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CPLR 3216: Held Unconstitutional by First Department

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CPLR 3215(h): Judgment may be entered pursuant to stipulation of settlement without notice to adversary.

CPLR 3215(h) provides, *inter alia:*

1. Where, after commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment in a specified amount with interest, if any, from a date certain, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof. . . .[125]

In a recent case, *Star Office Supply Co. v. Galton*,[126] an attorney attempted, ex parte, to secure judgment pursuant to a stipulation, but was advised by the clerk that application to the court on notice to defendant was required.

The court held that CPLR 3215(h) eliminated the necessity of a motion to the court and authorized the clerk to enter judgment directly, where there has been a failure to comply with a stipulation of settlement.[127] It was pointed out, however, that notice of motion will be required, in the "exceptional situation," where the parties have so agreed in the stipulation.

CPLR 3216: Held unconstitutional by first department.

In the midst of a standing conflict between the first and second departments, regarding the retroactivity of CPLR 3216,[128]

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[125] Prior to the enactment of CPLR 3215(h), there existed no uniform procedure for entering judgment upon default or a stipulation of settlement. The procedure varied from county to county, some required a court order, and others did not. *See* 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3215.37 (1968).

[126] 56 Misc. 2d 288, 288 N.Y.S.2d 651 (Sup. Ct. N.Y. County 1968).

[127] It should be noted that the stipulation itself must provide for entry of judgment without further notice, the specific sum stipulated, and a basis for computation of interest. The stipulation must be accompanied by an affidavit attesting to the defendant's failure to comply with its terms, as well as a complaint showing the basis of the claim which gave rise to the stipulation. *See* 7B MCKINNEY'S CPLR 3215, supp. commentary 238 (1966).

[128] CPLR 3216 provides a procedure whereby defendants can move to dismiss an action for plaintiff's failure to prosecute. The appellate division, first department, has taken the position that the 1967 amendment should not be applied retroactively, whereas the second department has applied it retroactively. *Compare* Leonard v. Metropolitan Opera Ass'n, Inc., 28 App. Div. 2d 844, 281 N.Y.S.2d 555 (1st Dep't 1967) *with* Levitt v. Ford Motor Co., 29 App. Div. 2d 688, 287 N.Y.S.2d 339 (2d Dep't 1968). For a brief survey of this conflict see *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 436, 456 (1968); 7B MCKINNEY'S CPLR 3216, supp. commentary 247 (1967).

the appellate division, first department, has recently held 3216 *unconstitutional* in *Cohn v. Borchard Affiliations.*[129]

That part of 3216 which the court found invalid, reads as follows:

> The court, either on its own motion or that of a party, may not dismiss an action for failure to prosecute unless and until issue has been joined and one year has elapsed, and, further, a notice served that prosecution is to be resumed and a note of issue served in 45 days.

It was found that the clause, *per se,* deprives a court of control over its own calendars, a power long established to be inherent in a court, and independent of any legislative authorization. The court alluded to the ever-increasing problem of cases instituted with no intent of going to trial[130]—thereby clogging already over-burdened calendars. Thus, it was held that CPLR 3216, to the extent that it restricts dismissal for general delay, is unconstitutional.[131]

The unconstitutionality of 3216 was hinted at by the Court of Appeals in *Commercial Credit Corp. v. Lafayette,*[132] where the Court avoided the question as unnecessary to determine, but alluded to "strong support" in regard to its unconstitutionality.[133]

Thus, with *Cohn,* the controversy over 3216 grows somewhat larger, and becomes ripe for resolution, by the Court of Appeals.

CPLR 3216: Court holds dismissal "on the merits" will not preclude interposing same fact in counterclaim or affirmative defense, because case deemed sui generis.

In a recent case, *Headley v. Noto,*[134] defendant Noto interposed an affirmative defense and counterclaim alleging the same

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[129] 30 App. Div. 2d 74, 289 N.Y.S.2d 771 (1st Dep't 1968). The court reversed special term's denial of defendant's motion to dismiss for lack of prosecution on the ground that no 45 day notice had been served under CPLR 3216. Defendant's contention that relief should be afforded despite its non-compliance with the statute, because the statute was unconstitutional, was upheld by the court.

[130] *See* Plachte v. Bancroft, Inc., 3 App. Div. 2d 437, 442, 161 N.Y.S.2d 892, 897 (1st Dep't 1957).

[131] 30 App. Div. 2d at 77, 289 N.Y.S.2d at 775 (1st Dep't 1968). It should be noted that Presiding Justice Stevents, dissenting, felt that 3216 was merely a procedural rule, which imposed a "modest" restriction upon the court's inherent power, and that, this alone was insufficient to render 3216 unconstitutional.

[132] 17 N.Y.2d 367, 218 N.E.2d 272. 271 N.Y.S.2d 212 (1966).

[133] For a brief discussion, *see* 7B McKinney's CPLR 3216, supp. commentary 248, 251 (1965-66).

[134] 22 N.Y.2d 1, 237 N.E.2d 871, 290 N.Y.S.2d 726 (1968).