

## CPLR 3211(A)(7): DEMURRER OR MERITS-TESTING DEVICE?

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New York Civil Practice Law and Rules (“CPLR”) 3211 is one of the most important and frequently used procedural devices in civil actions. The statute allows a defendant<sup>1</sup> to seek dismissal of some or all of the causes of action asserted against it before it answers the action.<sup>2</sup> Subdivision (a) of the statute lists the specific grounds on which a defendant may seek dismissal.<sup>3</sup> CPLR 3211(a)(7) is home

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<sup>1</sup> For the sake of simplicity, this article is couched in terms of a defendant seeking dismissal of some or all of a plaintiff’s causes of action. Any party against whom a cause of action is asserted, however, may seek relief under CPLR 3211(a). N.Y. C.P.L.R. 3211(a) (McKinney 2005 & Supp. 2009). Thus, a plaintiff against whom a counterclaim is asserted may move to dismiss that counterclaim under CPLR 3211(a). DAVID D. SIEGEL, NEW YORK PRACTICE § 257, at 438 (4th ed. 2005) [hereinafter SIEGEL, NEW YORK PRACTICE]; David D. Siegel, *Practice Commentaries*, C3211:4, in N.Y. C.P.L.R. 3211 (McKinney 2005) [hereinafter Siegel, *Practice Commentaries*].

<sup>2</sup> CPLR 3211(e) contains the time restrictions for motions to dismiss under subdivision (a). Generally, a motion to dismiss based on a ground enumerated in CPLR 3211(a) must be made before service of the defendant’s answer is required. Certain grounds, however, may be raised at any time, including after service of the defendant’s answer is required. The motion to dismiss for failure to state a cause of action is one of those grounds that are exempted from the time requirement. For a discussion of the time limitations imposed by 3211(e), see SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 272, at 453–54; Siegel, *Practice Commentaries*, *supra* note 1, C3211:52–54. *But see* ADVISORY COMM. ON CIVIL PRACTICE, REPORT TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK, at 76-78 (2009) (recommending that CPLR 3211(e) be amended to require a motion to dismiss for failure to state a cause of action to be made “by a date set by the court, or, if no such date is set, no later than one hundred twenty days after the filing of the note of issue; provided, however, that the court, for good cause shown or in the interest of justice may extend the time for making such motion”). For a discussion of the “single motion rule,” which generally prohibits a defendant from making more than one motion under CPLR 3211, see SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 273, at 454–55; Siegel, *Practice Commentaries*, *supra* note 1, C3211:55; 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 7:50, at 387–88 (Robert L. Haig ed., 2d ed. 2005) [hereinafter COMMERCIAL LITIGATION]. *See also* Held v. Kaufman, 694 N.E.2d 430, 432 (N.Y. 1998) (“The purpose of [the single motion rule contained in] CPLR 3211(e) is to prevent the delay before answer that could result from a series of motions [to dismiss].” (citations and internal quotation marks omitted)).

<sup>3</sup> N.Y. C.P.L.R. 3211(a) states that:

to arguably the most popular ground for pre-answer dismissal: failure to state a cause of action.<sup>4</sup> Query: can a defendant submit affidavits in support of its motion to dismiss under CPLR 3211(a)(7) and attack the merits of the plaintiff's pleadings? The answer to this query dictates the standard a court will employ in reviewing the motion. The extensive case law regarding the effect of a defendant's affidavits on a CPLR 3211(a)(7) motion is not consistent. This article will review both the law prior to CPLR 3211 and the legislative history of that statute, survey the case law construing CPLR 3211(a)(7), and provide a picture of the current

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A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or
2. the court has not jurisdiction of the subject matter of the cause of action; or
3. the party asserting the cause of action has not legal capacity to sue; or
4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or
5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or
6. with respect to a counterclaim, it may not properly be interposed in the action; or
7. the pleading fails to state a cause of action; or
8. the court has not jurisdiction of the person of the defendant; or
9. the court has not jurisdiction in an action where service was made under section 314 or 315; or
10. the court should not proceed in the absence of a person who should be a party;
11. the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law. Presumptive evidence of the status of the corporation, association, organization or trust under section 501(c)(3) of the internal revenue code may consist of production of a letter from the United States internal revenue service reciting such determination on a preliminary or final basis or production of an official publication of the internal revenue service listing the corporation, association, organization or trust as an organization described in such section, and presumptive evidence of uncompensated status of the defendant may consist of an affidavit of the chief financial officer of the corporation, association, organization or trust. On a motion by a defendant based upon this paragraph the court shall determine whether such defendant is entitled to the benefit of section seven hundred twenty-a of the not-for-profit corporation law or subdivision six of section 20.09 of the arts and cultural affairs law and, if it so finds, whether there is a reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm. If the court finds that the defendant is entitled to the benefits of that section and does not find reasonable probability of gross negligence or intentional harm, it shall dismiss the cause of action as to such defendant.

<sup>4</sup> While most grounds listed in subdivision (a) must be raised in a pre-answer motion to dismiss or asserted in the defendant's answer—or the defense is waived—a motion to dismiss for failure to state a cause of action may be made at any time regardless of whether the defendant has asserted failure to state a cause of action as an affirmative defense in its answer. N.Y. C.P.L.R. 3211(e) (McKinney 2000); see also David D. Siegel, *Striking Defense: 2d Dep't Holds No Motion Lies to Strike Defense of Failure to State Cause of Action*, 204 SIEGEL'S PRAC. REV. 2 (Dec. 2008); Siegel, *Practice Commentaries*, supra note 1, C3211:55–58; supra note 2 and accompanying text.

state of the law on this subject.

