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Article 28

# CPLR 3025(b): Amendment of Pleadings Allowed When Not Prejudicial

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It would appear that the cause of action stated in the instant complaint would not necessitate the itemization of special damages in the light of the latter approach. Nonetheless, it should be noted that if the complaint in the instant case was deemed to be one in prima facie tort the special damages would be an "element of the cause of action itself" and would, therefore, require the itemization.[108]

It appears that the court in the instant case is creating a strict rule that both elements, viz., that plaintiff would have obtained employment but for the defendant's act *and* the incidence of special damages, are integral parts of the cause of action alleged and would, therefore, not only have to be proved, but also would have to be specifically pleaded. It seems difficult to consider the instant action to be one in prima facie tort, where special damages would have to be itemized, unless we admit that a cause of action for wrongful interference with the right to employment is only as new as the advent of New York's recent theory of prima facie tort.

Adhering to the reasoning in the instant case, if the pleadings show that the plaintiff is entitled to some relief, whether legal or equitable, and if the pleadings conform to the notice requirement of CPLR 3013, the fact that the plaintiff has failed to allege other facts will not be a ground for a dismissal of the complaint. This is generally true unless it is determined that the facts not pleaded formed an integral part of the cause of action.

### *CPLR 3025(b): Amendment of pleadings allowed when not prejudicial.*

In *Stillwell v. Giant Supply Corp.*,[109] an action for personal injuries and loss of services, Giant's insurer admitted that defendant owned the vehicle involved in the collision and that defendant Akines, an infant, was operating it with the knowledge and consent of Giant. During the course of pretrial examinations it was ascertained that defendant Akines did not have Giant's consent to operate the vehicle and Giant, therefore, sought to deny its operation of the vehicle. The court held that if the plaintiffs were "qualified persons" within the provisions of the Insurance Law governing MVAIC,[110] their time to file a notice of claim with MVAIC would have expired. Accordingly, defendant Giant was not entitled to amend its answer until it was determined whether the plaintiffs would be prejudiced by the granting of a motion permitting such amendment.

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[108] *Ibid.*

[109] 47 Misc. 2d 568, 262 N.Y.S.2d 833 (Sup. Ct. Nassau County 1965).

[110] N.Y. INS. LAW § 608(a); see Note, 39 ST. JOHN'S L. REV. 321, 325-30 (1965).

CPLR 3025(b) contains no limitation on the scope of an amendment of a pleading with court leave.[111] Cases under the CPA were generally liberal in the types of amendments permitted,[112] even to the extent of allowing the addition or substitution of an entirely new cause of action, changes in the legal theory of the action, or even adding new defenses or counterclaims.[113] However, under CPLR 3025(b), the requirement that leave to amend a pleading be freely given does not preclude the court from exercising its discretion and denying a motion to amend an answer. In *Ciccone v. Glenwood Holding Corp.*,[114] defendant's motion to amend his answer so that he could allege that the plaintiff was his employee was denied because plaintiff's right to workmen's compensation was lost by that law's statute of limitations.

The decision in *Stillwell* is well in accord with past cases, and reveals that under the CPLR, the freedom to amend the pleadings, while broadly given in the statute, is still restrained by the discretion of the court. As the court stated: "the branch of the motion for leave to amend would ordinarily be granted as a matter of course unless plaintiffs could show that they would be prejudiced in some way by the granting of such a motion."[115] The inability of a plaintiff to prosecute the action if defendant's motion is granted surely constitutes such prejudice.[116]

*CPLR 3041: Bills of particulars and the burden of proof.*

In *Jansen's Bottled Gas Serv., Inc. v. Warren Petro. Corp.*,[117] plaintiff sued for damages for breach of warranty arising from defendant's sale of a quantity of propane gas. The defendant moved to dismiss the complaint for failure to diligently prosecute the

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[111] CPLR 3025(b) provides, in part: "a party may amend his pleadings . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." For a discussion of what constitutes "such terms as may be just," see 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3025.21 (1965).

[112] For a good discussion of the many problems involved in the distinction between the terms "amendment" and "supplement" under the previous law (CPA § 245), see Ponticello v. Prudential Ins. Co., 281 App. Div. 549, 121 N.Y.S.2d 305 (4th Dep't 1953).

[113] See Renwick v. Town of Allegany, 18 App. Div. 2d 877, 236 N.Y.S.2d 902 (4th Dep't 1963); 1936 N.Y. LEG. DOC. No. 48, 2 N.Y. JUD. COUNCIL REP. 15; PRASHKER & TRAPANI, NEW YORK PRACTICE 416-18 (4th ed. 1959). See generally PETERFREUND & MCLAUGHLIN, NEW YORK PRACTICE 754 n.3 (1964).

[114] 44 Misc. 2d 273, 253 N.Y.S.2d 576 (N.Y. City Civil Ct. 1964).

[115] Stillwell v. Giant Supply Corp., 47 Misc. 2d 568, 569-70, 262 N.Y.S.2d 833, 835 (Sup. Ct. Nassau County 1965).

[116] 7B MCKINNEY'S CPLR 3025, supp. commentary 123-24 (1965).

[117] 47 Misc. 2d 461, 262 N.Y.S.2d 768 (Sup. Ct. Albany County 1965).