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UNLOCKING A VALUABLE TOOL: SUMMARY JUDGMENT HEARINGS ON ISSUES OF FACT

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INTRODUCTION

The goal of summary judgment for most practitioners is "resolution without trial."[1] This goal epitomizes what turns out to be a very common misconception and the reason why the majority of motions for summary judgment end where they began. Simply stated, resolution with trial may be had at the summary judgment stage of an action. Just because an issue of fact is found does not mean that all the time and effort poured into a motion for summary judgment was for naught. Hearings on issues of fact are provided by statute in New York and should be used in those situations where the resolution of the remainder of the action by summary judgment would otherwise be appropriate. There are a number of provisions in the CPLR that clearly define this underutilized, yet powerful, tool that have gone largely overlooked.

Summary judgment is available in a myriad of circumstances. It may be utilized in contract cases where parole evidence is needed to clarify the terms and conditions of an agreement; where compliance within contract provisions is the *sine qua non* to recovery; where specific rights and/or obligations need to be interpreted and adjudicated; or even where the propriety of entering into the agreement ab initio is the issue. Likewise, in the area of torts, whether business or personal, summary judgment may also be a powerful tool. It may be utilized where the issue is whether there was breach of duty owing to the plaintiff; where causation is the issue; where specific elements of the burden of proof of a business tort are an issue; and even when the issue is intentional or willful conduct. Clearly, the more discrete the issues associated with the burden of proof in a particular fact pattern, the more powerful summary judgment becomes.

Deciding to bring a motion for summary judgment is very case specific. Nevertheless, many of the advantages and disadvantages of this motion are universal. It is, of course, a universal truth that no matter how strong a case, anything can happen over the course of a trial and therefore some cases are better suited to be adjudicated prior to trial.[2] Summary judgment motions may also reveal strategies and positions of the parties as the motion

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proceeds.[3] Being able to show evidence to the Judge in a light most favorable to your client and bearing witness to the Judge's reaction to such evidence if the case progresses to trial are additional benefits,[4] not to mention that early disposition of the case or at least some of its issues saves time and money.[5]

In many cases, the potential advantages of motions for summary judgment outweigh the disadvantages. The ability to present a motion for summary judgment, knowing that there is the option of requesting a hearing on an issue of fact which may have otherwise served to defeat the motion makes the advantage of bringing the motion even greater.[6]

I. CPLR § 3212 (c) - IMMEDIATE TRIAL

The first provision found in the CPLR that may be used as a basis for a hearing in the context of a summary judgment motion is CPLR § 3212 (c). CPLR § 3212 (c) is entitled "Immediate Trial," and provides that:

"If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if a motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper."[7]

This provision authorizes two specific instances in which a hearing would be appropriate: (1) hearings on the amount and extent of damages; and (2) hearings on grounds enumerated in CPLR § 3211 (a) or (b). This section was amended in 1973 to its present form to allow the immediate trial of a liability-related fact issue as long as it is shown to arise on a 3212 motion based on a 3211(a) objection.[8] This 1973 amendment permits the court to order immediate trial on any issue of fact in the context of summary judgment, just as it could on a motion to dismiss under CPLR § 3211.[9] Before 1973, any issue of fact going to liability required denial of the motion because the issue could not be immediately tried.[10] Despite the substantial similarities in the two sections concerning dismissal and summary judgment, this asymmetry existed.[11]

