

## CPLR 3211(a)(5): Statute of Limitations in Annulment Action

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defendant. Defendants in the state court action moved for a stay until disposition of the federal action. This motion was denied.

The court noted that although neither the state nor the federal court had jurisdiction over all three causes of action, many of the issues were common to both proceedings, so that, on the basis of collateral estoppel, an adjudication of the state court action would foreclose relitigation of these common issues in the federal action. In addition, the defendants failed to show that conveniences would be served by giving the federal action precedence, or that added expenses would be involved in permitting the state action to proceed to trial. Therefore, the court denied the motion for a stay, *on condition* that, in the federal action, the plaintiff stipulate that any beneficial collateral estoppel effect which the state court judgment would have on the state court defendants would also be fully accorded to the additional defendant in the federal action.<sup>68</sup>

The decision in *Gallo* is illustrative of the broad discretionary powers exercised by courts deciding motions to stay under CPLR 3211(a)(4).<sup>69</sup> This section provides that, where another related action is pending between the same parties, the court, in lieu of a dismissal, may issue "such order as justice requires." This broad authorization for judicial discretion is clearly justifiable, for in instances of parallel litigation, the requirements and circumstances of any particular case will determine what order the court should issue.<sup>70</sup>

*CPLR 3211(a)(5): Statute of limitations in annulment action.*

Statutes of limitations are statutes of repose<sup>71</sup> which compel the exercise of a right of action within a designated time. When affirmatively pleaded, these statutes bar stale claims by denying a remedy; they do not extinguish the cause of action, right or obligation.<sup>72</sup>

Distinguishable from statutes of limitations are statutes which create a right of action and annex conditions to that right. Such an enactment makes the time limitation an essential part of the statute out of which the right in question arises, so that a lapse of the statutory period operates to extinguish the right altogether. Such time qualifications annexed to a statutory cause of action, therefore, become jurisdictional elements that cannot be waived merely because they were not specially pleaded by the parties.<sup>73</sup>

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<sup>68</sup> *Id.* at 388, 270 N.Y.S.2d at 299-300.

<sup>69</sup> 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3211.25 (1965).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Shoemaker v. Benedict*, 11 N.Y. 176 (1854).

<sup>72</sup> *Lightfoot v. Davis*, 198 N.Y. 261, 91 N.E. 582 (1910).

<sup>73</sup> *United States v. Wardwell*, 172 U.S. 48 (1898).

Whether a legislative enactment is a statute of limitations or whether it is a time limitation inherent in the substantive cause of action itself may be ascertained from a proper construction of its terms. Generally, in those instances where the limitation clause is found in the section which creates the right of action, the time limitation will be construed as being part of the substantive cause of action.<sup>74</sup>

This distinction is illustrated by *Shoddy v. Shoddy*,<sup>75</sup> where plaintiff brought a marital action for annulment on the ground of fraud. The action was commenced five years after the discovery of the alleged fraud. The court, in dismissing the complaint, held that it was required to apply the three-year period of limitations even though the time limitation was not pleaded as a defense. The court noted that the inclusion of the three-year time limitation in both CPLR 214(7) and Section 140(e) of the Domestic Relations Law indicated an intent on the part of the legislature to make time a substantive condition of the action. Therefore, once the time limitation had elapsed, the court was without jurisdiction to pronounce a decree dissolving the marriage.<sup>76</sup>

*CPLR 3211(e): Inclusion of counterclaim in answer not a waiver of jurisdictional objection.*

In *M. Katz & Son Billiard Prods., Inc. v. G. Correale & Sons, Inc.*,<sup>77</sup> defendant's answer contained both a jurisdictional objection and a counterclaim arising out of the same transaction sued upon by the plaintiff. The appellate division, first department, held that the defendant did not waive its jurisdictional objection by the inclusion of the counterclaim in its answer.

There does not appear to be a substantial reason why a jurisdictional objection should be lost merely because it is coupled with a defense on the merits,<sup>78</sup> and also joined with a counterclaim which reflects "the same issues as that defense."<sup>79</sup> CPLR 320(b) specifies that the proper place for a counterclaim is in the answer, and CPLR 3211(e) provides that defendant may raise his jurisdictional objection either by way of motion or in the answer. Thus, it would be inconsistent for the court to say that defendant's jurisdictional objection is waived by including a counterclaim in the very place authorized by the CPLR.

<sup>74</sup> *The Harrisburg*, 119 U.S. 199, 214 (1886).

<sup>75</sup> 50 Misc. 2d 74, 269 N.Y.S.2d 584 (Sup. Ct. Albany County 1966).

<sup>76</sup> *Id.* at 74-75, 269 N.Y.S.2d at 585.

<sup>77</sup> 26 App. Div. 2d 52, 270 N.Y.S.2d 672 (1st Dep't 1966).

<sup>78</sup> 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3211.05 (1965).

<sup>79</sup> *M. Katz & Son Billiard Prods., Inc. v. G. Correale & Sons, Inc.*, 26 App. Div. 2d 52, 53, 270 N.Y.S.2d 672, 674 (1st Dep't 1966).