## I. PRIOR LAW & LEGISLATIVE HISTORY

Prior to the advent of the CPLR in September 1963,<sup>5</sup> civil procedure in New York was governed by the Civil Practice Act. Rule 106(4) of the Act provided a motion to dismiss for failure to state a cause of action.<sup>6</sup> Under that rule, a defendant could not submit affidavits in support of its motion—the defendant was allowed only to challenge the facial sufficiency of the plaintiff's pleading.<sup>7</sup> If, accepting the truth of the allegations and according the plaintiff the benefit of every reasonable inference, the court concluded that the plaintiff stated a cause of action cognizable at law, the defendant's motion was denied.<sup>8</sup> Moreover, courts rarely granted rule 106(4) motions without granting plaintiffs leave to replead, and plaintiffs had no obligation to support new allegations with evidence.<sup>9</sup> Rather, new allegations could be perfunctorily supplied by a plaintiff however baseless those allegations may have been.<sup>10</sup> Thus, the motion to dismiss for failure to state a cause of action under the Civil Practice Act generally resembled the traditional equity demurrer,<sup>11</sup> and while the motion often assisted

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<sup>5</sup> 1962 N.Y. Laws 1297–99; N.Y. C.P.L.R. 101 (McKinney 2003 & Supp. 2009) (“The civil practice law and rules shall succeed the civil practice act and rules of civil practice and shall be deemed substituted therefor throughout the statutes and rules of the state.”).

<sup>6</sup> See ADVISORY COMM. ON PRACTICE AND PROCEDURE, 1957 REPORT OF THE TEMPORARY COMMISSION ON THE COURTS TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF NEW YORK, N.Y. Legis. Doc. 6(b), at 308 (1957) [hereinafter the First Report].

<sup>7</sup> *St. Regis Tribe of Mohawk Indians v. State*, 152 N.E.2d 411, 417 (N.Y. 1958); *Lefler v. Clark*, 287 N.Y.S. 476, 478 (App. Div. 1st Dep't 1936); *Socony-Vacuum Oil Co. v. City of New York*, 287 N.Y.S. 288, 294 (App. Div. 1st Dep't 1936). In addition, prior to the enactment of the CPLR, plaintiffs were similarly barred from submitting affidavits in opposition to Civil Practice Act rule 106(4) motions to rehabilitate insufficient pleadings. See 7 HON. JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, *NEW YORK CIVIL PRACTICE: CPLR* ¶ 3211.29 (David L. Ferstendig ed., 2d ed. 2009) [hereinafter WEINSTEIN].

<sup>8</sup> *St. Regis Tribe of Mohawk Indians*, 152 N.E.2d at 417.

<sup>9</sup> The First Report, *supra* note 6, at 308.

<sup>10</sup> *Id.* at 309; WEINSTEIN, *supra* note 7, ¶ 3211.29.

<sup>11</sup> The common law demurrer was “[a] pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer.” BLACK’S LAW DICTIONARY 465 (8th ed. 2004); see also Siegel, *Practice Commentaries*, *supra* note 1, C3211:24 (“Under the common law demurrer, the defendant conceded the truth of every factual allegation made by the plaintiff but contended that, even so, the complaint states no cause of action cognizable under the law.”). There were two types of common law demurrers: the general demurrer, which resulted in a final judgment in the defendant's favor, and the equity demurrer, which resulted in the plaintiff being granted leave to replead. Comment, *Pleading and Demurrer Problems Re-Examined: New Proposals in New York*, 60 COLUM. L. REV. 1015, 1015 (1960).

defendants in obtaining more informative and technically correct pleadings, it rarely led to the disposition of cases.<sup>12</sup>

The Advisory Committee on Practice and Procedure, appointed to modernize civil practice, authored a series of reports between 1957 and 1962 that provide the effective legislative history of the CPLR.<sup>13</sup> In its First Report, the Committee concluded that the motion to dismiss for failure to state a cause of action under Civil Practice Act 106(4) was ineffective in terminating groundless suits.<sup>14</sup> The Committee was also concerned with the delay caused by that motion. The limited office of the motion as a tester of the facial sufficiency of a pleading, coupled with the liberality with which leave to replead was granted, promoted rounds of rule 106(4) motions and amended pleadings but did not reveal the facts underlying an action.<sup>15</sup> Accordingly, the Committee recommended *omitting* from the CPLR the motion to dismiss for failure to state a cause of action and requiring a challenge to the legal sufficiency of a pleading to be made after the joinder of issue by a summary judgment motion.<sup>16</sup> In the Committee's view, this proposal would

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<sup>12</sup> The First Report, *supra* note 6, at 84, 308; *see also* WEINSTEIN, *supra* note 7, ¶ 3211.29. Under the CPLR's single motion rule (see CPLR 3211(e); *supra* note 2), a defendant cannot make multiple motions to dismiss in an effort to secure more informative and technically correct pleadings. The mechanism provided by the CPLR that allows a defendant to obtain a sounder complaint is CPLR 3024(a) ("Motion to correct pleadings"; "Vague or ambiguous pleadings"), which provides that "[i]f a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a response he [or she] may move for a more definite statement." N.Y. C.P.L.R. 3024(a) (McKinney 2005). As to motions for more definite pleadings, *see* SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 230, at 379–81; Siegel, *Practice Commentaries*, *supra* note 1, C:3024:1.

