

## CPLR 3211(a)(4): Dismissal Denied Where Pending Action Was Instituted Subsequent to the Action Sought To Be Dismissed

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*CPLR 3121(a): Movant need not prove his case on the merits in order to obtain physical examination of his adversary.*

In *Constantine v. Diello*,<sup>108</sup> the fourth department further clarified the words "in controversy" as contained in CPLR 3121(a)'s statement of when a physical or mental examination may be employed as a disclosure device.<sup>109</sup> The case involved a wrongful death action arising from an automobile accident. At a prior motor vehicle hearing, defendant testified, *inter alia*, that his vision was unobstructed. An eye test conducted at the hearing disclosed that defendant's vision was, in fact, impaired. Subsequently, plaintiff sought to obtain an eye examination of the defendant in prosecution of her wrongful death action. In denying defendant's motion for a protective order, the court held that plaintiff's proof was sufficient to warrant the granting of her notice for an eye examination, *i.e.*, that plaintiff had sufficiently placed the condition of defendant's vision *in controversy*.

In support of its holding, the court stated that the requirement of proof in a 3121 situation is not to be equated with that which is necessary to make out a *prima facie* case. Apparently, the requirement is that there be "some evidence" in order to place a matter in controversy.

It should be noted, however, that to place an adversary's physical or mental condition in controversy requires at least that there be some logical connection between the party's condition and the issue(s) of the case. Thus, where a defendant stated at an examination before trial that he had not seen the injured plaintiff, the court denied plaintiff's request for a physical examination, holding such a statement insufficient for purposes of placing defendant's physical condition in controversy.<sup>110</sup>

#### ARTICLE 32 — ACCELERATED JUDGMENT

*CPLR 3211(a)(4): Dismissal denied where pending action was instituted subsequent to the action sought to be dismissed.*

In *Izquierdo v. Cities Serv. Oil Co.*,<sup>111</sup> the supreme court denied defendant's motion to dismiss the complaint on the ground that

<sup>108</sup> 24 App. Div. 2d 821, 264 N.Y.S.2d 153 (4th Dep't 1965).

<sup>109</sup> *Fisher v. Fossett*, 45 Misc. 2d 757, 257 N.Y.S.2d 821 (Sup. Ct. Erie County 1965), decided by a lower court within the fourth department, also discussed the meaning of the words "in controversy." This case is treated in *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 161 (1965).

<sup>110</sup> *Courtney v. Olsen*, 45 Misc. 2d 283, 256 N.Y.S.2d 748 (Sup. Ct. Westchester County 1965).

<sup>111</sup> 47 Misc. 2d 1087, 264 N.Y.S.2d 58 (Sup. Ct. Kings County 1965).

there was another action pending at the same time. The second action was instituted in federal court twenty-five days after the instant case was commenced. The court held that in order to obtain such a dismissal, the other action must have been commenced prior to the action in which the motion is made. Although this seems to be the first such holding under CPLR 3211(a)(4), it merely restates the rule which prevailed under the CPA.<sup>112</sup>

*CPLR 3213: Defects in moving papers.*

Under CPLR 3213, a plaintiff suing on a "judgment or instrument for the payment of money only" may serve a notice of motion for summary judgment and supporting papers with the summons in lieu of a complaint. This procedure provides a means of securing a speedy judgment on claims which are "presumptively meritorious."<sup>113</sup> The ordinary requirement of a formal complaint and answer are deemed superfluous and needlessly time consuming. If the motion is denied, the motion papers are treated as the pleadings unless the court orders otherwise.<sup>114</sup>

In *Mercantile Nat'l Bank v. Wismer*,<sup>115</sup> the appellate term, first department, reversed, with leave to renew, a motion granting plaintiff summary judgment because of defects in the moving papers and summons. Aside from amendable irregularities in the summons, one defect noted by the court was the absence of an authenticating certificate required by CPLR 2309(c) from plaintiff's supporting affidavit. Thus, because of plaintiff's failure to have the "flag" attached to its affidavit, it was not properly before the court.<sup>116</sup>

Furthermore, the plaintiff failed to allege its corporate status pursuant to the requirements of CPLR 3015(b). It would appear, however, that it was unnecessary for the plaintiff to have amended this defect. While upon motion the supporting papers must contain all of the essentials of a complaint, the omission of the allegation of corporate status in a formal complaint, if non-prejudicial, is usually ignored.<sup>117</sup> Thus, the court might have ignored the defect

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<sup>112</sup> *Avery v. Title Guar. & Trust Co.*, 230 App. Div. 519, 245 N.Y. Supp. 362 (1st Dep't 1930); 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3211.27 (1965).

<sup>113</sup> 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3213.01 (1965).

<sup>114</sup> McKinney's Sess. Laws (Leg. Mem.) 2058 (1965).

<sup>115</sup> 48 Misc. 2d 275, 264 N.Y.S.2d 850 (App. T. 1st Dep't 1965).

<sup>116</sup> See *Majestic Co. v. Wender*, 24 Misc. 2d 1018, 205 N.Y.S.2d 317 (Sup. Ct. Nassau County 1960).

<sup>117</sup> 7B MCKINNEY'S CPLR 3015, supp. commentary 82 (1965); 7B MCKINNEY'S CPLR 3026, supp. commentary 130 (1965); see *Foley v. D'Agostino*, 21 App. Div. 2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964); *Capital Newspapers Div.—The Hearst Corp. v. Vanderbilt*, 44 Misc. 2d 542, 254 N.Y.S.2d 309