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Article 24

CPLR 3216: Action Against Attorney for Malpractice After Dismissal for Failure To Prosecute

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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).

in the underlying action, he may nevertheless find himself the subject of disciplinary proceedings by the Bar Association for his negligence.[103]

CPLR 3221: Judgment by consent in property damage action may be alleged in later personal injury action.

CPLR 3221 allows a defendant in any other than a matrimonial action to serve plaintiff a written offer to allow judgment to be entered against him. If the plaintiff accepts, judgment is entered accordingly. The section further provides that "[a]n offer of judgment shall not be made known to the jury."

In *Card v. Budini*,[104] the plaintiff in a personal injury action alleged in her complaint a judgment entered, in accordance with CPLR 3221, against defendant in a prior property damage action arising out of the same accident. The appellate division, third department, reversed the supreme court's decision to strike out the allegation. The court carefully noted the language of 3221 that an offer of judgment shall not be made known to the jury. The court interpreted this to mean that the prohibition lay in using an offer which had not been reduced to a judgment. The court stated, further, that the words "the jury" indicated not any jury in a subsequent action but the jury in the case where an offer had been made and rejected. The judgment in the property damage action could, therefore, be properly pleaded in the present action.[105]

It was early established by the Court of Appeals that a judgment entered by a stipulation of the parties was conclusive in a later action involving the same issues.[106] The rationale of the Court was that a judgment by consent or by express stipulation should not be given any less conclusive effect than a judgment by default.[107] Furthermore, the Court of Appeals has expressed the opinion that the plaintiff as well as the defendant can make use of a prior judgment.[108]

With this foundation, then, it appears that any settlement or compromise which is reduced to a judgment will be given conclu-

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[103] *See In re* Satz, 12 App. Div. 2d 232, 209 N.Y.S.2d 1009 (1st Dep't 1961); *In re* Shelton, 7 App. Div. 2d 135, 181 N.Y.S.2d 14 (1st Dep't 1959).

[104] 29 App. Div. 2d 35, 285 N.Y.S.2d 734 (3rd Dep't 1967).

[105] *See* WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 316 (2d ed. 1966).

[106] Crouse v. McVickar, 207 N.Y. 213, 100 N.E. 697 (1912). In that case a stipulation entered into by the parties in an action to determine who was entitled to an estate, that each would share equally, was conclusive in a later action by one of the parties grounded upon fraud.

[107] *See* Canfield v. Elmer E. Harris & Co., 252 N.Y. 502, 170 N.E. 121 (1930).

[108] B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).