<sup>13</sup> *See* SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 2, at 2; *see also* 1962 N.Y. Sess. Laws 3621 (McKinney) (containing Governor Nelson A. Rockefeller's memorandum approving the enactment of the CPLR).

<sup>14</sup> The First Report, *supra* note 6, at 84 ("Requiring a determination on the basis of allegations rather than facts, [the motion to dismiss for failure to state a cause of action] does not perform well its traditional function of terminating groundless suits.").

<sup>15</sup> *Id.* at 84, 308–09. Under prior law, a defendant's time to answer the action was stayed pending resolution of its motion to dismiss. *Id.* at 84. Under current law, a defendant's time to answer is extended automatically until 10 days after service on the defendant of notice of entry of the order denying its motion to dismiss. N.Y. C.P.L.R. 3211(f) (McKinney 2005 & Supp. 2009); SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 277, at 459; Siegel, *Practice Commentaries*, *supra* note 1, C3211:71.

<sup>16</sup> The First Report, *supra* note 6, at 309. As then-Professor (now Federal District Judge) Weinstein, the reporter to the Committee, observed:

The most notable change we proposed in motion practice was the abolition of the motion to dismiss for failure to state a cause of action. For many years the Civil Practice Act has stated that "the demurrer is abolished." Our Advisory Committee proposed that this abolition really take place, because they considered that the pertinent question is not whether a pleader has stated a cause of action, but whether he has any substantial hope of proving a cause of action. If he has a cause of action and has not stated it clearly, in most cases his opponent is not prejudiced or deceived. Experienced attorneys are

have eliminated the delay that was promoted by the motion to dismiss under rule 106(4); responsive pleadings would be served after service of the initiatory papers, disclosure conducted, and summary judgment, where appropriate, granted based on the actual facts of the controversy developed through disclosure.<sup>17</sup>

That was all from the First Report. Approximately four years after that report was issued, the Committee offered its Fifth Report,<sup>18</sup> in which it modified its proposal omitting from the CPLR the motion to dismiss for failure to state a cause of action. The Committee added as a ground for pre-answer dismissal that “the pleading fail[ed] to state a cause of action”;<sup>19</sup> it also added a proposal to subdivision (e)<sup>20</sup> of the motion to dismiss statute imposing certain burdens on a plaintiff seeking leave to replead in response to a motion to dismiss for failure to state a cause of action. A plaintiff desiring leave to replead was required to (1) request

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reluctant to use the motion in such a case, since its only result is to educate a poor pleader. The courts in New York have rightfully permitted such a litigation to proceed despite weaknesses in the drafting of pleadings. The sanction for failure to follow the rules on details of the complaint, where there is a valid cause of action, would be assessment of costs and not dismissal. If, on the other hand, the pleader has failed to state a cause of action because he has none, the appropriate remedy is a motion for summary judgment, which would be dispositive of the case on the merits.

Jack B. Weinstein, *Proposed Revision of New York Civil Practice*, 60 COLUM. L. REV. 50, 74 (1960) [hereinafter Weinstein, *Proposed Revision*].

<sup>17</sup> The First Report, *supra* note 6, at 84, 309.

<sup>18</sup> The Second, Third, and Fourth Reports did not address the motion to dismiss for failure to state a cause of action.

<sup>19</sup> N.Y. SENATE FIN. COMM. & ASSEMBLY WAYS AND MEANS COMM., FIFTH PRELIMINARY REPORT RELATIVE TO THE REVISION OF THE CIVIL PRACTICE ACT, N.Y. Legis. Doc. No. 15, at 482 (1961) [hereinafter the Fifth Report].

<sup>20</sup> In the First Report, subdivision (e) (then subdivision (d)) stated that:

[a] party may combine in a single motion two or more of the enumerated objections, and no more than one motion shall be permitted under this rule. Any objection or defense enumerated in this rule except jurisdiction over the subject matter is waived unless it is raised either by motion or in the responsive pleading.

The First Report, *supra* note 6, at 86–87. In the Fifth Report, subdivision (e) was amended to state:

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 subdivision (a) is waived unless raised either by such motion or in the responsive pleading, except that a motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made by motion at any subsequent time or in a later pleading, if one is permitted. Where a motion is made on the ground set forth in paragraph seven of subdivision (a) . . . if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and in them set forth 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 no good ground to support his cause of action . . . .

The Fifth Report, *supra* note 19, at 485–86.

leave in its papers in opposition to the motion; and (2) submit evidence that could be considered on a motion for summary judgment demonstrating that the plaintiff had a cause of action.<sup>21</sup> The failure to state a cause of action provision and revised subdivision (e) of the statute:

reflect[ed] a middle view between the original proposal that the motion to dismiss for legal insufficiency should be abolished, and the feeling of some bar association committees that, despite abuses, such motions often perform a valuable function in permitting a party to have a defective pleading dismissed before being required to frame a responsive pleading and perhaps submit to disclosure proceedings unjustifiably extended by the scope of the defective pleading.<sup>22</sup>

“[T]he liberality with which leave [was] granted to plead over without any showing that a legally sufficient claim exist[ed]” was eliminated,<sup>23</sup> giving a dismissal under the failure to state a cause of action ground some bite.<sup>24</sup> The Legislature adopted these proposals

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<sup>21</sup> The Fifth Report, *supra* note 19, at 486.

