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CPLR 3018: Affirmative Defense of Illegality Is Not Waived If Plaintiff Is Not Surprised by Its Assertion at Trial

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entered, the decedent was an adult incapable of adequately defending his rights within the meaning of CPLR 1201. The court agreed, ruling that the defendant should have been represented by a guardian *ad litem*. Accordingly, it vacated the prior judgment and granted leave to interpose an answer.

The court was skeptical that any appearance by the decedent either *pro se* or by an attorney would have been authorized without the appointment of a guardian *ad litem*.[31] Additionally, it was of the opinion that quite possibly the decedent was inadequately apprised of his position because of the mode of service employed by the plaintiff.[32] Undoubtedly, however, the court was primarily motivated by the decedent's condition and the resultant obligation of the judiciary to protect him.[33]

If neither the court nor the opposing party is cognizant of the defendant's incapacity, the proceedings taken against him are valid.[34] Nonetheless, once incompetency is discovered, protective measures will be undertaken by the court, and prior orders and judgments may be set aside.[35] Consequently, it would behoove the plaintiff (or defendant as the case may be) to move for an order appointing a guardian if he suspects that his opponent is incapable of protecting his rights.[36] Such a gesture may seem foreign to our conception of litigation[37] and it may prove embarrassing if the party is later found to be of sound mind.[38] But, it is an indispensable undertaking if the litigant desires to insure finality to the proceedings.

Article 30 — Remedies and Pleading

CPLR 3018: Affirmative defense of illegality is not waived if plaintiff is not surprised by its assertion at trial.

CPLR 3018(b) mandates that a party plead all matters which are likely to "surprise" his adversary or would bring forth factual questions that had not appeared on the face of the prior pleadings. In addition, many of the defenses contained in this subsection may be asserted

31 *See* CPLR 321.

32 The defendant in *Lockwood* was served by a substituted method authorized by former section CPLR 308(3).

33 *Cf.* Seton Psychiatric Institute v. Arundel, 31 Misc. 2d 1082, 1083, 220 N.Y.S.2d 736, 737 (Erie County Ct. 1961): "[I]t disturbs the conscience of this court to think that a man who was in Gowanda State Hospital could be served and thereafter a judgment could be served against him without his in any way being able to defend himself . . . ."

34 1 WK&M ¶ 321.03.

35 *Id.*

36 *See* CPLR 1202.

37 2 WK&M ¶ 1201.05.

38 *Id.*

by motion under CPLR 3211(a).[39] *Carlson v. Travelers Insurance Co.*[40] involves the consequences emanating from the failure to plead illegality either by motion or in the answer.

In *Carlson* an action was brought to recover under a group accident and health policy for hospital expenses incurred by the insured who had undergone and had died from an illegal abortion. The defendant failed to plead illegality as an affirmative defense. Nonetheless, the court permitted the defendant to adduce proof of the proscribed transaction, reasoning that the plaintiffs were well aware of the decedent's act and there was thus little danger of prejudice.[41]

The *Carlson* outcome is a well-reasoned one. There is, however, an additional mode of attaining the same result. Under CPLR 3211(e), a motion prescribed in paragraph seven of 3211(a) — failure to state a cause of action — is never waived. Inasmuch as an allegation of illegality as to the merits of a claim is tantamount to an assertion that the pleader does not possess a legally cognizable cause of action,[42] one authority advocates the use of a 3211(a)(7) motion in instances such as *Carlson*.[43]

ARTICLE 31 — DISCLOSURE

CPLR 3102(d): Disclosure will not be permitted during trial where the movant had an opportunity to obtain the information by normal pretrial proceedings.

CPLR 3102(d) provides that "during and after trial, disclosure may be obtained only by order of the trial court on notice." In *Schricker v. City of New York*[44] the trial court permitted plaintiffs' expert witness, an orthopedic specialist, to testify out of the presence of the jury because of his phobia of testifying before them. The court then allowed plaintiffs to read the doctor's deposition to the jury. The appellate division viewed this procedure as prejudicial error inasmuch as the notice contemplated by CPLR 3102(d) was not given, and it did not appear that the plaintiffs were previously unaware of the witness' inability to testify before a jury.

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39 7B MCKINNEY'S CPLR 3018, supp. commentary at 171 (1970). Apparently, all of the defenses except fraud can be safely pleaded under CPLR 3211(a). Because of the intricate factual setting in which the allegation of fraud is likely to arise, it has been posited that this defense is more appropriately considered at the trial. 7B MCKINNEY'S CPLR 3211, commentary 36, at 40 (1970).

40 35 App. Div. 2d 351, 316 N.Y.S.2d 398 (2d Dep't 1970).

41 *See also* 3 WK&M ¶ 3018.18.

42 7B MCKINNEY'S CPLR 3211, commentary 29, at 33 (1970).

43 *Id.*, commentary 36, at 40.

44 35 App. Div. 2d 743, 316 N.Y.S.2d 170 (2d Dep't 1970).