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CPLR 3215(e): Predemand Complaint Viewed As Sufficient to Satisfy Requirements for Entry of Default Judgment

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Accordingly, the state court had to confront the issue of whether discovery of other claims comes within the scope of 3101(f).

Nevertheless, in view of the statute's purpose to promote realistic negotiations, the *Folgate* court appears to have reached the proper decision. Narrowly reading CPLR 3101(f) to restrict discovery to information on the face of the insurance policy[44] would clearly emasculate the statute in situations where information not disclosed by the policy itself affects the amount of money actually available to the plaintiff should he be awarded judgment. On the other hand, the liberal construction given in *Folgate* ensures CPLR 3101(f)'s viability as a settlement-inducing statute.[45]

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3215(e): Predemand complaint viewed as sufficient to satisfy requirements for entry of default judgment.

Service of a summons alone, unaccompanied by either notice or a complaint, commences a civil action[46] and necessitates a defendant's appearance[47] on pain of default.[48] Before a judgment of default can be entered, however, a plaintiff is required under CPLR 3215(e) to file proof that either a summons and complaint or a summons and notice[49] have been duly served upon the defendant. Consequently, when failure to appear follows service of a bare summons, entry of a default judgment is precluded[50] unless

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an essential issue in the case, *viz* insurance coverage. *See* note 25 *supra*. What funds are available under a malpractice insurance policy is obviously irrelevant, however, to the issue of whether a doctor has committed malpractice.

[44] The defendant in *Folgate* argued that since CPLR 3101(f) is in derogation of the common law, it must be strictly construed. — Misc. 2d at —, 381 N.Y.S.2d at 385. Justice Lazer properly ignored this point, however, since CPLR 104 impliedly makes inapplicable the rule calling for strict construction of statutes changing the common law. *See* FOURTH REP. 46.

[45] *Cf.* Monell v. International Business Machs. Corp., 85 Misc. 2d 323, 324, 378 N.Y.S.2d 615, 617 (Sup. Ct. Orange County 1976).

[46] CPLR 304.

[47] A defendant who has been served with a summons by personal delivery within the State must appear within 20 days of such service. Service of the summons by any other method as well as service without the State require the defendant's appearance within 30 days after service is complete. CPLR 320(a); 1 WK&M ¶ 320.02.

[48] A default occurs when a party fails to appear, plead, or timely carry out other procedural steps in the litigation. CPLR 3215(a); 8 CARMODY-WAIT 2d § 63:64, at 717 (1966); H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 321 (4th ed. 1973).

[49] Before a default judgment can be entered against a party, he must be apprised of the subject matter of the action and the relief sought. Accordingly, if a plaintiff wishes to preserve his right to judgment in the event of default, the summons must be accompanied by a copy of the complaint or a notice stating the object of the action and the monetary amount for which judgment will be taken in the event of default. *See* CPLR 305(b), 3215(e).

[50] Several commentators have expressed the view that the legislature did not intend the service of a bare summons to preclude entry of a default judgment since such a harsh result

the plaintiff is permitted to serve the required pleading subsequent to the default. Absent a defendant's demand for a complaint, such belated service is not expressly authorized by the CPLR.[51] In fact, pre-CPLR case law regarded service of a complaint prior to demand as a nullity.[52] Nevertheless, in *Keyes v. McLaughlin*,[53] the Appellate Division, Third Department, implicitly recognized pre-demand service of a complaint as sufficient to satisfy the requirements for entry of a default judgment.[54]

The plaintiff in *Keyes* instituted a personal injury action by service of a bare summons. No further action was taken by either party until 5 years later when plaintiff prepared to seek a default judgment by sending a complaint to the defendant's insurance carrier. The defendant moved to dismiss the complaint for failure to proceed to enter a default judgment within the 1-year period prescribed by CPLR 3215(c).[55] The court granted the motion, rejecting the plaintiff's contention that "sufficient cause" to justify the inordinate delay had been shown.[56] Of greater significance,

