

CPLR 3216: Case Illustrates that Rule Will Be Enforced

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CPLR 3216: Case illustrates that rule will be enforced.

Rule 3216 can be viewed as being either benevolent or malevolent, depending upon the action (or inaction) attributable to the plaintiff's attorney. It is benevolent in that a motion to dismiss for want of prosecution does not lie until one year has passed since joinder of issue and defendant has served a 45-day demand for a note of issue.¹⁰⁶ If the recipient duly complies with the demand, all neglect, including general delay, is excused.¹⁰⁷ On the other hand, the rule is potentially malevolent because a motion to dismiss will be granted if plaintiff's attorney fails to comply with the 45-day demand and is unable to exhibit a justifiable excuse for his delay. In this instance, a malpractice action by his aggrieved client is foreseeable. For, although dismissal is usually not on the merits,¹⁰⁸ a second action cannot be commenced if the statute of limitations has run.¹⁰⁹ Moreover, the attorney who neglects to prosecute is subject to censure, suspension and, possibly, disbarment.¹¹⁰

In view of the wide spectrum of conceivable consequences inherent in rule 3216, it has experienced a short but controversial history. As amended in 1964, it was construed to exclude the defense of general delay.¹¹¹ As subsequently reenacted in 1967, there was little doubt that general delay was included in the mandate that a motion to dismiss be preceded by a 45-day demand. But then the rule was attacked on the ground that it constituted an unconstitutional interference with the court's inherent power to control its own calendar. However, this objection was rejected by the Court of Appeals in *Cohn*

¹⁰⁶ CPLR 3216(b). The condition precedent to the motion is that a year must have elapsed between joinder of issue and the return date of the motion to dismiss. Hence, CPLR 3216 would seem to sanction a demand for a note of issue served forty-five days before the end of the year. 7B MCKINNEY'S CPLR 3216, commentary 16 at 926 (1970).

¹⁰⁷ *Cohn v. Borchard Affiliations*, 25 N.Y.2d 237, 250 N.E.2d 690, 303 N.Y.S.2d 633 (1969).

¹⁰⁸ Under CPLR 3216(a) a dismissal is not on the merits unless the court orders otherwise. For an interesting case wherein a dismissal on the merits was not afforded res judicata effect, see *Headley v. Noto*, 22 N.Y.2d 1, 237 N.E.2d 871, 290 N.Y.S.2d 726 (1968). See also *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 331-33 (1968).

¹⁰⁹ 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 generally 1 WK&M ¶ 205.06.

¹¹⁰ See, e.g., *In re Higgins*, 27 App. Div. 2d 340, 279 N.Y.S.2d 197 (1st Dep't 1967) (suspension); *In re Ribolow*, 26 App. Div. 2d 579, 271 N.Y.S.2d 45 (2d Dep't 1966) (censure); see also 7B MCKINNEY'S CPLR 3216, commentary 6 at 918 (1970).

¹¹¹ See *Thomas v. Melbert Foods, Inc.*, 19 N.Y.2d 216, 225 N.E.2d 534, 278 N.Y.S.2d 836 (1967), wherein it was held that, if the 3216 motion were based on general delay rather than failure to file a note of issue, the defendant could circumvent the 1964 amendment to the rule by moving to dismiss without first serving a 45-day demand for a note of issue.

v. Borchard Affiliations.¹¹² Accordingly, the rule is currently left to constitutional amendment, which is unlikely, and authoritative reproach.¹¹³

What the practitioner must now recognize is that rule 3216 is valid and that it will be enforced. For example, in *Navillus Inc. v. Guggino*¹¹⁴ an action was dismissed when plaintiff's attorney failed to comply with the 45-day demand and was unable to exhibit a justifiable excuse.

The recipient of a 45-day demand has several alternatives. He may gamble that, notwithstanding his failure to file a note of issue, the court will deem his excuse "justifiable." Such a result is not improbable since guidelines have been established to enable a court to pass on the attorney's delay.¹¹⁵ But in many instances the reason proffered will be a busy schedule, which is not considered a justifiable ground for denying a motion to dismiss.¹¹⁶ There is also the prospect that a court will find that dismissal is too severe a remedy and impose costs as its sanction,¹¹⁷ but this option has not been widely accepted.¹¹⁸ Undoubtedly, the best approach is familiarity with the exact procedure to be followed and prompt compliance with a 45-day demand.

ARTICLE 41 — TRIAL BY JURY

CPLR 4101: Defendant entitled to jury trial in derivative action where money damages are sought.

In *Fedoryszyn v. Weiss*,¹¹⁹ plaintiff brought a derivative suit to recover corporate funds fraudulently misappropriated by defendant. In response to a demand for a jury trial, plaintiff contended that, since a derivative action was created by equity, defendant was not entitled to a jury trial as of right.¹²⁰ Nevertheless, the Supreme Court, Nassau County, rejected this argument, reasoning that plaintiff was vindicating the corporation's rights, and, therefore, the right to a jury trial in a

¹¹² 25 N.Y.2d 237, 250 N.E.2d 690, 303 N.Y.S.2d 633 (1969). The Court in *Cohn* based its holding on article VI, section 30 of the Constitution, stating that "[t]he language of the Constitution leaves little room for doubt that the authority to regulate practice and procedure in the courts lies principally with the Legislature." *Id.* at 247, 250 N.E.2d at 695, 303 N.Y.S.2d at 640.

¹¹³ See, e.g., 7B MCKINNEY'S CPLR 3216, commentary 4 at 917 (1970).

¹¹⁴ 34 App. Div. 2d 648, 310 N.Y.S.2d 13 (2d Dep't 1970).

¹¹⁵ For a list of factors that a court should take into consideration when passing on a 3216 motion to dismiss, see *Sortino v. Fisher*, 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963).

¹¹⁶ See, e.g., *Beermon Corp. v. Yager*, 34 App. Div. 2d 589, 308 N.Y.S.2d 109 (3d Dep't 1970).

¹¹⁷ See *Schwartz v. United States*, 384 F.2d 833 (2d Cir. 1967).

¹¹⁸ See 7B MCKINNEY'S CPLR 3216, commentary 6 at 918 (1970).

¹¹⁹ 62 Misc. 2d 889, 310 N.Y.S.2d 55 (Sup. Ct. Nassau County 1970).

¹²⁰ CPLR 4101. See also N.Y. GEN. CORP. LAW §§ 60 & 61 (McKinney 1943).