

# CPLR 3012: Cross-Claim Valid If Delay Not Prejudicial

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*CPLR 3012: Cross-claim valid if delay not prejudicial.*

For a cross-claim to be available against a person he must be a party to the action. If the defendant serves an answer containing the cross-claim before the third person has been made a party, the cross-claim will be void. If the situation is such that the third party will have to indemnify the defendant, the appropriate procedure would be impleader under CPLR 1007. However, if this procedure is not available the defendant is in a dilemma. The service may be void, or set aside as being prejudicial to the third party.

In *Kaufman v. Mallin*,<sup>147</sup> the supreme court recognized the practical problem involved and took a liberal position in its determination. The court observed that the "general" provisions of CPLR 3012<sup>148</sup> govern the service of a cross-claim. Because of the generality of CPLR 3012, the precise requirements concerning the cross-claim are unclear. In light of this, the court held that if the delay of service of the cross-claim is not prejudicial, it will be considered valid.

*CPLR 3012(b): Defendant must demand complaint where lack of complaint disenables court from determining cause of action.*

In *Fralely v. Desilu Prods., Inc.*,<sup>149</sup> the defendant, a California corporation allegedly transacting business in New York, was served in California with a summons and notice of claim. No complaint was served. The defendant moved to dismiss the action, pursuant to CPLR 3211(a)(8), on the ground that the court lacked jurisdiction over the person of the defendant. In opposition to the motion the plaintiffs submitted affidavits but did not disclose the nature of the cause of action. The appellate division reversed the judgment of dismissal stating that since it was unable to determine the nature of the action, it could not determine whether the plaintiffs had a valid basis for jurisdiction under CPLR 302(a)(1).

Since a court will not dismiss under CPLR 3211(a)(8) without knowing the cause of action, it becomes the defendant's task to demand a complaint under CPLR 3012(b)<sup>150</sup> before moving for dismissal. If he fails to demand a complaint, or serve a notice of appearance, the plaintiff may seek a default judgment under CPLR 3215(a) if he has served the summons with a notice under CPLR 305(b).

<sup>147</sup> 45 Misc. 2d 541, 257 N.Y.S.2d 193 (Sup. Ct. Bronx County 1964).

<sup>148</sup> "A subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons. In any other case, a pleading shall be served in the manner provided for service of papers generally." CPLR 3012.

<sup>149</sup> 23 App. Div. 2d 79, 258 N.Y.S.2d 294 (1st Dep't 1965).

<sup>150</sup> 7B MCKINNEY'S CPLR 3012, supp. commentary 46 (1965).