St. John's Law Review

Volume 42
Number 3 *Volume 42, January 1968, Number 3*

Article 9

CPLR 203(c): Applies to Tort Counterclaim in a Contract Action

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The Table of Contents is designed to key the reader to those specific areas of procedure which may be of importance to him. The various sections of the CPLR which are specifically treated in the cases are listed under their respective titles.

ARTICLE 2—LIMITATIONS OF TIME

CPLR 203(c): Applies to tort counterclaim in a contract action.

In *Chevron Oil Co. v. Atlas Oil Co.*,[1] decided pursuant to the CPA, the appellate division, fourth department, recently ruled that in a suit for breach of contract the defendant could not interpose a tort counterclaim after the statute of limitations for tort had run. The court noted that, since the alleged act occurred in 1959 and the three year statute of limitations[2] had run prior to the effective date of the CPLR, the ameliorative provisions of the CPLR were not available to the defendant. From this language, it may be presumed that had the case been decided under the CPLR a different result would have been reached.

CPLR 203(c) states that "[i]f the . . . counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed." This section, while based on CPA §§ 11 and 61, greatly changes the statutory law in New York.[3]

Under CPA § 11, the statute of limitations on a defendant's counterclaim was not tolled until the answer containing the counterclaim was served.[4] The CPLR adopts the rule of *Parsell v. Essex* [5] that the statute of limitations is tolled when the plaintiff serves the summons.[6]

CPA § 61 provided that a cause of action barred by the statute of limitations could not be interposed as a defense or counterclaim. CPA § 11 further provided a similar limitation as concerning the interposition of a claim for relief.

CPLR 203(c) adopts, essentially, the doctrine of "equitable recoupment." Under this doctrine, a counterclaim barred by the statute of limitations can nevertheless be interposed, but only to the

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[1] 28 App. Div. 2d 644, 280 N.Y.S.2d 731 (4th Dep't 1967).
[2] CPA § 49(7).
[3] SECOND REP. 46.
[4] Hammill v. Curtis, 18 App. Div. 2d 749, 235 N.Y.S.2d 865 (3d Dep't 1962) (memorandum decision).
[5] 15 Misc. 2d 617, 181 N.Y.S.2d 1019 (Sup. Ct. Cattaraugus County 1958).
[6] 7B MCKINNEY'S CPLR 203(c), commentary 82 (1963).

extent that it abates the plaintiff's demand.[7] However, unlike prior expressions of the equitable recoupment doctrine in New York,[8] the CPLR does not require the counterclaim or defense to be based on the same theory as the complaint.[9] Instead, the defense or counterclaim need only stem from the "transactions, occurrences, or series of transactions or occurrences . . ." out of which the complaint arises.[10] Thus, where a claim in a complaint is based on contract, a counterclaim in tort arising from the same transactions, as in the *Chevron* case, should be allowed to be interposed to the extent that it abates a plaintiff's claim, regardless of the fact that it would be barred as an independent cause of action by the statute of limitations.

CPLR 205(a): Prior dismissal for failure to serve timely complaint not a bar to extension.

CPLR 205(a), a saving statute, allows a plaintiff to commence a new action on the same cause within six months after the cessation of the original action even though the statute of limitations would have since run,[11] provided the original action is not terminated,[12] *inter alia*, by a dismissal of the complaint for neglect to prosecute.[13] One issue which has repeatedly confronted the courts both under the CPA and the CPLR is whether a dismissal for failure to serve a timely complaint[14] constitutes a dismissal for failure to prosecute.[15]

In the recent case of *Virgilio v. Ketchum*,[16] the court was faced with the issue of whether plaintiffs should be allowed to commence, for a second time, two actions after they were dismissed initially pursuant to CPLR 3012(b), without prejudice, for failure to serve timely complaints. The causes of action arose on November 6, 1966 and were dismissed on April 24, 1967. The new

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[7] *See* Title Guar. & Trust Co. v. Hicks, 283 App. Div. 723, 127 N.Y.S.2d 340 (2d Dep't 1954).

[8] *See* Fish v. Conley, 221 App. Div. 609, 225 N.Y.S. 27 (3d Dep't 1927).

[9] For a complete discussion of the equitable recoupment doctrine under the CPLR, *see generally* 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 203.25 (1963).

[10] CPLR 203(c).

[11] This section is based upon CPA § 23; the only change is a reduction of the saving period from one year to six months.

[12] The word terminated includes a judgment reversed on appeal without awarding a new trial. SECOND REP. 52.

[13] Additionally, CPLR 205 is inapplicable where the action is terminated by a voluntary discontinuance or a final judgment on the merits. CPLR 205(a).

[14] *See* CPLR 3012(b).

[15] *See* CPLR 3216.

[16] 54 Misc. 2d 111, 281 N.Y.S.2d 376 (Sup. Ct. Broome County 1967).