

## CPLR 3216: Motion Based on General Delay

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*Star Co.*,<sup>81</sup> the court invalidated a statute making calendar preferences mandatory,<sup>82</sup> stating:

[W]hile the Legislature has the power to alter and regulate the proceedings in law and equity, it can only exercise such power in that respect as it has heretofore exercised; and it has never before attempted to deprive the courts of that judicial discretion which they have been always accustomed to exercise.<sup>83</sup>

If courts have a power to control their calendars, it would seem they must also have inherent discretionary power to dismiss for failure to prosecute.

However the constitutional issue may have been decided, the Court chose not to base its decision thereon. Hopefully, the uncertainty caused by the 1964 amendment to CPLR 3216 has been ended so that the constitutional issue need never be decided.

*CPLR 3216: Motion based on general delay.*

While *Thomas v. Melbert Foods, Inc.*,<sup>84</sup> has established that a defendant may move for a dismissal for failure to prosecute without first serving the plaintiff with a forty-five day demand for filing a note of issue, some questions remain as to the weight of the factors which are to be considered in deciding a motion based upon general delay. In *Kasiuba v. New York Times Co.*,<sup>85</sup> the court has emphasized the defendant's contribution to and acquiescence in the delay.

In *Sortino v. Fisher*,<sup>86</sup> the most exhaustive survey of the various factors to be considered on a 3216 motion, the court noted that while there are exceptions, the duty to prosecute lies primarily with the plaintiff. While the court in *Kasiuba* agreed, it stressed that even though no duty is owed to the plaintiff, the defendant at least owes a duty to the court to press for dismissal of the action. In *Kasiuba* the defendant had waited two months before serving its answer and another fifteen months

<sup>81</sup> 98 App. Div. 101, 90 N.Y. Supp. 772 (1st Dep't 1904), *aff'd mem.*, 181 N.Y. 531, 73 N.E. 1131 (1905).

<sup>82</sup> Code of Civil Procedure § 793, as amended by ch. 173, Laws of N.Y. 1904.

<sup>83</sup> *Riglander v. Star Co.*, 98 App. Div. 101, 105, 90 N.Y. Supp. 772, 775 (1st Dep't 1904). See also *Plachte v. Bancroft, Inc.*, 3 App. Div. 2d 437, 438, 161 N.Y.S.2d 892, 894 (1st Dep't 1957), wherein the court stated that "a statute which would impose a mandate upon the court in the otherwise discretionary handling of time of trial is unconstitutional."

<sup>84</sup> 19 N.Y.2d 216, 225 N.E.2d 534, 278 N.Y.S.2d 836 (1967).

<sup>85</sup> 51 Misc. 2d 700, 273 N.Y.S.2d 705 (Sup. Ct. Kings County 1966).

<sup>86</sup> 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963); *A Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 406, 448 (1964).

before serving a notice of examination before trial. Moreover, it had waited until eight months after the plaintiff had filed a note of issue to move for dismissal. In addition, the defendant had not shown that it had been prejudiced. The plaintiff, on the other hand, had shown a high degree of merit in its cause of action. Thus, even though four years and four months had elapsed between the completion of pretrial disclosure and the filing of the note of issue, the defendant's motion was denied.

All discretion involves the weighing of concrete factors and, in the case of a CPLR 3216 motion, it seems reasonable to place some weight upon the defendant's delay. There is apparent unfairness in a rule that would permit a defendant to delay, while granting the same defendant a windfall because of the plaintiff's similar delay.

*CPLR 3216: Dismissal under Delaware statute is on the merits.*

In November, 1958, an action was brought by the plaintiff in the Superior Court of Delaware. In March, 1963, after almost five years of delay, the complaint was dismissed because of the failure to prosecute pursuant to Civil Rule 41(b) of the Rules of the Superior Court of Delaware. Rule 41(b) provides that an involuntary dismissal, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication on the merits unless the order otherwise specifies. The plaintiff then brought the same action against the same defendant in New York. The defendant's motion to dismiss pursuant to CPLR 3211(a)(5), on the ground that plaintiff's cause of action was barred by res judicata, was granted by the court in *Signorile v. Sullivan*.<sup>87</sup> The Delaware order, being a final determination on the merits of the action by a court of competent jurisdiction, was entitled to full faith and credit.

The Delaware rule, patterned after Rule 41(b) of the Federal Rules of Civil Procedure, is contrary to CPLR 3216 which states: "Unless the order specifies otherwise, the dismissal is not on the merits." Perhaps New York courts should consider using the power to dismiss on the merits. The specter of such use would seem to be the greatest incentive for the rapid prosecution of claims. However, due to the harshness of the penalty, its imposition should be limited to those cases in which summary judgment against the plaintiff would be appropriate.

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<sup>87</sup> 52 Misc. 2d 17, 274 N.Y.S.2d 639 (Sup. Ct. Kings County 1966).