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CPLR 3213: Withdrawal of Moving Papers by Stipulation Where Action Not Discontinued Equated to Situation Resulting from Service of Summons Without Complaint

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but less than twenty days after service of the complaint. In objecting thereto, plaintiff contended that since defendant had interposed counterclaims he should be treated as a *plaintiff* for purposes of CPLR 3132, and not receive the benefits which accrue to a defendant under that provision. The court, in denying the objection, found no reasonable grounds for holding contrary to the construction given a similar provision by the federal courts.¹⁵⁴

CPLR 3019(f) provides that a cause of action contained in a counterclaim will be treated, *as far as practicable*, as if it were contained in a complaint. This would seem to support the plaintiff's contention that defendant should be treated as a plaintiff for purposes of CPLR 3132 and appears to militate against the court's holding. However, this would lead to the anomalous result of both parties being required to wait twenty days before being able to serve interrogatories without leave of court. Certainly, the plaintiff could not logically claim that because defendant is to be *deprived* of his priority, she is to be *endowed* with such a priority (assuming arguendo that her original contention is correct). Consequently, when viewed in light of the foregoing, it would appear that the court's holding is correct. To hold otherwise would be to overcome the result which CPLR 3132 is intended to effect, viz., to afford one of the parties a priority in serving interrogatories.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3213: Withdrawal of moving papers by stipulation where action not discontinued equated to situation resulting from service of summons without complaint.

Under CPLR 3213, plaintiff may serve a notice of motion for summary judgment and supporting affidavits with a summons in lieu of a complaint. If the motion is denied, the moving and answering papers are deemed the complaint and answer. This shortened procedure originated under the CPLR and, in a recent case, a situation arose which apparently was not contemplated by the legislature. In *Reiche v. Schuster*,¹⁵⁵ the moving papers were withdrawn by stipulation but the action itself was not formally

¹⁵⁴ *Id.* at 1014, 261 N.Y.S.2d at 416. It should be noted that the court appears to have misstated the requirement of CPLR 3132 in stating: "interrogatories may be served *without leave of court* by a plaintiff within 20 days of the summons and complaint and by defendant within five days after such service upon him of the summons and complaint." (Emphasis added.) That provision expressly states that interrogatories may not be served within twenty days by a plaintiff and within five days by a defendant, after service of the summons and complaint *unless* leave of court is obtained.

¹⁵⁵ 47 Misc. 2d 782, 263 N.Y.S.2d 287 (Nassau County Dist. Ct.

¹⁵⁵ 47 Misc. 2d 782, 263 N.Y.S.2d 287 (Dist. Ct. Nassau County 1965).

discontinued. When plaintiff subsequently brought suit in a second court on the same cause of action, defendant moved to dismiss on the ground of the "pendency" of the prior action.¹⁵⁶ The court equated the withdrawal of the moving papers to the situation which results after the service of a summons without a complaint, and held that since the summary judgment motion was not *denied* in the first action, the affidavit did not become the complaint.¹⁵⁷

The main problem in the instant case was whether the stipulated withdrawal served to effectively terminate the first cause of action. If so, the second action could proceed directly to judgment. The court found that the summons from the first action was still outstanding, and stayed its own action pending disposition of the prior litigation. However, it did not decide whether an outstanding summons was sufficient to constitute a prior pending action under CPLR 3211(a)(4).

It has been held, for the purposes of CPLR 3211(a)(4), that a summons alone will not bar future proceedings "as the party might, in his declaration, count upon an entirely different cause of action."¹⁵⁸ However, this reasoning may not be applicable to the situation presented in the instant case. Here, the court could examine the moving papers from the first action to determine whether the two actions were identical. If so, the court might dismiss the second action on the basis of a prior pending action. If not, the court would order that the second action proceed to judgment.

Pursuant to the disposition here, plaintiff can move in the original court for a voluntary discontinuance¹⁵⁹ or other clarification of the first action's status. If it is determined that the first action is no longer pending, plaintiff can bring that clarification to the attention of the second court, move to vacate the latter's stay, and proceed with the second action.

CPLR 3216: Forty-five day demand held condition precedent to a 3216 motion.

The controversy revolving about the forty-five day notice requirement of the 1964 amendment to CPLR 3216 appears finally to have been resolved. In *Salama v. Cohen*,¹⁶⁰ a memorandum

¹⁵⁶ CPLR 3211(a)(4).

¹⁵⁷ *Reiche v. Schuster*, 47 Misc. 2d 782, 783, 263 N.Y.S.2d 287, 288 (Dist. Ct. Nassau County 1965).

¹⁵⁸ *Louis R. Shapiro, Inc. v. Milspemes Corp.*, 20 App. Div. 2d 857, 248 N.Y.S.2d 85, 87 (1st Dep't 1964) (memorandum decision); see 7B MCKINNEY'S CPLR 3211, *supp. commentary* 96, 97 (1964).

¹⁵⁹ CPLR 3217. It is not clear, however, if plaintiff could discontinue the first action by mere notice to the defendant (CPLR 3217(a)(1)) or whether he was required to obtain a court order for discontinuance (CPLR 3217(b)). This would depend upon whether plaintiff had (by way of the since withdrawn moving papers) asserted a claim in the first action, which question was not resolved by the instant case.

¹⁶⁰ 154 N.Y.L.J., Dec. 3, 1965, p. 16, col. 1.