NYSBA CPLR Committee Meeting
June 4, 2021

Proposal to amend CPLR 3211(e):

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted; an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding under subdivision on or two of section seven hundred eleven of the real property actions and proceedings law. The papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed.[1] An objection based upon a ground specified in paragraph eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading. *An objection based upon a ground specified in paragraph eight or nine of subdivision (a) is waived if, having raised such an objection in the responsive pleading, the objecting party does not move for judgment on that ground within sixty days after serving the responsive pleading, unless the court extends the time upon the ground of undue hardship*.

[1] The statute was amended in 1996 at the recommendation of the CPLR Committee of NYSBA by adding the following provisions:

"; an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding under subdivision one or two of section seven hundred eleven of the real property actions and proceedings law. The papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed." L 1996, ch 501, § 1.

After the enactment of the CPLR in 1962, the Judicial Conference[2] with the assistance of the Committee to Advise and Consult with the Judicial Conference on the CPLR, and with input from the practicing bar and judiciary, continued to study the issues arising out of the various provisions with the aim of improving and making the rules more user friendly. During the 1964-1965 Judicial Conference, recommendations were made to amend CPLR 3211(e) as follows:

> (e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in *paragraphs one, three, four, five and six of* subdivision (a) is waived unless raised either by such motion or in the responsive pleading~~, except that a~~ *A* motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made ~~by a motion~~ at any subsequent time or in a later pleading, if one is permitted. *An objection based upon a ground specified in paragraph eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading.* Where a motion is made on the ground set forth in paragraph seven of subdivision (a), or in subdivision (b), if the opposing party desires leave to plead again in the event the

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[2] Former section 229 (3) of Judiciary Law, enacted as a part of former Article 7-A of Judiciary Law, in 1962 (L 1962, ch 309, § 9), provided:

> In addition to the power and duties elsewhere enumerated in this article the judicial conference shall have power to:
> . . .
> (3) Adopt, amend, or rescind rules of civil practice in the civil practice law and rules except that such a rule shall not be inconsistent with the constitution or the statutes of the state and it shall neither abridge nor enlarge the substantive rights of any party. Rules of civil practice in the civil practice law and rules so adopted, amended or rescinded by the judicial conference shall be reported by it annually to the legislature on or before February first and unless such proposal as reported be disapproved by the legislature by concurrent resolution adopted by it, or amended by law, and such change in the practice rules shall become effective on September first of that year. Any such change in the practice rules shall be published in the state bulletin before its effective date pursuant to section one hundred sixty of the executive law. The judicial conference may adopt such further means as it deems proper to insure effective publication.
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> Section 229 of Judiciary Law was repealed in 1978. L 1978, ch 156, § 6.

motion is granted, he shall so state in his opposing papers and in them set for evidence that could properly be considered on a motion for summary judgment in support of a new pleading; leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action or defense; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave.[3]

The Judicial Conference also recommended to amend CPLR 320(b) as follows:

(b) When appearance confers personal jurisdiction, generally. Subject to the previsions of subdivision (c), an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under paragraph eight of the subdivision (a) of rule 3211 is asserted by motion or in the answer *as provided in rule 3211*.

The Judicial Conference Report stated the reason for the proposed amendments to CPLR 320(b) and 3211(e):

"The present language of subdivision (b) appears to contravene the traditional policy of favoring the disposition of jurisdictional defense before defenses going to the merits.[4] The consequence may be highly undesirable. The court may be required to determine issues going to the merits, possibly in favor of the plaintiff, even in a case where later jurisdictional objection by the defendant would necessitate dismissal.

"If such later jurisdictional objection were sustained after a ruling on defense on the merits adverse to the defendant, a serious problem of *res judicata* would be involved in a second action with the same parties based on the same cause. It is far from clear whether or not a re-litigation of the same defense on the merits would be permitted on the ground that the

[3] This last sentence was removed by the 2005 amendment of the statute. *See* L 2005, ch 616, § 1.

[4] Prior to 1921, the Civil Practice Act § 278(1)(a) permitted an objection "that the court has not jurisdiction of the person of the defendant in cases where jurisdiction may be acquired by his consent" to be raised by "the motion *or in the answering pleading by which it is taken*." *Id.* (emphasis added). However, in 1921, the permission to raise the defense of lack of jurisdiction over the person of the defendant in an answering pleading was removed, and such objection was waived "unless taken by a motion." *See* L 1921, ch 372, § 280; *see also Davidoff v Roger Wurmser, Inc.*, 27 NYS2d 555 (County Ct, Nassau County 1941), *affd* 261 App Div 1087 (2d Dept 1941); *see generally Meyers v American Locomotive Co.*, 201 NY 163 (1911). For 41 years before the enactment of CPLR in 1962, an objection for lack of jurisdiction was waived unless made by a motion before service of the answering pleading.

> determination thereof in the first action is void because rendered by a court not having jurisdiction.
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> "A solution to this dilemma is recommended by way of an amendment to 3211(e) (see below) to which the proposed amendment of 320(b) makes reference and is ancillary."

