

## CPLR 3012(b): Retention of Belatedly Served Complaint Held To Be Waiver of Objection

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In a recent case, *Alex v. Grande*,<sup>85</sup> plaintiff, a New York resident, and defendant, a New Jersey resident, were involved in an automobile accident in New Jersey. Plaintiff obtained an order of attachment and defendant was served with a summons and complaint in New Jersey. Defendant moved to dismiss the complaint contending that the undertaking was defective since it was signed by the plaintiff without an independent surety. The appellate division, third department, agreed, holding that a party may not be his own surety under CPLR 2501.

There is nothing in CPLR 2502(a)<sup>86</sup> which specifically states that a party may not be his own surety; however, this was apparently the law under the CCP,<sup>87</sup> and no case to the contrary has been found. Even though a party may not be his own surety, he may, under 2501, advance cash in lieu of a bond.<sup>88</sup>

#### ARTICLE 30 — REMEDIES AND PLEADING

*CPLR 3012(b): Retention of belatedly served complaint held to be waiver of objection.*

CPLR 3012(b) provides that "[i]f the complaint is not served within twenty days after service of demand [for the complaint] the court upon motion may dismiss the action."

In *Lucenti v. City of Buffalo*,<sup>89</sup> plaintiff served a summons but failed to serve the required complaint within the allotted time after defendant's appearance and demand. However, while defendant's motion to dismiss for failure to serve the complaint was pending, defendant retained a belatedly served complaint. The appellate division, fourth department, held that "retention of the complaint was a waiver of the untimely service . . . and deprived defendant of the right to relief under CPLR 3012."<sup>90</sup> It is thus

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<sup>85</sup> 29 App. Div. 2d 616, 285 N.Y.S.2d 909 (3d Dep't 1967).

<sup>86</sup> CPLR 2502(a) provides, *inter alia*, unless the court orders otherwise, that the surety shall be:

"2. a natural person, except an attorney, who shall execute with the undertaking his affidavit setting forth his full name and address and that he is domiciled within the state and worth at least the amount specified in the undertaking exclusive of liabilities and of property exempt from application to the satisfaction of a judgment."

<sup>87</sup> See *Nichols v. MacLean*, 98 N.Y. 458 (1885).

<sup>88</sup> The court further decided that defendant would not be prejudiced by allowing plaintiff, under CPLR 6223, a reasonable opportunity to correct the defect. CPLR 6223 changes prior law which held that defects in attachment papers render an attachment null and void on "jurisdictional" grounds. See 7B MCKINNEY'S CPLR 6223, commentary 106 (1963).

<sup>89</sup> 20 App. Div. 2d 833, 287 N.Y.S.2d 612 (4th Dep't 1968).

<sup>90</sup> *Id.* at 834, 287 N.Y.S.2d at 613. See also *Rogers v. Rockwood*, 59 Hun. 628, 13 N.Y.S. 939 (Sup. Ct. 5th Dep't 1891).

submitted that a litigant, who wishes to avail himself of relief under CPLR 3012, should promptly reject pleadings which are served late.<sup>91</sup>

*CPLR 3017(a): Fiduciary relationship necessary for an accounting.*

It is well-established that an action for an accounting will not lie, unless a fiduciary relationship between plaintiff and defendant is first shown.<sup>92</sup> In a recent decision, *Kaminsky v. Kahn*,<sup>93</sup> the Court of Appeals reversed the appellate division, first department,<sup>94</sup> and held that a fiduciary relationship is still required before an accounting will lie.

The action arose out of a complicated stock transfer transaction, which culminated in a contract for the sale of stock from plaintiff to defendant. By the terms of the agreement, plaintiff was given an option to purchase on the same terms as defendant's offer to third parties. In the event the securities were sold to a third person, plaintiff was to receive one third of the net proceeds of the sale; however, as long as defendant held the stock, his interest was subject to plaintiff's continuing right to one third of any dividends declared.

In an action at law for breach of contract, plaintiff sought to hold the defendant accountable for certain stock sold without plaintiff's knowledge. The appellate division held that an accounting was proper under the circumstances, and that:

the right of the plaintiff to judgment is not to be foreclosed upon the narrow ground, urged by the defendant, that the agreement between the parties did not create a fiduciary relationship and that, therefore, the plaintiff is not entitled to an accounting. The question instead is, did the plaintiff, on the basis of the allegations of his pleadings, establish a right to any relief at the hands of the court, and . . . were the directions for an accounting and the . . . judgment proper.<sup>95</sup>

It was found that an accounting was proper in light of the trend to effectuate the statutory abolishment of distinctions be-

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<sup>91</sup> See *Graziano v. Albanese*, 24 App. Div. 2d 712, 263 N.Y.S.2d 20 (1st Dep't 1965).

<sup>92</sup> E.g., *Schantz v. Oakman*, 163 N.Y. 148, 156-57, 57 N.E. 288, 289 (1900); *Brigham v. McCabe*, 27 App. Div. 2d 100, 105, 276 N.Y.S.2d 328, 333 (3d Dep't 1966), *aff'd*, 20 N.Y.2d 525, 232 N.E.2d 327, 285 N.Y.S.2d 294 (1967); *Silverman v. Bob*, 253 App. Div. 303, 305, 2 N.Y.S.2d 121, 123 (1st Dep't 1938).

<sup>93</sup> 20 N.Y.2d 573, 232 N.E.2d 837, 285 N.Y.S.2d 833 (1967).

<sup>94</sup> 27 App. Div. 2d 248, 277 N.Y.S.2d 968 (1st Dep't 1967).

<sup>95</sup> 23 App. Div. 2d 231, 236, 259 N.Y.S.2d 716, 721 (1st Dep't 1965).