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CPLR 3211(c): Second Department Disapproves of Court's Sua Sponte Treatment of Motion to Dismiss as One for Summary Judgment

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of *Ives*, the appellate division of that department or the Court of Appeals should seize upon the earliest opportunity to overrule or limit the case.

ARTICLE 32 — ACCELERATED JUDGMENT

CPRL 3211(c): Second department disapproves of court's sua sponte treatment of motion to dismiss as one for summary judgment.

In denying plaintiff's motion to dismiss the defense of lack of standing,[135] the supreme court in *Mareno v. Kibbe*[136] held that the defense as stated in the answer was valid, and, on its own motion, granted summary relief to the nonmoving party.[137] However, the appellate division reversed on the ground that the lower court had misinterpreted the substantive law relating to appellant's standing to sue. But what is perhaps more significant is the judicial chastisement of special term for its sua sponte treatment of plaintiff's motion to strike a defense under CPLR 3211(b) as a motion for summary judgment by the opposing party .

The commentators suggest that 3211(c) may be used sua sponte[138] by the courts and that it may be used "to direct judgment against the moving party in the absence of a cross-motion. . . ."[139] Furthermore, the revisors, in making an addition to this section, manifested the intention that it was meant to apply to motions made under 3211(b) as well as to those made under 3211(a).[140] Therefore, it should be

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135 *See* CPLR 3211(b): "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit."

136 56 Misc. 2d 451, 289 N.Y.S.2d 6 (Sup. Ct. Westchester County 1968), *modified*, 32 App. Div. 2d 825, 302 N.Y.S.2d 324 (2d Dep't 1969).

In this taxpayers' action, plaintiffs sought certain equitable and monetary relief from defendants in the latters' official capacities as Supervisor and Councilmen of the Town Board of Yorktown. The defendants alleged as an affirmative defense the plaintiffs' lack of standing to sue. The substantive holding of the lower court was that while plaintiffs were taxpayers of the town, they were not taxpayers of the specific subdivision of the town affected by the action of the defendants, and so were not "interested parties" within the meaning of N.Y. GEN. MUNIC. LAW § 23 (McKinney 1965). Therefore, because the defendants had a valid defense to the action, the court, on its own motion, considered plaintiffs' motion to dismiss a defense as a cross-motion for summary judgment authorized by CPLR 3211(c).

137 CPLR 3211(c) provides, *inter alia*, that:

> Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment and the court may treat the motion as a motion for summary judgment. . . .

138 *See* 7B MCKINNEY'S CPLR 3211, supp. commentary 180, 191 (1965).

139 4 WK&M ¶ 3211.50 (1968).

140 *Compare* FIRST REP. rule 31.1(b) at 85 *with* SIXTH REP. rule 3211(c) at 332.

apparent, as the appellate court in the instant case seemingly recognized,[141] that CPLR 3211(c) permits the procedure utilized in the lower court with one possible caveat: the evidence in the record must be sufficient to justify a summary judgment which has res judicata effect.

If the record in the supreme court did contain the kind of proof sufficient to grant summary judgment, there is no reason why that court should not have granted sua sponte relief to a litigant. And it does seem probable that the lower court did have all the proof available and necessary to decide the only issue in question — the plaintiff's standing or lack of standing — notwithstanding the fact that its interpretation of the law was subsequently reversed by an appellate court.

The appellate division emphasized that the parties to the action should be apprised of the court's intention to treat the motion as a cross-motion for summary judgment "so that an appropriate record and submission of the facts and law may be made by the parties,"[142] but it is difficult to comprehend how a more appropriate record could have been compiled for the question in issue, since the plaintiff was moving to strike one of the defendant's defenses.

Of course, the use of this type of sua sponte action will create problems where the record is incomplete, because the dismissal may nevertheless be afforded res judicata effect. However, if the record is complete and states no facts upon which relief can be granted,[143] there is no reason why the court should not grant summary relief with res judicata effect in favor of a nonmoving party.

The procedural device authorized by rule 3211(c) should be left to the exercise of the trial court's proper discretion. It is action initiated by the court itself, and it is unlikely that the court would knowingly take any step that would prejudice a party, such as rendering a judgment with res judicata effect where additional proof that could affect the issue in question might exist. In addition, where the initial motion is based upon some jurisdictional defect,[144] it is patently clear that a court should not sustain the motion and give it the res judicata effect of a final judgment.

141 32 App. Div. 2d at 825, 302 N.Y.S.2d at 325: "[O]ccasions will arise when summary judgment may properly be granted when motions to dismiss pleadings have been initially served. . . ."

142 *Id.*

143 In the instant case, under the law as interpreted by the trial court, there was no conceivable way in which this plaintiff would ever have standing to sue on this issue, and, therefore, the substantive facts other than those relating to the issue of standing were irrelevant. Clearly summary judgment is called for in circumstances such as these.

144 *See, e.g.*, CPLR 3211(a)(8).