

# CPLR 3015(a): Where Plaintiff Alleges Performance of Contractual Conditions Precedent, Requirement that Defendant Deny Such Performance with Particularity Is Not Applicable

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court," the Court did not reach the question of the applicability of the Statute of Frauds to an oral stipulation.<sup>66</sup>

While the courts generally favor the resolution of issues by stipulation of the parties, CPLR 2104's requirement that such agreements be in writing is intended to insure that courts will not be confronted constantly with the task of resolving controverted issues of fact which invariably arise out of oral stipulations. The statute excepts open court stipulations because they are generally recorded, and the *Dolgin* decision recognized that an extension of this exception to informal conferences would defeat its purpose.

#### ARTICLE 30 — REMEDIES AND PLEADING

*CPLR 3015(a): Where plaintiff alleges performance of contractual conditions precedent, requirement that defendant deny such performance with particularity is not applicable.*

CPLR 3015(a) provides that the performance or occurrence of conditions precedent in a contract need not be pleaded. Hence, in order to raise a triable issue with respect to any such condition, the defendant must indicate "specifically and with particularity" those conditions which he contends have not been fulfilled.<sup>67</sup>

In *Allis-Chalmers Manufacturing Co. v. Malan Construction Corp.*,<sup>68</sup> the plaintiff alleged that certain conditions precedent had been performed, and the defendant entered a general denial.<sup>69</sup> When the defendant attempted to examine the plaintiff during its pretrial examination regarding its performance under the contract, it was precluded by the court from doing so. The Court of Appeals unanimously

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not be embroiled in inchoate, unprovable arrangements, in which the court or its officers play a part." *Id.* at 11, 286 N.E.2d at 234, 334 N.Y.S.2d at 841.

<sup>66</sup> The alleged agreement involved the transfer of land and would ordinarily come under the purview of General Obligations Law §§ 5-703 and 15-501. However, some courts have held that such an oral stipulation made in open court is not barred by the Statute of Frauds. *See Anders v. Anders*, 6 App. Div. 2d 440, 179 N.Y.S.2d 274 (1st Dep't 1958); *Rudolph v. Cinco*, 34 Misc. 2d 1016, 229 N.Y.S.2d 892 (Sup. Ct. Westchester County 1962). The *Dolgin* Court characterized this authority as "sparse but persuasive." 31 N.Y.2d at 8, 286 N.E.2d at 232, 334 N.Y.S.2d at 839.

<sup>67</sup> A host of cases illustrate this rule. *See, e.g.,* *Lourie v. Mishkin*, 279 App. Div. 754, 108 N.Y.S.2d 777 (2d Dep't 1951) (mem.); *Arrow Plumbing Co. v. Dare Constr. Corp.*, 212 N.Y.S.2d 438 (Sup. Ct. Nassau County 1961); *Rao v. Katz*, 6 Misc. 2d 760, 161 N.Y.S.2d 504 (Sup. Ct. Kings County 1957); *Koeppel v. Koeppel*, 138 N.Y.S.2d 366 (Sup. Ct. Queens County 1954); *Klapper v. Greenfield*, 100 N.Y.S.2d 921 (Sup. Ct. Kings County 1948). These cases construed RCP 92, the predecessor of CPLR 3015(a).

<sup>68</sup> 30 N.Y.2d 225, 282 N.E.2d 600, 331 N.Y.S.2d 636 (1972).

<sup>69</sup> Dean McLaughlin has stated that "the parties charted a middle course between the common law [which required that the performance or occurrence of all conditions precedent be pleaded in detail] and the CPLR . . ." *New York Trial Practice*, 167 N.Y.L.J. 112, June 9, 1972, at 4, col. 3.

reversed, holding that the defendant's general denial was sufficient to put all the plaintiff's allegations in issue. The Court reasoned that the particularity requirement was inapplicable because the plaintiff had already specified the pertinent conditions in his complaint, and thus the essential purpose of the requirement — *i.e.*, to give the plaintiff notice of that which he must prove at trial — was satisfied.<sup>70</sup>

*CPLR 3016(c): Specificity of pleading requirement applied to counterclaim in divorce action.*

CPLR 3016(c) requires that the complaint in an action for separation contain the nature, circumstances, time, and place of each act allegedly constituting the defendant's misconduct. In *Deane v. Deane*,<sup>71</sup> the Supreme Court, Westchester County, applied this pleading requirement to the defendant's counterclaim<sup>72</sup> for divorce, reasoning that since the ground pleaded, cruel and inhuman treatment, is identically worded for separation and divorce,<sup>73</sup> "[n]o distinction is made between the nature or the level of proof required to establish [this ground] insofar as it may relate to [either action]."<sup>74</sup> Thus, the court concluded, the same standards of pleading should apply.

CPLR 3016(c) was created at a time when multiple grounds existed for separation, while the only ground for divorce was adultery, and the pleading requirements for the latter were less than for the former. When the grounds for divorce were expanded in 1967,<sup>75</sup> no pleading provision corresponding to CPLR 3016(c) was created.<sup>76</sup> This legislative inactivity prompted the Supreme Court, Delaware County, in *Houck v. Houck*,<sup>77</sup> to conclude that a complaint for divorce should be given a more liberal reading than one for separation on identical grounds.

Although the *Deane* court indicated that the consequences of failing to satisfy this section will be minimal — the delinquent party may have to file an amended pleading or supply a bill of particulars,<sup>78</sup>

<sup>70</sup> 30 N.Y.2d at 233, 282 N.E.2d at 603, 331 N.Y.S.2d at 641.

<sup>71</sup> 69 Misc. 2d 1024, 332 N.Y.S.2d 302 (Sup. Ct. Westchester County 1972).

<sup>72</sup> CPLR 3019(f) provides: "A cause of action contained in a counterclaim . . . shall be treated, as far as practicable, as if it were contained in a complaint . . ."

<sup>73</sup> Compare DRL 200(1) with DRL 170(1).

<sup>74</sup> 69 Misc. 2d at 1025, 332 N.Y.S.2d at 304.

<sup>75</sup> DRL 170.

<sup>76</sup> See 3 WK&M ¶ 3016.08.

<sup>77</sup> 59 Misc. 2d 1070, 300 N.Y.S.2d 999 (Sup. Ct. Delaware County 1968).

<sup>78</sup> There is a disagreement as to whether a bill of particulars may be utilized for this purpose. Several cases have stated that this device must be held inappropriate if CPLR 3016(c) is to retain its effectiveness. See *Pustilnik v. Pustilnik*, 24 App. Div. 2d 868, 264 N.Y.S.2d 400 (2d Dep't 1965) (mem.), discussed in *The Quarterly Survey*, 41 St. JOHN'S