

CPLR 3219: Amendment

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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 It further provides that, if the amount is neither withdrawn by claimant nor returned to the depositor within a ten-day period, the amount will be deemed paid into court, and payment thereof will be made by the court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.

of finance of the City of New York in accordance with CPLR 2601. Any subsequent withdrawal of the amount must be made in accordance with the provisions of CPLR 2607, less any applicable fees as provided for in CPLR 8010.

Collateral Estoppel: Available where issues identical and parties all before court in prior action.

In *Cummings v. Dresher*,⁸¹ *A*, *B*, and *X* were involved in an automobile accident. *X*, a passenger in the car *A* was driving, and *A* brought separate suits which were tried jointly against *B* in federal court. *A* was denied recovery because of his contributory negligence. The jury also concluded, albeit gratuitously, that *B* was negligent. *X* recovered in his action against *B* when the jury found *B* negligent. Subsequently, *B* commenced an action against *A* in the New York Supreme Court on facts arising from the same accident.

In denying *A*'s motion for summary judgment, the appellate division, third department,⁸² held that *A* could not assert the defense of collateral estoppel against *B* since, in the action of *A* against *B*, the jury's finding as to *B*'s negligence was "gratuitous." Also, *A* could not assert the finding of *B*'s negligence in the action by *X* against *B* since, presumably under the test established in *Israel v. Wood Dolson Co.*,⁸³ the issues must be identical for the defensive assertion of collateral estoppel. In the court's opinion, the issue of *B*'s contributory negligence toward *A* was different from the issue of *B*'s negligence toward *X*. The Court of Appeals,⁸⁴ in reversing the appellate division, stated that it could find no reason for requiring the issue of negligence to be relitigated since it was already decided in a jury trial where both parties were present.

The doctrine of collateral estoppel has been a changing concept in the New York courts. Traditionally, a defendant would be allowed to assert collateral estoppel only where the plaintiff would have the same right defensively.⁸⁵ This necessitated that the defendant be a party or privy in the previous suit,⁸⁶ for otherwise the plaintiff would not be able to assert that suit's finding against

⁸¹ 43 Misc. 2d 556, 251 N.Y.S.2d 598 (Sup. Ct. Schenectady County 1964).

⁸² *Cummings v. Dresher*, 24 App. Div. 2d 912, 264 N.Y.S.2d 430 (3d Dep't 1965), *affirming*, 43 Misc. 2d 556, 251 N.Y.S.2d 598 (Sup. Ct. Schenectady County 1964).

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

⁸⁴ *Cummings v. Dresher*, 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966).

⁸⁵ *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912).

⁸⁶ See 1B MOORE, FEDERAL PRACTICE ¶ 0.412(1), at 1801 (2d ed. 1965).