

CPLR 3216: Cohn v. Borchard Affiliations Reversed by Court of Appeals

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CPLR 3213: Where neither party objects, and the court has jurisdiction, any procedural device may be used in the course of a trial to effectuate justice.

In *Reilly v. Insurance Company of North America*,¹⁴⁵ an action commenced under CPLR 3213 as a motion for summary judgment in lieu of complaint, the Appellate Division, First Department, held that neither party had put forth sufficient information in its affidavit for the court to grant summary relief.

The sole issue remaining in contention was whether the word "dollars," as it appeared in a group accident policy, meant American or Canadian dollars. Plaintiff's affidavit did not set forth the evidence necessary to determine this question, and thus, since an issue of fact remained for trial, the affidavit did not meet the standard of a "claim presumptively meritorious."¹⁴⁶ Plaintiff's motion was therefore properly denied.

However, the fact that the defendant sought to avail itself of the summary judgment procedure which, under the express language of CPLR 3213¹⁴⁷ is applicable solely to the plaintiff, does make the case worthy of note. As Justice Steuer observed in his dissent, since the procedure was acquiesced in by both parties, the application should have been treated as "a motion and cross-motion for summary judgment with the affidavits serving both as pleadings and supporting the evidentiary contentions of the parties."¹⁴⁸ Both the dissent and the majority recognized that any procedural device may be used in litigation so long as all of the parties to the controversy acquiesce in the deviation from the statutory norm. In the absence of an express statutory prohibition, litigants should remain free to chart their own procedural course through the courts.

CPLR 3216: Cohn v. Borchard Affiliations reversed by Court of Appeals.

The spectre of the unconstitutionality of CPLR 3216 and other CPLR provisions has been laid to rest by the Court of Appeals' unani-

¹⁴⁵ 32 App. Div. 2d 918, 302 N.Y.S.2d 435 (1st Dep't 1969).

¹⁴⁶ See FIRST REP. 91.

¹⁴⁷ CPLR 3213 provides, *inter alia*:

When an action is based upon an instrument for the payment of money only . . . , the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. . . .

¹⁴⁸ 32 App. Div. 2d at 919, 302 N.Y.S.2d at 439.

mous reversal of the appellate decision in *Cohn v. Borchard Affiliations*:¹⁴⁰

[T]he Appellate Division's decision invalidating [CPLR 3216] not only goes counter to the language and the history of this State's Constitution but also throws into doubt a number of other portions of the carefully formulated CPLR. Recognizing, as we must, that the statute — whatever we may think of the policy it expresses — constitutes a valid exercise of the legislative power, the necessity to reverse is clear.¹⁵⁰

Rule 3216 and its predecessors stirred considerable controversy between the legislature and the judiciary.¹⁵¹ Thus, it was the intent of the legislature to preclude the possibility of any future construction problems when it reenacted the rule in 1967. And Chief Judge Fuld's opinion in the *Cohn* reversal serves as proof that the legislature has been successful in this regard.¹⁵² The Appellate Division, First Department, had declared the rule to be unconstitutional in part in *Cohn* because it deprived the courts of their inherent power to control their calendars.¹⁵³ In so doing, however, that court cited no specific provision of the state constitution in support of its conclusion.

¹⁴⁰ 25 N.Y.2d 237, 250 N.E.2d 690, 303 N.Y.S.2d 633 (1969), *rev'g* 30 App. Div. 2d 74, 289 N.Y.S.2d 771 (1st Dep't 1968). For a detailed discussion of the appellate division holding see 7B MCKINNEY'S CPLR 3216, *supp. commentary* 336-43 (1968). See also *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 151-53 (1969); *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 330-31 (1968).

¹⁵⁰ 25 N.Y.2d at 252, 250 N.E.2d at 697, 303 N.Y.S.2d at 643.

¹⁵¹ Rule 3216, as it originally appeared, was merely a reenactment of CPA 181. It was first amended in 1964 as a result of the legislative reaction to *Sortino v. Fisher*, 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963) (introduction of rigid court standards meant to insure dismissal of all cases which were unreasonably delayed). See generally 7B MCKINNEY'S CPLR 3216, *supp. commentary* 336, 349-53 (1964); 4 WK&M ¶¶ 3216.04, 3216.04a (1969); *The Biannual Survey*, 38 ST. JOHN'S L. REV. 406, 448-52 (1964).