<sup>22</sup> *Id.* at 483; *see* Weinstein, *Proposed Revision*, *supra* note 16, at 74 (“The joint committee of bar associations objected to our abolition of the demurrer and proposed a compromise that may prove satisfactory; it is the provision found in our bill. A motion to dismiss for failure to state a cause of action will be permitted; but on the return of the motion, instead of obtaining leave to amend where the pleading is in fact defective for failing to state the material elements of a cause of action, the pleader will be required to show that he does have a cause of action.”); *see also* *Pleading and Demurrer Problems Re-Examined*, *supra* note 11, at 1028–29 (“The New York Advisory Committee initially recommended that the code motion to dismiss be eliminated since it seldom disposed of a case and was often used as a dilatory device, but objections from the bar forced the adoption of a compromise rule that attempts to eliminate dilatory motion practices and to utilize a motion to dismiss to determine at an early stage whether the plaintiff can possibly establish a right to relief.” (footnotes omitted)).

<sup>23</sup> The Fifth Report, *supra* note 19, at 487; *see* *Cushman & Wakefield, Inc. v. John David, Inc.*, 267 N.Y.S.2d 714, 717 (App. Div. 1st Dep’t 1966) (“The requirements for obtaining leave to amend a pleading, incorporated in CPLR 3211(e), were intended to obviate the former loose practice and undue liberality with which leave to replead was granted under the Civil Practice Act after the dismissal of a pleading for insufficiency. The privilege of serving an amended pleading must now rest not only upon formal corrections in the deficient pleading, but also upon an evidentiary demonstration to satisfy a Court that the party ‘has good ground to support his cause of action.’ In other words, it is not enough that a party may be able to state a cause of action; there must be some evidentiary showing that the claim can be supported.” (citation omitted)).

<sup>24</sup> It should be noted, however, that the *res judicata* effect of a dismissal for failure to state a cause of action generally is not the same as the effect of the granting of summary judgment dismissing a cause of action. Dismissal of a cause of action on a summary judgment motion generally will bar the plaintiff from suing again on that cause of action, while dismissal based on the failure to state a cause of action will not bar a new action provided the plaintiff corrects the pleading deficiency that led to the dismissal. *See* SIEGEL, *NEW YORK PRACTICE*, *supra* note 1, § 276, at 458; Siegel, *Practice Commentaries*, *supra* note 1, C3211:67; *see also* 175 E. 74th Corp. v. Hartford Acc. & Indem. Co., 416 N.E.2d 584, 586 n.1 (N.Y. 1980);

in enacting the original CPLR,<sup>25</sup> however, the version of subdivision (e) that it passed did not require a plaintiff to support its new pleading with evidence.<sup>26</sup> Rather, CPLR 3211(e) provided that a plaintiff *could* submit evidence supporting that pleading and that a court *could* require the plaintiff to do so to ensure that the plaintiff had “good ground to support” the challenged cause of action.<sup>27</sup>

At bottom, the Committee’s reports indicate the following: (1) that the Committee wanted to omit from the CPLR the pre-answer

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Sullivan v. Nimmagadda, 882 N.Y.S.2d 164, 165 (App. Div. 2d Dep’t 2009).

<sup>25</sup> N.Y. C.P.L.R. 3211(a)(7), (e) (Consol. 1963) (current version at N.Y. C.P.L.R. 3211 (McKinney 2005)).

<sup>26</sup> N.Y. C.P.L.R. 3211(e). Prior to the 2005 amendment of 3211(e), see *infra* note 27, the provision stated, in relevant part, that:

Where a motion is made on the ground set forth in paragraph seven of subdivision (a), or on the ground that a defense is not stated, if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and may set forth 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.

N.Y. C.P.L.R. 3211(e) (Consol. 1965) (current version at N.Y. C.P.L.R. 3211(e) (McKinney 2005)).

<sup>27</sup> See Mancuso v. Rubin, 861 N.Y.S.2d 79, 83 (App. Div. 2d Dep’t 2008) (“[W]e reject the plaintiff’s contention that her application for leave to replead her cause of action alleging fraudulent concealment against the Rubins should have been granted. Pursuant to former CPLR 3211[e], which was in effect at the time of the application, the plaintiff was required to demonstrate the existence of a ‘good ground’ to support a cause of action alleging fraudulent concealment. Since the plaintiff proffered no evidence to establish a ‘good ground,’ and made no argument as to why such good ground existed, the court providently exercised its discretion by, in effect, denying her application.”); *Island Surgical Supply Co. v. Allstate Ins. Co.*, 820 N.Y.S.2d 854, 855 (App. Div. 2d Dep’t 2006) (“[L]eave to plead again shall not be granted unless the court is satisfied that [a party opposing a motion to dismiss] has good ground to support [a] cause of action. To establish a ‘good ground’ sufficient to support a request for leave to replead, a plaintiff must proffer evidence, in the form of affidavits of those with direct knowledge of the facts. Here, the plaintiff proffered no such evidence, and made no specific argument as to why such good ground existed. Thus, the Supreme Court providently denied its cross application for leave to replead.” (internal citations omitted)); *Cushman & Wakefield, Inc.*, 267 N.Y.S.2d at 717 (“On an application, pursuant to CPLR 3211(e), for leave to serve an amended pleading, it is incumbent on a party applying for such relief not only to submit a proposed pleading supplying deficiencies in pleading but also evidence, by affidavit that could properly be considered upon a motion for summary judgment, which satisfies the Court that the moving party has good ground to support the cause of action.”).

