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Under the CPLR, a party to an action may "move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading."[54] In connection with such a motion, the Supreme Court, Oneida County, has held that allegations which were inserted into a complaint in anticipation of the defense of the statute of limitations fell within the description of proscribed matter and therefore ordered the allegations stricken.[55]

The paragraph complained of in *Toper v. Rotach*[56] alleged misrepresentations by defendant's insurer relative to an action for personal injuries to a minor and to a derivative action by the minor's parent, and was inserted to estop the defendant from asserting that the expiration of the statute of limitations barred the father's derivative action. In striking this paragraph, the court noted that the defendant might wish to waive his statute of limitations objection in the relatively small derivative action, rather than prejudice his position in the personal injury action by permitting proof of his representative's conduct to be offered at the trial.[57]

Since the statute of limitations is an affirmative defense,[58] facts in respect thereto contained in a complaint are unnecessary, as the failure of the defendant to assert the defense effectively waives it.[59] Yet, defects in a pleading are to be ignored unless a substantial right of the party is prejudiced.[60] Thus, matter which is merely extraneous may not be stricken on that ground alone: proof of prejudice is an absolute necessity.[61]

In *Toper*, the question of how much proof of prejudice is required before a 3024 motion will be granted was dealt with, and the answer that issued is: not very much. Thus, if the matter is clearly unnecessary to the pleadings, it will be deleted if there is little more than a hint of prejudice.[62]

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54 CPLR 3024(b).

55 Toper v. Rotach, 307 N.Y.S.2d 805 (Sup. Ct. Oneida County 1970).

56 *Id.*

57 Of course, if the defense is pleaded, the plaintiff is free to controvert it by a motion under 3211(b). Upon such a motion, plaintiff could present his evidence of estoppel. CPLR 3211(c). Moreover, a trial on any issues of fact would be available. H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 168 (3d ed. 1970).

58 CPLR 3018(b).

59 3 WK&M ¶ 3018.18.

60 CPLR 3026.

61 7B McKINNEY's CPLR 3024, supp. commentary at 181 (1969).

62 *See* 3 WK&M ¶ 3024.12.