

CPLR 3216: Third Department Does Not Give Amendment Retroactive Effect

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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

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.*

45 days of the demand.⁹³ Prior to the 1967 amendment of 3216, the law was unsettled as to whether a written demand was required where the ground for dismissal was "general delay," or whether it was required only where the ground was failure to file a note of issue.⁹⁴ Clearly, under present law, a demand is necessary in either situation.⁹⁵

In a recent case, *Horn v. Cooley*,⁹⁶ the appellate division, third department, reversed special term, Schenectady County, and granted defendant's motion to dismiss under 3216, on the ground of "general delay." While no 45 day demand was served, the fact that a note of issue was filed, and the circumstance of inordinate delay in prosecution—since 1960—demanded a dismissal despite the lack of demand.

In light of 3216's amendment in 1967, which would require a written demand under the facts of the instant case, practitioner should be aware, that the third department is apparently not applying 3216 retroactively—and to that extent, is now following the first department.⁹⁷

Collateral Estoppel: Glaser doctrine no longer followed in first department.

*Glaser v. Huette*⁹⁸ established the rule that co-defendants in a prior action are precluded from using collateral estoppel defensively against each other in a subsequent action because they were not adversaries in the prior action. Since there was no duty to defend *against each other* in the former action, they can relitigate the issue of negligence as between themselves in a later action.

In recent years, technical requirements for the defensive use of collateral estoppel have been liberalized by the Court of Appeals.

⁹³ This requirement became effective on September 1, 1967. 3216, as originally enacted, did not require any demand. The 1964 amendment added a demand requirement, but that amendment was repealed when the present amendment was enacted.

⁹⁴ For a discussion of this problem, see 7B MCKINNEY'S CPLR 3216, *supp. commentary* 311-16 (1967).

⁹⁵ CPLR 3216(b)(3) provides that a court may not take any initiative and no motion shall be made until a written demand is served upon plaintiff. The rigidity of this requirement is strengthened somewhat by the express denomination of this procedure as a "condition precedent."

CPLR 3216(d) provides that where a note of issue has been filed, with or without demand, the court cannot consider any delay *prior* to the filing of the note of issue.

⁹⁶ 30 App. Div. 2d 729, 291 N.Y.S.2d 549 (3d Dep't 1968).

⁹⁷ For a discussion of the conflict regarding the retroactive application of 3216, see *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 330 (1968); 43 ST. JOHN'S L. REV. 142, 159 (1968); 42 ST. JOHN'S L. REV. 438, 456 (1968).

⁹⁸ 232 App. Div. 119, 249 N.Y.S. 374 (1st Dep't), *aff'd mem.*, 256 N.Y. 686, 177 N.E. 193 (1931).