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DRL § 211: Amendment of Complaint for Separation To Include Action for Divorce Allowed

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DOMESTIC RELATIONS LAW

DRL § 211: Cooling-off period does not apply to counterclaim for separation in an annulment action.

Under the new Section 211 of the DRL,[153] a complaint in any action for a divorce or separation cannot be served until the expiration of a 120 day "cooling-off" period or, in the case of a divorce action, at the expiration of conciliation proceedings, whichever period is less.[154] In *Botti v. Botti*,[155] the husband brought an action for an annulment and the wife counterclaimed for a separation. The court rejected the husband's contention that the counterclaim was a violation of section 211 and allowed the wife's counterclaim without requiring the statutory cooling-off period. The court reasoned that section 211, by its language, applied only to divorce and separation actions and had no application in a suit for annulment. It was concluded that since the new section contained no prohibition against entering a counterclaim, it should be allowed under CPLR 3011 and 3019(a) and under "the liberal and expanding practice in claims between litigants to avoid multiplicity and circuity of actions." [156] The court directed that the husband's action for annulment be tried first and upon an unfavorable determination of that action, that the wife's claim be adjudicated.

It may be argued that the court's decision is inconsistent with the intent of the legislature in providing for the cooling-off period. However, it can be fairly said that in a situation such as this, there is little hope of saving the marriage and a cooling-off period or conciliation proceedings would be futile. In any event, the language of the statute appears to justify the conclusion of the court, and if the legislature did not intend such a result, an amendment would seem to be in order.

DRL § 211: Amendment of complaint for separation to include action for divorce allowed.

In another case involving an interpretation of Section 211 of the DRL [157] the husband moved to amend his complaint in a separation action so as to demand a divorce upon the same factual allegations.[158] The question arose as to whether such an amend-

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[153] N.Y. Sess. Laws 1966, ch. 254, § 7.

[154] For the law on conciliation proceedings see N.Y. Sess. Laws 1966, ch. 254, § 8.

[155] 55 Misc. 2d 269, 284 N.Y.S.2d 748 (Sup. Ct. Kings County 1967).

[156] *Id.* at 271, 284 N.Y.S.2d at 750.

[157] Taplinger v. Taplinger, 55 Misc. 2d 103, 284 N.Y.S.2d 794 (Sup. Ct. N.Y. County 1967).

[158] The plaintiff was motivated by the recently amended DRL § 170. *See* N.Y. Sess. Laws 1966, ch. 254, § 2.

ment was permissible in view of the requirement of section 211 that "an action for divorce or separation shall be commenced by the service of a summons" and the requirement of section 215-c(a) that within 10 days after the commencement of an action for divorce the plaintiff shall commence conciliation proceedings. The court allowed the amendment concluding that the requirements of the new law could be met without the service of a separate summons and the institution of a new action. The action for divorce was deemed to have been commenced by order of the court and the plaintiff was directed to serve his amended complaint at the end of 120 days or the expiration of conciliation proceedings, whichever came first.

The court referred to a conflict which existed within the second department as to whether a pleading in a separation action could be amended in light of the new law. The two cases cited by the court to illustrate the conflict, however, can be reconciled. In *Saunders v. Saunders*,[159] the plaintiff moved to amend her complaint on the condition that she would not be compelled to proceed to conciliation as required by section 215-c, whereas in *Fitzpatrick v. Fitzpatrick* [160] where the amendment was granted, no such limitation was requested.

While the court in *Saunders* refused to extend its opinion beyond the facts of that case, it appears that a court can have little objection to allowing the amendment so long as the conciliation proceedings are administered, especially in view of the court's attitude that "the ends of justice will be better served by the avoidance of two actions." [161]

DRL § 215: Failure to file timely notice of commencement of divorce action with conciliation bureau held excusable.

CPLR 2004 provides that except where otherwise expressly prescribed by law the court may "extend the time fixed by any statute . . . for doing any act, upon such terms as may be just and upon cause shown, whether the application for extension is made before or after the expiration of the time fixed."

In *Rodriguez v. Cowin*,[162] the court applied the above provision to a newly enacted section of the Domestic Relations Law, 215-c(a). This section provides that notice of the commencement of a divorce action must be filed within ten days after its commencement with the conciliation bureau. In *Rodriguez*, a number of circumstances, such as service having to be made outside the

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[159] 54 Misc. 2d 1081, 283 N.Y.S.2d 969 (Sup. Ct. Kings County 1967).
[160] 55 Misc. 2d 7, 284 N.Y.S.2d 355 (Sup. Ct. Westchester County 1967).
[161] Taplinger v. Taplinger, 55 Misc. 2d 103, 104, 284 N.Y.S.2d 794, 795 (Sup. Ct. N.Y. County 1967).
[162] 55 Misc. 2d 35, 284 N.Y.S.2d 137 (Sup. Ct. Kings County 1967).