St. John's Law Review

Volume 52
Number 3 *Volume 52, Spring 1978, Number 3*

Article 7

July 2012

CPLR 3211: Court of Appeals Modifies Showing Necessary to Gain Dismissal for Failure to State a Cause of Action

William T. Miller

In a broader context, the *Martin* decision may be interpreted as a suggestion by the Court that the legislature reconsider the viability of the statutory breach of warranty remedy in light of the availability of a fully developed common-law action in strict products liability. It has been observed that "the warranty rationale of strict liability for injury caused by defectively, though non-negligently, manufactured products was merely temporary scaffolding, useful in constructing the new tort, but to be dismantled once the structure was complete."[34] Now that New York has expressly approved the strict products liability remedy, there would appear to be no need to retain an additional remedy within a statutory scheme that was designed to govern commercial relationships.[35]

Susan Kaufman

ARTICLE 32—ACCELERATED JUDGMENT

CPLR 3211: Court of Appeals modifies showing necessary to gain dismissal for failure to state a cause of action

Upon the hearing of a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action,[36] section 3211(c) permits either

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LIABILITY § 16A[5][g] (1975), wherein the authors suggest that the *Goldberg* Court's use of warranty language rather than tort concepts had an influence on the *Mendel* Court's decision.

Finally, in Micallef v. Miehle, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976), the Court reaffirmed its position by stating that a cause of action for breach of implied warranty "based on tortious behavior, is more correctly treated under the theory of strict products liability." *Id.* at 387, 348 N.E.2d at 578-79, 384 N.Y.S.2d at 122 (citation omitted).

[34] Gegan, *supra* note 1, at 64.

[35] While the breach of warranty remedy and the tort remedy appeared superficially compatible, their underlying theoretical inconsistencies led to anomalous and sometimes illogical results. *See* Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), *overruled in* Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

[36] CPLR 3211(a)(7) provides: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the pleading fails to state a cause of action . . . ." A motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7) ordinarily is made before the answer is filed. CPLR 3211, commentary at 33 (McKinney 1970). The motion may be used simply to test the legal sufficiency of the pleading. Alternatively, the movant may use extrinsic material to attack the factual bases of the complaint. *Id.* at 30. The use of evidentiary matter in support of the motion, however, was drastically limited in Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 357 N.E.2d 970, 389 N.Y.S.2d 314 (1976) (per curiam); *see* note 39 *infra*.

In opposition to the motion the plaintiff should request leave to replead in the event of dismissal. *See* CPLR 3211(e). In addition, the plaintiff should submit or the court may require evidence in support of a new or amended pleading in order to satisfy the court that there are sufficient grounds to support a new cause of action if the present one is dismissed. *See id.* Finally, the court may "treat the motion as a motion for summary judgment" after adequate notice to the parties. CPLR 3211(c). This discretionary conversion can be utilized when the record on the motion to dismiss is "as complete as it would be on an outright motion for summary judgment . . . ." CPLR 3211, commentary at 48 (McKinney 1970). It should be

party to the suit to offer "any evidence that could properly be considered on a motion for summary judgment."[37] In *Rovello v. Orofino Realty Co.*,[38] the Court of Appeals adopted a narrow view of this provision and held that the use of evidence so offered is limited to curing defects in the pleadings or conclusively establishing that no cause of action exists.[39] Recently, however, in *Guggenheimer v. Ginzberg*,[40] the Court retreated from this position and indicated that, upon the hearing of a motion to dismiss, the Court may examine extrinsic evidence for the broader purpose of determining whether the facts alleged to establish the existence of a cause of action are "negated beyond substantial question."[41]

The *Guggenheimer* plaintiff, the Commissioner of the Department of Consumer Affairs for the City of New York, sought a permanent injunction against the defendant's allegedly deceptive advertising practices.[42] The complaint contained four causes of action averring various violations of the Consumer Protection Law of 1969.[43] The plaintiff also moved for a preliminary injunction[44] re-

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noted that, even where the motion is not converted to one for summary judgment, a dismissal after the court has examined evidentiary material may result in the order being deemed an adjudication on the merits of the claim. *See* D. SIEGEL, NEW YORK PRACTICE § 276 (1978).

[37] CPLR 3211(c).

[38] 40 N.Y.2d 633, 357 N.E.2d 970, 389 N.Y.S.2d 314 (1976) (per curiam).