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is inconsistent with the legislative decision to make service of the complaint or notice with the summons optional. *See, e.g.*, H. PETERFREUND & J. MCLAUGHLIN, NEW YORK PRACTICE 1301 (3d ed. 1973); 4 WK&M ¶ 3215.19; Homburger & Laufer, *Appearance and Jurisdictional Motions in New York*, 14 BUFFALO L. REV. 374, 397 (1965) [hereinafter cited as Homburger & Laufer]. The history of this problem can be traced to an early committee proposal that all but matrimonial actions be commenced by simultaneous service of a summons and complaint. FIRST REP. 60. Accordingly, the original draft of CPLR 3215(e) required proof of service of both summons and complaint prior to entry of default judgment. Simultaneous service of summons and complaint, however, was made optional under the CPLR. The legislature then sought to conform the proof requirements of 3215(e) by adding the provision for notice to be served in place of the complaint. *See* 4 WK&M ¶ 3215.19. Absolute conformity, however, was never achieved. While it is possible to commence an action by service of a bare summons, entry of default judgment under CPLR 3215(e) still necessitates proof of additional service of a complaint or notice.

[51] *See* 7B MCKINNEY'S CPLR 3012, commentary at 583 (1974). CPLR 3012(b) provides that "[i]f the complaint is not served with the summons, the defendant may serve a written demand for the complaint."

[52] *See* notes 58-59 and accompanying text *infra*.

[53] 49 App. Div. 2d 974, 373 N.Y.S.2d 891 (3d Dep't 1975) (mem.).

[54] *Id.* at 975, 373 N.Y.S.2d at 893.

[55] *Id.* at 974, 373 N.Y.S.2d at 892. CPLR 3215(c) states:

> If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed.

[56] The court held that plaintiff's infancy at the time of the accident and his reliance upon counsel's promises of diligent prosecution did not constitute "sufficient cause" within the meaning of CPLR 3215(c). 49 App. Div. 2d at 974, 373 N.Y.S.2d at 892-93.

The public policy consideration underlying CPLR 3215(c) is "[t]o prevent plaintiffs from unreasonably delaying the termination of an action." Employers Liab. Assurance Corp. v. Zolfo Merchandising, Inc., 62 Misc. 2d 872, 873, 311 N.Y.S.2d 471, 472 (N.Y.C. Civ. Ct. N.Y. County 1970), *citing* 13 REP. N.Y. JUD. COUNCIL 216 (1947). In general, the New York courts appear to have construed the "sufficient cause" language of 3215(c) to require fairly compelling circumstances. *See* Bubin v. County of Nassau, 31 App. Div. 2d 763, 297 N.Y.S.2d 628 (2d Dep't 1969) (mem.) (successive misfortunes suffered by attorney not

however, was the language of the court implying that service of a complaint within the 1-year limitation period satisfies the requirements of CPLR 3215(e) and permits the plaintiff to obtain a default judgment notwithstanding the defendant's failure to serve a written demand.[57]

The position of the *Keyes* court conflicts with that taken by the First Department in the 1928 case of *Gluckselig v. H. Michaelyan, Inc.*[58] The *Gluckselig* court affirmed the granting of the defendant's motion to vacate a judgment by default on the ground that service of a complaint before appearance and demand was invalid.[59] The court's holding reflected the fact that pre-CPLR practice rules required the recipient of a bare summons to demand a copy of the complaint.[60] Significantly, however, no such requirement is imposed by the CPLR.[61] This omission together with the *Gluckselig*

