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Article 25

CPLR 3216: Service of Forty-Five Day Demand by Ordinary Mail Permitted Where No Prejudice Is Shown

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these agreements.[114] Unfortunately, however, the refusal to extend the benefits of CPLR 3213 could be motivated by the fact that this is the safer approach. For, the denial of a 3213 motion only prolongs the action; it does not even foreclose a subsequent motion under CPLR 3212.[115] Nevertheless, it is anomalous to deny the possibly destitute spouse the advantages of CPLR 3213 while affording such relief in commercial transactions.[116]

CPLR 3216: Service of forty-five day demand by ordinary mail permitted where no prejudice is shown.

One year after joinder of issue, a motion to dismiss for lack of prosecution may be heard, provided that the motion is preceded by a demand for a note of issue.[117] If the note of issue is filed within forty-five days, *all* delay is forgiven.[118] However, the failure to comply with the demand warrants dismissal, either sua sponte or by motion of the aggrieved party, unless the recalcitrant party exhibits a meritorious cause of action and a justifiable excuse for the delay.[119] Although dismissal is usually without prejudice,[120] its implications are obvious if the statute of limitations has run. For, CPLR 205 specifically excepts a dismissal under CPLR 3216 from its ambit.[121]

The imminency of a malpractice suit in the above situation impels familiarity with the exact procedures to be followed; yet, the constitutional dimensions of CPLR 3216 have pervaded judicial construction of the section.[122] Now that the constitutionality of the sec-

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114 *See* Van Wagenberg v. Van Wagenberg, 24 Md. 154, 215 A.2d 812, *cert. denied*, 385 U.S. 833 (1966); Kochenthal v. Kochenthal, 52 Misc. 2d 437, 275 N.Y.S.2d 951 (Sup. Ct. Nassau County 1966). *See* notes 17-18 and accompanying text *supra*.

115 7B McKINNEY'S CPLR 3213, commentary 4, at 832 (1970).

116 *Id.*

117 CPLR 3216. A condition precedent to the motion is that a year must have elapsed between the joinder of issue and the hearing date for the motion to dismiss. Hence, CPLR 3216 would seem to sanction a demand for a note of issue served 45 days before the end of the first year. 7B McKINNEY'S CPLR 3216, commentary 16, at 926 (1970).

118 *See* Cohn v. Borchard Affiliations, 25 N.Y.2d 237, 250 N.E.2d 690, 303 N.Y.S.2d 633 (1969).

119 CPLR 3216(e). For a list of the factors that a court should take into consideration when passing on a 3216 motion, see Sortino v. Fisher, 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963).

120 CPLR 3216(a). *See* 7B McKINNEY'S CPLR 3216, commentaries 12-13, at 922-25 (1970).

121 CPLR 205 permits the commencement of a new action within six months of termination despite the fact that the statute of limitations has run. However, it expressly excepts termination due to a voluntary discontinuance, a dismissal for neglect to prosecute, or a final judgment on the merits. *See* 1 WK&M ¶ 205.06.

122 *See* Cohn v. Borchard Affiliations, 25 N.Y.2d 237, 250 N.E.2d 690, 303 N.Y.S.2d 633 (1969). For a discussion of the history of CPLR 3216, including amendments and judicial hostility, see 7B McKINNEY'S CPLR 3216, commentaries 1-4, at 910-17 (1970).

tion has been resolved, courts can focus on interpreting particular aspects of it. A problem recently posed centered on the efficacy of a demand for a note of issue which was served by ordinary mail, rather than by registered or certified mail as required under CPLR 3216.

In *Beermont Corp. v. Yager*,[123] the court found that despite the irregular mode of service plaintiff's attorney had not been prejudiced. Consequently, the court granted a motion to dismiss for lack of prosecution because a note of issue was not served within forty-five days, and the attorney's sole excuse was a busy schedule, which is not considered a justification for a denial of the motion. Moreover, the court took notice of the five-year lapse between defendant's demand for a bill of particulars and the appellant's compliance therewith.

Since the attorney in *Beermont* was not prejudiced by the irregular service, the court was justified in granting the motion to dismiss.[124] For, the demand did, in fact, serve its basic purpose: it apprised the attorney of his situation. And, the irregular service was not, in any event, related to the failure to file a note of issue within forty-five days. Hence, exacting compliance with the service requirements by the defendant was not mandated. Conversely, a slight delay by an attorney while attempting to comply with the demand should also be overlooked.[125]

CPLR 5004: Conflict over legal rate of interest continues.

CPLR 5004 prescribes that "interest shall be paid at the legal rate." This rate, which is set under section 5-501 of the General Obligations Law[126] had traditionally been a flat 6 percent. An amendment to section 5-501,[127] however, authorized the Banking Board to adjust the rate of interest "upon the loan or forbearance of any money, goods, or things in action." Accordingly, during February of 1969, the Board adopted the maximum rate of interest of 7.5 percent.[128]

Without a specific declaration of legislative intent, the courts had to determine the effect, if any, of the Board's action upon the

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123 34 App. Div. 2d 589, 308 N.Y.S.2d 109 (3d Dep't 1970).

124 *See* CPLR 2001.

125 For example, where local court rules have thwarted an otherwise diligent effort to procure a note of issue, an extension should be permitted without requiring the plaintiff to exhibit that his previous delay was justifiable. 7B McKINNEY'S CPLR 3216, commentary 26, at 934 (1970).

126 N.Y. GEN. OBLIGATIONS LAW § 5-501 (McKinney 1964).

127 *Id.* (McKinney supp. 1968).

128 *See* 3 NYCRR 34.1 (1969).