Report to the 1965 Legislature in Relations to the Civil Practice Law and Rules and Proposed Amendment Adopted Pursuant to Section 229 of the Judiciary Law at 372,

> "This amendment is designed to enable the court to determine any issue of jurisdiction over the person or of jurisdiction *in rem* or *Quasi in rem* before it is required to determine any issue reaching the merits of the case. The necessity for this amendment is discussed above in relation to the proposed amendment to CPLR 320 subdivisions (b) and (c)." *Id.* at 373.

While the unmistakable intent of the drafters was to provide prompt adjudication of jurisdictional defenses before litigation on the merits, as stated by Professor David D. Siegel in the 1967 Practice Commentaries to CPLR 3211 (McKinney's Cons Law of NY, Book 7B, CPLR 3211, Time Limit for Moving Based on Lack of Jurisdiction at 185-186 [1968]),"[t]he CPLR seems to be guilty of an oversight by not supplying to the defendant a device for bringing to early determination a defense of lack of jurisdiction asserted in the answer."

Some courts have interpreted the sentence – *An objection based upon a ground specified in paragraph eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading* – to mean that once an objection to jurisdiction is raised, it is preserved and could be raised at any time, even after a trial on merits. *See* ***Calloway v National Servs. Indus., Inc.***, 93 AD2d 734 (1st Dept 1983) (reversing a judgment rendered after a jury verdict and dismissing the action on the ground that the court lacked jurisdiction over the person of defendant), *affd on op below* 60 NY2d 906 (1983); *Ortiz v Booth Mem. Med. Cent.*, 94 AD2d 698 (2d Dept 1983) (four years of litigation and the expiration of the statute of limitation does not prevent raising the personal jurisdictional

defense asserted in the responsive pleading). As often stated by New York State courts, by defending the action on the merits and seeking discovery does not expressly or impliedly waive the jurisdictional defense asserted in the responsive pleading. The onus is placed on plaintiffs to move to dismiss the affirmative defense of lack of personal jurisdiction raised in responsive pleadings. At least in the past decade, the affirmative defense of lack of personal jurisdiction is routinely asserted in most "boiler plate" answers. A party raising the affirmative defense is often in the best position to present the evidence to support the defense.

As to where to draw the line, we are guided by the well settled practice in dealing with a jurisdictional defense on the ground of lack of proper service of process to invoke the court's jurisdiction, which exists in section 3211(e), and similar rules of our sister jurisdictions.

New Jersey requires that the defense of lack of jurisdiction over the defendant "be raised by motion within 90 days after service of the answer, provided that defense has been asserted therein and provided, further, that no previous motion to which R. 4:6-6 is applicable has been made." N.J. Court Rule 4:6-3. Connecticut requires that "[a]ny defendant, wishing to contest the court's jurisdiction, shall do so by filing a motion to dismiss within thirty days of the filing of an appearance." Connecticut Rules for the Superior Court § 10-30(b).

The existing language of section 3211(e) certainly requires diligence. When moving on any ground under 3211(a), the defense of lack of jurisdiction must be raised or it is waived. If the defense is not raised in the responsive pleading, it is waived. The commentators have recommended that once an objection is raised in the responsive pleading, early determination of the issue is in the interests of all parties. "Assuming that the defense had plain merit and could dispose of the case without merit, the compulsory postponement of it until the trial would benefit neither plaintiff, defendant nor court." Prof. David D. Siegel, *supra,* at 186.

Since the 1996 amendment to the statute, an objection that a pleading "was not property served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship." This rule has worked well by reducing unnecessary motion practice and delays associated therewith. For the past 25 years, the practicing bar has become accustomed that a motion based on a jurisdictional defense, if one exists, should be raised promptly before the time for a responsive pleading, or if that does not afford sufficient time to make such a motion, then the objection is raised in the responsive pleading and moved upon within 60 days. The proposed amendment would be congruent with the existing practice.

If a defendant is not subject to personal jurisdiction in New York, the issue should be promptly adjudicated before litigation on the merits. Neither our courts' scarce resources nor the parties' resources should be spent on litigating a dispute on merits that eventually will be dismissed on the grounds of lack of jurisdiction over a defendant.

CPLR 205 provides that "if an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, . . ., the plaintiff, . . ., may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period." Most states have similar statutes or common law doctrines tolling statute of limitations under such circumstances. Thus, even a tactical "victory" dismissing the case while or after the matter is litigated on the merits does not foreclose another action by the same plaintiff against the same

defendant, and raises serious issues about the application of res judicata and collateral estoppel doctrines.

Having in mind the public policy of this state for fair and efficient adjudication of disputes on the merits, this oversight in the statute, which prolongs resolution of disputes, brings uncertainty based on issues not on merits but on procedure, funnels the already scarce courts' resources in resolving disputes that might eventually be dismissed for lack of personal jurisdiction, increases litigation expenses, and casts doubts on the fairness in the administration of civil justice – should be corrected.

Of course, if jurisdictional discovery is needed in support or in opposition to such motion, it should be considered an undue hardship and the court should allow continuance under subsection (d) of CPLR 3211 for the parties to diligently conduct the jurisdictional discovery and present the evidence to the court for prompt determination of the issue.