There is no disagreement that on a dismissal motion under CPLR 3211 the immediate trial of an issue of fact is permissible and that the specific defenses enumerated under Rule 3211(a) are of the kind that commonly form the basis for summary judgment, especially when the defense is founded upon documentary evidence (Rule 3211(a) (1)).[12] Furthermore, a motion to dismiss based on failure to state a cause of action (Rule 3211(a) (7)) often raises the same issues as a motion for summary judgment and when matters outside the pleading are submitted (Rule 3211(c)) the motion is almost indistinguishable from one for summary judgment.[13] The court has express power under CPLR § 3211(c) to order the immediate trial of an issue of fact arising on a CPLR § 3211 motion and it would be idle to preclude immediate trial of an identical issue merely because it arises in conjunction with a CPLR § 3212 rather than a CPLR § 3211 application.[14] Thus, in light of the foregoing, the 1973 amendment clarifying and conforming practice under the two rules was a necessary evolution of the adjudicatory process.[15] The amendment allows the court under the conditions stated to consider other issues of fact, in addition to the category of disputed damages, and has brought balance to this issue.[16]

In July, 1995, the New York Court of Appeals, while reviewing CPLR § 3212 (c) in the case of *Argentina v. Otsego Mut. Fire Ins. Co.*,[17] further broadened the provision's

applicability in order to resolve a lone remaining substantive issue. The issue before the Court was whether there was a cognizable excuse in a personal injury action for a delay in providing notice of injury.[18] Although the issue was initially presented in a cross motion for summary judgment, the Supreme Court ultimately considered and determined the question after a testimonial hearing.[19] The Court's basis for this hearing was CPLR § 3212 (c).[20]

The Court in *Argentina* verified that the summary judgment statute was designed primarily to permit early resolution of preliminary or secondary factual issues, but that it was used in this instance to resolve the only substantive issue in the case.[21] The proceeding was effectively converted from summary judgment to a plenary bench trial, where judgment was than rendered only after full fact finding.[22] *Argentina* has, in essence, opened the door for a court in this state to order a hearing on a substantive factual issue under CPLR § 3212(c) that is neither based upon the amount and extent of damages or the grounds enumerated in CPLR § 3211 (a) or (b).

II. CPLR § 2218 - TRIAL OF ISSUE RAISED ON MOTION

CPLR § 2218 is entitled "Trial of Issue Raised on Motion" and states, in pertinent part, that: "... the Court may order that an issue of fact raised on a motion shall be separately tried by the court or a referee."[23] Under this section, the CPLR authorizes the hearing of any issue, on any motion. The question therefore is: What relationship is there between CPLR § 2218 and CPLR § 3212 (c)? May an issue of fact raised specifically on a motion for summary judgment be separately tried under CPLR § 2218? Professor Siegel has argued that CPLR § 3212 (c), because it has more specific language than CPLR § 2218, precludes the use of CPLR § 2218 hearings in connection with motions for summary judgment.[24] Given the Court of Appeals decision in *Argentina* discussed above, however, there is room for the conclusion that courts, based upon judicial economy and the need for expeditious resolution of the simpler factual issues, should be able to hear any issue on any motion, even one for summary judgment, based upon either CPLR § 3212 (c) or CPLR § 2218.[25] In essence, CPLR § 2218 could be utilized in areas not specifically covered by CPLR § 3212 (c) so as to permit a hearing on any summary judgment issue.

There are numerous references to the vibrations between §§ 2218 and 3212 (c) in the caselaw. For instance, there have been a number of decisions that discussed CPLR § 2218 together with CPLR § 3212 (c) where the focus was on the right to a jury trial under both sections. One Appellate Division case in particular, *Baseball Office of the Comm'r v. Marsh & McLennan*, is worthy of mention.[26] Although in this instance the right to a jury trial under these sections was the main focus of the Court's decision, the *dicta* in the case is helpful.[27] The Court described the proceeding "... as a hearing 'in aid of' determining Baseball's motion for partial summary judgment and, alternatively, a hearing 'in aid of' Baseball's motion to dismiss ...." When "[y]ou make a motion for summary judgment, you open up a panoply of tools that the court has, and one of them is a hearing in aid of a motion ...."[28] Although this language was an excerpt of a quotation from the lower court's decision, the remainder of which was overruled by the First Department, the substance is telling with regard to the issue at hand.

