S T A T E O F N E W Y O R K

5072

2013-2014 Regular Sessions

I N S E N A T E

May 8, 2013

Introduced by Sen. BONACIC -- (at request of the Office of Court Administration) -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the civil practice law and rules, in relation to certain notices of claim, pleading an affirmative defense and making a motion to dismiss

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivision (b) of section 3018 of the civil practice law and rules, as amended by chapter 504 of the laws of 1980, is amended to read as follows:

(b) Affirmative defenses. A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as arbitration and award, collateral estoppel, culpable conduct claimed in diminution of damages as set forth in article fourteen-A OF THIS CHAPTER, discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, res judicata, statute of frauds, or statute of limitation, OR FAILURE TO SERVE A NOTICE OF CLAIM OR FAILURE TO PROPERLY OR TIMELY SERVE A NOTICE OF CLAIM. The application of this subdivision shall not be confined to the instances enumerated.

S 2. Subdivisions (a) and (e) of rule 3211 of the civil practice law and rules, paragraph 5 of subdivision (a) as amended by judicial conference proposal number 6 for the year 1964, paragraph 11 of subdivision (a) as amended by chapter 656 of the laws of 1991 and subdivision (e) as amended by chapter 616 of the laws of 2005, are amended to read as follows:

(a) Motion to dismiss cause of action.

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

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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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] THREE HUNDRED FOURTEEN or [315] SECTION THREE HUNDRED FIFTEEN OF THIS CHAPTER; or
10. the court should not proceed in the absence of a person who should be a party[.]; OR
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; OR
12. IN AN ACTION IN WHICH SERVICE OF A NOTICE OF CLAIM IS A CONDITION PRECEDENT TO THE COMMENCEMENT OF THE ACTION, THE NOTICE OF CLAIM WAS NOT SERVED OR WAS NOT PROPERLY OR TIMELY SERVED.

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a) OF THIS RULE, and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) OF THIS RULE is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven [or], ten OR ELEVEN of subdivision (a) OF THIS RULE may be made at any subsequent time or in a later pleading, if one is permitted; an objection that the

summons and complaint, summons with notice, or notice of petition and petition was not properly served if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding under subdivision one or two of section seven hundred eleven of the real property actions and proceedings law. The papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed. An objection based upon a ground specified in paragraph eight [or], nine OR TWELVE of subdivision (a) OF THIS RULE is waived if a party moves on any of the grounds set forth in subdivision (a) OF THIS RULE without raising such objection or if, having made no objection under subdivision (a) OF THIS RULE, he or she does not raise such objection in the responsive pleading. AN OBJECTION BASED UPON A GROUND SPECIFIED IN PARAGRAPH TWELVE OF SUBDIVISION (A) OF THIS RULE IS ALSO WAIVED IF THE OBJECTING PARTY FAILS TO MOVE FOR JUDGMENT ON THAT GROUND WITHIN NINETY DAYS AFTER SERVING THE PLEADING, UNLESS THE COURT EXTENDS THE TIME UPON THE GROUND OF UNDUE HARDSHIP.

S 3. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all actions commenced on or after such effective date.