

**APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW
YORK, SECOND DEPARTMENT**

Patel v. Primary Construction, LLC

115 A.D.3d 834 (2d Dep't 2014) · Decided March 19, 2014

SUMMARY

The Appellate Division reversed an order that converted the defendants' CPLR 3211(a) motion to dismiss into a motion for summary judgment and granted dismissal. The court held that CPLR 3211(c) required notice of the intended conversion, and that the parties had not unequivocally charted a summary judgment course sufficient to excuse the notice requirement.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Rivera, J.E.; Balkin, J.; Hinds-Radix, J.; Maltese, J.
JURISDICTION	New York
DECIDED	March 19, 2014
DISPOSITION	reversed
PROCEDURAL POSTURE	Plaintiffs appealed from the portion of an order that converted defendants' CPLR 3211(a) motion to dismiss into a motion for summary judgment and granted summary judgment dismissing the complaint.
STANDARD OF REVIEW	Review of the legal propriety of converting a CPLR 3211(a) motion into a motion for summary judgment.
PRECEDENTIAL VALUE	published appellate opinion
PARTIES	Plaintiffs v. Defendants

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QUESTIONS PRESENTED

1. Whether the Supreme Court could convert defendants' CPLR 3211(a) motion to dismiss into a motion for summary judgment without providing notice under CPLR 3211(c).
2. Whether the parties' evidentiary submissions were sufficiently extensive to establish that they had unequivocally charted a summary judgment course, thereby excusing the notice requirement.

HOLDINGS

1. A court intending to treat a CPLR 3211 motion as one for summary judgment under CPLR 3212 must notify the parties of that intention.
2. The exception to the notice requirement does not apply where the parties' evidentiary submissions were not so extensive as to demonstrate that they were laying bare their proof.

KEY QUOTATIONS

“CPLR 3211 (c) requires that if a court intends to treat a CPLR 3211 motion as one for summary judgment under CPLR 3212, it must give the parties notice of its intention to do so” (834)

FACTUAL BACKGROUND

Plaintiffs brought an action, among other claims, to recover damages for nuisance and trespass. Defendants moved to dismiss under CPLR 3211(a), and the Supreme Court converted the motion into one for summary judgment based on the parties' submissions without first notifying them of its intention to do so.

PROCEDURAL HISTORY

In an action involving claims for nuisance and trespass, defendants moved under CPLR 3211(a) to dismiss the complaint. The Supreme Court, Orange County, converted the motion into one for summary judgment and dismissed the complaint. The Appellate Division reversed the appealed portion of the order and denied defendants' motion.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The order was reversed insofar as appealed from, and defendants' motion was denied.

CASES CITED

- Hendrickson v. Philbor Motors, Inc., 102 A.D.3d 251, 258 (2012)
- Mihlovan v. Grozavu, 72 N.Y.2d 506, 508 (1988)
- Deutsche Bank Nat'l Trust Co. v. Kuldip, 108 A.D.3d 686, 687 (2013)
- One Monroe, LLC v. City of New York, 89 A.D.3d 812, 813 (2011)

- Harris v. Hallberg, 36 A.D.3d 857, 858 (2007)
- Wesolowski v. St. Francis Hosp., 108 A.D.3d 525, 526 (2013)
- Sunset Cafe, Inc. v. Mett's Surf & Sports Corp., 103 A.D.3d 707, 708 (2013)
- Warren v. Mickle, 40 A.D.3d 974, 975 (2007)
- Hoeffner v. John F. Frank, Inc., 302 A.D.2d 428, 430 (2003)

OPINION

PER CURIAM.

In an action, inter alia, to recover damages for nuisance and trespass, the plaintiffs appeal from so much of an order of the Supreme Court, Orange County (Onofry, J.), dated September 14, 2012, as converted the defendants' motion pursuant to CPLR 3211 (a) to dismiss the complaint into one for summary judgment dismissing the complaint, and thereupon granted the motion.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the defendants' motion is denied. The Supreme Court erred when it converted the defendants' motion pursuant to CPLR 3211 (a) to dismiss the complaint into one for summary judgment dismissing the complaint, and thereupon granted the motion. "CPLR 3211 (c) requires that if a court intends to treat a CPLR 3211 motion as one for summary judgment under CPLR 3212, it must give the parties notice of its intention to do so" (Hendrickson v Philbor Motors, Inc., 102 AD3d 251, 258 [2012]; see Mihlovan v Grozavu, 72 NY2d 506, 508 [1988]; Deutsche Bank Natl.

Trust Co. v Kuldip, 108 AD3d 686, 687 [2013]). While the defendants contend that such notice was not required because the parties unequivocally charted a summary judgment course on the motion (see generally One Monroe, LLC v City of New York, 89 AD3d 812, 813 [2011]; Harris v Hallberg, 36 AD3d 857, 858 [2007]), that exception to the notice requirement is not applicable here because the parties' evidentiary submissions were not so extensive as to indicate that they were laying bare their proof (see generally Wesolowski v St. Francis Hosp., 108 AD3d 525, 526 [2013]; Sunset Cafe, Inc. v Mett's Surf & Sports Corp., 103 AD3d 707, 708 [2013]; Warren v Mickle, 40 AD3d 974, 975 [2007]), and the plaintiffs may have made different offers of proof to defeat a summary judgment motion if they had received such notice (see Hoeffner v John F. Frank, Inc., 302 AD2d 428, 430 [2003]).

The defendants' remaining contentions are without merit. Rivera, J.E, Balkin, Hinds-Radix and Maltese, JJ., concur.