

## CPLR 3012(b): Defendant Must Demand Complaint Where Lack of Complaint Disenables Court from Determining Cause of Action

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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).

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<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).

CPLR 3012(b) provides that a defendant may serve a written demand for a complaint if it was not served with the summons. It also states that a demand for a complaint does not constitute an appearance in the action. Therefore, the defendant in *Frale* need not have feared subjecting itself to the jurisdiction of the New York court by merely demanding a complaint. If the defendant had served a written demand for a complaint and had not received it within 20 days, a motion to dismiss under CPLR 3012(b) would have been appropriate.

*CPLR 3014: Motion to compel plaintiff to separately state and number causes of action to be granted if complaint incomprehensible.*

In the orderly process of justice it is necessary that a defendant be reasonably apprised of the charges made against him. As a means to this end, CPLR 3014 provides that every claim must consist of consecutively numbered paragraphs, each containing, as far as practicable, a single allegation. If the complaint is incomprehensible, a motion to compel the plaintiff to separately state and number the causes of action alleged will be granted. In accord with the general philosophy of the CPLR, however, a defendant cannot attain relief under this rule unless his rights are actually prejudiced, *i.e.*, if he is unable to answer because the complaint is truly incomprehensible.<sup>151</sup>

In *Consolidated Airborne Systems, Inc. v. Silverman*,<sup>152</sup> the defendant's motion to require separate statement and numbering was denied. His appeal from this denial was considered by the appellate division to be one of right, since the order affected his substantial rights.<sup>153</sup>

There would seem to be no doubt that the defendant's right to understand allegations made against him is indeed "substantial"—to deny this right, would be, in effect, a violation of due process of law.

*CPLR 3015(d): Failure to itemize special damages does not render complaint insufficient.*

CPLR 3015(d) requires the itemization of special damages as a device to eliminate the bill of particulars formerly required under the CPA.<sup>154</sup> However, the bill of particulars was restored without

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<sup>151</sup> 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3014.03 (1964).

<sup>152</sup> 23 App. Div. 2d 695, 257 N.Y.S.2d 827 (2d Dep't 1965).

<sup>153</sup> *Ibid.*; see 3 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 151, at ¶ 3014.09.

<sup>154</sup> RCP 116(i).