

# CPLR 3211(e): Motion Under 3211(a)(7) Allowed Before Answer Although Another 3211(a) Motion Is Pending

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## ARTICLE 32—ACCELERATED JUDGMENT

*CPLR 3211(e): Motion under 3211(a)(7) allowed before answer although another 3211(a) motion is pending.*

While ostensibly the CPLR holds non-waivable an objection under 3211(a)(7) that a complaint fails to state a cause of action,<sup>67</sup> debate has arisen as to whether such an objection may be raised by motion prior to answer while another 3211(a) motion is pending. Some authors have contended that a second motion may not be made prior to answer.<sup>68</sup>

In contrast, however, is *Higby Enterprises, Inc. v. City of Utica*.<sup>69</sup> There the defendant moved, with 3211(a)(7) as authority, for a dismissal on the ground that the plaintiff had failed to state a cause of action. At the time the motion was made, another of defendant's motions to dismiss the action under 3211(a) was pending before the court. The court held that the latter motion was not barred by the prior one, and remarked that "the defendant . . . may have set forth this defense in its answer or may, at its own option, make a motion under CPLR 3211 at any time."<sup>70</sup>

Resolution of the multi-motion problem raised by 3211(a)(7) will necessarily involve a construction of the words "any subsequent time" contained in CPLR 3211(e). That subsection seeks to prevent dilatory tactics in the prosecution of a cause of action by providing for an omnibus motion to be made prior to answer.<sup>71</sup> As originally drafted, a motion to dismiss for failure to state a cause of action could be made only after answer, and would be treated as a motion for summary judgment.<sup>72</sup> However, the final compromise version of subdivision (e) allowed for a 3211(a)(7) motion to be made either prior or subsequent to answer. It is

<sup>67</sup> CPLR 3211(e) states that an objection based upon the grounds set forth in 3211(a)(1), (3), (4), (5), and (6) is waived unless raised by motion or in the responsive pleading. Further, an objection based on the grounds contained in 3211(a)(8) and (9) is waived if not raised in a 3211(a) motion or in the responsive pleading, whichever comes first. Thus, by elimination, an objection under 3211(a)(7), and also objections under 3211(a)(2) and (10), are readily discerned as non-waivable. A like rule prevailed under the CPA. For example, in *Booth v. Carleton Co.*, 236 App. Div. 296, 258 N.Y.S. 159 (1st Dep't 1932), it was noted that "a motion objecting to the complaint because it does not state facts sufficient to constitute a cause of action may be made at any time before trial or at the trial." *Id.* at 298, 258 N.Y.S. at 162.

<sup>68</sup> 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶3211.43 (1966).

<sup>69</sup> 54 Misc. 2d 405, 282 N.Y.S.2d 583 (Sup. Ct. Oneida County 1967).

<sup>70</sup> *Id.* at 406, 282 N.Y.S.2d at 585.

<sup>71</sup> 7B MCKINNEY'S CPLR 3211, commentary 320, 321 (1963).

<sup>72</sup> 7B MCKINNEY'S CPLR 3211, legislative studies and reports, 327, 329 (1963).

suggested that the omnibus-motion approach of CPLR 3211(e) is not overridden by the compromise with respect to 3211(a)(7) and, therefore, motions pursuant to 3211(a)(7) should be made at the time other 3211(a) motions are made. Consequently, it is submitted that "any subsequent time" should be construed to mean any subsequent time after answer.

*CPLR 3215: One year period in third-party action runs from judgment against third-party plaintiff in main action.*

In *Multari v. Glalin Arms Corp.*,<sup>73</sup> a wrongful death action, the defendant, an owner and general contractor, served a third-party summons and complaint for contractual and implied indemnification on Krugman Construction Corporation (Krugman), the deceased's employer. Since Krugman had not yet answered one month prior to the trial the defendant advised Krugman to notify its insurance carrier about the impending trial, and enclosed certain pleadings, but Krugman did not appear. Shortly before the trial, Krugman was given notice of its default but this notice was also ignored.

Subsequent to a judgment rendered against the defendant for failure to provide plaintiff with a safe place to work, the court granted a default judgment to defendant against Krugman, based on the negligent manner in which it covered the opening through which plaintiff fell.

On motion in supreme court, special term, the default was vacated<sup>74</sup> on the ground that CPA § 193(a), in effect when the third-party complaint was served, did not require Krugman to answer the third-party complaint.<sup>75</sup> The court allowed the third-party plaintiff to serve a supplemental complaint, to which Krugman was directed to answer, indicating that a new trial was necessary to resolve the issue of indemnity.

Reversing, the appellate division, second department, held, that the third-party answer, despite the statutory words "may answer," was mandatory under CPA § 193(a) and reinstated the original default judgment.<sup>76</sup>

The appellate division was then presented with the contention that the default judgment was invalid since it had been entered more than three years after the third-party complaint was served. CPLR 3215(c) provides that if judgment is not entered within

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<sup>73</sup> 28 App. Div. 2d 122, 282 N.Y.S.2d 782 (2d Dep't 1967).

<sup>74</sup> 51 Misc. 2d 1019, 274 N.Y.S.2d 827 (Sup. Ct. Kings County 1966).

<sup>75</sup> CPA § 193(a) stated that the third-party defendant "may answer" the third-party complaint. Contrast with this the mandatory wording of CPLR 1008, "[t]he third-party defendant shall answer the [third-party] claim. . . ."

<sup>76</sup> *Multari v. Glalin Arms Corp.*, 28 App. Div. 2d 122, 282 N.Y.S.2d 782 (2d Dep't 1967).