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CPLR 3211(a)(7): Importance of Proper Pleadings

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CPLR 3122: Five-day limitation inapplicable where CPLR 3120 notice is defective.

In *Mustapich v. Huntington Union Free School Dist. No. 3*,[202] plaintiff sought discovery of accident reports and statements, failing, however, to specify with reasonable particularity the documents sought to be inspected. Thereafter, defendant moved for a protective order pursuant to CPLR 3122 but not within the five-day period of limitation. In upholding defendant's motion, the court held that in order for the five-day limitation of 3122 to be applicable, the notice served under 3120 must comply with its (3120's) provisions. "If the notice is totally in disregard of the provisions of Rule 3120, it cannot be said to be a notice under the rule." [203]

CPLR 3123: "Statement of readiness" rule inapplicable to a notice to admit.

Recently the general rulemaking power of the appellate division [204] and CPLR 3123 came into conflict. In *Rovegno v. Lush*,[205] plaintiffs filed, pursuant to appellate division rules,[206] a statement of readiness and, long after, served a notice to admit the truth of certain facts under CPLR 3123. Defendant moved pursuant to CPLR 3103 for a protective order on the ground that plaintiffs waived their right to serve a notice to admit upon the filing of a statement of readiness. The defendant's motion was made in the face of 3123's unqualified provision permitting a party to serve a notice to admit up to twenty days before trial. Thus the court was faced with a conflict. The court resolved the conflict by stating that the rulemaking power of the appellate division may not be used to contravene existing statutory law, and that the construction sought to be placed on the rule in question would do just that, *i.e.*, amend and abridge the provisions of CPLR 3123 concerning a notice to admit.[207]

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3211(a)(7): Importance of proper pleadings.

In *Infusino v. Pelnik*,[208] a real estate broker brought an action to recover commissions. The defendant moved to dismiss under

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[202] 46 Misc. 2d 439, 260 N.Y.S.2d 39 (Sup. Ct. 1965).

[203] *Id.* at 441, 260 N.Y.S.2d at 41. See Rios v. Donovan, *supra* note 177, which defines the procedure to be followed with respect to notices to admit. "[S]pecify with particularity" are the key words.

[204] CPLR 3401 confers this rulemaking power.

[205] 45 Misc. 2d 579, 257 N.Y.S.2d 406 (Sup. Ct. Suffolk County 1965).

[206] N.Y. App. Div. R. II, pt. 7 (2d Dep't 1964).

[207] For an extensive treatment of this case, see 7B MCKINNEY'S CPLR 3123, supp. commentary 34 (1965).

[208] 45 Misc. 2d 333, 256 N.Y.S.2d 815 (Sup. Ct. Oneida County 1965).

CPLR 3211(a)(7), for failure to state a cause of action, and asked that his motion be treated as a motion for summary judgment pursuant to CPLR 3211(c).[209] After reviewing all of the papers before it, the court declined to exercise its power to so treat the motion, on the simple ground that the papers were not sufficiently complete to enable it to determine as a matter of law that the plaintiff had no cause of action.

It is only when, upon a CPLR 3211 motion, the entirety of papers before the court is so thorough and complete that the court can determine from them that no substantial issue of fact is involved that the court can treat a motion to dismiss as one for summary judgment and dispose of it as if it were a motion originally made under 3212.[210] Where the papers before the court are insufficient to justify a motion for summary judgment under 3212, they are, ipso facto, insufficient to allow an exercise of the treat-as-summary-judgment power of 3211(c).[211]

CPLR 3212(a): Motion for summary judgment where third-party defendant not joined in the action.

In *Koreska v. United Cargo Corp.*,[212] plaintiff's motion for summary judgment was granted before the answering time of the third-party defendant had expired. The appellate division held that lack of notice of the motion presented no procedural bar to the granting of such motion.

It is true, of course, that whether or not the third-party defendant is to have any liability at all depends upon whether the plaintiff recovers anything from the defendant (third-party plaintiff). Thus, any matter that would affect plaintiff's claim would be of vital importance to the third-party defendant. It is this interest which CPLR 1008 recognizes in permitting the third-party defendant to submit whatever the defendant could have interposed to defeat the plaintiff.[213] The same consideration would seem due the third-party defendant when a summary judgment motion is made by the plaintiff.

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[209] CPLR 3211(c) allows the court to treat a 3211(a) or (b) motion as a motion for summary judgment.

[210] 4 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 196, ¶ 3212.02.

[211] *Cf.* Cohen v. Dannia, 7 App. Div. 2d 886, 181 N.Y.S.2d 220 (4th Dep't 1959); Di Sabato v. Soffes, 9 App. Div. 2d 297, 193 N.Y.S.2d 184 (1st Dep't 1959).

[212] 23 App. Div. 2d 37, 258 N.Y.S.2d 432 (1st Dep't 1965); *cf.* American Surety Co. v. Manufacturers Trust Co., 3 Misc. 2d 363, 367-68, 154 N.Y.S.2d 260, 263-64 (Sup. Ct. 1956), *aff'd mem.*, 3 App. Div. 2d 831, 162 N.Y.S.2d 334 (1st Dep't 1957).

[213] Mansfield Iron Works, Inc. v. Silveri, 106 N.Y.S.2d 496 (Sup. Ct. 1951); see Bobrose Dev., Inc. v. Jacobson, 251 App. Div. 825, 296 N.Y. Supp. 520 (2d Dep't 1937).