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Article 13

CPLR 3211(d): Court of Appeals Adopts Liberal Approach in Allowing Discovery To Oppose a Motion To Dismiss for Lack of Personal Jurisdiction

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warning required under the latter section.[166] Considering the possible consequences, a plaintiff who elects to serve a summons without a complaint would be well advised to speedily comply with the defendant's demand for service.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3211(d): Court of Appeals adopts liberal approach in allowing discovery to oppose a motion to dismiss for lack of personal jurisdiction.

At times, a party may seek to oppose a motion to dismiss a cause of action where "facts essential to justify opposition may exist but cannot then be stated."[167] In such instances, CPLR 3211(d) permits a court to order a continuance for disclosure of such facts.[168] This section has proven to be a particularly useful aid for plaintiffs attempting to establish jurisdiction under the long-arm statute.[169] Facts necessary to show sufficient New York contacts to confer jurisdiction thereunder are often exclusively within the control of the moving defendant. Without the aid of disclosure, a plaintiff, though diligent in his search for existing facts, would face eventual loss of his opportunity to litigate in a New York court.

In *Peterson v. Spartan Industries, Inc.*,[170] the Court of Appeals considered what burden a plaintiff need overcome to establish that sufficient facts supporting jurisdiction "may exist." Once having satisfied this burden, a nonresident defendant would be compelled to comply with a discovery and inspection notice.

The claim in *Peterson* arose when plaintiff was burned in New

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166 CPLR 3216(b)(3) states that before an action can be dismissed for failure to prosecute pursuant to CPLR 3216(a), the court or the defendant seeking the dismissal must serve upon the plaintiff a written demand to resume the prosecution. Thereafter, plaintiff has 45 days to resume prosecution and file a note of issue. No such requirement applies to a motion for a CPLR 3012(b) dismissal. *See* 7B MCKINNEY'S CPLR 3012, commentary at 591-92 (1974).

167 CPLR 3211(d) provides:

> Should it appear from affidavits submitted in opposition to a motion [to dismiss a cause of action or defense] that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

168 Prior to enactment of the CPLR, the courts were in conflict. However, the weight of authority favored interpreting CPA 307 as not allowing an examination before trial of a defendant in order to oppose a motion to dismiss. *Compare* Loonsk Bros., Inc. v. Mednick, 246 App. Div. 464, 285 N.Y.S.2d 801 (4th Dep't 1935) (allowing a preliminary examination), *with* Standard Foods Prods. Corp. v. Vinas Unidas S.A., 200 Misc. 590, 104 N.Y.S.2d 596 (Sup. Ct. Kings County 1951) (no authority exists for taking a deposition of a party for use upon a motion before trial).

169 CPLR 302.

170 33 N.Y.2d 463, 310 N.E.2d 513, 354 N.Y.S.2d 905 (1974).

York while using a garden torch, the fuel for which was manufactured by a Connecticut corporation. Jurisdiction was alleged under CPLR 302(a)(1) and (3). In opposition to defendant's motion to dismiss for lack of personal jurisdiction, plaintiff was able to state only such facts which established the most tenuous contacts with the state, clearly insufficient in themselves to support jurisdiction.[171] Special Term referred the jurisdictional issue to a referee. While this issue was pending before the referee, plaintiff served a notice of discovery and inspection; defendant countered by moving for a protective order to vacate the notice. The defendant's motion was denied, and the Appellate Division, First Department, affirmed.[172] Two judges dissented in part, contending that the defendant should not be subjected to the burden of a detailed hearing until the plaintiff had made out "some prima facie showing of jurisdiction."[173] Such a showing, they urged, was particularly essential where the defendant had merely "manufactured a fuel which was intended to, and did, ignite . . . ."[174]

In affirming the First Department, the Court of Appeals rejected the notion that some threshold jurisdiction must first be established.[175] The Court held that so long as the allegation of jurisdiction is not

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171 The only evidence that plaintiff was able to produce regarding defendant's activities in New York were records of the New York City Fire Department indicating that defendant had applied to it for approval to store and use its product. While defendant had been representing to the public that such approval had been obtained, this was not, in fact, the case. It was also established that permits to conduct such activities had been issued to defendant some years prior to the incident in question. *Id.* at 467, 310 N.E.2d at 515, 354 N.Y.S.2d at 908. These facts are clearly insufficient to constitute the transaction of business within the state to satisfy CPLR 302(a)(1).

