

CPLR 3218: Affidavit of Debtor in Judgment by Confession Must State Detailed Information Regarding Debt

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The appellate division, first department, affirmed the order granting defendant's motion to dismiss for lack of prosecution.¹⁰⁵ 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.¹⁰⁶

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

In *County National Bank v. Vogt*,¹⁰⁷ 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.¹⁰⁸

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

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

¹⁰⁶ 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.

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

¹⁰⁸ CPLR 3218(a).

for the protection of the [debtor]. . . ."¹⁰⁹ Thus, the affidavit must contain enough information to enable a creditor to carry out an investigation to determine whether the confession is bona fide.

In holding that the affidavit in the instant case was insufficient, the court observed that the debtor's affidavit stated the county in which he resided, and authorized the entry of a \$40,000 judgment "for a debt justly due to the plaintiff arising from the following facts: Money loaned by Plaintiff to Defendant and not repaid."¹¹⁰ This general statement provides little means of determining whether the confession was bona fide. The court stated that the affidavit lacked information as to the amount of the loan, the date of the loan, the amount repaid, and how much of the amount confessed was principal or interest.¹¹¹ Because of these deficiencies, the court vacated the judgment.

This case should remind the practitioner that it is important to include sufficiently detailed information concerning the obligation in the debtor's affidavit. Adherence to the guidelines established by the court should insure that the judgment will not be subject to a motion to vacate.

Res judicata: Mills v. Gabriel applicable where plaintiff is a car rental agency.

Section 388 of the Vehicle and Traffic Law imputes to the owner of a motor vehicle the negligence of one who uses or operates it with his permission for the purpose of imposing on the owner liability to an injured third party. The section was authoritatively interpreted by the Court of Appeals in *Mills v. Gabriel*,¹¹² where plaintiff brought an action to recover for damages done to her automobile in a collision. Both plaintiff's driver, who was driving with plaintiff's permission but in her absence, and the defendant, owner-operator of the other vehicle, were found to be negligent. However, this negligence was not imputed to plaintiff so as to bar her recovery for damages.¹¹³

¹⁰⁹ 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3218.03 (1964).

¹¹⁰ County Nat'l Bank v. Vogt, 28 App. Div. 2d 793, 280 N.Y.S.2d 1016, 1018 (3d Dep't 1967).

¹¹¹ See also Wood v. Mitchell, 117 N.Y. 439, 22 N.E. 1125 (1889), where the affidavit contained rather general information concerning the obligation, therefore justifying the Court of Appeals' finding that the affidavit was too indefinite.

¹¹² 259 App. Div. 60, 18 N.Y.S.2d 78 (2d Dep't 1940), *aff'd mem.*, 284 N.Y. 755, 31 N.E.2d 512 (1940). *Mills* interpreted § 59 of the Vehicle and Traffic Law, the predecessor of present § 388.

¹¹³ The *Mills* court stated: "The statute does not change the common-law rule respecting the owner's right to recover from third persons under the