St. John's Law Review

Volume 47
Number 3 *Volume 47, March 1973, Number 3*

Article 44

CPLR 3215(a): Court Sua Sponte Dismisses Complaint for Improper Service in Response to Plaintiff's Motion for Default Judgment

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also rejected the plaintiff's contention that the principle of collateral estoppel cannot be applied where the prior proceeding was a criminal prosecution, noting that mutuality of estoppel is no longer required[87] and finding it "very significant"[88] that in *Schindler v. Royal Insurance Co.*,[89] the Court of Appeals stated that in the absence of that doctrine, a prior criminal determination could be the basis of collateral estoppel in a subsequent civil action.

The dissent, which contested the majority's finding that the issues in this proceeding had been previously adjudicated, argued that the essence of the plaintiff's malpractice "seems to be [that it was] bad legal advice to take a plea of guilty. . . . [P]laintiff might, given the opportunity, be able to prove that he had available a good defense to the indictment."[90]

It is laudable that *Vavolizza* eliminated the anachronistic distinction[91] between a criminal determination and a civil proceeding made in prior New York cases in applying the doctrine of collateral estoppel. In lieu of granting the defendant's motion to dismiss, however, it would have been preferable for the court to admit the denial of the plaintiff's motion to withdraw his plea in order to establish that the plea had not been coerced and then to permit the plaintiff to litigate the broader question of the defendant's alleged malpractice on grounds other than coercion.

CPLR 3215(a): Court sua sponte dismisses complaint for improper service in response to plaintiff's motion for default judgment.

CPLR 3215(c) provides for dismissal of a complaint as abandoned, in the discretion of the court, where the plaintiff has failed to proceed to enter a default judgment for more than one year after default.[92] In such a case, *Career Placements Inc. v. Sibilia*,[93] the Nassau County District Court held that the summons was not properly served where the process server's affidavit failed to state facts constituting diligent effort to effect personal service[94] before resort was had to substituted

87 *Id.* at 449, 336 N.Y.S.2d at 752.

88 *Id.* at 448, 336 N.Y.S.2d at 751.

89 258 N.Y. 310, 179 N.E. 711 (1932).

90 39 App. Div. 2d at 449, 336 N.Y.S.2d at 752.

91 In federal cases, no such distinction is made. *See, e.g.*, Yates v. United States, 354 U.S. 298 (1957) (dictum); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951); United States v. Oppenheimer, 242 U.S. 85 (1916); United States v. Fabric Garment Co., 366 F.2d 530 (2d Cir. 1966); United States v. Guzzone, 273 F.2d 121 (2d Cir. 1959).

92 7B McKINNEY'S CPLR 3215, commentary at 870-71 (1970); 4 WK&M ¶¶ 3215.13, 3215.14, 3215.15.

93 71 Misc. 2d 345, 336 N.Y.S.2d 83 (Dist. Ct. Nassau County 1972).

94 *Id.*, 336 N.Y.S.2d at 84, *citing* Blatz v. Benschine, 53 Misc. 2d 352, 278 N.Y.S.2d 533 (Sup. Ct. Queens County 1967), *discussed in The Quarterly Survey*, 42 ST. JOHN'S L. REV.

service under CPLR 308(4).[95] In vacating the summons and dismissing the complaint sua sponte in response to the plaintiff's motion for a default judgment, the court noted the growing concern with "sewer service"[96] and cautioned that "[a]ffidavits of [this] kind, totally devoid of facts to show even a semblance of compliance with the statute are not 'requisite proof' "[97] for entry of a default judgment by the clerk under CPLR 3215(a).

This laudable decision serves notice to the bar that there must be exact compliance with the personal service prerequisites of CPLR 308(4).[98]

CPLR 3216: Claim that failure to timely file note of issue was result of attorney's poor health, without medical evidence, will not prevent dismissal for want of prosecution.

CPLR 3216 authorizes a court to dismiss an action for want of prosecution on its own initiative or on motion.[99] Issue must have been joined, one year must pass after such joinder, and a written demand must be served on the plaintiff to file a note of issue within 45 days. If a plaintiff fails to file a note of issue after demand, the court may dismiss the action unless he shows a justifiable excuse for the delay and a meritorious cause of action.

In *Prezio v. Milanese*,[100] the defendant moved to dismiss a personal injury action for lack of prosecution when no note of issue was

283, 302 (1967); Goldner v. Reiss, 64 Misc. 2d 785, 315 N.Y.S.2d 644 (N.Y.C. Civ. Ct. N.Y. County 1970). The affidavit listed four dates on which service of the summons was attempted, but set forth "no hour, no inquiry or search for the defendant."

95 *See* 7B McKINNEY's CPLR 308, commentary at 208 (1972); 1 WK&M ¶¶ 308.13, 308.13a, 308.14. Prior to resorting to such service, a diligent effort must be made to serve the party by either personal service or delivery of the summons to a person of suitable age and discretion at the actual place of business, dwelling place, or abode of the party and mailing of a copy to his last known residence.

96 71 Misc. 2d at 346, 336 N.Y.S.2d at 85, *citing* All-State Credit Corp. v. Riess, 61 Misc. 2d 677, 306 N.Y.S.2d 596 (App. T. 2d Dep't 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 145, 165 (1970) (affirming the action of the district court which sua sponte vacated the judgments and dismissed the complaints against 669 defendants for failure to allege a basis for personal jurisdiction in the pleadings).

97 71 Misc. 2d at 346, 336 N.Y.S.2d at 85.

98 *See* Jones v. King, 24 App. Div. 2d 430, 260 N.Y.S.2d 666 (1st Dep't 1965) (mem.); Polansky v. Paugh, 23 App. Div. 2d 643, 256 N.Y.S.2d 961 (1st Dep't 1965) (mem.); 7B McKINNEY's CPLR 308, commentary at 208 (1972).

99 *See* 7B McKINNEY's CPLR 3216, supp. commentary at 56-57 (1970). *See generally* H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 312-14 (3d ed. 1970). In order to protect the client's interests, the courts have been imposing substantial personal costs upon delinquent attorneys. Moran v. Rynar, 39 App. Div. 2d 718, 332 N.Y.S.2d 138 (2d Dep't 1972) (mem.).

100 40 App. Div. 2d 910, 337 N.Y.S.2d 842 (3d Dep't 1972) (mem.).