Effective January 1, 2006, CPLR 3211(e) was amended to (1) delete the requirement that plaintiffs request leave to replead in their opposition papers; and (2) divest courts of the authority to require plaintiffs to submit evidence demonstrating “good ground to support” the new pleadings. 2005 N.Y. Laws 3391 (codified at N.Y. C.P.L.R. 3211 (McKinney Supp. 2009)); see *Janssen v. Incorporated Vill. of Rockville Ctr.*, 869 N.Y.S.2d 572, 579–80 (App. Div. 2d Dep’t 2008); see also David D. Siegel, *Amendment Lets Party Moved Against Under CPLR 3211 Await Court’s Treatment as Summary Judgment Before Gathering Up Effective Opposition Proof*, 170 SIEGEL’S PRAC. REV. 1 (Feb. 2006).

motion for failure to state a cause of action; (2) that multiple bar associations wanted the motion to dismiss for failure to state a cause of action to be included in the CPLR; and (3) that, as a compromise, failure to state a cause of action was included as a ground for a pre-answer motion to dismiss, but requirements were imposed for leave to replead. Nothing in the reports, however, indicate that the failure to state a cause of action motion that was inserted in the CPLR was anything other than the motion that had existed under the Civil Practice Act—the common law demurrer. The Committee contemplated only a motion for failure to state a cause of action that resembled the demurrer and a motion for summary judgment.<sup>28</sup> “Speaking motions,” i.e., motions to dismiss for failure to state a cause of action supported by evidence,<sup>29</sup> were not discussed in the Fifth Report, and the only discussion in that report of evidence on the motion to dismiss for failure to state a cause of action came in the context of the modification to subdivision (e) suggesting that a plaintiff seeking leave to replead be required to submit evidence supporting its new pleading.

This interpretation of the legislative history of CPLR 3211(a)(7) is not shared by all. The leading commentator on New York civil procedure, Professor David Siegel, has concluded to the contrary, finding that the drafters of the CPLR intended that a defendant could submit affidavits on a motion to dismiss for failure to state a cause of action and challenge the allegations in the complaint.<sup>30</sup>

CPLR 3211(c), also part of the original CPLR, does not appear to support the conclusion that a court may grant a defendant’s motion to dismiss for failure to state a cause of action based on affidavits

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<sup>28</sup> CPLR 3212, New York’s summary judgment statute, permits [a]ny party [to] move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

N.Y. C.P.L.R. 3212(a) (McKinney Supp. 2009); see also SIEGEL, NEW YORK PRACTICE, *supra* note 1, §§ 265, 278–287, at 446, 459–71. As to issues relating to the timing of summary judgment motions, see Patrick M. Connors, *CPLR 3212(a)’s Timing Requirement for Summary Judgment Motions: Ona Brill’s Stroll Through Brooklyn and the Dramatic Effect It Has Had on New York State’s Civil Practice*, 71 BROOK. L. REV. 1529 (2006).

<sup>29</sup> WEINSTEIN, *supra* note 7, ¶¶ 3211.29, 3211.35; see *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1010–11 (2d Cir. 1986); see also *Pleading and Demurrer Problems Re-Examined*, *supra* note 11, at 1019 n.32 (“At common law a ‘speaking’ demurrer was one that averred facts that were not alleged in the preceding pleadings. Today the term also designates motions that are supported by documentary evidence.”).

<sup>30</sup> See SIEGEL, NEW YORK PRACTICE, *supra* note 1, §§ 265, 275, at 446, 457–446; Siegel, *Practice Commentaries*, *supra* note 1, C3211:25.

the defendant submitted.<sup>31</sup> While that statute permits any party on a motion to dismiss to “submit any evidence that could properly be considered on a motion for summary judgment,” it does not expressly authorize a court to consider affidavits for the purpose of granting a motion to dismiss for failure to state a cause of action.<sup>32</sup> Rather, after stating that the parties may submit evidence on a CPLR 3211(a)(7) motion, subdivision (c) provides that a court, after giving notice to the parties, may treat the motion to dismiss as one for summary judgment.<sup>33</sup> Reading subdivisions (c) and (e) together and in a manner that gives each effect,<sup>34</sup> subdivision (c) allows (1) a defendant to submit affidavits to aid the court in ascertaining whether it should convert the motion to dismiss into one for summary judgment,<sup>35</sup> and (2) a plaintiff to submit affidavits to remedy pleading deficiencies and salvage the challenged cause of action. This interpretation is consistent with both the Committee’s view, as expressed in its Fifth Report, that the motion to dismiss for failure to state a cause of action resemble the common law demurrer and that a plaintiff should be required to provide evidentiary support for new pleadings,<sup>36</sup> and the principle that “[w]hether a . . . plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss [for failure to state a cause of action].”<sup>37</sup>

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<sup>31</sup> *But see* WEINSTEIN, *supra* note 7, ¶ 3211.32.

<sup>32</sup> N.Y. C.P.L.R. 3211(c) (McKinney 2005 & Supp. 2009). Following an amendment in 1973 that required the court to provide notice to the parties if the court planned on converting a motion to dismiss under CPLR 3211 into one for summary judgment, subdivision (c), entitled “Evidence permitted; immediate trial; motion treated as one for summary judgment,” states that

[u]pon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

<sup>33</sup> N.Y. C.P.L.R. 3211(a), (c); *see* *Mihlovan v. Grozavu*, 531 N.E.2d 288, 289 (N.Y. 1988); *Four Seasons Hotels, Ltd. v. Vinnik*, 515 N.Y.S.2d 1, 2, 8 (App. Div. 1st Dep’t 1987).

