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2013-2014 Regular Sessions

I N A S S E M B L Y

April 9, 2013

Introduced by M. of A. WEPRIN, WEINSTEIN, TITONE, HENNESSEY -- (at request of the Office of Court Administration) -- read once and referred 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:

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

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

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

21 (a) Motion to dismiss cause of action.

22 A party may move for judgment dismissing one or more causes of action
23 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.

LBD09835-01-3

1 1. a defense is founded upon documentary evidence; or
2 2. the court has not jurisdiction of the subject matter of the cause
3 of action; or
4 3. the party asserting the cause of action has not legal capacity to
5 sue; or
6 4. there is another action pending between the same parties for the
7 same cause of action in a court of any state or the United States; the
8 court need not dismiss upon this ground but may make such order as
9 justice requires; or
10 5. the cause of action may not be maintained because of arbitration
11 and award, collateral estoppel, discharge in bankruptcy, infancy or
12 other disability of the moving party, payment, release, res judicata,
13 statute of limitations, or statute of frauds; or
14 6. with respect to a counterclaim, it may not properly be interposed
15 in the action; or
16 7. the pleading fails to state a cause of action; or
17 8. the court has not jurisdiction of the person of the defendant; or
18 9. the court has not jurisdiction in an action where service was made
19 under section [314] THREE HUNDRED FOURTEEN or [315] SECTION THREE
20 HUNDRED FIFTEEN OF THIS CHAPTER; or
21 10. the court should not proceed in the absence of a person who should
22 be a party[.]; OR
23 11. the party is immune from liability pursuant to section seven
24 hundred twenty-a of the not-for-profit corporation law. Presumptive
25 evidence of the status of the corporation, association, organization or
26 trust under section 501 (c) (3) of the internal revenue code may consist
27 of production of a letter from the United States internal revenue
28 service reciting such determination on a preliminary or final basis or
29 production of an official publication of the internal revenue service
30 listing the corporation, association, organization or trust as an organ-
31 ization described in such section, and presumptive evidence of uncompen-
32 sated status of the defendant may consist of an affidavit of the chief
33 financial officer of the corporation, association, organization or
34 trust. On a motion by a defendant based upon this paragraph the court
35 shall determine whether such defendant is entitled to the benefit of
36 section seven hundred twenty-a of the not-for-profit corporation law or
37 subdivision six of section 20.09 of the arts and cultural affairs law
38 and, if it so finds, whether there is a reasonable probability that the
39 specific conduct of such defendant alleged constitutes gross negligence
40 or was intended to cause the resulting harm. If the court finds that the
41 defendant is entitled to the benefits of that section and does not find
42 reasonable probability of gross negligence or intentional harm, it shall
43 dismiss the cause of action as to such defendant; OR
44 12. IN AN ACTION IN WHICH SERVICE OF A NOTICE OF CLAIM IS A CONDITION
45 PRECEDENT TO THE COMMENCEMENT OF THE ACTION, THE NOTICE OF CLAIM WAS NOT
46 SERVED OR WAS NOT PROPERLY OR TIMELY SERVED.
47 (e) Number, time and waiver of objections; motion to plead over. At
48 any time before service of the responsive pleading is required, a party
49 may move on one or more of the grounds set forth in subdivision (a) OF
50 THIS RULE, and no more than one such motion shall be permitted. Any
51 objection or defense based upon a ground set forth in paragraphs one,
52 three, four, five and six of subdivision (a) OF THIS RULE is waived
53 unless raised either by such motion or in the responsive pleading. A
54 motion based upon a ground specified in paragraph two, seven [or], ten
55 OR ELEVEN of subdivision (a) OF THIS RULE may be made at any subsequent
56 time or in a later pleading, if one is permitted; an objection that the

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

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