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and not a default in the action itself.[168] Furthermore, since the three methods of appearance specified in CPLR 320(a) do not include the service of an answer to a motion,[169] it was held that defendant could not be considered in default until the return date of the motion. Thus, this decision interprets the reference to CPLR 320(a) in CPLR 3213 as merely setting forth the time allowable for the return of motion papers, rather than as giving an exact date upon which a defendant will automatically be in default.

The opinion of the court in the principal case is consistent with the purpose and spirit of the legislation. That purpose is "to destroy the delay incident upon waiting for an answer and then moving for summary judgment." [170] The Judicial Conference designed the amendment "to allow plaintiff time to study the answering papers. . . ." [171] This more simple, direct, time and expense saving procedure can not be considered so desirable as to allow a defendant to be deprived of his day in court. Moreover, there is no undue delay in the disposition of meritorious claims inherent in a rule which prevents a default judgment in the brief span between the date set for service of answering papers and the return date.

CPLR 3216: Court can dismiss for want of prosecution on basis of "general delay."

The calm in the plaintiffs' bar created by the interpretation that *Salama v. Cohen* [172] destroyed general delay as an independent basis for a CPLR 3216 motion, was, viewed retrospectively, the quiet before a storm. Ignoring those who considered *Salama* the last word on the interpretation of the 1964 Volker Amendment, the Court of Appeals in *Commercial Credit Corp. v. Lafayette Lincoln-Mercury, Inc.*[173] restricted the applicability of the forty-five day demand requirement solely to motions based on failure to file a note of issue. Simultaneously, the Court recognized the existence of unreasonable "general delay" as a separate basis for dismissal for want of prosecution.

With this recognition of general delay, the controversy surrounding the extensiveness of the 1964 amendment has come full

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[168] *Id.* at 80, 266 N.Y.S.2d at 899.

[169] *Supra* note 163, at 30. Any extension (up to 10 days) over the minimum period provided by CPLR 320(a), granted by the plaintiff, entitles him to a copy of the answering papers that many days before the return date of the motion.

[170] Knudson v. Flynn-Hill, Knudson Elevator Corp., *supra* note 166, at 81, 266 N.Y.S.2d at 900.

[171] 7B McKINNEY'S CPLR 3213, commentary 817 (1963).

[172] 16 N.Y.2d 1058, 213 N.E.2d 461, 266 N.Y.S.2d 131 (1965); see 40 ST. JOHN'S L. REV. 303, 340 (1966).

[173] 17 N.Y.2d 367, 212 N.E.2d 271, 272 N.Y.S.2d 218 (1966).

circle. The amendment was the proximate result of the first department's decision in *Sortino v. Fischer*,[174] which declared war on lethargic plaintiffs by decimating numerous excuses for delay traditionally found sufficient.[175] Noting that it would henceforth be difficult to excuse any avoidable delay, the court in *Sortino* flexibly defined proscribed general delay as "any unreasonable delay, depending upon the nature of the case, the degree of merit, and the particular difficulties which the litigating plaintiff faced. . . ." [176]

Based on the premise that the merit of a claim is inversely proportional to the delay in litigating it, the *Sortino* court held that only a convincing affidavit of merits would overcome a motion by a defendant who had not himself affirmatively added to the delay.[177] The court thus aligned itself with the legislative intent to allow the court full discretion in deciding CPLR 3216 motions.[178]

The reaction of the plaintiffs' bar to *Sortino* was swift. Three months after the decision, the 1964 amendment was signed into law. This provided that a motion to dismiss for failure to serve and file a note of issue could not be made until at least six months after joinder of issue. Thereafter, defendant had to serve a written demand upon the plaintiff, requiring a note of issue to be filed. The plaintiff then had forty-five days in which to comply, at the risk of having his case dismissed.

The amendment was "intended to enable plaintiff to file his note of issue within 45 days and thereby avoid 3216 entirely." [179] However, the language of the amendment created problems. The courts had to decide whether "such a motion" referred to all 3216 motions or whether it was restricted to a motion to dismiss for failure to file a note of issue.

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[174] 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963). For an excellent analysis of the *Sortino* case, see 7B McKINNEY'S CPLR 3216, supp. commentary 169-73 (1964).

[175] The court scrutinized law office failures, settlement negotiations, pretrial activity, statute of limitations, disabling circumstances and parallel litigation.

[176] Sortino v. Fischer, 20 App. Div. 2d 25, 28, 245 N.Y.S.2d 186, 191 (1st Dep't 1963).

