* at 636, 357 N.E.2d at 972, 389 N.Y.S.2d at 316.

⁵⁹ *Id.*

⁶⁰ *Id.* at 636, 357 N.E.2d at 973, 389 N.Y.S.2d at 317 (Wachtler, J., dissenting). The common law demurrer was a device which tested the face of the complaint. Defendant was deemed to have admitted all of plaintiff's allegations. In answer to the complaint defendant stated, in effect, that even if true the complaint still failed to state a cause of action. Many jurisdictions, including New York and the federal courts, have eliminated the common law demurrer. This was done as part of the reform of American pleadings from fact pleading to notice pleading. The purpose of this reform was to shift the emphasis of the proceedings from determination of the technical accuracy of the pleadings to determination of the legal basis of the claim. Korn & Paley, *Survey of Summary Judgment, Judgment on the Pleadings and Related Pre-Trial Procedures*, 42 CORNELL L.Q. 483, 493-96 (1957). See Reppy, *The Demurrer—At Common Law, Under Modern Codes, Practice Acts, and Rules of Civil Procedure*, 3 N.Y.L.F. 175, 199-204 (1957).

⁶¹ 40 N.Y.2d at 638, 357 N.E.2d at 974, 389 N.Y.S.2d at 318 (Wachtler, J., dissenting).

⁶² *Id.*

⁶³ *Id.*

In reaching its decision the *Rovello* Court relied heavily on the 1973 amendment of CPLR 3211(c). The amendment requires that notice be given to the parties prior to converting a motion to dismiss to a motion for summary judgment.⁶⁴ The majority's reliance on the effect of this amendment as limiting the use of affidavits to remedying pleading defects appears to be misplaced. At the time of the 1973 amendment, the statute explicitly permitted the court, on a motion to dismiss for failure to state a cause of action, to accept "any evidence that could properly be considered on a motion for summary judgment."⁶⁵ This language has been widely construed as creating a "speaking motion," which is decided on the basis of both the pleadings and the evidence submitted.⁶⁶ It is submitted that the 1973 amendment was intended only to ensure that parties were apprised of the conversion of the CPLR 3211(a)(7) motion before suffering the more drastic effect of summary judgment, and not to limit the evidence considered by the court.⁶⁷

As the *Rovello* Court noted, "[m]odern pleading rules are 'designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one' . . ."⁶⁸ Unfortunately, the *Rovello* majority appears to have cast aside modern pleading practice in favor of a return to the technical distinctions of the common law. Perhaps, as Dean McLaughlin has pointed out, the solution to this problem now lies with the motion court. When it becomes apparent that the plaintiff has no cause of action, "the court should, on appropriate notice . . . treat the motion as one for summary judgment and proceed under CPLR 3212."⁶⁹

⁶⁴ CPLR 3211(c) (McKinney Supp. 1977) (amending CPLR 3211(c) (McKinney 1970)).

⁶⁵ CPLR 3211(c).

⁶⁶ See, e.g., note 46 *supra*; *Rapoport v. Schneider*, 29 N.Y.2d 396, 401, 278 N.E.2d 642, 645, 328 N.Y.S.2d 431, 436 (1972); 4 WK&M ¶¶ 3211.35, 3212.02, at 32-142.11: CPLR 3211, commentary at 31 (McKinney 1970). It would appear that CPLR 3211 was intended to operate as a motion for summary judgment. The Advisory Committee on Practice and Procedure has stated: "It is clear that the motion is in essence one for summary judgment." FIRST REP. 85. See 4 WK&M ¶ 3212.02, at 32-142.11.

⁶⁷ See N.Y. JUDICIAL CONFERENCE, NINETEENTH ANNUAL REPORT, N.Y. LEG. DOC. NO. 90 (1974), at 62, wherein it is stated: "[T]he amendment serves the interests of justice by requiring that the court apprise the parties, by adequate notice, of its intention to treat the motion as one for summary judgment . . ." Since the language regarding accepting extrinsic evidence in support of the motion to dismiss remains unaltered by the amendment, presumably, the cases which allowed the court to accept affidavits, see note 46 *supra*, also were not altered by the amendment.

⁶⁸ 40 N.Y.2d at 636, 357 N.E.2d at 972, 389 N.Y.S.2d at 316.

⁶⁹ McLaughlin, *New York Trial Practice*, 177 N.Y.L.J. 10, Jan. 14, 1977, at 4, col. 2.