

## CPLR 3216: Departments Differ as to Retroactivity of Amendment

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3123, notices to admit were not subject to preliminary attack.<sup>92</sup> Because the draftsmen of the CPLR did not *expressly* change this rule, it has, despite criticism,<sup>93</sup> been deemed applicable to CPLR 3123 as well.<sup>94</sup>

In *Nader v. General Motors Corp.*,<sup>95</sup> plaintiff's notice to admit consisted of more than three hundred items which the court stated made it "patently burdensome, unnecessarily prolix, and unduly protracted."<sup>96</sup> The court granted a protective order under CPLR 3103 in order to protect the defendant from the clear abuse of CPLR 3123. The broad language of 3103 was deemed to authorize a protective order *at any time* in advance of trial. It was stated that since the notice to admit is included in the disclosure article, and since 3103 applies to *any* disclosure device, a fortiori it was applicable to 3123.

#### ARTICLE 32 — ACCELERATED JUDGMENT

*CPLR 3216: Departments differ as to retroactivity of amendment.*

In *Kaprow v. Jacoby*,<sup>97</sup> the supreme court entered an order granting defendant's motion to dismiss the complaint for unreasonable neglect to proceed as provided in CPLR 3216. On appeal, the appellate division, second department, found the dismissal of plaintiff's complaint to have been an improvident exercise of discretion. One of the factors relied upon by the court was that the defendant had failed to make a demand upon plaintiff to serve and file a note of issue pursuant to CPLR 3216.

In 1964, the legislature amended CPLR 3216, apparently intending that no 3216 motion to dismiss could be made until the plaintiff had received a forty-five day demand to serve and file a note of issue. However, the Court of Appeals, in *Thomas v. Melbert Foods, Inc.*,<sup>98</sup> held, in effect, that if the defendant's 3216 motion were based on "general delay" rather than plaintiff's failure to file a note of issue, the defendant could circumvent the 1964 amendment to 3216, and the motion could be made without first serv-

<sup>92</sup> *Belfer v. Dictograph Prods., Inc.*, 275 App. Div. 824, 89 N.Y.S.2d 125 (1st Dep't 1949); *Langan v. First Trust & Deposit Co.*, 270 App. Div. 700, 62 N.Y.S.2d 440 (4th Dep't 1946), *aff'd mem.*, 296 N.Y. 1014, 73 N.E.2d 723 (1947).

<sup>93</sup> 7B MCKINNEY'S CPLR 3103, *supp. commentary* 59 (1965).

<sup>94</sup> *Schwartz v. Macrose Lumber & Trim Co.*, 46 Misc. 2d 202, 259 N.Y.S.2d 289 (Sup. Ct. Queens County 1965). *But see* 3 WEINSTEIN, KORN & MILLER, *NEW YORK CIVIL PRACTICE* ¶¶ 3103.04, 3123.09 (1963).

<sup>95</sup> 53 Misc. 2d 515, 279 N.Y.S.2d 111 (Sup. Ct. N.Y. County 1967).

<sup>96</sup> *Id.* at 516, 279 N.Y.S.2d at 112.

<sup>97</sup> 28 App. Div. 2d 722, 281 N.Y.S.2d 591 (2d Dep't 1967).

<sup>98</sup> 19 N.Y.2d 216, 225 N.E.2d 534, 278 N.Y.S.2d 836 (1967).

ing the plaintiff with a forty-five day demand for filing a note of issue.<sup>99</sup> The legislative reaction was to repeal CPLR 3216 and enact a new amendment which provides that as a condition precedent to the making of a motion to dismiss under 3216, the plaintiff must be served a written demand requesting him to serve and file a note of issue within forty-five days and notifying him that a default in this matter will serve as the basis of a motion to dismiss for failure to prosecute.<sup>100</sup> While this amendment did not take effect until September 1, 1967, the appellate division, second department, has sought to comply with the intent of the legislature by applying its provisions to actions which are commenced and considered by the court prior to the effective date.<sup>101</sup> In the *Kaprow* case, the second department reversed the dismissal granted under 3216 which was based on the general unreasonable neglect of plaintiff to proceed. While the second department did not refer to the 1967 amendment in its memorandum decision, the court did base its reversal, in part, on defendant's failure to make a forty-five day demand upon plaintiff as provided by the amended CPLR 3216. Thus, in effect, the second department has prematurely applied the 1967 amendment which makes a demand a condition precedent to a 3216 motion.

