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Rule 3211–Motion to Dismiss Searches the Record

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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).

This case illustrates a method by which a defendant may end up with a judgment under 3211 for which he had not even moved. It should make plaintiffs aware of a possible pitfall in moving under 3211(b).

Summary judgment may be granted in a summary proceeding.

The appellate term of the first department has held that a "summary judgment device is applicable to summary proceedings."[211] The holding arose out of a summary proceeding brought to oust holdover tenants wherein the landlord moved for summary judgment and to dismiss an affirmative defense. The trial court denied the motion. The appellate term, in reversing, noted that it had been generally accepted that the summary proceeding must be "strictly followed and that there could be no departure from the mode of trial . . . provided by the statute."[212]

The court cited instances in which prior courts had treated a motion for summary judgment made in a summary proceeding in different ways so as to achieve a just result. The opinion continued:

> Are we not hypocritical in holding that a motion for summary judgment is not applicable to a summary proceeding? It would seem that since the purpose of the summary proceeding is to provide a means for an expeditious determination, anything which will afford even speedier justice is not opposed to the philosophy of summary proceeding.[213]

The court noted that there is no justification for making such a motion unavailable in a summary proceeding. The court then pointed out that CPLR 3212 permits any party to move for summary judgment in any action except a matrimonial one. The changes made in the transition of Article 83 of the CPA to Article 7 of the Real Property Actions and Proceedings Law were then cited. Section 1428 of the CPA required a trial by a jury in a summary proceeding if either party so requested. The new Article 7 of the RPAPL provides a trial only "where triable issues of fact are raised. . . ."[214] Therefore, the court concluded, if there are no triable issues of fact a summary judgment is proper and entirely consistent with the purpose of a "summary" proceeding.

The logic of the court's reasoning is unimpeachable. Whatever distinctions prior law may have made concerning summary proceedings, there is no justification under the RPAPL or the CPLR to exclude the summary judgment device from such pro-

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[211] Metropolitan Life Ins. Co. v. Carroll, 43 Misc. 2d 639, —, 251 N.Y.S.2d 693, 697 (Sup. Ct. 1964).

[212] *Id.* at —, 251 N.Y.S.2d at 695.

[213] *Id.* at —, 251 N.Y.S.2d at 695.

[214] RPAPL § 745.