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Failure to Prosecute--Motion to Dismiss Denied Where a Strong Meritorious Case Is Established

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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).

most of the motions to dismiss,[204] the instant case reminds practitioners that the coin is not entirely one-sided. The practitioner should note the emphasis placed on the detailed statements in the affidavits of merit which indicated a strong case on the petitioner's behalf. The weight of the case's merits were such, held the court, as to overcome the admittedly "weak" excuses for the delay in prosecution.

Relevant to any motion to dismiss for neglect to prosecute is the 1964 amendment of CPLR 3216. The amendment is extensively treated in the May 1964 installment of the "Biannual Survey." [205]

Rule 3211—Motion to dismiss searches the record.

In *Schoonmaker v. Schoonmaker*,[206] the trial court granted the wife's motion to dismiss affirmative defenses of the husband in accordance with CPLR 3211(b). The appellate division, citing CPLR 3211(c), stated that the "motion to dismiss affirmative defenses searches the record." [207] In reviewing the record, the court declared that "the cause of action as presently pleaded is defective," [208] and dismissed the case though defendant had not cross-moved for such dismissal. The court, therefore, never had to deal with the affirmative defenses.

This case illustrates an important aspect of a motion to dismiss. Upon such a motion, both parties may submit the same proof to the court as would be permitted on a motion for summary judgment. Under the CPLR, the court is expressly empowered to treat the 3211 motion to dismiss as a summary judgment motion.[209]

Rule 109 of the Rules of Civil Practice provided for a motion to strike a defense. It further provided that if the court finds on such a motion that the complaint does not state a cause of action it may dismiss the complaint "even in the absence of a cross motion."

Rule 3211 lacks this explicit language. But rule 3212, the summary judgment provision, has such language.[210] The statement contained in 3211(c) permitting a 3211 motion to be treated as a summary judgment motion would appear to be all the authority needed to apply to a 3211 motion that part of 3212 which permits the summary judgment motion to search the record.

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[204] 7B McKINNEY'S CPLR 3216, supp. commentary 78 (1964).
[205] 38 ST. JOHN'S L. REV. 461 (1964).
[206] 21 App. Div. 2d 777, 250 N.Y.S.2d 979 (1st Dep't 1964).
[207] Schoonmaker v. Schoonmaker, 21 App. Div. 2d 777, —, 250 N.Y.S.2d 979, 980 (1st Dep't 1964).
[208] *Id.* at —, 250 N.Y.S.2d at 980.
[209] CPLR 3211 (c).
[210] See the last sentence of CPLR 3212 (b).