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DRL § 215: Failure To File Timely Notice of Commencement of Divorce Action with Conciliation Bureau Held Excusable

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ment was permissible in view of the requirement of section 211 that "an action for divorce or separation shall be commenced by the service of a summons" and the requirement of section 215-c(a) that within 10 days after the commencement of an action for divorce the plaintiff shall commence conciliation proceedings. The court allowed the amendment concluding that the requirements of the new law could be met without the service of a separate summons and the institution of a new action. The action for divorce was deemed to have been commenced by order of the court and the plaintiff was directed to serve his amended complaint at the end of 120 days or the expiration of conciliation proceedings, whichever came first.

The court referred to a conflict which existed within the second department as to whether a pleading in a separation action could be amended in light of the new law. The two cases cited by the court to illustrate the conflict, however, can be reconciled. In *Saunders v. Saunders*,[159] the plaintiff moved to amend her complaint on the condition that she would not be compelled to proceed to conciliation as required by section 215-c, whereas in *Fitzpatrick v. Fitzpatrick*[160] where the amendment was granted, no such limitation was requested.

While the court in *Saunders* refused to extend its opinion beyond the facts of that case, it appears that a court can have little objection to allowing the amendment so long as the conciliation proceedings are administered, especially in view of the court's attitude that "the ends of justice will be better served by the avoidance of two actions."[161]

DRL § 215: Failure to file timely notice of commencement of divorce action with conciliation bureau held excusable.

CPLR 2004 provides that except where otherwise expressly prescribed by law the court may "extend the time fixed by any statute . . . for doing any act, upon such terms as may be just and upon cause shown, whether the application for extension is made before or after the expiration of the time fixed."

In *Rodriguez v. Cowin*,[162] the court applied the above provision to a newly enacted section of the Domestic Relations Law, 215-c(a). This section provides that notice of the commencement of a divorce action must be filed within ten days after its commencement with the conciliation bureau. In *Rodriguez*, a number of circumstances, such as service having to be made outside the

[159] 54 Misc. 2d 1081, 283 N.Y.S.2d 969 (Sup. Ct. Kings County 1967).
[160] 55 Misc. 2d 7, 284 N.Y.S.2d 355 (Sup. Ct. Westchester County 1967).
[161] Taplinger v. Taplinger, 55 Misc. 2d 103, 104, 284 N.Y.S.2d 794, 795 (Sup. Ct. N.Y. County 1967).
[162] 55 Misc. 2d 35, 284 N.Y.S.2d 137 (Sup. Ct. Kings County 1967).

state and notice of service arriving while the plaintiff's attorney was away from her office, made compliance with the statute impossible. The court held, therefore, that failure to file within ten days was excusable and was not jurisdictional or prejudicial.

Thus the court continues the policy of permitting extensions of time when just cause is shown. The degree of "just cause" one must show varies with the degree of prejudice resulting to the other party by the extension of time.[163] Thus where the degree of prejudice is slight or non-existent, the courts have been very liberal in granting extensions of time.[164]

The court in *Rodriguez* points out that the special proceeding initiated by plaintiff in this case—"an application for an order to direct the commissioner to accept the late filing"—is not needed or warranted. In the future, an extension of time may be applied for by an application ex parte or by a motion on notice made in the very action initiated by the service of the summons.

JUDICIARY LAW

Judiciary Law § 751: Sanctions appear to be ineffective.

In *Board of Education of City of New York v. Shanker*,[165] the court held that where an employee organization wilfully disregards an order enjoining its members from striking, a fine will be imposed for criminal contempt. In accordance with Section 751 of the Judiciary Law, the United Federation of Teachers was fined $150,000 and the president of the organization fined $250 and sentenced to fifteen days in jail.

Violation of a court injunction has long been recognized as a form of criminal contempt.[166] Prior to September 1, 1967, however, the maximum punishment for this violation was $250 and thirty days in jail.[167] In order to remedy the ineffectiveness of this penalty against employee organizations as defined in Section

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[163] 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶2004.03 (1967).

[164] *E.g.*, Clarson Constr. Co. v. Vespa, 21 Misc. 2d 149, 196 N.Y.S.2d 362 (Sup. Ct. Queens County 1960); Van Dyne v. Sabo, 110 N.Y.S.2d 625 (Sup. Ct. Kings County 1951); *In re* Luckenback's Will, 196 Misc. 782, 96 N.Y.S.2d 244 (Surr. Ct. Kings County 1949).

[165] 54 Misc. 2d 941, 283 N.Y.S.2d 548 (Sup. Ct. N.Y. County 1967).

[166] *See* People *ex rel.* Stearns v. Marr, 181 N.Y. 463, 74 N.E. 431 (1905); People *ex rel.* Davis v. Sturtevant, 9 N.Y. 263 (1853); Spohrer v. Cohen, 3 Misc. 2d 248, 149 N.Y.S.2d 493 (Sup. Ct. Nassau County 1956).

[167] N.Y. JUDICIARY LAW § 751.