

CPLR 3216: Plaintiff's Unexcused General Delay Before Filing Note of Issue Held Ground for Dismissal of Action

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notice of dishonor, it would appear that summary judgment should not be granted since CPLR 3213 was intended to be used only where substantial issues of fact were not present.

CPLR 3216: Plaintiff's unexcused general delay before filing note of issue held ground for dismissal of action.

CPLR 3216 was amended in 1964 to provide that a motion to dismiss an action for the plaintiff's failure to serve and file a note of issue could not be granted until at least six months after joinder of issue. Thereafter, if the defendant served a written demand upon the plaintiff requiring a note of issue to be filed, the plaintiff had forty-five days within which to comply, at the risk of having his case dismissed. It was widely believed by the plaintiffs' bar that this amendment enabled a plaintiff to file his note of issue within forty-five days and thereby avoid a 3216 dismissal. However, confusion as to the effect of the amendment still existed among the various departments; the first department regarded it as merely creating a new basis for a 3216 dismissal,⁶⁴ while the second department regarded it as being relevant to all 3216 motions.⁶⁵

It appeared that the Court of Appeals had resolved the question in *Commercial Credit Corp. v. Lafayette Lincoln-Mercury, Inc.*⁶⁶ There, the Court recognized the existence of a dismissal for general delay and held that such a dismissal could be had although the plaintiff had already filed a note of issue.⁶⁷ However, confusion still exists, as illustrated by the recent case of *Lunn v. United Aircraft Corp.*⁶⁸ There, the majority, citing *Commercial Credit*, dismissed the action because of the plaintiff's general delay *antedating* the filing of her note of issue. However, while concurring in the result, Justice Benjamin stated that the court was empowered to dismiss for general delay only with respect to delay *following* the filing of the note of issue, where a note of issue has actually been filed in response to a forty-five day notice.

It would, therefore, appear that further clarification by the Court of Appeals is needed to dispose of this question.

⁶⁴ Weeks v. Jankowitz, 23 App. Div. 2d 549, 256 N.Y.S.2d 341 (1st Dep't 1965).

⁶⁵ McLoughlin v. Weiss, 23 App. Div. 2d 881, 259 N.Y.S.2d 941 (2d Dep't 1965).

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

⁶⁷ For a comprehensive discussion of the history behind *Commercial Credit* see *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 312 (1966).

⁶⁸ 26 App. Div. 2d 698, 272 N.Y.S.2d 674 (2d Dep't 1966).