

CPLR 3211(e): Inclusion of Counterclaim in Answer Not a Waiver of Jurisdictional Objection

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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.⁷⁴

This distinction is illustrated by *Shoddy v. Shoddy*,⁷⁵ 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.⁷⁶

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.*,⁷⁷ 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,⁷⁸ and also joined with a counterclaim which reflects "the same issues as that defense."⁷⁹ 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.

⁷⁴ *The Harrisburg*, 119 U.S. 199, 214 (1886).

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

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

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

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

⁷⁹ *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).

While this case concerned a counterclaim related to the main cause of action, a situation may arise where the defendant pleads a counterclaim unrelated to the plaintiff's cause of action. This situation may present a problem where, as in the instant case, jurisdiction is obtained over the defendant pursuant to New York's long-arm statute.⁸⁰

Under CPLR 302(b), the defendant's appearance gives the court personal jurisdiction only with respect to causes of action arising under CPLR 302(a). When, as in *Katz*, the defendant pleads a counterclaim related to the main claim, it is clear that he has not jeopardized this protection, since the plaintiff is similarly free to include causes of action related to the main claim. However, when the defendant pleads a counterclaim unrelated to the main claim, the court could reasonably consider this to be a waiver of this protection, and thus permit the plaintiff to amend his complaint to include causes of action similarly unrelated to CPLR 302. Alternatively, the court in such a case could limit the defendant's waiver and only allow the plaintiff to amend his complaint to include causes of action which are related to the defendant's counterclaim.

CPLR 3215(h): Amendment.

This new provision authorizes the court clerk to enter default judgment for failure to comply with a stipulation of settlement. It requires that the stipulation be entered into subsequent to the commencement of the action, and that it provide for entry of judgment without further notice to the other party. The stipulation must also be accompanied by both an affidavit as to the failure to comply with the terms of the stipulation, as well as with either a complaint or a concise statement reiterating the facts on which the claim was based.

CPLR 3219: Amendment.

This provision provides that an amount tendered in satisfaction of an asserted contract claim is to be deposited with the court clerk for safekeeping and that such amount is not to be deemed paid into court. The amendment provides that the clerk shall place such money "in the safe or vault of the court to be provided for the safekeeping thereof" until a disposition is made of it. It further provides that, if the amount is neither withdrawn by claimant nor returned to the depositor within a ten-day period, the amount will be deemed paid into court, and payment thereof will be made by the court clerk to the county treasurer or director

⁸⁰ Either CPLR 302 or its counterpart CCA § 404 might be employed.