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CPLR Art. 41: Trial De Novo Assured in Compulsory Arbitration Project

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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).

when a litigant files an affidavit setting forth "grounds" therefor within twenty days after arbitration.[110]

In *Bayer v. Ras*,[111] the Rochester City Court granted the plaintiff's motion to dismiss the defendant's application for a trial de novo after a hearing before an arbitration panel had resulted in an award for the plaintiff. The defendant alleged that there was a question of fact to be decided by a jury — the evidence of an alleged contract of purchase by the defendant. The Monroe County Court reinstated the application, holding that the "simple affidavit required" should be treated not "as an application addressed to the discretion of the de novo court, but . . . rather in the nature of a note of issue, a procedural mechanism only."[112]

The *Bayer* decision was a necessary step to insure that no constitutional deficiency or litigant dissatisfaction jeopardizes the compulsory arbitration program's tremendous potential for reducing the courts' civil case load.[113]

ARTICLE 50 — JUDGMENTS GENERALLY

CPLR 5015: Court has inherent discretionary power to relieve party from judgment after lapse of statutory period.

CPLR 5015(a) allows a defendant to open an excusable default "within one year after service of a copy of the judgment or order with written notice of its entry on the moving party," or, if he has entered the judgment or order, within one year after entry. This provision however, does not preempt a court's inherent common-law right to set aside its own judgments at any time in the interest of justice.[114] Recently, in

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110 22 NYCRR 28.12.

111 71 Misc. 2d 464, 336 N.Y.S.2d 261 (Monroe County Ct. 1972).

112 *Id.* at 468, 336 N.Y.S.2d at 265. A prior rule required an affidavit setting forth "substantial grounds" for a trial de novo.

113 In Capital Traction Co. v. Hof, 174 U.S. 1, 23 (1899), the United States Supreme Court held that compulsory arbitration does not violate the seventh amendment as long as an appeal from the decision is allowed, stating:

> [The Constitution] does not prescribe at what stage of an action a trial by jury must, if demanded, be had, or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it.

Pennsylvania has had a program similar to New York's in operation since 1952. Its constitutionality was upheld in *In re* Smith, 381 Pa. 223, 112 A.2d 625, *appeal dismissed sub. nom.* Smith v. Wissler, 350 U.S. 858 (1955).

114 The Advisory Committee on Practice and Procedure has stated that "[t]he court's inherent power to relieve a party from the operation of a judgment in the interest of substantial justice is not limited in any way by the proposed rules [*i.e.*, the CPLR]." THIRD REP. 204.