Under CPLR 302(a)(3), the plaintiff would have to establish that the defendant committed "a tortious act without the state causing injury to person or property within the state" and either (1) has substantial contacts with the state or (2) should reasonably expect consequences within the state from the tortious act and derives substantial revenue from interstate or international commerce. Satisfaction of these standards was highly improbable, since it was undisputed that the defendant had made no sales to anyone in New York for at least two years prior to the accident. Peterson v. Spartan Indus. Inc., 40 App. Div. 2d 807, 808, 338 N.Y.S.2d 352, 354 (1st Dep't 1972) (per curiam).

172 40 App. Div. 2d 807, 338 N.Y.S.2d 352 (1st Dep't 1972) (per curiam).

173 *Id.* at 809, 338 N.Y.S.2d at 355.

174 *Id.*

175 33 N.Y.2d 463, 310 N.E.2d 513, 354 N.Y.S.2d 905 (1974).

Previous cases allowed disclosure to oppose a motion to dismiss for lack of personal jurisdiction although the particular issue of whether the plaintiff must make a prima facie showing of jurisdiction had not been considered. *See* Potter Real Estate Co., v. O & S Bearing & Mfg. Co., 32 App. Div. 2d 883, 302 N.Y.S.2d 178 (4th Dep't 1969) (mem.); Sucrest Corp. v. Fisher Governor Co., 32 App. Div. 2d 517, 298 N.Y.S.2d 881 (1st Dep't 1969) (per curiam); Propulsion Systems, Inc. v. Avondale Shipyards, Inc., 67 Misc. 2d 839, 325 N.Y.S.2d 332 (Sup. Ct. N.Y. County 1971); Gershuny v. Compagnia Italia Dei Grandi Alberghi, 53 Misc. 2d 653, 279 N.Y.S.2d 504 (Sup. Ct. Westchester County 1967).

frivolous, discovery should be allowed to enable the plaintiff to oppose the motion. The Court realized the essential role discovery often plays in guiding it to a competent judgment regarding jurisdiction. In rejecting "prima facie jurisdiction" as the test under CPLR 3211(d), the Court noted that such a showing would place an unfair burden on a plaintiff who attempts to establish jurisdiction under the long-arm statute. In such cases, it felt, the jurisdictional issue is often complex and the facts may be unobtainable in any other manner.[176]

The language of CPLR 3211(d) would seem to support the Court's liberal attitude in allowing discovery.[177] If facts necessary to oppose a motion to dismiss "cannot then be stated," it would be impossible for the plaintiff to make out any prima facie showing of jurisdiction. Even requiring affirmative proof that they "may exist" would often impose an impossible burden on the plaintiff and require a judgment involving pure speculation on the part of the Court.

Moreover, the concept underlying the extraterritorial reach of process is essentially one of "fairness."[178] Certainly, much less proof would appear necessary to require a defendant to undergo a limited inquiry into the question of the existence of personal jurisdiction than to compel him to defend on the merits. It would by no means seem "unfair" to require a corporation in a neighboring state which had at one time obtained permission to market and store its products in New York to undergo such an inquiry.[179] The Court of Appeals, therefore, allowed the plaintiff every reasonable doubt in determining whether the allegation of jurisdiction was sufficient to warrant further inquiry.

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176 33 N.Y.2d at 467, 310 N.E.2d at 515, 354 N.Y.S.2d at 908. The Court noted that CPLR 3211(d) was adapted from FED. R. CIV. P. 56(f), which allows a party opposing a motion for summary judgment to obtain disclosure if he states why he is unable to present facts essential to justify his opposition. 33 N.Y.2d at 466, 310 N.E.2d at 514, 354 N.Y.S.2d at 907. This section has been liberally applied by the federal courts. *See, e.g.*, Slagle v. United States, 228 F.2d 673, 678-79 (5th Cir. 1956). The federal courts would apparently grant disclosure under circumstances similar to those in *Peterson*. *See, e.g.*, Surpitski v. Hughes-Keenan Corp., 362 F.2d 254 (1st Cir. 1966), wherein the court noted: "When the fish is identified, and the question is whether it is in the pond, we know no reason to deny a plaintiff the customary license." *Id.* at 256.

177 *See* note 167 *supra*.

178 [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), *quoting* Milliken v. Meyer, 311 U.S. 457, 463 (1940).

179 *See* note 171 *supra*.