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CPLR 3212: Defendant Held Not Entitled to Summary Judgment in Negligence Action When Plaintiff Has Been Precluded from Establishing a Prima Facie Case

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waiver until trial,[118] thereby permitting the consideration of evidence otherwise excludable to defeat the motion for summary judgment. In support of this construction, the Court cited the possibility that the incompetency might be waived at trial.[119]

Chief Judge Fuld dissented, attacking the decision on several grounds: (1) that CPLR 4519 had been consistently read to apply to pretrial motions as well as at trial;[120] (2) that the claim that the incompetency might subsequently be waived was unrealistic;[121] and (3) that the plaintiff had been unable to produce, after a continuance for that purpose, other competent evidence to support his claim.[122]

CPLR 4519 has been criticized;[123] its repeal has even been suggested.[124] A technical construction of the statute to restrict it to the trial stage of litigation and a denial of summary judgment "upon the assumption that a party will shortly do something utterly inconsistent with his own best interest"[125] are unwelcome. Inhibition in exercising the power to grant summary judgment in an appropriate case "not alone defeats the ends of justice . . . but contributes to calendar congestion which, in turn, denies to other suitors their rights to prompt determination of their litigation."[126]

CPLR 3212: Defendant held not entitled to summary judgment in negligence action when plaintiff has been precluded from establishing a prima facie case.

In *Jawitz v. British Leyland Motor, Inc.*,[127] a personal injury action, the defendant moved for summary judgment on the ground that since the plaintiff, pursuant to CPLR 3042(c), was precluded from offering certain evidence for failure to serve a bill of particulars, he would be unable to establish a prima facie case. The Supreme Court, New York County, in denying the motion, felt constrained to follow *Israel v. Drei Corp.*,[128] a 1958 decision of the Appellate Division, First Department, which held that the existence of a preclusion order against

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118 *Id.* at 313, 291 N.E.2d at 132, 338 N.Y.S.2d at 887.

119 *Id.* at 315, 291 N.E.2d at 133, 338 N.Y.S.2d at 888. "[I]t cannot be said as a matter of law that the Dead Man's Statute will not be waived so long as a matter of law it may be waived."

120 *Id.* at 316, 291 N.E.2d at 133, 338 N.Y.S.2d at 889.

121 *See* 7B McKINNEY'S CPLR 3212, supp. commentary at 21 (1972); 5 WK&M ¶ 4519.06.

122 31 N.Y.2d at 316, 291 N.E.2d at 133-34, 338 N.Y.S.2d at 889.

123 *See* 1 J. WIGMORE, EVIDENCE § 578 (2d ed. 1923).

124 *See* 5 WK&M ¶ 4519.06.

125 7B McKINNEY'S CPLR 3212, supp. commentary at 21 (1972).

126 DiSabato v. Soffes, 9 App. Div. 2d 297, 299, 193 N.Y.S.2d 184, 188 (1st Dep't 1959).

127 72 Misc. 2d 594, 340 N.Y.S.2d 305 (Sup. Ct. N.Y. County 1972).

128 5 App. Div. 2d 987, 173 N.Y.S.2d 360 (1st Dep't 1958) (per curiam).

the plaintiff did not entitle the defendant to summary judgment in a negligence action.

The *Jawitz* court may have overlooked the significant broadening of the applicability of summary judgments since the *Israel* decision. Under the RCP, summary judgment was unavailable in negligence actions.[129] CPLR 3212 now authorizes its use "in any action" except matrimonial actions.[130] Thus, the *Israel* court was powerless, and the *Jawitz* court was free to grant a motion for summary judgment.[131]

ARTICLE 34—CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3403: Tort action lacking proper venue denied general preference.

CPLR 3403 requires that nonpreferred civil cases be tried in the sequence in which their notes of issue are filed. Since the statute thus serves to postpone such actions indefinitely,[132] all parties seek a special preference under it, or where one is not obtainable, a general preference through compliance with the applicable appellate division rules regulating preferences.[133]

In *Chiques v. Sanso*,[134] the plaintiffs, residents of Nassau and Dutchess Counties, sought a general preference in a negligence action commenced in Westchester County against defendants who were residents of Nassau County and New Jersey.[135] In denying the plaintiffs' motion without prejudice to renewal in a proper forum, the Supreme Court, Westchester County, held that they had failed to comply with subdivision (a) of section 674.1 of the Rules and Regulations of the

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129 RCP 113. The section was amended a year after *Israel* to essentially its present form. *See* FIFTH ANNUAL REPORT OF THE N.Y. JUDICIAL CONFERENCE 20 (1960); 4 WK&M ¶¶ 3212.01, 3212.03.

130 For a discussion of the special provisions for summary judgment in matrimonial actions contained in CPLR 3212(d), see 7B MCKINNEY'S CPLR 3212, commentary at 446 (1970).

131 *See* Dent v. Baxter, 37 App. Div. 2d 908, 325 N.Y.S.2d 672 (4th Dep't 1971) (mem.); Clements v. Peters, 33 App. Div. 2d 1096, 308 N.Y.S.2d 258 (4th Dep't 1970) (mem.); Jansen's Bottled Gas Serv., Inc. v. Warren Petroleum Corp., 47 Misc. 2d 461, 262 N.Y.S.2d 768 (Sup. Ct. Albany County 1965).

132 4 WK&M ¶ 3403.04.

133 Chiques v. Sanso, 72 Misc. 2d 376, 377, 339 N.Y.S.2d 394, 397 (Sup. Ct. Westchester County 1972), *citing* Haas v. Scholl, 68 Misc. 2d 197, 199, 325 N.Y.S.2d 844, 846-47 (Sup. Ct. Westchester County 1971). Also, certain causes are preferred as of course, *e.g.*, commercial and matrimonial actions. *See* 4 WK&M ¶ 3403.03.

134 72 Misc. 2d 376, 339 N.Y.S.2d 394 (Sup. Ct. Westchester County 1972).

135 The court noted that the corporate defendant had a "nonexistent address" in the state, but was in fact incorporated in New Jersey. *Id.*, 339 N.Y.S.2d at 396.