[177] *Id.* at 28, 31-32, 245 N.Y.S.2d at 190, 194-95. "Such an affidavit must contain evidentiary facts establishing that plaintiff has a viable cause of action . . . as good as the kind of affidavit which could defeat a motion for summary judgment." *Id.* at 32, 245 N.Y.S.2d at 194-95.

[178] See *id.* at 26, 32-33, 245 N.Y.S.2d at 190, 195.

[179] 7B McKINNEY'S CPLR, supp. commentary 160 (1965). Legislative history shows that the original CPLR 3216 was intended to be broader than its predecessor CPA § 181, wherein specific bases for dismissal were enumerated, and that nothing was to inhibit the court in its dealings "with the multifarious situations which might amount to want of prosecution and the numerous factors that might excuse a delay." FIRST REP. 102 (1957).

Subsequently, the first department consistently regarded the amendment as merely creating a new basis for a CPLR 3216 dismissal.[180] For the first department, the statutory prerequisites of a written demand and forty-five day waiting period applied only to the motion to dismiss for failure to file a note of issue, leaving dismissal for general delay to the court's discretion.

The second department, however, refused to agree with the first department's interpretation of the words "such a motion," and read the amendment as being relevant to all 3216 motions.[181]

Those who looked to the Court of Appeals to resolve the lower courts' divergent views were disappointed when, in *Fischer v. Pan Am. Airways, Inc.*,[182] it merely ruled that a motion based on the plaintiff's failure to file a note of issue could not be granted before the 1964 amendment's procedural requisites had been complied with. Since *Fischer* did not decide whether a motion based on general delay survived the amendment, the first department was able to distinguish it, and thus retain its interpretation of CPLR 3216.[183]

The New York State Association of Trial Lawyers[184] was highly critical of the first department's decisions, and it is possible that their arguments contributed to the Court of Appeals' reversal of the first department's dismissal in *Salama*. It was believed that the Court contributed substantially to the Association's battle for a singular reading of CPLR 3216 by holding that:

> a motion to dismiss under CPLR 3216 cannot be granted prior to the filing of a note of issue unless defendant has first served a written demand on the plaintiff to serve and file the note of issue within the forty-five days in accordance with the terms of the statute.[185]

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[180] Weeks v. Jankowitz, 23 App. Div. 2d 549, 256 N.Y.S.2d 341 (1st Dep't 1965); Rutigliano v. Richter, 23 App. Div. 2d 489, 255 N.Y.S.2d 341 (1st Dep't 1965); Brown v. Weissberg, 22 App. Div. 2d 282, 254 N.Y.S.2d 628 (1st Dep't 1964) (dictum); Malinos v. Coliseum Constr. Corp., 22 App. Div. 2d 163, 254 N.Y.S.2d 282 (1st Dep't 1964).

[181] McLoughlin v. Weiss, 23 App. Div. 2d 881, 259 N.Y.S.2d 941 (2d Dep't 1965); Dooley v. Gray, 22 App. Div. 2d 791, 253 N.Y.S.2d 808 (2d Dep't 1964).

[182] 16 N.Y.2d 725, 209 N.E.2d 725, 262 N.Y.S.2d 108 (1965).

[183] Roberts v. New York Post Corp., 24 App. Div. 2d 714, 263 N.Y.S.2d 338 (1st Dep't 1965). See Commercial Credit Corp. v. Lafayette Lincoln-Mercury, 24 App. Div. 2d 851, 264 N.Y.S.2d 893 (1st Dep't 1965), *aff'd*, 17 N.Y.2d 367, 212 N.E.2d 271, 272 N.Y.S.2d 218 (1966), decided before the *Salama* ruling, which based a dismissal on the *Roberts* decision.

[184] The New York State Association of Trial Lawyers led the lobby for the 1964 amendment and has filed amicus curiae briefs in all the New York Court of Appeals decisions. See the criticism of *Sortino* written by its president, Mr. Herman Glaser, in 151 N.Y.L.J., February 6, 1964, p. 4, col. 1.

[185] Salama v. Cohen, 16 N.Y.2d 1058, 1060, 213 N.E.2d 461, 462, 266 N.Y.S.2d 131, 132 (1965).

Subsequently, in spite of the generality of the *Salama* ruling, the first department unexpectedly acquiesced in the interpretation of the amendment's proponents. In *Shabot v. Quincy Mut. Fire Ins. Co.*,[186] the court, citing *Salama*, stated that "a compliance with the provisions of the forty-five day rule of CPLR 3216 by placing the case on the calendar in the requisite time would seem to preclude the dismissal of the action for failure to serve and file a note of issue *or* for lack of prosecution." [187] Thus, although still convinced of the existence of two distinct CPLR 3216 motions, the first department nevertheless held that *Salama* dictated that all such motions were governed by the procedural restrictions of the 1964 amendment.