[39] *Id.* at 636, 357 N.E.2d at 972, 389 N.Y.S.2d at 316. In adopting a restrictive test for granting a motion to dismiss under CPLR 3211(a)(7), the *Rovello* Court gave considerable weight to the effect of a 1973 amendment to CPLR 3211(c) which requires that notice be given the parties before a motion to dismiss is converted to a motion for summary judgment. Since the plaintiff confronted with an unconverted CPLR 3211(a)(7) motion to dismiss is not entitled to similar notice, the *Rovello* Court reasoned that dismissal on the merits under such circumstances should be limited to rare situations. 40 N.Y.2d at 635, 357 N.E.2d at 972, 389 N.Y.S.2d at 316. The dissent, however, observed that CPLR 3211(a)(7) was intended to enable the Court to ascertain whether a cause of action, in addition to being stated in the pleadings, exists in fact. 40 N.Y.2d at 636, 357 N.E.2d at 974, 389 N.Y.S.2d at 318 (Wachtler, J., dissenting). For a discussion of the *Rovello* decision, see *The Survey*, 51 ST. JOHN'S L. REV. 632, 642 (1977), in which the majority view is criticized as ignoring the plain language and intended application of CPLR 3211(c). Professor Siegel also has criticized the *Rovello* holding as a return to the common-law demurrer. CPLR 3211, commentary at 9-10 (McKinney Supp. 1977-1978). Dean McLaughlin, however, has suggested that the *Rovello* holding has little practical significance, since a CPLR 3211(a)(7) motion can be converted readily to a motion for summary judgment if it appears that the plaintiff has no cause of action. *See* note 36 *supra*. Once the motion is converted and proper notice is given to the parties, all evidentiary material may then be considered by the court. McLaughlin, *New York Trial Practice*, N.Y.L.J., Jan. 14, 1977, at 4, col. 2.

[40] 43 N.Y.2d 268, 372 N.E.2d 17, 401 N.Y.S.2d 182 (1977), *rev'g* 53 App. Div. 2d 513, 384 N.Y.S.2d 162 (1st Dep't 1976) (mem.).

[41] 43 N.Y.2d at 275, 372 N.E.2d at 20-21, 401 N.Y.S.2d at 186.

[42] *Id.* at 271, 372 N.E.2d at 18, 401 N.Y.S.2d at 183.

[43] NEW YORK, N.Y., ADMIN. CODE ch. 64, tit. A (1969). The defendant was doing business as "The Webster's Dictionary Company" and was advertising that his mail order company was selling authentic Webster's dictionaries at an unprecedented price, $20 below list. 43 N.Y.2d at 271, 372 N.E.2d at 18, 401 N.Y.S.2d at 183. The Commissioner alleged, *inter alia*,

straining the defendant from advertising during the pendency of the action. Both parties submitted affidavits on this motion.[45] The trial court denied the plaintiff's motion and, on its own initiative, dismissed the claim for failure to state a cause of action.[46] The Appellate Division, First Department, affirmed, noting that although the plaintiff arguably had stated a cause of action, there was little chance of success on the merits.[47]

On appeal, Judge Cooke, writing for a unanimous Court, reviewed the allegations and concluded that the plaintiff had sufficiently *stated* all four causes of action.[48] Significantly, however, the Court went on to examine the affidavits in order to determine

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that the defendant's claim of authenticity was false and that the dictionary never actually had been sold at the claimed list price. *Id.*

[44] 43 N.Y.2d at 271, 372 N.E.2d at 18, 401 N.Y.S.2d at 183.

[45] *Id.* at 275, 372 N.E.2d at 21, 401 N.Y.S.2d at 186. A motion for a preliminary injunction requires the petitioner to "show, by affidavit and such other evidence as may be submitted, that there is a cause of action . . . ." CPLR 6312(a). The motion opens the record and permits the court to determine whether the underlying complaint is legally sufficient. 43 N.Y.2d at 272, 372 N.E.2d at 19, 401 N.Y.S.2d at 183 (citing Shapiro v. City of New York, 67 Misc. 2d 1021, 1028, 325 N.Y.S.2d 787, 794 (1971), *aff'd*, 32 N.Y.2d 96, 296 N.E.2d 230, 343 N.Y.S.2d 323 (1973); Leonard v. John Hancock Mut. Life Ins. Co., 118 N.Y.S.2d 170, 171, *aff'd mem.*, 281 App. Div. 859, 119 N.Y.S.2d 918 (1st Dep't 1953); Challenger v. Household Fin. Corp., 179 Misc. 966, 40 N.Y.S.2d 465, *aff'd mem.*, 266 App. Div. 244, 43 N.Y.S.2d 517 (1st Dep't 1943)). It was apparently this procedural rule that prompted the *Guggenheimer* trial court to dismiss the plaintiff's complaint even in the absence of a CPLR 3211(a)(7) motion by the defendant. 43 N.Y.2d at 272, 372 N.E.2d at 19, 401 N.Y.S.2d at 183.

[46] 43 N.Y.2d at 271, 372 N.E.2d at 18, 401 N.Y.S.2d at 183. While the courts have required a showing of a clear right to relief in order to avoid dismissal of a motion for a preliminary injunction, *see* Weisner v. 791 Park Ave. Corp., 6 N.Y.2d 426, 160 N.E.2d 720, 190 N.Y.S.2d 70 (1959), in determining whether the underlying complaint should be dismissed, the criteria for using evidentiary material prescribed in CPLR 3211(c) should be adhered to. Under the decision in Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 357 N.E.2d 970, 389 N.Y.S.2d 314 (1976) (per curiam), dismissal under such circumstances would not be granted unless the evidence conclusively negated the facts essential to the cause of action. *See id.* at 636, 357 N.E.2d at 972, 389 N.Y.S.2d at 316. Thus, in applying both standards it is possible for a plaintiff to be denied preliminary injunctive relief and yet be permitted to pursue the underlying claim because the essential facts are not conclusively negated. A similar result could be reached even under the more flexible *Guggenheimer* standard for dismissing a cause of action under CPLR 3211(a)(7), *i.e.*, a dismissal may be granted where the essential facts are negated beyond substantial question. *See* 43 N.Y.2d at 275, 372 N.E.2d at 21, 401 N.Y.S.2d at 186.

[47] 53 App. Div. 2d 513, 514, 384 N.Y.S.2d 162, 163 (1st Dep't 1976) (mem.).

[48] 43 N.Y.2d at 271-74, 372 N.E.2d at 19-21, 401 N.Y.S.2d at 183-86. Prior to examining the legal sufficiency of the complaint itself, the Court noted that CPLR 3211(c) permits a motion to dismiss to be converted to one for summary judgment, even before issue is joined, provided adequate notice is given to the parties. *Id.* at 272, 372 N.E.2d at 19, 401 N.Y.S.2d at 183-84. Since no such notice was given in *Guggenheimer*, the Court, citing *Rovello*, stated that "there could be no conversion to a summary judgment motion, even on the court's initiative, and the affidavits were received for a limited purpose only, a purpose unconnected with summary judgment . . . ." *Id.* at 272, 372 N.E.2d at 19, 401 N.Y.S.2d at 184. The Court concluded that "the proper focus is on whether the complaint states a cause of action." *Id.*

whether the plaintiff in fact *had* those causes of action.[49] Evidentiary matter was utilized to determine whether "a material fact as claimed by the pleader to be one [was] not a fact at all" or whether "it [could] be said that no significant dispute [existed] regarding [that fact]."[50] Applying this analysis to the affidavits before the Court, Judge Cooke held that the essential facts had not been "negated beyond substantial question."[51] The complaint was therefore reinstated, although the lower court's denial of a preliminary injunction was upheld.[52]

In contrast to *Rovello,* the affidavits in *Guggenheimer* were not examined by the Court to determine whether they *"[established] conclusively* that plaintiff [had] no cause of action."[53] Rather, the Court stated that dismissal may be granted if the affidavits demonstrate *beyond substantial question* that the plaintiff has no cause of action.[54] Consequently, where affidavits are submitted with respect to a CPLR 3211(a)(7) motion, the *Guggenheimer* Court's standard substantially reduces the showing necessary to gain dismissal. Thus, without explicitly distinguishing *Rovello,* the decision appears to have significantly modified the restrictions on a court's authority to rely on extrinsic material in determining whether to dismiss a cause of action.[55]

It is submitted that the *Guggenheimer* Court's approach closely

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[49] 43 N.Y.2d at 274-75, 372 N.E.2d at 20-21, 401 N.Y.S.2d at 185-86. In support of its position that the affidavits could be used to determine whether a cause of action existed, the Court relied on Rappaport v. International Playtex Corp., 43 App. Div. 2d 393, 352 N.Y.S.2d 241 (3d Dep't 1974); 4 WK&M ¶ 3211.36; and CPLR 3211, commentary at 31 (McKinney 1970). These authorities suggest that under CPLR 3211(a)(7), the movant is permitted to establish that a material fact on which the claim relies is not a fact at all or that there is no significant dispute as to the non-existence of the fact. It is this aspect of the CPLR 3211(a)(7) motion that the *Rovello* decision appeared to have all but destroyed. *See* CPLR 3211, commentary at 9 (McKinney Supp. 1977-1978); note 39 and accompanying text *supra.*

[50] 43 N.Y.2d at 275, 372 N.E.2d at 20-21, 401 N.Y.S.2d at 185.

[51] *Id.,* 372 N.E.2d at 21, 401 N.Y.S.2d at 186. The Court cited Kelly v. Bank of Buffalo, 32 App. Div. 2d 875, 302 N.Y.S.2d 60 (4th Dep't 1969) (mem.), as support for the requirement that the essential facts be negated "beyond substantial question." In *Kelly* the extrinsic material submitted on the motion to dismiss was sufficient to create a question of fact to be properly determined at trial. *Id.*

[52] 43 N.Y.2d at 275, 372 N.E.2d at 21, 401 N.Y.S.2d at 186.

[53] 40 N.Y.2d at 636, 357 N.E.2d at 972, 389 N.Y.S.2d at 316 (emphasis added).

[54] 43 N.Y.2d at 275, 372 N.E.2d at 21, 401 N.Y.S.2d at 186.

[55] In his *Rovello* dissent, Judge Wachtler criticized the majority's decision finding that under the Court's standard it would be an "empty exercise" for a defendant to submit evidence pursuant to CPLR 3211(c). 40 N.Y.2d at 638, 357 N.E.2d at 974, 389 N.Y.S.2d at 318 (Wachtler, J., dissenting). He argued that dismissal should result whenever a defendant can clearly show the absence of an essential element of the cause of action. *Id.* at 636, 357 N.E.2d at 973, 389 N.Y.S. 2d at 317 (Wachtler, J., dissenting). The standard enunciated in *Guggenheimer,* therefore, should give courts the flexibility urged by Judge Wachtler and provide them with the authority to dismiss a cause of action where extrinsic evidence indicates that a claim has no merit.

approximates the intended application of CPLR 3211(c) and is therefore more consistent with modern pleading rules than *Rovello*. The legislative history indicates that a motion to dismiss pursuant to CPLR 3211 was intended to be "in essence one for summary judgment"[56] permitting an inquiry into the factual basis of the allegations.[57] The original draft of CPLR 3211 did not provide for a motion to dismiss for failure to state a cause of action. This omission reflected the intention of the framers to eliminate the abuses of technical fact-pleading rules in favor of a more informal system of notice pleading.[58] CPLR 3211(a)(7) was inserted in the final draft as part of a compromise measure which permitted such motions but required that, in the event of dismissal, leave to replead be granted only upon an adequate evidentiary showing that a cause of action actually existed.[59] Although this provision ultimately was modified to give the courts discretion in requiring extrinsic material,[60] the clear intent of the drafters was to minimize dilatory practices and encourage early examination of the factual merits of the claim.

Revitalizing CPLR 3211 as a "speaking motion"[61] was a position

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[56] FIRST REP. 85. The legislative history also indicates that CPLR 3211(c), which applies to all pre-answer motions under CPLR 3211(a), "allows a motion preliminary to answer, with or without supporting proof . . . ." *Id.* at 83.

[57] *See* CPLR 3212, commentary at 424 (McKinney 1970).

[58] FINAL REP. A465; 4 WK&M ¶ 3211.30, at 32-100. Those who opposed retention of a motion to dismiss for legal insufficiency were primarily concerned with unnecessary delays resulting from the practice of dismissing defective complaints and liberally granting leave to replead. In addition, a national trend existed to replace fact pleading with notice pleading. Korn & Paley, *Survey of Summary Judgment, Judgment on the Pleadings and Related Pre-Trial Procedures*, 42 CORNELL L.Q. 483, 493-96 (1957). Support for retention of the motion came primarily from the various state bar associations which argued that the inability to have defective pleadings dismissed before responsive pleadings were made would force the movant to disclose evidentiary material prematurely. New York State Bar Ass'n, Report of the Joint Committee on the Civil Practice Act 10 (Dec. 31, 1959).

[59] The compromise measure was designed to reconcile opposing views on the desirability of the motion to dismiss for legal sufficiency. *See* note 58 *supra*. The motion was retained through the insertion of CPLR 3211(a)(7); but the availability of leave to replead was curtailed by the additional provisions in subdivision (e), which required the party opposing the motion to submit extrinsic material establishing a cause of action in order to obtain leave to resubmit the complaint. 4 WK&M ¶ 3211.31, at 32-102 to -103. *See* JOINT BAR ASS'NS COMM., CIVIL PRACTICE ACT REPORT, *reprinted in* [1960] N.Y. Laws 2073, 2082-83; FINAL REP. 85.