In the overwhelming majority of cases in which the court orders a hearing on an issue of fact found in a motion for summary judgment, whether the hearing is based on CPLR § 2218 or CPLR § 3212(c), both sections are cited, without distinguishing one from the other.[29] If these sections may be used interchangeably -- or at least in conjunction with one

another—then the term "motion" as stated within CPLR § 2218, would include motions for summary judgment and a hearing may be ordered on any issue raised. If issues of fact arising on a motion "will require a lengthy hearing," they should not as a rule be ordered to an immediate trial.[30] However, even the groundwork for lengthier hearings has been laid for such a decision to be made by a court, as to whether in each circumstance, a hearing would be appropriate. CPLR 2218 contemplates a trial of narrow, clear-cut issues, whose disposition can advance the litigation and possibly even end it, rather than a trial of lengthy, complicated ones which would be central to the main issues at an ultimate trial.[31]

The Second Department in *Stowell v. Berstyn* discussed CPLR § 2218 in conjunction with CPLR § 3211 (c), stating that "... CPLR 2218 empowers the court to order that an issue of fact raised on a motion shall be separately tried, and ... CPLR 3211 (subd. [c]) empowers the court to treat a motion to dismiss as one for summary judgment and to order an immediate trial of the issues raised on the motion ...."[32] Whether under 3211(c) or 3212(c), or whether in the context of a motion to dismiss or motion for summary judgment, it is clear that the same conclusion should be reached. A hearing may be had on an issue of fact raised in a motion for summary judgment. Although the court in Stowell ultimately held that the sections did not apply where "... the issues as found by the court are serious and will require a lengthy hearing," the proposition that the sections would apply if the issues were not so serious or would not require a lengthy hearing seems quite evident.[33]

III. CPLR § 3212(g) - LIMITATION OF ISSUES OF FACT FOR TRIAL

Finally, if a motion for summary judgment is decided and is either granted in part or denied outright, some trial benefit may still be salvaged. CPLR 3212(g) entitled "Limitation of Issues of Fact for Trial" is the third possibility established in the CPLR under which a summary judgment hearing may be had. It provides:

"If a motion for summary judgment is denied or is granted in part, the court, by examining the papers before it and, in the discretion of the court, by interrogating counsel, shall, if practicable, ascertain what facts are not in dispute or are incontrovertible. It shall thereupon make an order specifying such facts and they shall be deemed established for all purposes in the action. The court may make any order as may aid in the disposition of the action."[34]

CPLR 3212(g) permits the court to limit issues of fact for trial, by specifying which facts are not in dispute or are incontrovertible, and such facts shall be deemed established for all purposes in the action.[35] It recognizes that, notwithstanding the denial or partial grant, one of several facts may nonetheless appear to be conceded or otherwise definitively resolved by the moving and opposing papers.[36] If established as such, there is no need to examine further such facts and those facts found to be without dispute should be enumerated in the order disposing of the motion and be usable without further litigation.[37]

Professor Siegel suggests that "... if calendars were less congested and judges had more time for each case, an order under CPLR 3212 (g) establishing given facts would be more common" and that, although it is little used, it can be quite versatile.[38] Many motions for summary judgment are denied, and the only product of the substantial expenditure of time and effort by both the lawyers and the court is very often an order that reflects only the denial, making no effort to set forth at least those undisputed facts, if any, that clearly emerge from the motion papers.[39] Unfortunately, it is not uncommon for a busy trial judge, who is faced with an unwieldy number of motions before him or her, to examine summary

judgment motion papers looking only for a single issue of fact whose existence would require denial of the motion.[40]

The fact that calendars are congested and that Judges are busy should not limit the use of this tool provided by CPLR § 3212(g), but rather should put greater demand on it. If the comparison is between the denial of a motion for summary judgment resulting in a full trial on all issues or the partial denial resulting in a trial on only those issues not deemed established, the amount of time a court would be required to spend on a limited hearing is dwarfed by the enormous time and resources required by a full trial. CPLR 3212(g) is a tool with enormous potential to save time and money in the busy court system.

