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Article 56

DRL § 211; § 232: Questions as to Service of Complaint Answered

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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 3211 [225] 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

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[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).

and separation proceedings. The court, emphasizing the provisions of 215-a, felt that the legislative intent was not to have a "cooling-off" period in separation cases.

The conflict between *Cohen* and other lower court cases has now become academic. Sections 211 and 215-a of the Domestic Relations Law have recently been amended to include all matrimonial actions except an action to declare the nullity of a void marriage.[230]

Effective September 1, 1968, a complaint in a separation, divorce, or annulment action may not be served until the expiration of 120 days from the date of service of the summons or the expiration of conciliation proceedings, whichever period is less.

If the complaint in a separation action is in violation of section 211, will the summons also be dismissed? In *Apploff v. Apploff*,[231] a complaint in violation of section 211 was dismissed. The summons, however, defective because it did not bear the endorsement notifying the defendant of the nature of the action as required by section 232 [232] was not dismissed. The court, on its own motion, in light of the fact that defendant had notice of the nature of the action and was represented by counsel, deemed the summons amended *nunc pro tunc* to the caption "Action for a Separation." The court's action here was certainly in conformity with modern practice; since the defendant had notice, nothing would have been accomplished by dismissing the summons.

General Municipal Law

GML § 50-e: CPLR 2004 applied.

General Municipal Law section 50-e requires a 90 day notice of claim before a suit may be commenced against a municipality. Extensions may be granted in a limited number of cases, for example, infant claims, deaths, or prejudicial reliance upon settlement representations. Courts have been extremely rigorous in enforcing the 90 day limit and have allowed few extensions.[233]

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[230] Laws of 1968, ch. 701 amending section 211; Laws of 1968, ch. 706 amending 215-a.

[231] 55 Misc. 2d 781, 287 N.Y.S.2d 486 (Sup. Ct. Kings County 1968).

[232] DRL Section 232 states, *inter alia*: "In an action to annul a marriage or for divorce or for separation, if the complaint is not personally served with the summons, the summons shall have legibly written or printed upon the face thereof: 'Action to annul a marriage', 'Action to declare the nullity of a void marriage', 'Action for a divorce', or 'Action for a separation', as the case may be. A judgment shall not be rendered in favor of the plaintiff upon the defendant's default in appearing or pleading, unless either the summons and a copy of the complaint were personally delivered to the defendant, or the copy of the summons delivered to the defendant, upon personal service of the summons, or delivered to him without the state, or published, pursuant to an order for that purpose, containing such notice."

[233] *E.g.*, Jefferson v. New York City Housing Authority, 24 App. Div. 2d 943, 265 N.Y.S.2d 336 (1st Dep't 1965); Payne v. Village of Horseheads,