

# CPLR 4101: Defendant Entitled to Jury Trial in Derivative Action Where Money Damages Are Sought

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

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*<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup> There is also the prospect that a court will find that dismissal is too severe a remedy and impose costs as its sanction,<sup>117</sup> but this option has not been widely accepted.<sup>118</sup> 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*,<sup>119</sup> 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.<sup>120</sup> 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

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<sup>112</sup> 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.

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

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

<sup>115</sup> 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).

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

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

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

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

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

derivative action attaches whenever the corporation, had it been suing in its own right, would be entitled to one. Inasmuch as plaintiff did not request the unique remedies afforded by equity for fraud — *e.g.*, rescission, an accounting or a constructive trust — but, in fact, his interest lay only in securing a money judgment, the court concluded that the action was at law, triable by a jury as a matter of right.

The Supreme Court of the United States recently dealt with the same issue in *Ross v. Bernhard*.<sup>121</sup> In determining that a jury trial was mandated by the seventh amendment, the Court stated that

legal claims are not magically converted into equitable issues by their presentation to a court of equity in a derivative suit. . . . The heart of the action is the corporate claim. If it presents a legal issue . . . the right to a jury is not forfeited merely because the stockholder's right to sue must first be adjudicated as an equitable issue triable to the court. . . .<sup>122</sup>

*Ross* and *Fedoryszyn* represent a sharp break with precedent.<sup>123</sup> By postulating a "nature of the claim" criterion, both decisions recognize that the stockholder is standing in the shoes of the corporation and that the mere denomination "derivative action" should not foreclose a party's right to a jury trial when legal relief is sought. It is no longer feasible to maintain to the contrary, *i.e.*, that actions to recover money damages are like chameleons taking their color from surrounding circumstances.<sup>124</sup>

#### ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

*CPLR 5231: Employer estopped by failure to promptly object to improperly served income execution.*

If a judgment debtor fails to pay installments pursuant to an income execution<sup>125</sup> or if the sheriff is unable to serve him therewith,<sup>126</sup> a copy of the income execution may be served upon the debtor's employer<sup>127</sup> who then has a duty to withhold 10 percent of

<sup>121</sup> 396 U.S. 531 (1970).

<sup>122</sup> *Id.* at 538-39, citing *Fleitmann v. Welsbach St. Lighting Co.*, 240 U.S. 27 (1916).

<sup>123</sup> See, *e.g.*, *Goetz v. Manufacturers & Traders Trust Co.*, 154 Misc. 733, 277 N.Y.S. 802 (Sup. Ct. Erie County 1935); *cf.* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Compare 5 J. MOORE, FEDERAL PRACTICE ¶ 38.38 (4) (2d ed. 1969) with C. WRIGHT, FEDERAL COURTS 320 (2d ed. 1970).

<sup>124</sup> *Ross v. Bernhard*, 396 U.S. 550 (1970) (dissenting opinion).

<sup>125</sup> The machinery in CPLR 5231 was established to avoid harassment of the judgment debtor who is willing to make regular installment payments to satisfy a judgment. 6 WK&M ¶ 5231.02.

<sup>126</sup> The failure-of-service provision is not limited to situations wherein the judgment debtor is not a resident of or employed in the proper county for service; it covers any situation in which the judgment debtor cannot be located. *Id.* ¶ 5231.18.

<sup>127</sup> CPLR 5231(d).