CONCLUSION

It is not an inevitable for the future that all the time and effort expended preparing a motion for summary judgment should go to waste where an issue of fact is found and the motion is denied. The three sections of the CPLR discussed here clearly set forth a number of bases for a hearing to determine substantive fact issues that would otherwise constitute grounds for the denial of a motion for summary judgment. These underutilized tools should be in every litigator's arsenal. The courts in New York are overrun with time consuming and expensive litigation. If the full power of summary judgment is utilized, it could aid in the quicker resolution of many of the cases now crowding the dockets either by a faster disposition or a narrowing of the issues actually tried. The use of such hearings can be very effective in the resolution of particular issues and in reducing the time spent and money expended on protracted litigation. ■

Endnotes

[1] http://en.wikipedia.org/wiki/Summary_judgment.

[2] David Larson and Margaret Duncan, *United States: Dispositive Motions in Patent Cases - Strategies and Considerations*, May 13, 2004, at http://www.mondaq.com/article.asp?articleid=25981.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] N.Y. C.P.L.R. 3212 (c).

[8] David D. Siegel, *New York Practice* § 284 (2d ed. 1991).

[9] N.Y. C.P.L.R. 3212 (c).

[10] David D. Siegel, *New York Practice* § 284 (2d ed. 1991).

[11] N.Y. C.P.L.R. 3212 (c).

[12] N.Y. C.P.L.R. 3212 (c).

[13] N.Y. C.P.L.R. 3212 (c).

[14] David D. Siegel, McKinney's *Consolidated Laws of New York Annotated*, Book 7B, Practice Commentaries C3212:35, West Publishing Co. (November, 2004).

[15] N.Y. C.P.L.R. 3212 (c).

[16] N.Y. C.P.L.R. 3212 (c).

[17] *Argentina v. Otsego Mut. Fire Ins. Co.*, 86 N.Y.2d 748, 750, 631 N.Y.S.2d 125 (1995).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 750.

