

CPLR 3212(a): Motion for Summary Judgment Where Third-Party Defendant Not Joined in the Action

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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that the court can treat a motion to dismiss as one for summary judgment and dispose of it as if it were a motion originally made under 3212.²¹⁰ Where the papers before the court are insufficient to justify a motion for summary judgment under 3212, they are, ipso facto, insufficient to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.

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).

The court in *Koreska* (though the opinion in this regard is far from exhaustive) apparently balanced the above considerations and concluded that the position of the third-party defendant on the facts should not be permitted to prevent the summary judgment motion of the plaintiff. It is clear, however, that even if all those factors in favor of the third-party defendant's claim were passed upon by the court, the result might well have been the same, for the court has the power to dismiss a third-party claim even on the simple ground that its mere presence would unduly delay or prejudice the main claim.²¹⁴

CPLR 3212(g): Effective means of striking denials.

In *Cicci v. Lincoln Nat'l Bank*,²¹⁵ although plaintiff's motion for summary judgment was denied, the court granted his request to strike certain denials of the defendant pursuant to CPLR 3212(g).

The *Survey* reports this case only for a suggestion implicit within it which may serve a purpose akin to that served by the prior law motion to strike denials. If a summary judgment motion is denied or granted only in part, the court is empowered under 3212(g) to incorporate into its order whatever facts it deems uncontroverted (from a perusal of the summary judgment motion papers), to the end that those facts will be deemed established for all further purposes of the litigation.²¹⁶

Thus if a plaintiff feels that only certain denials in the answer are without merit, he need not be without remedy because he no longer has available the motion to strike denials.²¹⁷ He may move for summary judgment, perhaps even with the knowledge that he cannot prevail, with the aim of having the court, in its order denying the motion, list as established those denied facts which, on the summary judgment motion, the plaintiff can show to be without merit.

Therefore, although a motion to strike denials does not exist per se under the CPLR, the attorney is advised that the same effect may be achieved by the utilization of CPLR 3212(g) upon denial of a motion for summary judgment.²¹⁸

²¹⁴ CPLR 1010.

²¹⁵ 46 Misc. 2d 465, 260 N.Y.S.2d 100 (Syracuse City Ct. 1965).

²¹⁶ Compare 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3212.11 (1964), with 2 MOORE, FEDERAL PRACTICE ¶ 5620 (1964).

²¹⁷ *Chicago Dressed Beef Co. v. Gold Medal Packing Corp.*, 22 App. Div. 2d 1010, 254 N.Y.S.2d 717 (4th Dep't 1964); 3 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 216, ¶ 3024.10.

²¹⁸ 4 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 216, ¶ 3212.12.