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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.[112]

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."[113] 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.[114]

In *Mercantile Nat'l Bank v. Wismer*,[115] 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.[116]

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.[117] Thus, the court might have ignored the defect

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[112] 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).

[113] 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3213.01 (1965).

[114] McKinney's Sess. Laws (Leg. Mem.) 2058 (1965).

[115] 48 Misc. 2d 275, 264 N.Y.S.2d 850 (App. T. 1st Dep't 1965).

[116] See Majestic Co. v. Wender, 24 Misc. 2d 1018, 205 N.Y.S.2d 317 (Sup. Ct. Nassau County 1960).

[117] 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

or deemed it amended if the sole error had been the failure to allege corporate status.

The practitioner should note that, although the court reversed the order granting the motion, it did so with leave to renew the motion on proper papers. It appears that the court was motivated by the cumulative effect of the errors rather than by their individual importance.

Collateral Estoppel: Unavailable to party where issue in subsequent suit was similar but not identical to that previously determined.

While res judicata serves to prevent the relitigation of a particular *cause of action* where there has been a final judgment on the merits, collateral estoppel insures that *issues* previously litigated and determined will be conclusive in a subsequent suit involving different causes of action or parties.[118] Both are doctrines of repose and, although closely related, are technically distinct. For example, if *A* sues *B* for negligence and recovers, the doctrine of res judicata will bar any subsequent suit by *A* against *B* on the same cause of action. However, if, in the subsequent suit, *A* sues *B* on a different cause of action, but one in which an issue is identical with one in the previous suit, res judicata would not apply. Here, the doctrine of collateral estoppel would be used to preclude a relitigation of the issue.

Previously, the courts generally imposed a requirement of mutuality upon one seeking to interpose the doctrine of collateral estoppel. "It is a principle of general elementary law that the estoppel of a judgment must be mutual." [119] This connotes that the party seeking to invoke the estoppel must have been either a party or privy to the suit in which the judgment was rendered.[120] Subject to several exceptions,[121] the rule of mutuality was adhered to by the New York courts until the case of *Israel v. Wood Dolson Co.*[122] was decided in 1956.

In *Israel,* the Court of Appeals allowed a defendant who had not been a party to the prior action to assert the previous determination of an issue in a subsequent suit. Rather than merely establishing a new exception to the rule of mutuality the Court stated that:

(Sup. Ct. Albany County 1964); Hewitt v. Maass, 41 Misc. 2d 894, 246 N.Y.S.2d 670 (Sup. Ct. Suffolk County 1964).

[118] McKinney's Sess. Law News, June 25, 1965, A-262.

[119] Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912).

[120] See 1B MOORE, FEDERAL PRACTICE, ¶ 0.412[1], at 1801 (2d ed. 1965).

[121] See *id.* at ¶ 0.412[3], at 1813.

[122] 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).