[22] *Id.*

[23] N.Y. C.P.L.R. 2218.
[24] David D. Siegel, McKinney's *Consolidated Laws of New York Annotated*, Book 7B, Practice Commentaries C2218:1 (December, 1990).
[25] *See Argentina, supra.*
[26] *Baseball Office of the Comm'r v. Marsh & McLennan*, 295 A.D.2d 73, 742 N.Y.S.2d 40 (1st Dep't, 2002); *see also, Marable v. Robinson*, 102 Misc. 2d 96, 97-98, 422 N.Y.S.2d 630 (N.Y.C. Civil Ct., Queens Cty., 1979).
[27] *Baseball*, supra.
[28] *Baseball*, supra at 80.
[29] *Bono v. City of New York*, 2 Misc. 3d 59, 60, 774 N.Y.S.2d 250 (Sup. Ct., Kings Cty., 2003) (the use of such a hearing to resolve clearly defined issues is specifically contemplated in statutory and case law (*see e.g.* CPLR 2218 3212 [c]); *Sherman, LLC v. Vasquez*, 4 Misc. 3d 370, 371, 777 N.Y.S.2d 853 (N.Y.C. Civil Ct., N.Y. Cty., 2004) (the court ordered a trial on this limited issue. C.P.L.R. §§ 2218, 3212(c)); *Gross v. Newburger, Loeb & Co.*, 103 Misc. 2d 417, 429, 426 N.Y.S.2d 667 (Sup. Ct., Nassau Cty., 1980) (Fairness to all parties dictates, and the order to be entered shall provide, that there be an immediate trial, by the court, of the factual issue of whether defendants are equitably estopped from raising the defense of the Statute of Limitations with respect to the second cause of action. (*See* CPLR 3212, 2218.)).
[30] David D. Siegel, McKinney's *Consolidated Laws of New York Annotated*, Book 7B, Practice Commentaries C2218:2 (December, 1990). Quoting *Stowell v. Berstyn*, 26 A.D.2d 828 (A.D., 2d Dep't, 1966).
[31] *Korn v. Korn*, 56 A.D.2d 837, 838, 392 N.Y.S.2d 73 (2d Dep't, 1977); *See also* David D. Siegel, McKinney's *Consolidated Laws of New York Annotated*, Book 7B, Practice Commentaries C2218:2 and C2218:5 (December, 1990). (Since it is contemplated that the power to order an immediate trial will be exercised only when the issue is clear-cut and potentially dispositive, CPLR 2218 requires that the order directing such a trial "specify the issue to be tried." The use of the singular does not preclude the resort to CPLR 2218 for the trial of several motion issues, but it does suggest that the isolatable issue with dispositive potential is the ideal situation contemplated.)
[32] Stowell, supra. See also David D. Siegel, McKinney's *Consolidated Laws of New York Annotated*, Book 7B, Practice Commentaries C2218:1 (December, 1990). (Professor Siegel states that the power in CPLR § 2281 is akin to that contained in CPLR § 3211 (c) and that the two may in fact be treated as analogous. The main difference is that the CPLR 3211 (c) power relates only to the dismissal motion authorized by that rule while the power under CPLR § 2218 is generic and applies to any motion).
[33] *Id.* at 829; *see also Trager v. Trager*, 43 Misc. 2d 829, 832-833, 252 N.Y.S.2d 480 (Sup. Ct., Queens Cty., 1964) (The Court ordered the immediate trial of an issue of fact arising on a summary judgment motion, and even did so in regard to a fraud claim, which is not even contained on the CPLR 3211 (a) list. "Pursuant to the provisions of CPLR 3212 (subd. [g]) and 3211 (subd. [c]), as an aid in the disposition of said cause of action and in the exercise of discretion, the court referred issues raised to the Honorable Samuel S. Tripp and held the Court's determination of plaintiff's motion for summary judgment in abeyance").
[34] N.Y. C.P.L.R. 3212 (g)
[35] *Garcia v. Tri County Ambulette Serv.*, 282 A.D.2d 206, 207, 723 N.Y.S.2d 163 (1st Dep't 2001); *see also Siewert v. Loudonville Elementary Sch.*, 210 A.D.2d 568, 569, 620 N.Y.S.2d 149 (3rd Dep't 1994) (CPLR 3212 (g) permits a court, when a summary judgment motion is denied or granted in part, to ascertain what facts are not in dispute or are incontrovertible, and to make an order specifying the facts deemed established for all purposes in the action. Although the order in this case which denied defendants' motion for summary judgment did not specify the facts deemed established, CPLR 3212 (g) also authorizes the court to make any order as may aid in the disposition of the action).
[36] David D. Siegel, McKinney's *Consolidated Laws of New York Annotated*, Book 7B, Practice Commentaries C3212:35 (November, 2004).
[37] *Id. See also Cooper v. Mallory*, 51 Misc.2d 749, 273 N.Y.S.2d 853 (Sup. Ct., Suffolk Cty., 1966)

(The court held that they could limit some issues of fact for trial (CPLR 3212, subd. [g]). The motion for summary judgment and cross motion were denied and the court directed that the order include specification of the facts deemed established).

[38] David D. Siegel, New York Practice § 286 (2d ed. 1991).

[39] *Id.*

[40] David D. Siegel, McKinney's *Consolidated Laws of New York Annotated*, Book 7B, Practice Commentaries C3212:35 (November, 2004). (In the urban counties, in any event, CPLR 3212 (g) appears to be a luxury the courts just can't afford. The revisers knew this, and therefore made the exploitation of CPLR 3212 (g) discretionary. In the hands of a busy judge, the phrase, "shall, if practicable" often gets theoretically reduced to "may" and practically reduced to "can't-no time").