<sup>34</sup> N.Y. C.P.L.R. 3211(c), (e); *see* *Friedman v. Conn. Gen. Life Ins. Co.*, 877 N.E.2d 281, 286–87 (N.Y. 2007).

<sup>35</sup> *See* SIEGEL, *NEW YORK PRACTICE*, *supra* note 1, § 270, at 451–452; *see also* COMMERCIAL LITIGATION, *supra* note 2, § 7:55, at 393 (“[D]efendants often proffer affidavits and other evidence in an attempt to demonstrate both that plaintiff has not pleaded a viable cause of action and that, as a matter of law, it has no such claim. If this is your situation, you should give serious thought to joining your dismissal motion with one for summary judgment.”). *But see* *Henbest & Morrissey Inc. v. W.H. Ins. Agency Inc.*, 686 N.Y.S.2d 207, 208 (App. Div. 3d Dep’t 1999) (suggesting that affidavits submitted by a defendant on a motion to dismiss for failure to state a cause of action must be ignored by the court).

<sup>36</sup> The Fifth Report, *supra* note 19, at 482.

<sup>37</sup> *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 842 N.E.2d 471, 476

## II. CASE LAW

The Court of Appeals' seminal treatment of CPLR 3211(a)(7) occurred in 1976 in *Rovello v. Orofino Realty Co.*<sup>38</sup> The issue before the Court in *Rovello* was "whether a motion court may grant judgment under CPLR 3211 (subd. (a), par. 7), without treating the pleading motion as one for summary judgment, when the complaint is sufficient on its face, but the affidavits submitted indicate, not quite conclusively, that [plaintiff] may have no cause of action."<sup>39</sup> The Court stated that:

CPLR 3211 allows plaintiff to submit affidavits, but it does not oblige him to do so on penalty of dismissal, as is the case under CPLR 3212 when defendant has made an evidentiary showing that refutes the pleaded cause of action. If plaintiff chooses to stand on his pleading alone, confident that its allegations are sufficient to state all the necessary elements of a cognizable cause of action, he is at liberty to do so and, unless the motion to dismiss is converted by the court to a motion for summary judgment, he will not be penalized because he has not made an evidentiary showing in support of his complaint. . . . [A]ffidavits received on an unconverted motion to dismiss for failure to state a cause of action are not to be examined for the purpose of determining whether there is evidentiary support for the pleading. . . . In sum, in instances in which a motion to dismiss made under CPLR 3211 (subd. (a), par. 7) is not converted to a summary judgment motion, affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, although there may be instances in which a submission by plaintiff will conclusively establish that he has no cause of action. It seems that after the amendment of 1973 [to subdivision (c) explicitly requiring the court to give notice to the parties if it elects to treat the motion as one for summary judgment] affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of

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(N.Y. 2005) (quoting *EBC I, Inc. v. Goldman, Sachs & Co.*, 832 N.E.2d 26, 31 (N.Y. 2005)); see *O'Henry's Film Works, Inc. v. Nabisco, Inc.*, 492 N.Y.S.2d 744, 745 (App. Div. 1st Dep't 1985) ("The prospect of a pleading's success is not the criterion by which it should be adjudged under CPLR 3211.").

<sup>38</sup> 357 N.E.2d 970 (N.Y. 1976).

<sup>39</sup> *Id.* at 971.

action.<sup>40</sup>

Under *Rovello*, a defendant's motion under CPLR 3211(a)(7) may be granted only where (1) accepting the truth of the plaintiff's pleadings and affidavits (if any) and affording the plaintiff the benefit of every reasonable inference to be drawn from its submissions, the plaintiff does not have a cause of action,<sup>41</sup> or (2) the defendant's (or the plaintiff's) affidavits "establish conclusively that plaintiff has no cause of action."<sup>42</sup> If the affidavits submitted by the defendant (or the plaintiff) signal to the court that the action is ripe for accelerated judgment but do not "establish conclusively that plaintiff has no cause of action,"<sup>43</sup> then the court may, upon notice to the parties,<sup>44</sup> treat the motion as one for summary judgment and grant summary judgment to whichever party, if any, is entitled to that relief. *Rovello* is essentially true to the intention of the Committee that the motion to dismiss for failure to state a cause of action resemble the common law demurrer;<sup>45</sup> however, that decision opened the window for limited speaking motion—a motion to dismiss for failure to state a cause of action supported by affidavits that is permissible where the affidavits conclusively establish that the plaintiff has no cause of action.<sup>46</sup> *Rovello* places

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<sup>40</sup> *Id.* at 972 (quotation marks and citations omitted).

<sup>41</sup> *Id.* at 971; *see, e.g.*, *Snyder v. Bronfman*, 2009 N.Y. slip op. 08667 (N.Y. Nov. 23, 2009) ("Because this case arises on a motion to dismiss the first amended complaint . . . under CPLR 3211, we take the facts alleged by plaintiff to be true. Where the allegations are ambiguous, we resolve the ambiguities in plaintiff's favor."); *People ex rel. Cuomo v. Coventry First LLC*, 915 N.E.2d 616, 620 (N.Y. 2009) ("When assessing the adequacy of a complaint in light of a CPLR 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . the benefit of every possible favorable inference. Our sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." (citations and internal quotation marks omitted)); *Sokoloff v. Harriman Estates Dev. Corp.*, 754 N.E.2d 184, 187 (N.Y. 2001) ("On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.").