[60] 4 WK&M ¶ 3211.31, at 32-102 to -103. Unless required by the court, CPLR 3211(e) no longer mandates that extrinsic evidence be produced in support of a request for leave to replead. By virtue of the 1965 amendment, the movant is now given the option of either submitting such proof or relying on his pleadings. *See* CPLR 3211(e).

[61] A "speaking motion" is one based on the evidence submitted in addition to the pleadings. 4 WK&M ¶ 3211.35. Prior to *Rovello*, New York courts treated a motion to dismiss for failure to state a cause of action as a "speaking motion." *See, e.g.*, Rapoport v. Schneider, 29 N.Y.2d 396, 278 N.E.2d 642, 328 N.Y.S.2d 431 (1972); Rappaport v. International Playtex Corp., 43 App. Div. 2d 393, 352 N.Y.S.2d 241 (3d Dep't 1974); Kelly v. Bank of Buffalo, 32 App. Div. 2d 875, 302 N.Y.S.2d 60 (4th Dep't 1969) (mem.).

urged by the commentators after *Rovello* had, in effect, "relegated it to its common law demurrer equivalent."[62] The language utilized by the *Guggenheimer* Court, coupled with the legislative background of this section, furnishes ample support for this position.[63] Yet, by purporting to follow *Rovello*[64] while actually applying a more flexible standard, the Court has introduced some uncertainty into this important area of civil practice. It is suggested that in future cases the Court of Appeals seek to clarify its position on the application of CPLR 3211(c) by articulating clear standards governing the use of extrinsic material in pre-answer proceedings.

William T. Miller

ARTICLE 54—ENFORCEMENT OF FOREIGN JUDGMENTS

CPLR 5401: Fourth department refutes competence of foreign decree to directly affect New York realty

Designed to promote national unity,[65] the full faith and credit

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[62] CPLR 3211, commentary at 9 (McKinney Supp. 1977-1978); *see* Rovello v. Orfino Realty Co., 40 N.Y.2d 633, 636, 357 N.E.2d 970, 973, 389 N.Y.S.2d 314, 317 (1976) (Wachtler, J., dissenting); *The Survey*, 51 ST. JOHN'S L. REV. 632, 642 (1977).

[63] Additional support for the flexible approach approved in *Guggenheimer* can be found in Rapoport v. Schneider, 29 N.Y.2d 396, 401, 278 N.E.2d 642, 645, 328 N.Y.S.2d 431, 436 (1972), a pre-*Rovello* decision, which permitted the use of affidavits upon the hearing of a motion to dismiss for legal insufficiency. *But see* Gerber v. New York City Hous. Auth., 42 N.Y.2d 162, 366 N.E.2d 268, 397 N.Y.S.2d 608 (1977). In *Gerber*, the Court dismissed the plaintiff's complaint because the extrinsic facts left "no other conclusion" than that the plaintiff had no cause of action. *Id.* at 167, 366 N.E.2d at 271, 397 N.Y.S.2d at 611. This language would appear to bring *Gerber* within the rigid *Rovello* exception permitting the use of affidavits only where they conclusively negate the cause of action. *But see id.* (Fuchsberg, J., dissenting).

[64] *See* text accompanying notes 53-55 *supra*.

[65] Johnson v. Muelberger, 340 U.S. 581, 584 (1951); Sherrer v. Sherrer, 334 U.S. 343, 355 (1948); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943); Porter v. Wilson, 419 F.2d 254, 259 (9th Cir. 1969), *cert. denied*, 397 U.S. 1020 (1970). One commentary has indicated that the full faith and credit doctrine is aimed at providing "the benefits of a unified nation by altering the status of otherwise 'independent, sovereign states.'" Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 161 (1949) (footnote omitted) [hereinafter cited as Reese & Johnson] (quoting Sherrer v. Sherrer, 334 U.S. 343, 355 (1948)). Since the underlying policy is the promotion of national unity, the courts should apply federal law in determining whether one state must afford full faith and credit to another state's judgment. Reese & Johnson, *supra*, at 161-62.

Because of the requirement "that the judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had in the State where it was pronounced," Hampton v. McConnel, 16 U.S. (3 Wheat.) 234, 235 (1818) (Marshall, C.J.), *quoted in* Fauntleroy v. Lum, 210 U.S. 230, 236 (1908) (Holmes, J.), the full faith and credit clause extends nationwide res judicata effect to a state court's judgment. Since a final judgment in a state court usually would be conclusive on the parties and unimpeachable in subsequent proceedings within that state, full faith and credit mandates that all other