Then, altering what was considered to be settled law, the Court of Appeals, in *Commercial Credit Corp. v. Lafayette Lincoln-Mercury, Inc.*,[188] recognized the existence of a dismissal for general delay and held that such a dismissal could be had even though plaintiff had filed a note of issue. The Court took into account the insight into the legislative intent afforded it by the vetoed 1965 amendment. This amendment would have explicitly applied the written demand and forty-five day grace period to the original statute as well as to the 1964 amendment. If, implied the Court, the legislature originally intended the forty-five day demand to apply to the first as well as to the second paragraphs of the effective statute, the subsequent activity to ratify the 1965 amendment would have been useless and contradictory. Additionally, the veto on the advice of the entire appellate division, the state's bar associations, and the Judicial Conference confirmed for the Court the existence, after the 1964 amendment, of a motion ruled solely by "the ancient power of the courts"—judicial discretion—and not by a legislative formula. The history of the defeated amendment indicated that the lower courts could grant a dismissal for want of prosecution if, in their opinion, the plaintiff's delay was unreasonable and unjustified. But the Court added that this could occur only after plaintiff had filed a note of issue. However, the Court intimated that once the plaintiff had filed a note of issue, it would be a meaningless formality to require the defendant to serve a forty-five day demand.[189] The Court restricted *Salama* to situations wherein the plaintiff did not file a note of issue.

One commentator sees *Commercial Credit* as creating a "logical absurdity" when allowed to exist simultaneously with *Salama*. He stated that "the plaintiff who persists in his delay . . . is protected by *Salama*, secure in the knowledge that by complying with any

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[186] 24 App. Div. 2d 972, 266 N.Y.S.2d 503 (1st Dep't 1965).
[187] *Id.* at 973, 266 N.Y.S.2d at 504. (Emphasis added.)
[188] 17 N.Y.2d 367, 212 N.E.2d 271, 272 N.Y.S.2d 218 (1966).
[189] *Id.* at 372-73, 212 N.E.2d at 271, 272 N.Y.S.2d at 218.

forty-five day demand he can forestall a motion to dismiss." [190] But such security is misleading. A defendant can demand that a note of issue be filed within forty-five days. Afterwards, he can seek a dismissal for the "general delay" which occurred *prior* to the filing of the note of issue. Thus, by failing to timely file, a plaintiff will play right into the hands of a defendant seeking a dismissal for "general delay." The net effect of this is that defendants are encouraged *not* to expedite the proceedings, but rather to allow the plaintiff enough rope to hang himself.

Collateral Estoppel: Defensive assertion of collateral estoppel allowed in suit involving joint tort-feasors.

Ten years ago, the Court of Appeals abolished the requirement of mutuality for the defensive assertion of collateral estoppel in *Israel v. Wood Dolson Co.*[191] Until recently, it did not appear that the lower courts had applied the *Israel* decision to cases involving joint tort-feasors. Although the facts given by the court are incomplete, it seems that the appellate division, fourth department, in *Hires v. New York Central R.R.*[192] has applied *Israel* to such a situation.

There, plaintiff's intestate was found to have been contributorily negligent in a prior suit against the State of New York and, therefore, plaintiff was denied recovery. Plaintiff then sued the New York Central on a cause of action arising out of the same accident. The court held that "the prior judgment is a complete defense and precludes the prosecution of the cause herein." [193]

This is a departure from the previous attitude of the lower courts in applying the *Israel* doctrine. For example, in the July, 1966 issue of *The Quarterly Survey of New York Practice*, a third department decision, *Cummings v. Dresher*, was examined. The court took great pains to show that there was no identity of issues so that the holding of *Israel* could be avoided.[194]

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[190] Davis, Jr., *Volker Law*, 156 N.Y.L.J., July 11, 1966, p. 1, col. 6.

[191] 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956). Collateral estoppel insures that issues once litigated will be conclusive in a subsequent suit involving different causes of action or parties. Prior to the *Israel* case, the courts imposed a requirement of mutuality in order to assert the estoppel. Since non-parties and non-privies are not bound by a judgment, normally they cannot attempt to benefit therefrom. Thus the party seeking to assert collateral estoppel must have been either party or privy to the previous action. *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 121, 148 (1966).

[192] 23 App. Div. 2d 1075, 265 N.Y.S.2d 895 (4th Dep't 1965).

[193] Hires v. New York Cent. R.R., 23 App. Div. 2d 1075, 265 N.Y.S.2d 895, 896 (4th Dep't 1965).

[194] 24 App. Div. 2d 912, 264 N.Y.S.2d 430 (3d Dep't 1965), as discussed in *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV.