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CPLR 3212: Summary Judgment Granted on an Unpleaded Cause of Action

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would not appear to offer the defendant much relief since, in all likelihood, the plaintiff would again refuse to answer the questions. Although the court did not discuss whether defendant could have appealed by permission, it would seem that the court would deny such permission, and require the defendant to follow the suggested procedure.[60]

To be compared with *Tri-State* is *Presti v. Schalck*.[61] There the appellate division, fourth department, held that while an appeal from an order under CPLR 3124, compelling plaintiffs to answer certain questions and make full disclosure of all matters pertaining to such questions, was not available as a matter of right, the order was appealable by permission under CPLR 5701(c). The appeal in that case was dismissed, however, because of the appellant's failure to obtain the required permission to appeal.

The practitioner is cautioned to distinguish the practice followed in the different departments, at least until the Court of Appeals resolves the question of whether orders or rulings made upon objections at an examination before trial are appealable by permission.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3212: Summary judgment granted on an unpleaded cause of action.

In *Dampskibsselskabet Torm v. P. L. Thomas Paper Co.*,[62] the appellate division, first department, has granted summary judgment on an unpleaded cause of action. The plaintiff, a common carrier by sea, sued a shipper and its forwarder, ostensibly, for breach of contract. The parties had agreed that the final bill for a series of shipments would reflect a ten per cent discount on the total freight charges. Plaintiff sought to recover the amount of the discount, reflected as "balance due" on the freight due bill. In its motion for summary judgment, plaintiff submitted evidence of a shipping conference, approved by the United States Shipping Board and signed by the shipper, which fixed rates and prohibited discounts to shippers. Also supporting the motion was a "reference" to Section 16 of the Shipping Act of 1916[63] which makes it unlawful for a shipper or forwarder to obtain

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[60] This conclusion would seem warranted by the court's reference to *Lee v. Chemway Corp.*, *supra* note 57, which held that orders made at examinations before trial were not appealable by permission under CPLR 5701(c).

[61] 26 App. Div. 2d 793, 275 N.Y.S.2d 36 (4th Dep't 1966).

[62] 26 App. Div. 2d 347, 274 N.Y.S.2d 601 (1st Dep't 1966).

[63] 46 U.S.C. § 815 (1964).

water transportation at less than otherwise applicable rates by means of false billing. The court granted the motion, holding the forwarder liable by reason of section 16.

On appeal, the shipper argued, *inter alia,* that the lower court had erred in granting summary judgment on a cause of action based upon section 16, which had not been pleaded by plaintiff but had merely been referred to in support of the motion. The court, however, noted that the plaintiff's motion had given notice to the shipper of the statutory claim. Indeed, there could have been no prejudice, for the shipper, in its affidavit in opposition to the motion, denied the claim of false billing. Moreover, the court was obligated to take judicial notice of the law involved.[64] Even on appeal the court could have amended the complaint to conform to the proof presented with the plaintiff's motion.

It has been frequently held that a cause of action not contemplated in the complaint but presented in support of a motion cannot be made the basis of summary judgment.[65] Nevertheless, the court's opinion seems consistent with the intent of CPLR 3212(g), which permits any order which will aid in the disposition of the action. The facts not being in dispute, the issues were determined by a clearly applicable statute. If this alone was not sufficient notice of an alternate theory to the defendants, plaintiff's reference to the statute was. Since there was no prejudice or unfair surprise, summary judgment was proper.

CPLR 3212: Partial summary judgment available in the Court of Claims.

While the Court of Claims has granted severance and an immediate trial on the merits where it was apparent that no valid defense was involved, it has explicitly refused to term this a partial summary judgment.[66] However, a recent case, *Vern Norton, Inc. v. State,*[67] has held that partial summary judgment may be granted in the Court of Claims.

Neither the Court of Claims Act nor the Rules of the Court of Claims expressly provide for a summary judgment procedure. Nevertheless, by virtue of Section 9(9) of the Court of Claims Act, which states that except as otherwise provided "the practice

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[64] CPLR 4511.

[65] *E.g.,* Cohen v. City Co. of New York, 283 N.Y. 112, 27 N.E.2d 803 (1940); Potalski Int'l v. Hall's Boat Corp., 282 App. Div. 44, 122 N.Y.S.2d 166 (3d Dep't 1953); Morrisey v. Toumaniantz, 27 Misc. 2d 309, 208 N.Y.S.2d 77 (Sup. Ct. Nassau County 1960).

[66] Yonkers Contracting Co. v. State, 28 Misc. 2d 495, 218 N.Y.S.2d 159 (Ct. Cl. 1961); Poszuwert v. State, 192 Misc. 528, 78 N.Y.S.2d 108 (Ct. Cl. 1948).

[67] 27 App. Div. 2d 13, 275 N.Y.S.2d 564 (3d Dep't 1966).