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CPLR 3216: Fourth Department Applies Amendment Retroactively

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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.*