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Sham No Longer Ground for Dismissal of Irrelevant Matter

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Telefilm Sales, Inc. v. United Artists Corp.[149] The complaint alleged that defendant had misappropriated plaintiff's common-law property rights, which were grounded on a written agreement with a third party concerning a motion picture film. The appellate division held that the complaint failed to comply with CPLR 3013 in that it did not allege what constituted the rights of the licensor to the film, whether the public was deceived or confused, or any indication that the film was not in the public domain. The court indicated that because of the unsettled state of the law with respect to republication of motion pictures, the pleadings should be sufficiently particular to apprise the court and the adverse party of the precise problem involved.

It is essential for the practitioner to realize that while the courts will construe pleadings in conformity with the liberal philosophy of the CPLR, they will not uphold a pleading which fails to indicate that the plaintiff is entitled to recover on some legal theory. Liberalized rules are not an excuse for poorly-drawn or sloppy pleadings. To comply with CPLR 3013, a pleading must be drawn up with sufficient precision to enable the parties to adequately prepare their cases and to enable the court to control the case.

Sham no longer ground for dismissal of irrelevant matter.

In a recent case, the Oneida Special Term granted plaintiff's motion to dismiss an affirmative defense and certain denials contained in an answer on the ground of sham. The appellate division, upon review, ruled that "there is no longer a motion to strike as sham under the CPLR." [150] Accordingly, they reversed special term as to the denials in the answer. However, since the affirmative defense alleged "no facts . . . sufficient in law," [151] it fell within the province of a 3211(b) motion (failure to state a defense) and the dismissal was upheld on that ground.

The appellate division's ruling is consistent with the letter and intent of the CPLR. Rule 103 of the Rules of Civil Practice, which permitted a motion to strike specific matter from a pleading on the ground that it was a sham,[152] was superseded by 3024(b) of the CPLR,[153] which permits the striking of *only* scandalous or prejudicial matter unnecessarily inserted in the pleading. Apparently the striking of matter from a pleading for any other purpose has been eliminated by the CPLR.

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[149] 22 App. Div. 2d 778, 254 N.Y.S.2d 36 (1st Dep't 1964).

[150] Chicago Dressed Beef Co. v. Gold Medal Packing Corp., 22 App. Div. 2d 1010, 254 N.Y.S.2d 717 (4th Dep't 1964).

[151] *Id.* at 1010, 254 N.Y.S.2d at 718.

[152] See PRASHKER & TRAPANI, NEW YORK PRACTICE 449 (4th ed. 1959). Rule 104 is the rule which authorized the striking of the whole answer or reply.

[153] Rule 104 of the RCP has been omitted in the CPLR.

If the pleadings are truly defective, a motion pursuant to 3211 or 3212 will lie to dismiss the entire pleading or defense. In other words, if the "sham" goes to the heart of the allegation, the entire pleading will be dismissed, but if the "sham" affects only an insignificant portion of the pleading, the court will not entertain a motion to dismiss that portion unless it falls within the limited scope of 3024(b).

Protracted delay in amending bill of particulars causes costs, both of the appeal and of the case to date, to be assessed against a successful plaintiff.

In *Silverman v. Ashe*[154] the plaintiff moved to amend his bill of particulars during the trial, two years after that bill had been served. The fact to be added was ascertainable at the time the bill was served, but was omitted due to an oversight by plaintiff's counsel.

The supreme court, special term, granted plaintiff's motion to amend. The appellate division modified that order and, using its discretion,[155] assessed both costs of the appeal and of the case to that date against plaintiff. This case indicates that amendments will be freely granted although the delay be unreasonably long,[156] subject to an assessment of costs.

Pleading dismissed for failure to itemize special damages in counterclaim based on prima facie tort and defamation.

General damages are those damages that are the necessary result of a wrong or injury. While special damages are the natural result of a wrong or injury, they are not deemed to be a necessary effect.[157] The difference between the two is well established. Historically, while a non-specific indication of general damages sufficed, special damages had to be specifically pleaded to avoid surprise.

CPLR 3015(d) codified prior existing case law by requiring that special damages be itemized.[158] There has been some dispute as to the value of this provision. Professors Weinstein, Korn and Miller desire strict compliance with the CPLR provision.[159] On the other hand, Professor Siegel, in his commentaries on

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[154] 22 App. Div. 2d 659, 253 N.Y.S.2d 137 (1st Dep't 1964).

[155] CPLR 8107.

[156] For another indication of the liberal approach taken with respect to the bill of particulars see *The Biannual Survey of New York Practice*, 39 ST. JOHN'S L. REV. 209-10 (1964).

[157] CLARK, NEW YORK LAW OF DAMAGES § 3 (1925).

[158] For further development of the area see *The Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 406, 425-27 (1964).

[159] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3015.17 (1963).