<sup>42</sup> *Rovello*, 357 N.E.2d at 972.

<sup>43</sup> *Id.*

<sup>44</sup> The notice to treat a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action as one for summary judgment under CPLR 3212 must come from the court itself. *Mihlovan v. Grozavu*, 531 N.E.2d 288, 289 (N.Y. 1988); SIEGEL, *NEW YORK PRACTICE*, *supra* note 1, § 270, at 451; Siegel, *Practice Commentaries*, *supra* note 1, C3211:44; *see supra* note 32.

<sup>45</sup> The Fifth Report, *supra* note 19, at 482.

<sup>46</sup> *Rovello*, 357 N.E.2d at 974; *see Henbest & Morrisey Inc. v. W.H. Ins. Agency Inc.*, 686 N.Y.S.2d 207, 208 (App. Div. 3d Dep't 1999) (suggesting that affidavits submitted by a defendant on a motion to dismiss for failure to state a cause of action must be ignored by the court).

the CPLR 3211(a)(7) motion on par with the motion to dismiss based on documentary evidence,<sup>47</sup> which authorizes the dismissal of a cause of action where “documentary evidence [submitted by the defendant] utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.”<sup>48</sup>

The next Court of Appeals decision construing CPLR 3211(a)(7), *Guggenheimer v Ginzburg*,<sup>49</sup> muddled the waters as to the appropriate standard a court should apply in reviewing a motion to dismiss supported by affidavits. In *Guggenheimer*, the court reversed an order of the Appellate Division dismissing a complaint brought by the commissioner of a New York City administrative agency asserting that the defendant violated the City’s Consumer Protection Law.<sup>50</sup> After reviewing the relevant provisions of that law and the plaintiff’s complaint, the court stated that:

whether the pleading was weighed without evidentiary material or tested in the light of it, the complaint should not have been dismissed. Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail. When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate.<sup>51</sup>

The court concluded that each of the causes of action in the

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<sup>47</sup> N.Y. C.P.L.R. 3211(a)(1) (McKinney 2005 & Supp. 2009); see SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 259, at 440; Siegel, *Practice Commentaries*, *supra* note 1, C3211:10; see also COMMERCIAL LITIGATION, *supra* note 2, § 7:60, at 398–99.

<sup>48</sup> *Goshen v. Mut. Life Ins. Co. of New York*, 774 N.E.2d 1190, 1197 (N.Y. 2002). CPLR 3211(a)(1) states that a court may dismiss a cause of action on the ground that “a defense is founded upon documentary evidence.” N.Y. C.P.L.R. 3211(a)(1) (McKinney 2005 & Supp. 2009). An affidavit, the content of which may be questioned and controverted with other evidence, does not constitute “documentary evidence” and, therefore, cannot support dismissal under CPLR 3211(a)(1). See SIEGEL, NEW YORK PRACTICE, *supra* note 1, § 259, at 440; Siegel, *Practice Commentaries*, *supra* note 1, C3211:10; see also Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 780 N.Y.S.2d 593, 596 (App. Div. 1st Dep’t 2004); Berger v. Temple Beth-El of Great Neck, 756 N.Y.S.2d 94, 95–96 (App. Div. 2d Dep’t 2003); Williamson, Picket, Gross, Inc. v. Hirschfeld, 460 N.Y.S.2d 36, 38 (App. Div. 1st Dep’t 1983).

<sup>49</sup> 372 N.E.2d 17 (N.Y. 1977).

<sup>50</sup> *Id.* at 18, 21.

<sup>51</sup> *Id.* at 20–21 (emphasis added) (citations omitted).

complaint were:

set forth with sufficient factual specificity and fullness, so as to identify the transaction and indicate the theory of redress to enable the court to control the matter and the adversary to prepare, and the essential facts have not been *negated beyond substantial question* by the affidavits submitted . . . so that it might be ruled that the pleader does not have the causes of action.<sup>52</sup>

A rational interpretation of *Guggenheimer* is that the very limited speaking motion permitted under *Rovello* had been expanded. After all, there is a difference between affidavits that “conclusively establish that [the plaintiff] has no cause of action”<sup>53</sup> and affidavits that demonstrate that “no *significant* dispute exists” regarding a fact or “negate[ ] beyond *substantial* question” that fact.<sup>54</sup> The inquiry adopted by the court in *Guggenheimer* could be viewed as similar (but not identical) to the inquiry on a summary judgment motion, i.e., whether the party seeking summary judgment demonstrated the absence of material issues of fact.<sup>55</sup>

Owing to the different standards set forth in *Rovello* and *Guggenheimer*, the Appellate Division case law interpreting CPLR 3211(a)(7) is not consistent. Some courts, following *Rovello*, refuse to dismiss a plaintiff’s cause of action unless the affidavits “conclusively establish that [the plaintiff] has no cause of action.”<sup>56</sup> Others, employing the seemingly more expansive inquiry permitted under *Guggenheimer*, give greater scrutiny to the plaintiff’s causes of action in light of the affidavits and are more willing to dismiss claims of questionable merit.<sup>57</sup> Until recently, Court of Appeals

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<sup>52</sup> *Id.* at 21 (emphasis added) (citation omitted).

<sup>53</sup> *Rovello v. Orofino Realty Co.*, 357 N.E.2d 970, 972 (N.Y. 1976) (emphasis added).

<sup>54</sup> *Guggenheimer*, 357 N.E.2d at 21 (emphasis added).