sufficient cause); Herzbrun v. Levine, 23 App. Div. 2d 744, 259 N.Y.S.2d 237 (1st Dep't 1965) (mem.) (loss of contact with attorney not sufficient cause); Milligan v. Hycel Realty Corp., 20 App. Div. 2d 527, 245 N.Y.S.2d 210 (1st Dep't 1963) (mem.), *appeal dismissed mem.*, 14 N.Y.2d 581, 198 N.E.2d 256, 248 N.Y.S.2d 877 (1964) (secretarial error not sufficient cause). In Abrams v. Resort Constr. Corp., 38 App. Div. 2d 735, 329 N.Y.S.2d 335 (2d Dep't) (mem.), *appeal dismissed mem. sub nom.* Abrams v. Seaboard Pools, Inc., 30 N.Y.2d 674, 282 N.E.2d 890, 332 N.Y.S.2d 106 (1972), however, the court found that sufficient cause had been established where the plaintiff was an unskilled California laborer who could not afford trips to New York to prosecute his cause of action. The *Abrams* court was favorably impressed by the fact that the defendants were periodically informed of the progress of the litigation. 38 App. Div. 2d at 736, 329 N.Y.S.2d at 336-37. The requirements for excusable delay under CPLR 3215(c) have been likened to the conditions that will defeat a motion to dismiss for failure to prosecute under CPLR 3216. *See* Milligan v. Hycel Realty Corp., 20 App. Div. 2d 527, 245 N.Y.S.2d 210 (1st Dep't 1963) (mem.), *appeal dismissed mem.*, 14 N.Y.2d 581, 198 N.E.2d 256, 248 N.Y.S.2d 877 (1964).

[57] *See* 49 App. Div. 2d at 975, 373 N.Y.S.2d at 893.

[58] 225 App. Div. 666, 231 N.Y.S. 757 (1st Dep't 1928).

[59] *Id., aff'g mem.* 132 Misc. 783, 230 N.Y.S. 593 (Sup. Ct. N.Y. County 1928). The *Gluckselig* plaintiff had instituted an action by service of a bare summons. Five days later a complaint was left at the defendant's place of business; the defendant had neither filed a notice of appearance nor made a demand for a complaint. On the 20th day after service of summons, the defendant appeared by attorney and made the appropriate demand. Ten days later, the defendant attempted to file an answer. This was rejected, however, and a default judgment was entered. *See* 132 Misc. at 783-84, 230 N.Y.S. at 593-94. The supreme court granted the motion to vacate judgment, holding that the complaint served before appearance and demand was a nullity and thus ineffective to require an answer. *Id.* at 784-85, 230 N.Y.S. at 595. The Appellate Division, First Department, affirmed this decision in a memorandum opinion. Similar reasoning appears to have been employed by the courts in Crouse v. Reichert, 15 N.Y.S. 369 (Sup. Ct. 4th Dep't 1891), and Everett v. Everett, 150 Misc. 609, 269 N.Y.S. 833 (Sup. Ct. N.Y. County 1933).

[60] CPA 257 required the defendant to demand a copy of the complaint within 20 days after service of summons.

[61] CPLR 3012(b), *quoted in* note 51 *supra*, provides that the defendant *may* demand a copy of the complaint. The 20-day time limitation imposed by its counterpart under the CPA, *see* note 60 *supra*, was deleted when the decision was made to allow for optional service of the complaint at the commencement of an action. 3 WK&M ¶ 3012.03. The only explanation for this deletion was that a time limit was "unnecessary [since] time to appear is covered by . . . [CPLR 320(a), the appearance statute]." FIFTH REP. A-418. This rationale is confusing, as an appearance and a demand for a complaint are not identical. 3 WK&M

rule enables the astute defendant who has been served with only a bare summons to completely frustrate entry of default judgment. The defendant need only forego his option to demand to preclude service of the requisite complaint.[62] Upon the expiration of the statutory 1-year limitation period, the defaulting party can move to dismiss the complaint as abandoned.[63] Statewide legislative or judicial adoption of the *Keyes* rationale would uniformly rectify this anomalous result.

The *Keyes* position can also be extended to remedy a similar problem which may arise when the defendant elects not to default. For example, a defendant served with a bare summons may appear in the action by the mere filing of a notice of appearance. If he takes no further action, *i.e.* serves no written demand for a complaint, under the *Gluckselig* rule which invalidates service of a complaint without demand, the plaintiff is effectively barred from continuing to prosecute his action. The defendant cannot be held in default, yet he has successfully obstructed the progress of the litigation.[64] Application of the *Keyes* principle to this situation would empower the plaintiff to complete service and continue his lawsuit.

