

CPLR 3016(c): Bill of Particulars Not a Satisfactory Alternative for Insufficient Complaint

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dismiss for neglect to prosecute under CPLR 3216, he would not have to adhere to the forty-five-day demand requirement under that section as a condition for the motion.⁸⁶ A plaintiff is, therefore, well advised to adhere to the defendant's demand for the complaint. Failure to do so will result in a dismissal of his action unless the court is satisfied with his excuse and finds sufficient merit in his cause of action to disregard the delay.

CPLR 3016(c): Bill of particulars not a satisfactory alternative for insufficient complaint.

In *Pustilnik v. Pustilnik*,⁸⁷ the appellate division, second department, held that a complaint in a separation action which failed to specify the time and place of each act complained of was insufficient pursuant to CPLR 3016(c), and, that such information contained in a bill of particulars would not be a satisfactory alternative.

It is a rule of construction that one must view specific statutory enactments in context with relevant general provisions. The fundamental pleading requirement of the CPLR is contained in section 3013 which provides that pleadings are sufficient if notice of the elements of the cause of action or defense is conveyed to the adversary. In *Foley v. D'Agostino*,⁸⁸ judicial confirmation was given to the revisers' intent to remove the unsubstantial "technicalities" from the pleading provisions. CPLR 3016(c),⁸⁹ however, requires that, in a separation action, the time and place of each act complained of be specifically stated. The problem is, therefore, whether a failure to comply with the requirements of CPLR 3016(c) should give rise to a dispositive motion under the CPLR.

It is difficult to give a definitive answer to this problem, but some case law has already indicated a judicial tendency in this area.⁹⁰ In *Crossett v. Crossett*,⁹¹ a separation action, the court held that the plaintiff does not cure the omissions in his pleading by stating them in affidavits opposing a motion to dismiss the complaint. The court cited *Kurcz v. Kurcz*,⁹² which held that a bill of particulars

⁸⁶ 7B MCKINNEY'S CPLR 3012, supp. commentary 48, 49-51 (1965); see also 7B MCKINNEY'S CPLR 3216, supp. commentary 160, 169 (1965).

⁸⁷ 24 App. Div. 2d 868, 264 N.Y.S.2d 400 (2d Dep't 1965).

⁸⁸ 21 App. Div. 2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964).

⁸⁹ Subdivision (c) of CPLR 3016 is substantially the same as its predecessor RCP 280.

⁹⁰ See, e.g., *St. Germain v. St. Germain* (Sup. Ct. Queens County), 150 N.Y.L.J., Nov. 15, 1963, p. 17, col. 2. The court held therein that the failure to carry out the requirements of CPLR 3016(c) constituted a defect which made the pleadings insufficient and subjected them to a motion to dismiss under CPLR 3211(a) (7).

⁹¹ 150 N.Y.L.J., Nov. 21, 1963, p. 16, col. 1 (Sup. Ct. Nassau County).

⁹² 13 App. Div. 2d 954, 216 N.Y.S.2d 736 (1st Dep't 1961). The court in the instant case also cited *Kurcz*. See also *Rizzi v. Rizzi*, 279 App. Div. 676, 108 N.Y.S.2d 324 (2d Dep't 1951).

could not save a pleading which failed to supply the detail sought to be included therein. Both of these decisions seem consistent with the instant case in requiring that a complaint satisfy the requirements of *both* CPLR 3013 and CPLR 3016(c).

However, it appears highly doubtful, when viewing the general approach of the revisers respecting pleading, that the best interests of justice would be served by dismissing a pleading for any CPLR 3016 omission, provided that the basic CPLR 3013 requirements are satisfied. It is submitted that a complaint may provide sufficient *notice* to apprise a defendant of a separation action against him, and still not specifically indicate the exact time and place of the acts complained of. It seems that a pleading should not be dismissed for an omission if it can be supplied by a bill of particulars, by affidavits opposing a motion to dismiss, by a disclosure device or by other means calculated to supply the omitted information. However, it should be remembered that the basic *notice* requirements of CPLR 3013, as portrayed in the *Foley* case, must always be satisfied. If the purpose of CPLR 3016(c) is to ensure that the defendant receives the information specified therein, the means by which he obtains such information should not be a critical issue.⁹³ Such a view would serve to implement the requirements of CPLR 3016, and it would also adhere to the mandate of CPLR 104 which provides that the CPLR shall be "liberally construed to secure the just, speedy and inexpensive determination" of every action.

CPLR 3026: Pleading saved where cause of action can be culled from complaint.

In *Barrick v. Barrick*,⁹⁴ the appellate division, second department, although concurring with the lower court that a cause of action for reformation was not stated, reversed on the ground that a valid cause of action could be gathered from the averments of the complaint. In so holding, the court relied upon CPLR 3026 which mandates a liberal construction of pleadings.

The second sentence of CPLR 3026 states that "defects shall be ignored if a substantial right of a party is not prejudiced." The revisers, consistent with the modern attitude toward procedure, inserted this directive to discourage unnecessary attacks against a pleading which are designed principally to harass an opponent.⁹⁵

⁹³ In the first department, it was indicated that a pleading is not necessarily to be dismissed where the required information can be supplied by other means. *Pernet v. Peabody Eng'r Corp.*, 20 App. Div. 2d 781, 248 N.Y.S.2d 132 (1st Dep't 1964).

⁹⁴ 24 App. Div. 2d 895, 264 N.Y.S.2d 888 (2d Dep't 1965).

⁹⁵ FIRST REP. 79.