A recent first department case, dealing with a different provision of CPLR 3216, indicates that the first department is not applying the provisions of the 1967 amendment prematurely to actions or proceedings considered by the court prior to the effective date of the amendment. In *Leonard v. Metropolitan Opera Association, Inc.*,<sup>102</sup> defendant made a motion to dismiss for failure to prosecute, pursuant to 3216, after plaintiff failed to comply with defendant's forty-five day demand requesting the plaintiff to place the action on the calendar for trial. Since this motion was made approximately eleven months from the day issue was joined, defendant had complied with the 1964 amendment which required the passing of six months after the joinder of issue before a motion under 3216 could be made.<sup>103</sup> However, the amendment to CPLR 3216, which became effective on September 1, 1967, provides that a motion to dismiss for failure to prosecute may not be made until "[o]ne year . . . [has] lapsed since the joinder of issue."<sup>104</sup>

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<sup>99</sup> For a full discussion of the history of this matter see generally 7B MCKINNEY'S CPLR 3216, *supp.* commentary 246 (1967) and *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 128, 145 (1967).

<sup>100</sup> CPLR 3216.

<sup>101</sup> For an additional discussion of the Second Department's premature application of the 1967 amendment to 3216 see 7B MCKINNEY'S CPLR 3216, *supp.* commentary 246, 247 (1967).

<sup>102</sup> 28 App. Div. 2d 844, 281 N.Y.S.2d 555 (1st Dep't 1967).

<sup>103</sup> CPLR 3216.

<sup>104</sup> CPLR 3216(b)(1).

The appellate division, first department, affirmed the order granting defendant's motion to dismiss for lack of prosecution.<sup>105</sup> Since the defendant's motion to dismiss under 3216 was made eleven months after the joinder of issue, the first department, in effect, held that the 1967 amendment to CPLR 3216, which extended to one year the mandatory waiting period between the joinder of issue and a 3216 motion to dismiss, does not apply prematurely to actions and proceedings which were commenced and considered by the court prior to September 1, 1967. While the dissent argued that the spirit of the 1967 amendment should be implemented even before its effective date to avoid a harsh policy of dismissal, it is clear that the first department is apparently not applying these provisions prematurely.<sup>106</sup>

*CPLR 3218: Affidavit of debtor in judgment by confession must state detailed information regarding debt.*

In *County National Bank v. Vogt*,<sup>107</sup> plaintiffs appealed from an order of the appellate term which denied their motion to vacate a judgment by confession on the ground that the affidavit upon which it was based was insufficient. In question was the defendant's compliance with CPLR 3218 which provides that a judgment, either for money due or to become due, may be confessed without an action upon an affidavit executed by the debtor. Such affidavit must authorize the entry of the judgment, state the sum for which judgment may be entered and the county where the defendant resides. In addition, the affidavit must state the facts out of which the debt arose and show that the sum confessed is justly due.<sup>108</sup>

The requirement that the affidavit state facts relating to the obligation for which the judgment may be entered is designed for the protection of "third persons who might be prejudiced in the event that a collusively confessed judgment is entered, rather than

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<sup>105</sup> 28 App. Div. 2d 844, 845, 281 N.Y.S.2d 555, 556 (1st Dep't 1967).

<sup>106</sup> The 1967 amendment to CPLR 3216 provides that no 3216 dismissal may be sought before a year has elapsed from the joinder of issue. The 1964 provision required only a six-month waiting period before the dismissal could be made. The 1967 amendment also serves to reaffirm the intent of the legislature in 1964 by providing that either the court or the defendant *must* give the plaintiff a 45-day demand to serve and file a note of issue before a 3216 motion to dismiss may be made. This provision removes the "general delay" ground which was recognized by cases which held that delay prior to the filing of the note of issue could be considered on a 3216 motion, despite the fact that the plaintiff had filed a note of issue within the forty-five days of demand.

<sup>107</sup> 28 App. Div. 2d 793, 280 N.Y.S.2d 1016 (3d Dep't 1967).

<sup>108</sup> CPLR 3218(a).