

## CPLR 3012(b): Action Dismissed for Failure to Serve a Complaint

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ment, guided by CPA precedent, held void a summons and complaint naming only a deceased person as plaintiff. Formerly, the name of the executor or administrator was required to be included.<sup>77</sup> The rationale behind the rule was that since a deceased person could not institute an action, the court, in such a situation, obtained no jurisdiction over the defendant. The Court of Appeals, however, unanimously reversed this decision,<sup>78</sup> holding that such a defect constituted nothing more than an irregularity, subject to correction under CPLR 2001.<sup>79</sup>

CPLR 2001 (formerly CPA § 105) is the general provision authorizing the courts to ignore or correct non-prejudicial defects or irregularities in procedure. There are, in addition, many specific remedial provisions in the CPLR designed to correct particular defects.<sup>80</sup> These provisions abrogate the strict approach to procedural irregularities which dictated the decision of the appellate division in the *Rosenberg* case.

Although correction of a defect or irregularity may not be expressly provided for, practitioners should urge the courts to analyze defects in light of the liberal policy of the CPLR. The practitioner should demonstrate to the court, by analogy, that the defect in question comes within the purview of the CPLR's general corrective provision.

#### ARTICLE 30—REMEDIES AND PLEADING

*CPLR 3012(b): Action dismissed for failure to serve a complaint.*

In *Friedman v. Guthrie*,<sup>81</sup> the action was commenced in February, 1963, two days before it would have been barred by the statute of limitations. The defendant appeared promptly but was not served with a complaint. Approximately one year thereafter, defendant made a motion to dismiss for failure to prosecute which

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limitations. In *Grippio*, had the summons been declared a nullity the statute of limitations would have prevented the executor from commencing a subsequent action.

<sup>77</sup> *Lawson v. L. R. Mack, Inc.*, 246 App. Div. 622, 284 N.Y. Supp. 381 (2d Dep't 1935).

<sup>78</sup> *Rosenberg v. Caban*, 16 N.Y.2d 905, 212 N.E.2d 151, 264 N.Y.S.2d 697 (1965).

<sup>79</sup> CPLR 2001 permits the correction of non-prejudicial irregularities at any stage of the proceeding, upon such terms as may be just.

<sup>80</sup> See, e.g., CPLR 103(c)—no dismissal where civil proceeding brought in improper form; CPLR 203(e)—saves action from bar of statute of limitations when mistake in pleading requires claim to be asserted in an amended pleading; CPLR 305(c)—permits correction of non-prejudicial defects in process of proof of service; CPLR 325(a) and (b)—provides for transfer of action when commenced in wrong court.

<sup>81</sup> 24 App. Div. 2d 966, 265 N.Y.S.2d 315 (1st Dep't 1965).

was granted with leave to plaintiff to move to vacate upon a proper affidavit of merits. A subsequent motion by plaintiff to vacate was granted. On appeal, the appellate division, first department, held that plaintiff's motion should not have been granted since she *both* failed to adequately explain the failure to serve the complaint and neglected to present an "adequate" affidavit demonstrating the merits of the action.

CPLR 3216 provides for dismissal when a plaintiff unreasonably neglects to proceed with the prosecution of an action. CPLR 3012(b)<sup>82</sup> provides for dismissal where a plaintiff does not serve a complaint within twenty days from demand. Under the predecessor of CPLR 3012(b), dismissals were granted where there was neither an adequate excuse for the delay nor a showing of the claim's merit.<sup>83</sup>

Some courts have been inclined to treat a prolonged failure to serve a complaint under CPLR 3012(b) as a failure to prosecute.<sup>84</sup> In such cases, the courts have not as a rule been concerned with the technical "labels" to be placed upon the motion, but have dismissed on either or both grounds. Since the service of a complaint is an integral step in the prosecution of a plaintiff's cause of action, it seems logical that a failure to pursue this step should result in a finding of a neglect to prosecute, especially if the delay is lengthy and unjustified.

In *Keogh v. New York Post Corp.*,<sup>85</sup> the appellate division, first department, held that where the plaintiff delayed in serving the complaint for fourteen months, a dismissal was warranted in the absence of an adequate affidavit of merit. In *Keogh*, the court did not seem disturbed by the fact that it held a failure to serve a complaint under CPLR 3012(b) to be a valid ground for a CPLR 3216 motion.