The import of the *Keyes* opinion is clear. Should its rationale be sanctioned by the Court of Appeals or the legislature, a plaintiff who institutes an action by service of a summons alone will no longer have to fear the possible loss of his cause of action through the defendant's failure to demand a complaint. The plaintiff need only be warned that if the defendant fails to appear in the action, the period of limitations for entry of default judgment requires service of the complaint within 1 year of the failure to appear.[65] Until such time as it becomes clear that predemand service will be uniformly recognized, however, prudent practice will include initial

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¶ 3012.14. The fact that the defendant is required to appear within a specified time does not create a similar duty to timely serve a demand for a complaint.

[62] For a discussion of the anomalous result produced when the *Gluckselig* rule is applied to cases governed by the CPLR, see Homburger & Laufer, *supra* note 50, at 397-99. Prior to the *Keyes* decision, Professor David D. Siegel surmised that under the CPLR service of a complaint without demand might be effective if the complaint is served in the same manner as the summons. *See* 7B McKinney's CPLR 3215, commentary at 872-73 (1970).

[63] *See* note 55 *supra*.

[64] Several commentators have expressed the opinion, presumably shared by the *Keyes* court, that the *Gluckselig* case does not represent the law under the CPLR. *See, e.g.*, 3 WK&M ¶ 3012.03; Homburger & Laufer, *supra* note 50, at 398. This position is based on the theory that *Gluckselig* should have no bearing on post-CPLR cases since it was based on the CPA requirement that the defendant demand a copy of the complaint. *See* notes 60-61 and accompanying text *supra*.

[65] *See* CPLR 3215(c), *quoted in* note 55 *supra*.

service of either a summons and a complaint or a summons with notice.[66]

COURT OF APPEALS RULES OF PRACTICE

22 NYCRR 500.6(a): Dismissal of appeal for want of prosecution precludes subsequent appeal in a civil action.

Rule 500.6(a) of the New York Court of Appeals Rules of Practice requires that an appeal be argued or submitted within 9 months after leave to appeal is granted by the lower court.[67] Noncompliance with this provision results in a summary dismissal for want of prosecution.[68] Recently, in *Bray v. Cox*,[69] the Court of Appeals held that such a dismissal in a civil case is an adjudication on the merits which bars any subsequent appeal of the same issues.[70]

The *Bray* plaintiff was a passenger in a car driven by defendant's decedent while the two were returning from a trip to Buffalo, New York. The vehicle collided with a utility pole, killing the driver and injuring the plaintiff. Both parties were residents of Ontario, Canada, and the car was registered and insured there. The plaintiff brought a negligence action against the defendant's estate in the Supreme Court, Erie County, to recover for personal injuries. The court ruled that the Ontario guest statute, which precluded recovery,[71] was applicable and dismissed the complaint. The appellate division reversed, finding error on the conflict of laws issue.[72] The defendant obtained leave to appeal to the Court of Appeals, but his failure to file and serve the necessary papers for more than a year resulted in dismissal of the appeal pursuant to

[66] *See* 7B MCKINNEY'S CPLR 3012, commentary at 582 (1974).

[67] 22 NYCRR 500.6(a) provides:

> An appeal must be argued or submitted within nine months after the appeal is taken. If it is not so argued or submitted a summary order of dismissal shall be entered on the minutes by the clerk without regard to whether or not the record and briefs have been filed. Notice of entry thereof shall be given by mail to attorneys of record in the cause.

[68] A motion to dismiss for want of prosecution, however, will be denied upon a showing of an adequate reason for the delay. 10 CARMODY-WAIT 2d § 70:260, at 530 (1966); Peterfreund, *Civil Practice*, 1959 *Survey of New York Law*, 34 N.Y.U.L. REV. 1563, 1581 (1959).

[69] 38 N.Y.2d 350, 342 N.E.2d 575, 379 N.Y.S.2d 803 (1976) (per curiam).

[70] *Id.* at 353, 342 N.E.2d at 576, 379 N.Y.S.2d at 805.

[71] ONT. REV. STAT. c. 202, § 132(3) (1970) provides:

> [T]he owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle, except where such loss or damage was caused or contributed to by the gross negligence of the driver of the motor vehicle.

[72] 39 App. Div. 2d 299, 333 N.Y.S.2d 783 (4th Dep't 1972).