St. John's Law Review

Volume 38, May 1964, Number 2 Article 43

Motion to Dismiss for Nonjoinder of an Indispensable Party

St. John's Law Review

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Recommended Citation

St. John's Law Review (1964) "Motion to Dismiss for Nonjoinder of an Indispensable Party," *St. John's Law Review*: Vol. 38 : No. 2 , Article 43.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol38/iss2/43

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to note because the no-extension rule appears not in the text of section 205, but in judicial interpolation. And even if the original period of limitations is still alive, so that the plaintiff does not require a section 205 extension, he would still suffer prejudice, *e.g.*, the loss of witnesses or their failure to recollect.

In another recent case, *Vazzano v. Horn*,[217] the court held that although the Revisers did not anticipate that rule 3211(b) would be used to dispose of a dispute over service, the motion must be held to lie in order to avoid the consequence of the long delay that would result if the objection, taken by answer rather than by motion at the defendant's option, were not reached until trial.

Note also that the court permits affidavits and other proof on the motion, which means, very simply, that the defense need *not* (despite the language of rule 3211(b), which might be construed to the contrary) be defective on its face. Thus, rule 3211(b) may test the factual or evidentiary basis, as well as the legal bases, of the defense or claim.[218] This case resolves one of the most serious dilemmas initially posed by the CPLR.

Motion to Dismiss for Nonjoinder of an Indispensable Party

In *Polar Distribs., Inc. v. Granger Realty Corp.*,[219] which involved an action to foreclose a mechanic's lien, defendant moved to dismiss the complaint on the ground, *inter alia*, that the court should not proceed in the absence of a person who should have been made a party.[220] The court denied defendant's motion and held that before a motion to dismiss for nonjoinder of an indispensable party pursuant to Rule 3211(a)(10) of the CPLR may be granted, it is a condition precedent that the defendant make a prior motion to have the indispensable party joined in the action.

Under prior practice a motion to dismiss the complaint for nonjoinder could not be made in the first instance.[221] Two motions were necessary. Defendant had to move, first, for an order directing the plaintiff to join the omitted party within a specified time and if such order was not complied with, he might *afterwards* move, second, to dismiss the complaint.[222] It was

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217 Vazzano v. Horn, (Sup. Ct. Kings County), 151 N.Y.L.J., Feb. 19, 1964, p. 19, col. 1.

218 4 Weinstein, Korn & Miller, New York Civil Practice ¶¶ 3211.01, 3211.46 (1964).

219 (Sup. Ct. Queens County), 151 N.Y.L.J., Feb. 21, 1964, p. 20, col. 1.

220 CPLR R. 3211(a)(10).

221 RCP 102; CPA §§ 192-93.

222 Wolff v. Brontown Realty Corp., 281 App. Div. 752, 118 N.Y.S.2d 74 (2d Dep't 1953); Marisco v. Tramutolo, 135 N.Y.S.2d 258 (Sup. Ct. 1954); Marrero v. Levitt, 152 N.Y.S.2d 802 (Munic. Ct. 1956).

required that the defendant make the motion to add the omitted party even if the order directing the party to be added was futile in that the absent party was clearly not subject to the jurisdiction of the court and had refused to appear voluntarily.[223]

Since the avowed intent of the Revisers was the avoidance of delay caused by multiplicity of motions, one might assume that the CPLR would change this procedure, and allow a motion to dismiss for nonjoinder in such instance to be made immediately. There is no specific provision in the CPLR which makes a motion for joinder of the indispensable party a condition precedent to a rule 3211(a)(10) motion to dismiss on grounds of nonjoinder.[224] It is apparent that a rule 3211(a)(10) motion could be conditionally granted.[225] The court in such an order would allow a reasonable time for the absent party to be joined, after which time the order would become absolute (and the action would be dismissed) unless an extension was granted.

If it appears at the very outset, however, that the action cannot continue without the party; that such party is not subject to the jurisdiction of the court; and that he has refused to appear voluntarily, the court should order immediate dismissal.

The court in the instant case interpreted the CPLR as retaining the dual-motion procedure of the CPA. Such motion practice results in unnecessary delay. The decision appears to give the relevant CPLR provisions a construction they were not intended to have.[226] The dual-motion procedure should not be required in circumstances where it serves no useful purpose.

Motion to Dismiss for Want of Prosecution

Rule 3216 of the CPLR, which provides for the dismissal of a complaint for failure to prosecute an action, has become a strong source of controversy recently. The storm center is the first department case of *Sortino v. Fisher*,[227] which will be treated at length shortly.

Where the plaintiff has unreasonably delayed in pressing his claim to adjudication, the court, on its own initiative or upon motion, may dismiss the complaint.[228] No particular period of delay is required; if it is substantial on the facts of the case it is

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[223] Carruthers v. Jack Waite Mining Co., 306 N.Y. 136, 116 N.E.2d 286 (1953).

[224] See CPLR § 1001(b).

[225] See 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1003.05 (1964).

[226] See *Ibid.*; WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 80 (1963); *but see* 7B MCKINNEY'S CPLR R. 3211, commentary 324-25.

[227] 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963).

[228] CPLR R. 3216.