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Article 57

GML § 50-e: CPLR 2004 Applied

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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,

In *Quintero v. Long Island Railroad*,[234] the plaintiff, who had suffered a double amputation in a railroad accident, did not file a notice of claim within 90 days. However, the railroad had immediately investigated the accident and plaintiff's counsel had written to the railroad's insurer advising it of the accident and of his retainer. Counsel also had served the railroad with a summons and complaint within 88 days of the accident. The supreme court, Kings County, held that plaintiff was entitled to file a late notice of claim and that the railroad was estopped from asserting its defense of no notice.

The court pointed out that the Long Island Railroad was neither a municipal nor a public benefit corporation for whose benefit § 50-e was enacted, but rather a private stock corporation. The railroad became entitled to a 90 day notice of claim by virtue of an amendment adding subsection 6 to § 1276 of the Public Authorities Law. The court termed this a "quiet" amendment because its provision, that stock corporations of the Metropolitan Transit Authority are to be subject to the provisions of General Municipal Law section 50-e, applies only to the Long Island Railroad. In spite of the fact that the amendment applies exclusively to the Long Island Railroad, it is not specifically named in the enactment. The court thus felt that notice to the bar of the applicability of § 50-e was inadequate.

Recognizing that the purpose of the statute was to protect municipalities against fraudulent or stale claims by providing an opportunity for an early investigation of the facts and circumstances, the court points out that the notice of claim is not intended to be a statute of limitation. However, it has become one because judges have not exercised their discretion in this area. A highly worthwhile suggestion that CPLR 2004[235] be used to extend the time to file the notice, when the court, in its discretion, deems it proper, is made.

The decisions of the past, in so strictly enforcing the notice of claim provision, have created injustice in many cases.[236] In

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21 App. Div. 2d 715, 249 N.Y.S.2d 550 (3d Dep't 1964); *In re* Daly, 19 App. Div. 2d 691, 241 N.Y.S.2d 732 (4th Dep't), *aff'd*, 14 N.Y.2d 574, 248 N.Y.S.2d 873 (1964).

[234] 55 Misc. 2d 813, 286 N.Y.S.2d 748 (Sup. Ct. Kings County 1968).

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

[236] *See, e.g.*, Nori v. City of Yonkers, 300 N.Y. 632, 90 N.E.2d 492 (1950); Thompson v. City of New York, 24 App. Div. 2d 427, 260 N.Y.S.2d 667 (1st Dep't 1965); *In re* Kreuzer, 282 App. Div. 881, 124 N.Y.S.2d 752 (2d Dep't 1953).

addition to creating an injustice to the injured party, a malpractice trap for lawyers has been created. For all concerned, the injured parties, lawyers, and judges, the appellate courts would do well if they applied CPLR 2004 so as to mitigate the undue burden of § 50-e.

NEW YORK INSURANCE LAW

Ins. Law § 167: Party who obtained judgment in excess of policy limits is not "aggrieved" by insurer's refusal to settle within limits.

Section 167(b) of the Insurance Law, New York's "direct action" statute, permits an injured party whose judgment against the insured has remained unsatisfied for thirty days from notice of entry of judgment to maintain an action against the insurer under the terms of and within the policy limits.

In *Browdy v. State-Wide Insurance Co.*,[237] the injured party, who had obtained judgment for personal injuries against the insured in excess of the policy limits, brought an action against the insurer for the entire amount of the judgment. The plaintiffs contended that the insurance company had refused to settle in bad faith. Special term, Queens County, held that the plaintiff could not recover from the insurance company for refusal to settle within the policy limits, because clearly he recovered more than he would have had the company settled. Plaintiff was therefore not a "person aggrieved" by any improper conduct on the insurer's part. The court, however, did point out that the insured should be able to assign his cause of action for refusal to settle.[238] For example, in partial payment of the judgment, the injured party could accept the assigned cause of action against the insurer from the insured. He could then sue the insurance company as the proper party plaintiff.[239]

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[237] 56 Misc. 2d 610, 289 N.Y.S.2d 711 (Sup. Ct. Queens County 1968).

[238] *Id.* at 612-13, 289 N.Y.S.2d at 714.

[239] *See, e.g.*, Lemons v. State Auto Mut. Ins. Co., 171 F. Supp. 92 (E.D. Ky. 1959). For discussion of the New York rule on an insurance company's refusal to settle, see Note, *Insurer's Liability for Refusal to Settle*, 42 ST. JOHN'S L. REV. 544 (1968).