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Statement of Readiness--Even Upon Consent of Both Parties, Restoration of a Case to the Calendar Must Be at the Foot Thereof

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ceedings. It is, in fact, the most expeditious method, when there are no genuine fact issues, for concluding *any* proceeding and would appear most appropriate of all for a "summary" one.

The court then directed its attention to the second motion made by the landlord to dismiss an affirmative defense pursuant to 3211(b) of the CPLR. The court stated that the question to be determined is not whether the pleadings appear to be sufficient, nor whether they are technically correct, but whether there is "substance behind the facade." [215] Under CPLR 3211 the court's inquiry must be directed to whether "the pleader *has* a claim or defense rather than whether he has properly stated one." [216] This distinction is an important one for the practitioner. It permits him to introduce evidence on the motion to determine if the pleading has substance. It makes no difference that it purports on its face to state a cause of action.

The case is a valuable one in that it establishes, as a simple proposition, that CPLR 3211 and 3212 are available as procedural tools to assist in the determination of summary proceedings.

ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

Statement of readiness — Even upon consent of both parties, restoration of a case to the calendar must be at the foot thereof.

In *Scully v. Jefferson Truck Renting Corp.*[217] the action was removed from the calendar for failure to file a timely statement of readiness. The parties submitted a stipulation consenting to the placement of the action to its original numerical position on the trial calendar. The court reinstated the action, but did so at the foot of the trial calendar. The court held that it has no authority, regardless of the cause for delay, to return this action to its original numerical position.[218]

The statement of readiness is governed by the rules of the court in the four departments respectively. The rules for the second department, which the court in the instant case has applied, are contained in part 7 of the second department court rules and provide that a negligence action may be placed upon the calendar without a statement of readiness being filed. However, an action so filed will be removed from the calendar if the statement is not filed within one year after the filing of the note of issue. It is

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[215] *Supra* note 211, at —, 251 N.Y.S.2d at 697.

[216] 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3211.01 (1964).

[217] 43 Misc. 2d 48, 249 N.Y.S.2d 983 (Sup. Ct. 1964).

[218] Scully v. Jefferson Truck Renting Corp., 43 Misc. 2d 48, 52, 249 N.Y.S.2d 983, 987 (Sup. Ct. 1964).

further provided that upon motion made within one year following a removal from the calendar, an action which has been removed may be replaced at the foot thereof.[219]

The court's conclusion that it may replace the action only at the foot of the calendar under the present rules may be seen more clearly by reference to the prior rules. The rules effective in 1958 (but now superseded) state that if a motion to restore the action to the calendar is granted, "the action must be placed at the foot of the general trial calendar; provided, however, that for good cause shown . . . the justice presiding in his discretion may order the action placed in any other appropriate calendar position." [220] The last clause, allowing judicial discretion to determine the calendar position upon restoration, is not contained in the present rules.

The court further reasoned that even though both parties consented, a restoration would defeat the purpose of the rule, which is to penalize a dilatory party.[221]

The practitioner's attention is called to the fact that if he fails to have the action restored within one year of its removal, the action "shall be dismissed . . . for neglect to prosecute." [222]

In conclusion, if the practitioner requires longer than the one year to file his statement of readiness, he may obtain an extension, upon motion to the court,[223] which will be granted if good cause is shown.

ARTICLE 41 — TRIAL BY A JURY

"Quotient verdict" illegal; "averaging" legal.

The New York City Civil Court in denying defendant's motion to set aside a jury's verdict, explained in detail the methods by which a jury may arrive at its verdict.[224] The defendant in this case based his motion on statements made by the jury foreman when he announced the verdict. When questioned as to the jury's decision the foreman stated, "it [the verdict] was decided upon by the Jury, an average method. . . ." Thereafter the jury was polled and found to be unanimous in its decision. After being polled, the foreman, in answer to a question by the defendant's attorney, stated that "the amount of money was arrived at by averaging."

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[219] N.Y. APP. DIV. R. VIII, pt. 7 (2d Dep't 1964).

[220] CLEVENGER, PRACTICE MANUAL 21-17 (1958 ed.).

[221] *Supra* note 218.

[222] CPLR 3404. The statute of limitations consequences of a dismissal for neglect to prosecute should be borne in mind here. See CPLR 205.

[223] *Supra* note 219.

[224] Honigsberg v. New York City Transit Authority, 43 Misc. 2d 1, 249 N.Y.S.2d 296 (Civ. Ct. 1964).