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CPLR 3212: Partial Summary Judgment Available in the Court of Claims

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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).

shall be the same as in the supreme court," CPLR 3212 is made applicable to the Court of Claims.

In *Vern Norton,* the state argued that since Rule 13 of the Rules of the Court of Claims provides that the state is not required to responsively plead, and since, in fact, no answer had been served, the requirement of CPLR 3212 that issue be joined before summary judgment is awarded had not been fulfilled. However, the court noted that rule 13 also provides that the state is deemed to deny all the allegations of the claim. Therefore, issue is joined as required by CPLR 3212, without formal service of responsive pleadings and the plaintiff may move for summary judgment immediately after filing his claim.[68]

*CPLR 3216: 45-day demand inapplicable to dismissal for general delay.**

It appears that the controversy surrounding the interpretation of the 1964 amendment to CPLR 3216[69] has been finally settled by the Court of Appeals. In *Thomas v. Melbert Foods, Inc.,*[70] personal injury was alleged to have occured in October, 1960, and an action was commenced in June, 1962. The plaintiff failed

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[68] *Cf.* CPLR 3018(a).

*As this issue of the *Survey* was going to press, CPLR 3216 was repealed and replaced with an amended section, which, in part, reads: "(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays . . . or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleadings on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

"(b) No dismissal shall be directed under any portion of subdivision (a) . . . and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with: . . . (3) The court or party seeking such relief . . . shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a notice of issue within forty-five days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within the forty-five day period will serve as a basis for a motion . . . for unreasonably neglecting to proceed."

While practical considerations prevent a full treatment of the repeal and amendment of 3216 in this issue, the next installment of the *Survey* will include a thorough discussion of the effect, if any, of this change upon the practitioner. It is important to note here, however, that the new section makes service of a written demand a necessary prerequisite both in cases of failure to proceed and in cases of failure to file a note of issue.

[69] See generally 7B McKINNEY'S CPLR 3216, supp. commentary 210 (1966); *The Quarterly Survey of New York Practice,* 41 ST. JOHN'S L. REV. 279, 312 (1966).

[70] 19 N.Y.2d 216, 225 N.E.2d 534, 278 N.Y.S.2d 836 (1967).