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Article 20

CPLR 3211(a)(8): Motion Challenging Jurisdiction Granted After Service of Answer

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It is submitted that such a result, although not violative of CPLR 3110's express wording, does violate its spirit. It remains to be seen whether the second department will qualify the holding in *Ambrose* (as might easily be done since the opinion does not expressly say that the objection was not supported by facts tending to establish real prejudice). But, presently, the law in the second department is that a mere preemptory objection will suffice.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3211(a)(8): Motion challenging jurisdiction granted after service of answer.

Brodsky v. Spencer,[84] previously discussed in this issue of the *Survey*, dealt primarily with the sufficiency of notice under a court ordered service. However, the interesting problem of raising a defense in a timely manner was also presented. The court allowed a motion challenging jurisdiction although it was not made in the interval "before service of the responsive pleading is required."

The legislature, though attempting to prevent dilatory tactics and yet achieve the economy afforded by preliminary hearings aimed at avoiding trial, seemingly left no specific provision whereby the defendant[85] could speed a determination of a jurisdictional issue when it is raised in the answer.

While the court found no problem with the limitation, it provided no rationale for its action. However, its holding can be justified in two ways. First, a 3211 motion can be treated as a 3212 motion for summary judgment. Under this provision the lack of jurisdiction could have been determined at any time prior to trial and was thus timely.[86] Second, justification can be drawn from 3211 itself. The defendant properly raised the defense in his answer, so as not to waive it under 3211, but then moved for an early adjudication of his claim. This specific procedure is not provided for by 3211. However, the section stresses the correct procedure so as not to waive the defense—raising the defense in the answer as the defendant did. Seemingly, then, it does not torture the section to allow a determination of the defense by motion.[87] Such an interpretation would hurt neither the plaintiff nor defendant and would help clear the court's calendar.

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[84] 52 Misc. 2d 4, 277 N.Y.S.2d 802 (Sup. Ct. Monroe County 1966).
[85] The plaintiff can, by 3211(b), make a motion to dismiss a defense.
[86] 7B MCKINNEY'S CPLR 3211, supp. commentary 140 (1967).
[87] *Ibid.*

It seems, however, that the soundest procedure would be to rely upon a direct 3212 motion in such situations until the legislature provides a specific provision by which the defendant can speed the determination of 3211 defenses.

CPLR 3211(e): Jurisdictional defense raised in amended answer relates back to time of original answer.

In *Blatz v. Benschine*,[88] defendant raised the defense of lack of personal jurisdiction,[89] not in his original answer, but in his responsive pleadings to plaintiff's amended complaint. The Supreme Court, Queens County, ruled that the defense interposed was timely.[90] The court reasoned: since plaintiff decided to serve, as a matter of right, an amended complaint, defendant was forced to respond, also as a matter of course, with amended pleadings which contained the CPLR 3211(a)(8) defense. The amendment was deemed to relate back to the time of service of the original answer, therefore, defendant's assertion of the jurisdictional defense was timely.

It is significant to note that the court in the present case allowed the interposition of the defense as a *matter of right*, and not as a matter of its discretion. Thus, the plaintiff who elects to amend his complaint may then be faced with a jurisdictional defense.

CPLR 3213: Summary judgment on conditional instrument denied.

CPLR 3213 provides that "[w]hen an action is based upon a judgment or instrument for the payment of money only, the plaintiff may serve with the summons a notice of motion for summary judgment . . . in lieu of a complaint." The statute was conceived in an effort to provide a speedy and effective means of securing a judgment on claims presumptively meritorious where a formal complaint would be superfluous and the resulting delay needless.[91]

In *Baker v. Gundermann*,[92] the plaintiff's motion for summary judgment was based on two written instruments. The first failed to come within the purview of the statute as an "instrument for

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[88] 53 Misc. 2d 352, 278 N.Y.S.2d 533 (Sup. Ct. Queens County 1967).

[89] CPLR 3211(a)(8).

[90] 53 Misc. 2d at 354, 278 N.Y.S.2d at 535. CPLR 3211(e) provides: "An objection based upon a ground specified in paragraphs eight or nine of subdivision (a) is waived if a party . . . does not raise such objection in the responsive pleading."

[91] FIRST REP. 91. *See also* 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3213.01 (1965).

[92] 52 Misc. 2d 639, 276 N.Y.S.2d 495 (Sup. Ct. Nassau County 1966).