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Lack of Jurisdiction Held Waived Where Motion to Vacate Judgment Based Thereon Joined with Defense on Merits

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defendant appealed from an order of the lower court which, *inter alia,* denied his motion to conduct an examination of plaintiff in New York County and ordered the examination to take place in Kings County. The appellate division modified the order and held that plaintiff's examination should take place in New York County since a party who is subject to an examination in New York City may be required to appear for the taking of his pre-trial depositions in *any* of the counties of New York City.

Since the five counties of New York City cover a comparatively small area and there is an abundance of convenient transportation available, CPLR 3110 provides: "For the purposes of this rule New York City shall be considered one county." Under former law, a deponent residing or having an office in a county within New York City could be compelled to attend an examination in that county or the county where the action was pending.[198] The instant case makes it clear that under CPLR 3110 in order to compel attendance of a party within any of the counties of New York City, it is necessary only that he reside or have an office within the city, or that the action be pending within the city.[199] CPLR 3110 was intended to assist attorneys by permitting them to notice examinations at their offices.[200] In the event the examining party should abuse the privilege of selecting a county within the city by noticing an examination at an inconvenient place in order to harass a party, a protective order may be obtained under CPLR 3103(a).

ARTICLE 32 — ACCELERATED JUDGMENT

Lack of jurisdiction held waived where motion to vacate judgment based thereon joined with defense on merits.

In a recent supreme court case,[201] the defendant moved to vacate a judgment of foreclosure on two grounds: (1) that defendant was not served in the action and (2) that he had a valid defense on the merits. The court held that the joinder of the second ground, regarding the merits, constituted a waiver of the first ground, regarding jurisdiction.

That would very likely have been the case under the CPA, but it would appear to be an incorrect conclusion under the CPLR.

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[198] 12 App. Div. 2d 791, 209 N.Y.S.2d 856 (2d Dep't 1961).

[199] Similarly, a witness who resides, is employed or has an office, and a non-resident witness who is served, employed or has a place of business within New York City may have his deposition taken in any county within New York City. CPLR 3110.

[200] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3110.09 (1964).

[201] Mutual Home Dealers Corp. v. Alves, — Misc. 2d —, 252 N.Y.S.2d 726 (Sup. Ct. 1964).

Under CPA § 237-a, it was the clear policy of the law to require that jurisdictional objections be taken by motion without any other objection being joined. The joinder of any other objection constituted a waiver of the jurisdictional objection.

That is not the case under the CPLR. CPLR 3211(e) not only permits merits grounds to be joined on motions alleging lack of jurisdiction; it makes clear that if the movant should ever raise those merits grounds by way of a motion to dismiss under 3211, he would *have* to join them with the jurisdictional objection being moved on; only one 3211 motion is allowed.

Taking the intendment of the CPLR from the foregoing, and applying it to a post-judgment motion to vacate a judgment, it would appear quite satisfactory under the CPLR to join merits grounds with jurisdictional grounds on the motion to vacate the judgment.

It was the *policy* of CPA § 237-a which would have justified the statement made in the *Alves* case under prior law. But the case was handed down under present law, whose policy, as indicated above, is decidedly different.

The matter became academic in *Alves* because, on the merits ground, the defendant prevailed. But the point is an important one. A defendant should not be precluded from joining merits grounds in a motion to vacate a judgment for lack of jurisdiction. The joinder amounts, in effect, to an alternative request that the default be vacated and the defendant permitted to defend on the merits. It accomplishes nothing, and only creates unnecessary delay and expense, to require the defendant first to make a motion to vacate on jurisdictional grounds and then, if that is denied, to make an entirely new motion to open the default (offering excuses for it) and secure leave to defend on the merits.

Failure to prosecute — Motion to dismiss denied where a strong meritorious case is established.

The appellate division of the first department in a per curiam opinion [202] upheld the special term which denied a motion to dismiss for failure to prosecute. The delay in the instant case was three years. The appellate division admitted that the excuses for delay were "weak" but pointed out that the affidavits of merit set forth facts which, if proven, "establish a meritorious case." In light of this, it would not reverse the special term's "exercise of discretion."

Despite *Sortino v. Fisher*,[203] cited by the court and the cases which followed it in which the appellate division granted

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[202] Friedman v. Fortgand, 21 App. Div. 2d 779, 250 N.Y.S.2d 862 (1st Dep't 1964).

[203] 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963). For a discussion of *Sortino*, see 38 ST. JOHN'S L. REV. 449 (1964).