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Pleading Dismissed for Failure to Itemize Special Damages in Counterclaim Based on Prima Facie Tort and Defamation

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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

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).

practice, propounds a generally liberal position.¹⁶⁰ The latter states that "where special damages are not an integral part of the cause of action . . . 3015(d)'s requirement of itemization should be given very little if any significance by the courts."¹⁶¹ Professor Siegel indicates that the necessity for this section is obviated by the bill of particulars.

It is this obvious contrariety of opinion that is dealt with by the supreme court in *Friendly Babylon Corp. v. Locust at Ralph Corp.*¹⁶² In this case, plaintiff moved to dismiss defendant's answer on the ground that two defenses-counterclaims were inadequately pleaded. Defendant had generally alleged special damages in pleading defamation and prima facie tort. The court granted plaintiff's motion to dismiss and indicated that of the two aforementioned views, that of Professors Weinstein, Korn and Miller was the proper one.

Unfortunately, trial counsel had inadvertently failed to call the court's attention to Professor Siegel's *full* commentary. Although Professor Siegel advocates general disregard of 3015(d) he does cite an exception:

[D]ifferent conclusions may be warranted in those few cases in which special damages are an element of the cause of action itself, *e.g.*, libel other than libel per se . . . prima facie tort. . . .¹⁶³

Thus, by virtue of this exception, it appears that Professor Siegel would be in agreement with the result reached by the court.

Dismissal of complaint—importance of having court specify whether dismissal is pursuant to CPLR 3012 or 3216.

CPLR 3012 provides for the dismissal of an action when plaintiff fails to serve a complaint within twenty days after a demand by the defendant. Dismissals pursuant to this section, or its predecessor, CPA § 257, have occurred where no valid excuse for the delay is indicated and no meritorious claim is shown.

In addition, CPLR 3216 provides for dismissal when a party unreasonably neglects to proceed in the prosecution of his cause.

Clearly, the distinction between the two may become clouded when there is a dismissal following an untimely service of a complaint, if the court is not explicit about the ground for its decision. This distinction is significant when the motion to dismiss is granted after the statute of limitations on the plaintiff's claim has run. If the action is then dismissed, plaintiff would

¹⁶⁰ 7B MCKINNEY'S CPLR 3015, *supp.* commentary 57 (1964).

¹⁶¹ *Id.* at 59.

¹⁶² 44 Misc. 2d 563, 254 N.Y.S.2d 250 (Sup. Ct. 1964).

¹⁶³ *Supra* note 160, at 59.