The 1967 amendment was occasioned by the Court of Appeals holding in *Thomas v. Melbert Foods*, 19 N.Y.2d 216, 225 N.E.2d 534, 278 N.Y.S.2d 836 (1967). In *Thomas* the Court held that where the basis for the motion to dismiss was "general delay," the 1964 amendment embodying the 45-day demand procedure was inapplicable; it was relevant only to a 3216 motion based upon plaintiff's failure to file a note of issue. Thus in *Thomas*, the Court of Appeals effectively emasculated the 1964 amendment. As amended in 1967, 3216 clearly establishes the requirements for a motion to dismiss — issue must be joined, one year must elapse from the joinder of issue, a 45-day demand must be served upon the party asserting the claim and a default in compliance with that demand must occur. Only after all three of these conditions precedent have been met, whether the motion is based upon want of prosecution ("general delay") or failure to serve and file a note of issue, may the defendant move to dismiss. See generally 7B MCKINNEY'S CPLR 3216, *supp. commentary* 335, 343-48 (1967); 4 WK&M ¶¶ 3216.01, 3216.02, 3216.04a (1968).

¹⁵² 25 N.Y.2d at 246, 250 N.E.2d at 694, 303 N.Y.S.2d at 638:

As it now reads, the statute permits of no doubt as to its meaning: no motion to dismiss for failure to prosecute, brought prior to the filing of a note of issue, may be made unless the defendant has first served the plaintiff with a demand that he file a note of issue.

¹⁵³ It should be noted that the second and fourth departments have upheld the rule's constitutionality. See *Foisy v. Penn Aluminum Inc.*, 31 App. Div. 2d 783, 296 N.Y.S.2d

On the other hand, the Court of Appeals based its finding of constitutionality upon the mandate of article VI, section 30 of the constitution.¹⁵⁴ "[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,"¹⁵⁵ since the procedure of dismissing complaints for undue delay was legislatively created and did not arise from the inherent power of the court.¹⁵⁶

The Court has thus put to rest any questions as to the constitutionality of a rule designed to insure that a plaintiff be given every possible opportunity to prosecute a meritorious claim. Although the courts and several authorities may be displeased with the result,¹⁵⁷ the only way to effectuate any desired reform is through constitutional amendment, and this course does not appear likely.

ARTICLE 34—CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3403: Special preference denied Seider-based plaintiff.

In denying an application for a special preference under CPLR 3403, in *Tjepkema v. Kenney*,¹⁵⁸ Justice Gold pointed out another in the myriad of problems generated by *Seider*-based¹⁵⁹ attachments of insurance policy proceeds. The action was brought against the non-resident defendant to recover damages for the wrongful death of a New York decedent in an out-of-state automobile accident. Quasi in rem jurisdiction was predicated upon the attachment of the defendant's liability insurance policy through his insurance company's New York office. This fact pattern, of course, precisely parallels that which existed in *Seider*.

1019 (4th Dep't 1969); *Kull v. City of New York*, 31 App. Div. 2d 638, 295 N.Y.S.2d 959 (2d Dep't 1968); *Johnson v. Parrow*, 56 Misc. 2d 863, 291 N.Y.S.2d 175 (Sup. Ct. Ontario County 1968). For a discussion of the reaction of the third department to *Cohn*, see *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 151-53 (1969).

¹⁵⁴ N.Y. CONST. art. VI, § 30:

The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and equity that it has heretofore exercised. The legislature may . . . delegate . . . any power possessed by [it] . . . to regulate practice and procedure in the courts.

See *Johnson v. Parrow*, 56 Misc. 2d 863, 291 N.Y.S.2d 175 (Sup. Ct. Ontario County 1968), where this section of the constitution was first cited in support of the validity of CPLR 3216. See also *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 498, 517-18 (1969).

¹⁵⁵ 25 N.Y.2d at 247, 250 N.E.2d at 695, 303 N.Y.S.2d at 640.

¹⁵⁶ *Id.* at 298-99, 250 N.E.2d at 695-96, 303 N.Y.S.2d at 640-41. See also 7B MCKINNEY'S CPLR 3216, supp. commentary 336, 339, 345 (1967-68).

¹⁵⁷ See, e.g., 25 N.Y.2d at 251, 250 N.E.2d at 697, 303 N.Y.S.2d at 643; 7B MCKINNEY'S CPLR 3216, supp. commentary 336, 339 (1968).

¹⁵⁸ 59 Misc. 2d 670, 299 N.Y.S.2d 943 (Sup. Ct. N.Y. County 1969).

¹⁵⁹ See *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). See also Note, *Seider v. Roth: The Constitutional Phase*, 43 ST. JOHN'S L. REV. 58 (1968).