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CPLR 3216: Court Holds Dismissal "On the Merits" Will Not Preclude Interposing Same Fact in Counterclaim or Affirmative Defense, Because Case Deemed, Sui Generis

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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).

facts that he had asserted in a prior action. There, Noto, as plaintiff, had brought suit under Article 15 of the Real Property Actions and Proceedings Law[135] claiming equitable title, under a contract of sale by a prior owner, to property to which defendants held legal title. That action was dismissed when Noto failed to appear at trial. His motion to open his default was granted, but Noto, once again, failed to appear at trial. The trial court, after taking testimony with respect to his neglect to prosecute, dismissed the action "on the merits."

In the instant case, special term granted plaintiff's motion for summary judgment and dismissed Noto's counterclaim on the grounds of res judicata, since the dismissal of the earlier action was "on the merits," involved the same parties and sought the same relief.

The Court of Appeals, however, reversed and remanded, stating that under CPLR 3216,[136] the trial court has the power to dispose of a case with prejudice when a plaintiff is shown to have unreasonably neglected to prosecute it.[137] Moreover, as a general rule, where a plaintiff has been dismissed "on the merits" and is barred from bringing an action or interposing a counterclaim on the same claim, he is not precluded from asserting those facts *defensively* in an action arising out of the same transaction.[138] The Court concluded that this case was *sui generis* because the property involved would remain in a state of limbo by permitting defendant's allegations to remain merely as a defense, while striking his counterclaim. Legal title could rest in the hands of one party, and equitable title in the hands of another.

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[135] Suits brought under this Article are essentially actions for declaratory judgments to compel the determination of a claim to real property. *See* Buell V. Genesee State Park Comm'r, 25 Misc. 2d 841, 206 N.Y.S.2d 65 (Sup. Ct. Monroe County 1960); Village of Ossining v. Lahin, 5 Misc. 2d 1024, 160 N.Y.S.2d 1012 (Sup. Ct. Westchester County 1957).

[136] CPLR 3216(a) provides, *inter alia*:

> "Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof . . . the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits."

[137] In Mink v. Keim, 291 N.Y. 300, 52 N.E.2d 444 (1943), the Court held that under CPA 482, there could be no judgment entered against plaintiff "on the merits," until the close of the plaintiff's evidence. This rule has been changed by CPLR 3216, especially in light of the Advisory Committee's Notes, which clearly indicate that 3216 should *not* be read in the same manner as CPA 482. *See* 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3216.15 (1968).

[138] The Court analogized this principle with that under CPLR 203(c), wherein a defense or counterclaim barred by the Statute of Limitations may be asserted as a set-off, if it arose out of the same transaction which gave rise to the complaint.

Judge Breitel, with whom Judge Bergan concurred, dissented on the ground that CPLR 3216 empowered the courts to dismiss an action "on the merits," and the effect of the majority opinion would be to abrogate this power. Moreover, the lower court's dismissal with prejudice, *a fortiori,* holds that Noto's claim is inferior to that of plaintiff. The logical extension of that proposition, is that Noto cannot now reassert a claim of title in contradiction to the prior judgment. To allow him to do so is repugnant to any application of res judicata. Finally, the dissent reasoned that an affirmance would not leave title to the property unsettled, because title would be awarded to plaintiffs, who claim legal title, while defendant's affirmative defenses would be barred.

It is somewhat confusing why the majority chose to don this case *sui generis,* a label which renders the case sterile in precedental value. On the basis of the reported decision, the dissent seems to have expounded the preferred view of the law.

Res Judicata: Jurisdictional question can be reopened unless based on litigated question of fact.

The scope of res judicata in questions of subject matter jurisdiction has rarely been discussed by New York courts. Ordinarily the issue arises only when a collateral attack is being made on a foreign judgment, in which case full faith and credit requires that New York employ the res judicata rule of the foreign state.[139] However, in a recent case, *Friedman v. State,*[140] the judgment of the New York Court on the Judiciary [141] was attacked as having been rendered by an improperly constituted tribunal.

The claimant, a removed Supreme Court Justice, instituted a suit to recover his salary. The Court of Claims, dismissed the claim finding that the judgment of the Court on the Judiciary, removing claimant from office, was safe from collateral attack.[142] In so doing, the court relied on the federal court rule,[143] which grants to every court the power to conclusively determine its own jurisdiction, subject only to direct review. This decision has recently been reversed by the appellate division, third department, which allowed attack under the liberal rule of *O'Donoghue v. Boies* [144]

[139] Langerman v. Langerman, 303 N.Y. 465, 473-74, 104 N.E.2d 857, 861 (1952).

[140] 29 App. Div. 2d 162, 286 N.Y.S.2d 525 (3d Dep't 1968).

[141] *In re* Friedman, 12 N.Y.2d [a]-[e] (Court on the Judiciary 1963).

[142] 53 Misc. 2d 455, 278 N.Y.S.2d 999 (Ct. Cl. 1967). For a discussion of this case, see *The Quarterly Survey of New York Practice,* 42 St. John's L. Rev. 436, 461 (1968).

[143] Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940); Stoll v. Gottlieb, 305 U.S. 165 (1938).

[144] 159 N.Y. 87, 53 N.E. 537 (1899).