It does not appear to be material how the defendant labels his motion to dismiss, and even if he labels it as a motion to

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<sup>82</sup> CPLR 3012(b) provides in part that: "If the complaint is not served with the summons, the defendant may serve a written demand for the complaint. If the complaint is not served within twenty days after service of the demand, the court upon motion may dismiss the action. . . ."

<sup>83</sup> CPA § 257; see *The Biannual Survey of New York Practice*, 39 ST. JOHN'S L. REV. 406, 441 (1965).

<sup>84</sup> *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 303, 325-27 (1966), contains a discussion of the interrelationship between the provisions of CPLR 3012(b) and CPLR 3216, and, in turn, their relationship to the statute of limitations' extension under CPLR 205(a).

<sup>85</sup> 22 App. Div. 2d 659, 253 N.Y.S.2d 140 (1st Dep't 1964). Again, in *Flannery v. Stewart*, 22 App. Div. 2d 786, 254 N.Y.S.2d 130 (1st Dep't 1964), the first department held that where no complaint had been served for at least eight months, and where the excuse tendered was inadequate and there had been no adequate demonstration of merit, a dismissal was warranted. See also *Sortino v. Fisher*, 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963); 7B MCKINNEY'S CPLR 3216, *supp. commentary* 169 (1964).

dismiss for neglect to prosecute under CPLR 3216, he would not have to adhere to the forty-five-day demand requirement under that section as a condition for the motion.<sup>86</sup> A plaintiff is, therefore, well advised to adhere to the defendant's demand for the complaint. Failure to do so will result in a dismissal of his action unless the court is satisfied with his excuse and finds sufficient merit in his cause of action to disregard the delay.

*CPLR 3016(c): Bill of particulars not a satisfactory alternative for insufficient complaint.*

In *Pustilnik v. Pustilnik*,<sup>87</sup> the appellate division, second department, held that a complaint in a separation action which failed to specify the time and place of each act complained of was insufficient pursuant to CPLR 3016(c), and, that such information contained in a bill of particulars would not be a satisfactory alternative.

It is a rule of construction that one must view specific statutory enactments in context with relevant general provisions. The fundamental pleading requirement of the CPLR is contained in section 3013 which provides that pleadings are sufficient if notice of the elements of the cause of action or defense is conveyed to the adversary. In *Foley v. D'Agostino*,<sup>88</sup> judicial confirmation was given to the revisers' intent to remove the unsubstantial "technicalities" from the pleading provisions. CPLR 3016(c),<sup>89</sup> however, requires that, in a separation action, the time and place of each act complained of be specifically stated. The problem is, therefore, whether a failure to comply with the requirements of CPLR 3016(c) should give rise to a dispositive motion under the CPLR.

It is difficult to give a definitive answer to this problem, but some case law has already indicated a judicial tendency in this area.<sup>90</sup> In *Crossett v. Crossett*,<sup>91</sup> a separation action, the court held that the plaintiff does not cure the omissions in his pleading by stating them in affidavits opposing a motion to dismiss the complaint. The court cited *Kurcz v. Kurcz*,<sup>92</sup> which held that a bill of particulars

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<sup>86</sup> 7B MCKINNEY'S CPLR 3012, supp. commentary 48, 49-51 (1965); see also 7B MCKINNEY'S CPLR 3216, supp. commentary 160, 169 (1965).

<sup>87</sup> 24 App. Div. 2d 868, 264 N.Y.S.2d 400 (2d Dep't 1965).

<sup>88</sup> 21 App. Div. 2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964).

<sup>89</sup> Subdivision (c) of CPLR 3016 is substantially the same as its predecessor RCP 280.

<sup>90</sup> See, e.g., *St. Germain v. St. Germain* (Sup. Ct. Queens County), 150 N.Y.L.J., Nov. 15, 1963, p. 17, col. 2. The court held therein that the failure to carry out the requirements of CPLR 3016(c) constituted a defect which made the pleadings insufficient and subjected them to a motion to dismiss under CPLR 3211(a) (7).

<sup>91</sup> 150 N.Y.L.J., Nov. 21, 1963, p. 16, col. 1 (Sup. Ct. Nassau County).

<sup>92</sup> 13 App. Div. 2d 954, 216 N.Y.S.2d 736 (1st Dep't 1961). The court in the instant case also cited *Kurcz*. See also *Rizzi v. Rizzi*, 279 App. Div. 676, 108 N.Y.S.2d 324 (2d Dep't 1951).