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CPLR 3215: One Year Period in Third-Party Action Runs from Judgment Against Third-Party Plaintiff in Main Action

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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.*,[73] 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[74] 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.[75] 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.[76]

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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[73] 28 App. Div. 2d 122, 282 N.Y.S.2d 782 (2d Dep't 1967).

[74] 51 Misc. 2d 1019, 274 N.Y.S.2d 827 (Sup. Ct. Kings County 1966).

[75] 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. . . ."

[76] Multari v. Glalin Arms Corp., 28 App. Div. 2d 122, 282 N.Y.S.2d 782 (2d Dep't 1967).

one year from date of default, the court, in the absence of a showing of sufficient cause, shall dismiss the complaint as abandoned. Reasoning that the purpose of third-party practice is to expedite the termination of an action, the court held that the one year period for entering a default judgment in a third-party action commences when the judgment against the defendant in the main action is rendered, since the cause of action in indemnity does not accrue until then.

As one commentator has noted,[77] any other result than that reached by the court, would be impractical, if not impossible. Any damages to which the third-party plaintiff may be entitled are not ascertainable and nonrecoverable until after judgment is rendered against the third-party plaintiff. If the one year period were to commence from the return date of the answer, the result would be to require a third-party plaintiff to prove a case in which no loss has been or may be incurred by him.[78]

ARTICLE 50 — JUDGMENTS GENERALLY

CPLR 5013: Evasive tactics may allow dismissal on merits before close of plaintiff's case so as to bar second suit.

CPLR 5013 is the seminal provision for the determination of whether a judgment dismissing a cause of action is on the merits and, thus, a bar to any subsequent action. It provides, in part, that unless expressly specified otherwise, the dismissal of a cause of action before the close of the proponent's case is not a dismissal on the merits. Usually, the problem will not arise, since the courts are loathe to dismiss on the merits before the proponent's proof is complete, especially where the grounds for dismissal are technical.[79] Additionally, the mere statement that the dismissal is on the merits or with prejudice is not conclusive as to whether the second action is barred. Either the circumstances in the prior action must warrant the conclusion that the dismissal is on the merits, or it must be clear that the trial court intended such a result.[80] For example, in *Mink v. Keim*,[81] the plaintiff

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[77] *See* 7B MCKINNEY'S CPLR 3215, supp. commentary 237 (1967).

[78] An additional aspect of the present case is that, under certain factual conditions, the five-day notice prerequisite to a CPLR 3215 motion may be ignored. The court here found that such a formality would not be mandated when the third-party defendant has disregarded all prior notices, including one advising him of possible default.

[79] Greenberg v. DeHart, 4 N.Y.2d 511, 151 N.E.2d 891, 176 N.Y.S.2d 344 (1958); Richard v. American Union Bank, 253 N.Y. 166, 170 N.E. 532 (1930); Jones v. Merit Truck Renting Corp., 17 App. Div. 2d 779, 232 N.Y.S.2d 519 (1st Dep't 1962).

[80] 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5013.02 (1965).

[81] 291 N.Y. 300, 52 N.E.2d 444 (1943).