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CPLR 3216: Second Department Continues Retroactive Application of Amendment

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prior to the joinder of issue, even in accounting proceedings. In the action below, the surrogate, while recognizing that CPLR 3106(a) did not require joinder of issue, would not allow such an examination in the accounting proceeding for fear that such liberality would lead to "fishing expeditions." However, the appellate division did not think that such a reason was sufficient to deny the pre-trial examination, especially in light of the safeguards provided by CPLR 3103(a).[91]

The rule of the *Welsh* case has recently been adopted in the first department. In *William V. Griffin & Co. v. Sperling S.S. & Trading Corp.*,[92] the first department, citing the *Welsh* case, held that pre-trial examination may proceed prior to the serving of an answer without a showing of any special circumstances. The decision in this case provides for liberal disclosure before trial, in keeping with the intent of the CPLR.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3216: Second department continues retroactive application of amendment.

Prior to the amendment of CPLR 3216, a defendant could circumvent the 45-day notice required before moving to dismiss for failure to prosecute by merely basing his motion on a "general delay" rather than on a failure to file a note of issue. Under the recent amendment, this loophole was eliminated, and the 45-day notice requirement is now a condition precedent to any motion made under CPLR 3216.[93]

While the effective date of the amendment was September 1, 1967, some courts have applied it to motions made prior to that date.[94] In *Kaprow v. Jacoby*,[95] the appellate division, second department, held that a dismissal for "unreasonable neglect to proceed" dated October 5, 1966, where no 45-day notice was given to the plaintiff, was an improvident exercise of the dismissing

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[91] In order to avoid unreasonable annoyance or expense, etc., "[t]he court may . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device." Under CPLR 3103(a) the court can regulate such things as when the deposition can be taken; who can be questioned; and what may or may not be inquired into. 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶3103.01 (1967).

[92] 28 App. Div. 2d 976, 283 N.Y.S.2d 449 (1st Dep't 1967).

[93] For a thorough discussion of the purpose and effect of the amendment, see 7B McKINNEY'S CPLR 3216, supp. commentary, 246 (1967) and *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 456-58 (1968).

[94] 7B McKINNEY'S CPLR 3216, supp. commentary 246, 247 (1967).

[95] 28 App. Div. 2d 722, 281 N.Y.S.2d 591 (2d Dep't 1967).

court's discretion. Thus, the court, without ever mentioning the amendment, gave it retroactive effect.[96]

The second department again employed retroactive application of 3216, in the recent case of *Terasaka v. Rehfield.*[97] There, the amended section was applied to an order of the supreme court dated prior to the statute's effective date. The court merely stated that under the amended statute the defendant was obliged to give the 45-day notice as a condition precedent to the motion for dismissal.

Thus, while not expressly stating it, the second department continues to apply the amended section retroactively. The first department, however, has yet to follow this course and has given strong indication that it will not do so.[98]

CPLR 3216: Action against attorney for malpractice after dismissal for failure to prosecute.

It has been said that "the primary source of the lawyer's fear of 3216" is that, after a dismissal for failure to prosecute, he will be the object of a new action for malpractice.[99] In *Gladden v. Logan,*[100] this situation developed. The court found the defendants guilty, but further suggested, however, that the plaintiff could not recover for the malpractice unless she could show that she would have recovered in the action that had been dismissed pursuant to CPLR 3216.

It was early established that when one seeks to hold an attorney liable for neglect in the prosecution of litigation he must prove both negligence and that he would have been successful in the original action.[101] This rule has been consistently followed in cases stemming from a dismissal for failure to prosecute.[102]

While the attorney is thus clothed with an ostensible safeguard, he should, however, take care to notify his client if he does not feel the suit should be prosecuted, for although he may be safe from a malpractice action where his client had little hope of success

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[96] For a discussion of this case, see *The Quarterly Survey of New York Practice,* 42 ST. JOHN'S L. REV. 456 (1968).

[97] 28 App. Div. 2d 1011, 284 N.Y.S.2d 168 (2d Dep't 1967).

[98] *See* Leonard v. Metropolitan Opera Ass'n, 28 App. Div. 2d 844, 281 N.Y.S.2d 555 (1st Dep't 1967). This case involved another portion of the amended statute. *See The Quarterly Survey of New York Practice,* 42 ST. JOHN'S L. REV. 456, 457-58 (1968).

[99] 7B MCKINNEY'S CPLR 3216, supp. commentary 246, 254 (1967).

[100] 28 App. Div. 2d 1116, 284 N.Y.S.2d 920 (1st Dep't 1967).

[101] *See* McAllenan v. Mass. Bonding & Ins. Co., 232 N.Y. 199, 133 N.E. 444 (1921); Vooth v. McEachen, 181 N.Y. 28, 73 N.E. 488 (1905).

[102] *See, e.g.,* Hamilton v. Dannenberg, 239 App. Div. 155, 267 N.Y.S. 156 (1st Dep't 1933); Gross v. Eannace, 44 Misc. 2d 797, 255 N.Y.S.2d 625 (Sup. Ct. Nassau County 1964).