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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

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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.).

filed by the plaintiff after demand. The plaintiff's excuse for the delay was his attorney's poor health. Because the plaintiff presented no medical evidence and because there had been an associate counsel, the Appellate Division, Third Department, unanimously held that the excuse was unsatisfactory.[101] The court also rejected the contention that the county court's failure to establish a commencement date for its civil term prevented him from timely filing a note of issue.[102]

Want of prosecution dismissals continue[103] although (1) a timely note of issue will excuse all prior delay in the prosecution of an action, and (2) an attorney's neglect to prosecute can be grounds for a malpractice suit or disbarment.[104]

ARTICLE 41 — TRIAL BY A JURY

CPLR 41: Trial de novo assured in compulsory arbitration project.

Under the Rules of the Administrative Board of the Judicial Conference of the State of New York,[105] a compulsory arbitration program applicable to certain money actions[106] has been in successful operation in the Rochester City Court since September 1, 1970.[107] Since the program initially deprives parties of their right to a jury trial,[108] its enabling legislation requires that such rules promulgated by the Administrative Board "must permit a jury trial de novo upon demand by any party following the determination of the arbitrators. . . ."[109] Accordingly, the new rules provide for a trial de novo

101 *Id.*, 337 N.Y.S.2d at 843. The plaintiff also failed to submit a verified complaint or an acceptable affidavit of merits.

102 *Id.* at 911, 337 N.Y.S.2d at 844. Cf. 7B McKINNEY'S CPLR 3216, commentary at 930 (1970):

> If the plaintiff has proceeded with dispatch, after receiving the 45-day demand, to do everything possible to file the note of issue, but he has met local rules which prevent him from doing so despite his diligence, he should be held to have satisfied CPLR 3216.

103 *See* Jacobs v. Chemical Bank of New York Trust Co., 38 App. Div. 2d 701, 328 N.Y.S.2d 347 (1st Dep't 1972) (mem.); Chodikoff v. Troy Estates, Inc., 37 App. Div. 2d 670, 322 N.Y.S.2d 898 (3d Dep't 1971) (mem.); Navillus, Inc. v. Guggino, 34 App. Div. 2d 648, 310 N.Y.S.2d 13 (2d Dep't 1970) (mem.).

104 7B McKINNEY'S CPLR 3216, commentary at 918 (1970).

105 22 NYCRR 28.1-.15.

106 The program calls for all actions for a sum of $4,000 or less, except those commenced in the small claims part, to be decided by a panel of three arbitrators.

107 The program has been extended to the Civil Court of Bronx County and to the Binghamton City Court.

108 CPLR 4101(1) provides for jury trial of issues of fact in actions for a sum of money only. CPLR 4102(a) permits "any party" to demand a jury trial "of any issue of fact triable of right by a jury." These provisions implement the New York Constitution, article I, section 2, which calls for "[t]rial by jury in all cases in which it has heretofore been guaranteed by constitutional provision. . . ."

109 N.Y. JUDICIARY LAW § 213(8) (McKinney Supp. 1972).