<sup>55</sup> See *Smalls v. AJI Indus., Inc.*, 883 N.E.2d 350, 351 (N.Y. 2008); *Alvarez v. Prospect Hosp.*, 501 N.E.2d 572, 574 (N.Y. 1986); see also *Winegrad v. N.Y. Univ. Med. Ctr.*, 476 N.E.2d 642, 643 (N.Y. 1985); *Zuckerman v. City of New York*, 404 N.E.2d 718, 720 (N.Y. 1980); *Friends of Animals, Inc. v. Assoc. Fur Mfrs., Inc.*, 390 N.E.2d 298, 299 (N.Y. 1979).

<sup>56</sup> See, e.g., *IMS Eng’r-Architects, P.C. v. State*, 858 N.Y.S.2d 486, 488 (App. Div. 3d Dep’t 2008); *Kempf v. Magida*, 832 N.Y.S.2d 47, 49 (App. Div. 2d Dep’t 2007); *Riordan v. BOCES of Rochester*, 772 N.Y.S.2d 428, 430 (App. Div. 4th Dep’t 2004); *Pietrosanto v. NYNEX Corp.*, 600 N.Y.S.2d 802, 802–03 (App. Div. 3d Dep’t 1993).

<sup>57</sup> See, e.g., *Kelly v. Schwend*, 789 N.Y.S.2d 723, 724 (App. Div. 2d Dep’t 2005); *Biondi v. Beekman Hill House Apartment Corp.*, 692 N.Y.S.2d 304, 308 (App. Div. 1st Dep’t 1999), *aff’d*, 731 N.E.2d 577 (N.Y. 2000); *Blackgold Realty Corp. v. Milne*, 501 N.Y.S.2d 44, 46 (App. Div. 1st Dep’t 1986), *aff’d*, 504 N.E.2d 392 (N.Y. 1987); *Kaufman v. Int’l Bus. Mach. Corp.*, 470 N.Y.S.2d 720, 722–23 (App. Div. 3d Dep’t 1983); see also *Sonne v. Bd. of Trustees*, 887 N.Y.S.2d 145 (App. Div. 2d Dep’t 2009); *Fenster v. Smith*, 832 N.Y.S.2d 572, 573 (App. Div. 1st Dep’t 2007) (“The court properly considered [the defendant’s] affidavit since factual

case law succeeding *Guggenheimer* did not indicate clearly which of the competing standards offered by *Rovello* and *Guggenheimer* should govern.<sup>58</sup> The Court's latest decisions on the subject, however, endorse the *Rovello* test.<sup>59</sup>

### III. CONCLUSION

The motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7) was only supposed to provide a mechanism to challenge the facial sufficiency of a pleading. Under *Rovello*, the statute offers that and a bit more. Pursuant to the *Rovello* line of authority, a defendant seeking to challenge the sufficiency of a complaint through a motion to dismiss can submit affidavits in an effort to "establish conclusively that plaintiff has no cause of action."<sup>60</sup> Should the affidavits establish conclusively the absence of a cause of action, dismissal for failure to state a cause of action may follow. Alternatively, the affidavits may signal to the court that summary judgment in the action is appropriate. Notably, however, while the Court of Appeals' most recent case law suggests that the *Rovello* rule controls, the Court has not expressly overruled *Guggenheimer* and its progeny. *Guggenheimer* and its brood therefore remain in the picture. Absent a specific repudiation of *Guggenheimer* by the Court of Appeals, the issue of whether CPLR 3211(a)(7) is simply a demurrer or a merits-testing device will remain an open one.

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allegations presumed to be true on a CPLR 3211 motion may properly be negated by affidavits and documentary evidence."); *Allstate Ins. Co. v. Raguzin*, 784 N.Y.S.2d 644, 645 (App. Div. 2d Dep't 2004).

<sup>58</sup> See, e.g., *Leon v. Martinez*, 638 N.E.2d 511, 513 (N.Y. 1994); *Arrington v. N.Y. Times Co.*, 434 N.E.2d 1319, 1323 (N.Y. 1982).

<sup>59</sup> See *Lawrence v. Miller*, 901 N.E.2d 1268, 1271 (N.Y. 2008); see also *M & B Joint Venture, Inc. v. Laurus Master Fund, LTD.*, 907 N.E.2d 690, 692 (N.Y. 2009); *Nonnon v. City of New York*, 874 N.E.2d 720, 722 (N.Y. 2007); cf. *Godfrey v Spano*, 2009 N.Y. slip op. 08474 (N.Y. Nov. 19, 2009) ("In support of his motion to dismiss, Executive Spano submitted an Affidavit of the Commissioner of Finance for Westchester County, dated November 17, 2006. The Commissioner stated that he could think of 'no instance where the County has expended funds or extended benefits in connection with [the] Executive Order.' That statement is unsurprising in that Westchester County already insured same-sex domestic partners and dependents of County employees before the Executive Order was issued, requiring only that applicants for domestic partner coverage have lived with their domestic partners in a committed financially interdependent relationship for at least a year. Indeed the Executive Order begins by acknowledging that 'the County of Westchester has long provided health benefits to the qualifying domestic partners of its members . . .' Although the affidavit does not in itself warrant dismissal under CPLR 3211, because it does not establish conclusively that plaintiffs have no cause of action, it supports our judgment that the conclusory nature of plaintiffs' allegations is more than a matter of inartful pleading." (citations omitted)).

<sup>60</sup> *Rovello v. Orofino Realty Co.*, 357 N.E.2d 970, 972 (N.Y. 1976).