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Article 26

CPLR 3216: Court Disavows Cohn Holding and Finds Rule Constitutional

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It is interesting to note that the court's additional reliance on CPLR 3140 was unnecessary because the appraisals were not within CPLR 3101(d) to begin with. They were not, therefore, in need of the release-from-immunity provided by CPLR 3140.[83]

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3216: Court disavows Cohn *holding and finds rule constitutional.*

Under CPLR 3216, a court may dismiss an action for failure to prosecute. The conditions precedent to such dismissal, however, are that issue must have been joined, one year must have elapsed since the joinder, and movant must serve a written demand upon the dilatory party requiring that prosecution be resumed and a note of issue be filed within 45 days of the demand.

Recently, the appellate division, first department, in *Cohn v. Borchard Affiliations*,[84] held 3216 unconstitutional on the ground that it unreasonably interfered with a court's inherent power to control its calendars. However, Justices Stevens and Tilzer dissented, pointing out that the legislative rule-making power, exercised here, merely imposed a modest restriction on a court's powers that alone was insufficient to render the rule unconstitutional.

In a recent case, *Johnson v. Parrow*,[85] defendant moved to dismiss for neglect to prosecute under 3216. Because defendant failed to serve a 45 day demand upon plaintiff, as is required under 3216, the motion was denied. In express repudiation of the *Cohn* holding, the Court sustained the validity of 3216 on the authority of article VI, section 30 of the New York State Constitution.[86]

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[83] *See* 7B McKINNEY'S CPLR 3140, supp. commentary 162, 163 (1968).

[84] 30 App. Div. 2d 74, 289 N.Y.S.2d 771 (1st Dep't 1968). For a detailed discussion of this holding, see 7B McKINNEY'S CPLR 3216, supp. commentary 304 (1968). *See also The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 330 (1968).

[85] 56 Misc. 2d 863, 291 N.Y.S.2d 175 (Sup. Ct. Ontario County 1968).

[86] Article VI, section 30 provides, *inter alia*:

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

While the rule-making power, therefore, rests ultimately in the legislature, the Judicial Conference has, in fact, been delegated the power to make "Rules" for the CPLR (as distinguished from "Sections," which only the legislature can enact) subject to legislative veto and control. See N.Y. JUDICIARY LAW § 229. For a discussion of the rule-making power, vis-à-vis article VI, section 30, in which the constitutionality of 3216 is urged, see 7B McKINNEY'S CPLR 3216, supp. commentary 304, 307-09 (1968).

The present status of CPLR 3216 is clearly in a state of confusion. It is submitted, however, that the constitutional mandate of article VI, section 30 lodges power in the legislature to enact a rule such as 3216. In fact, that power was expressly given to the legislature by the first constitution of the State of New York, in 1846, and has continued without interruption to our present constitution. Moreover, as Justice Stevens urged in his dissent in *Cohn,* 3216 is not operative until the conditions precedent have been fulfilled, and one such condition is a demand that a note of issue be filed within 45 days of the demand. Since a case is not actually on a court's calendar until a note of issue has been filed,[87] it is difficult to contend that the rule unconstitutionally interferes with a court's inherent power to control its calendars.

CPLR 3216: Fourth department applies amendment retroactively.

The retroactive application of amended 3216, effective on September 1, 1967, has been the subject of conflict recently between the first and second departments of the appellate division,[88] *i.e.,* the second department has quite consistently given the amendment retroactive effect,[89] whereas the first department has not.[90]

The appellate division, fourth department, in a recent case, *Williams v. Baker,*[91] reversed special term's order of March 3, 1967, and denied defendant's 3216 motion to dismiss because of his failure to give the notice provided for under the new 3216(d). The court reasoned that an appellate tribunal usually applies the law as it exists on the date it makes its decision, "notwithstanding the fact that a change has been made in the law since the date of the appealed order." [92] Thus, the fourth department is now, apparently, applying 3216 retroactively.

CPLR 3216: Third department does not give amendment retroactive effect.

A condition precedent to a 3216 dismissal for failure to prosecute is that movant serve a written demand upon plaintiff, requiring that prosecution be resumed and a note of issue be filed within

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[87] *See* Cohn v. Borchard Affiliations, 30 App. Div. 2d 74, 78, 289 N.Y.S.2d 771, 775 (1st Dep't 1968) (dissenting opinion).

[88] *See The Quarterly Survey of New York Practice,* 42 ST. JOHN'S L. REV. 436, 456 (1968); 43 ST. JOHN'S L. REV. 142, 158 (1968); 7B MCKINNEY'S CPLR 3216, supp. commentary 312 (1967).

[89] *See* Terasaka v. Rehfield, 28 App. Div. 2d 1011, 284 N.Y.S.2d 168 (2d Dep't 1967); Kaprow v. Jacoby, 28 App. Div. 2d 722, 281 N.Y.S.2d 591 (2d Dep't 1967).

[90] *See* Leonard v. Metropolitan Opera Ass'n, Inc., 28 App. Div. 2d 844, 281 N.Y.S.2d 555 (1st Dep't 1967).

[91] 29 App. Div. 2d 915, 290 N.Y.S.2d 188 (4th Dep't 1968).

[92] *Id.*