

DRL § 211: Motion to Dismiss for Insufficiency Deemed Premature until Termination of Conciliation Proceedings or Expiration of 120 Days

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allow costs. In an earlier case, *Kavareş v. MYAIC*,²²⁰ where confirmation of an arbitration award was not opposed, it was held to be inequitable to allow court costs.

The *Terenzi* court relying on CPLR 8201 allowed \$25 court costs, the amount awarded in a special proceeding for proceedings before a note of issue is filed.

BUSINESS CORPORATION LAW

BCL § 307: Applicable in quasi in rem situation.

In 1965, Section 307(a) of the Business Corporation Law was amended to provide as follows:

In any case in which a non-domiciliary would be subject to the personal or other jurisdiction of the courts of this state under article three of the civil practice law and rules, a foreign corporation not authorized to do business in this state is subject to a like jurisdiction. In any case, process against such foreign corporation may be served upon the secretary of state as its agent. Such process may issue in any court in this state having jurisdiction of the subject matter.²²¹

In the first case found construing this section, *Petrossi v. Ontario Properties, Inc.*,²²² the supreme court, Monroe County, held that "other jurisdiction" means quasi in rem. In *Petrossi*, a mortgage foreclosure action, plaintiff claimed that his lien on property located in New York was preferred to defendant's. Service of process upon the defendant foreign corporation through substituted service upon the Secretary of State was held to be proper even though the corporation was not doing business in this state.

It is interesting to note that CPLR 314 permits service on a foreign corporation to cut off an interest in or lien upon property in this state. However, the use of BCL § 307 is preferable to CPLR 314, because under section 314 service of process without the state must be made by personal service upon the corporation.

DOMESTIC RELATIONS LAW

DRL § 211: Motion to dismiss for insufficiency deemed premature until termination of conciliation proceedings or expiration of 120 days.

DRL § 211 provides that a complaint in a divorce action may not be served until the expiration of 120 days from the date of service of the summons or until the expiration of conciliation proceedings.

²²⁰ 29 App. Div. 2d 68, 285 N.Y.S.2d 983 (1st Dep't 1967).

²²¹ N.Y. Sess. Laws 1965, ch. 803 (emphasis added).

²²² 55 Misc. 2d 601, 285 N.Y.S.2d 928 (Sup. Ct. Monroe County 1968).

In a recent case, *Tortorice v. Tortorice*,²²³ before either the 120 day period had expired or conciliation proceedings had terminated,²²⁴ defendant wife moved to dismiss a divorce "action," under CPLR 3211²²⁵ as insufficient.

The court reasoned that "[t]he entire spirit of Article 11-B of the Domestic Relations Law is slanted toward a resolution of matrimonial difficulties by the Conciliation Bureau, uncluttered by pleadings and differences regarding the merits of the controversy."²²⁶ Although the court admitted that it was inclined to the defendant's view that if there were a complaint before it, it would be demurrable for insufficiency, the motion was nevertheless denied as premature.

DRL § 211; § 232: Questions as to service of complaint answered.

Two questions posed by the new Domestic Relations Law have recently been answered. When can a complaint in a separation action be served? In *Cohen v. Cohen*,²²⁷ the court examined section 211 of the Domestic Relations Law which provides:

An action for divorce or separation shall be commenced by the service of a summons. A verified complaint in such action may not be served until the expiration of one hundred twenty days from the date of service of the summons or the expiration of conciliation proceedings under article eleven-B of this chapter, whichever period is less.

In spite of the provisions of this section, the court held that a complaint served with the summons was not served prematurely and denied a motion to dismiss. This decision, which is contrary to several other supreme court cases,²²⁸ was based upon the inconsistency between sections 211 and 215-a. Although the 1966 Report of the Joint Legislative Committee on Matrimonial and Family Laws had recommended conciliative proceedings in both separation and divorce actions,²²⁹ section 215-a empowered the Conciliation Bureau solely for divorce cases. On the other hand, section 211 contains the same "cooling-off" period for divorce

²²³ 55 Misc. 2d 649, 286 N.Y.S.2d 198 (Sup. Ct. Kings County 1968).

²²⁴ For a brief survey of the new "cooling-off" and conciliation provisions of the Domestic Relations Law see *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 615, 634 (1968).

²²⁵ It is unclear what ground was urged for dismissal as defendant failed to specify, as required under 3211(e).

²²⁶ 55 Misc. 2d at 650, 286 N.Y.S.2d at 200.

²²⁷ 55 Misc. 2d 721, 286 N.Y.S.2d 342 (Sup. Ct. N.Y. County 1967).

²²⁸ *Beanland v. Beanland*, 54 Misc. 2d 1010, 283 N.Y.S.2d 890 (Sup. Ct. Kings County 1967); *Crocker v. Crocker*, 54 Misc. 2d 738, 283 N.Y.S.2d 362 (Sup. Ct. Queens County 1967).

²²⁹ REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON MATRIMONIAL AND FAMILY LAWS, 99-100 (1966).