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CPLR 5013: Evasive Tactics May Allow Dismissal on Merits Before Close of Plaintiff's Case So As to Bar Second Suit

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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).

brought a second action after the first had been dismissed "on the merits." The Court of Appeals held that where the plaintiff had offered no additional proof, the mere fact of dismissal indicated nothing more than a non-suit. The addition of the words "on the merits" added virtually nothing to the claim that the second action was barred.

In the recent case of *Palmer v. Fox*,[82] the plaintiffs failed to comply with defendant's demand for a bill of particulars and a ten-day conditional preclusion order was granted. When the plaintiffs made no attempt to comply with the order, the complaint was dismissed "on the merits." The plaintiffs unsuccessfully attempted to vacate the dismissal. Subsequently, the plaintiffs served a second complaint for the same cause of action.

The appellate division, fourth department, dismissed the complaint, noting that the plaintiffs brought the second action primarily to circumvent the effect of the preclusion order granted in the first action. Emphasizing that the power to bar a second suit should be "sparingly exercised," the court noted that the plaintiffs' evasive tactics constituted the "exceptional circumstances" contemplated by CPLR 5013 which would warrant such a dismissal of the first suit prior to the completion of the plaintiffs' case as would bar the second action herein brought.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201: Seider v. Roth *again held constitutional by lower court.*

The many facets of the problem created by *Seider v. Roth*[83] again came to light in the recent case of *Lefcourt v. Seacrest Hotel & Motor Inn, Inc.*[84] There, the obligation of defendant's insurer, licensed and doing business in New York, to investigate, defend, indemnify, and make medical payments constituted the res in New York by which jurisdiction was obtained. The defendant alleged a violation of due process and equal protection guarantees for two reasons: he had no property which could be deemed a res within the State, and CPLR 320(c) was unfair in making submission to personal jurisdiction a requisite to a defense on the merits.

On plaintiff's motion, the Supreme Court, Queens County, dismissed the objection relating to the lack of a res within the

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[82] 28 App. Div. 2d 968, 283 N.Y.S.2d 216 (4th Dep't 1967).

[83] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). For a prior discussion of the constitutionality of *Seider*, see *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 130, 157 (1967), discussing Jones v. McNeil, 51 Misc. 2d 527, 273 N.Y.S.2d 517 (Sup. Ct. Albany County 1966).

[84] 54 Misc. 2d 376, 282 N.Y.S.2d 896 (Sup. Ct. Queens County 1967).