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Article 33

CPLR 3212(e): Entry of Partial Summary Judgment Proper Despite Outstanding Counterclaims in Excess of Demands in Complaint

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wherein the court, emphasizing the word "all," reasoned that the condemnor should not be allowed to have appraisals made, discard the highest, and submit the lowest.

Both the second and fourth department rules use the words "intended to be used at the trial." When is an appraisal report "intended to be used at the trial?" It logically follows from the disposition made by the *Inwood* court that only appraisal reports *on file* are "intended to be used at the trial." However, the decision in *Ives* seems to indicate that the mere preparation of an appraisal *ipso facto* makes it "intended to be used at the trial." The *Inwood* court seems to have reached the better result. An amendment to the fourth department's rule requiring *filing* of appraisals should bring about the better result achieved in *Inwood.*

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3212(e): Entry of partial summary judgment proper despite outstanding counterclaims in excess of demands in complaint.

CPLR 3212(e) permits a court to grant summary judgment "as to one or more causes of action, or part thereof . . . on such terms as may be just." The court is further authorized to sever the cause of action in which summary judgment is granted from any remaining cause of action.[122]

In *Dalminter v. Dalmine*,[123] appellants contended that special term erred in granting partial summary judgment to plaintiffs, since meritorious counterclaims in excess of the amounts in the complaint and directly related thereto had not been tried.

The appellate division, first department, held that since the counterclaims were not inseparable from plaintiffs' causes of action, it was within the discretion of special term to enter partial summary judgment under CPLR 3212(e).[124] However, the court pointed out that the defendants were protected by a stay of execution until the remaining issues were tried.

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[122] It is interesting to note that this provision is somewhat redundant in light of CPLR 5012 which authorizes the court to order a severance and direct judgment "upon a part of a cause of action or upon one or more causes of action as to one or more parties." *See* 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 501201 *et seq.* (1967).

[123] 29 App. Div. 2d 852, 288 N.Y.S.2d 110 (1st Dep't 1968).

[124] It should be noted, however, that where there is but one cause of action and one or more counterclaims which raise triable issues, it would be improper to award summary judgment for an amount equal to or greater than the prayer for relief, since there can be no severance. *See* Illinois McGraw Elec. Co. v. Watters, Inc., 7 N.Y.2d 874, 164 N.E.2d 872, 196 N.Y.S.2d 1003 (1959); Dietz v. Glynne, 221 App. Div. 329, 223 N.Y.S. 221 (2d Dep't 1927).