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CPLR 3216: First Department Holds 45-Day Demand Inapplicable to Motions Based on General Delay

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The controversy over the 1964 Amendment of CPLR 3216 still rages.[219] It began as a result of the *Mulinos*[220] and *Brown*[221] cases in which the first department restricted the scope of its application to cases wherein failure to file a note of issue was the only ground alleged. The court stated that where general delay was the ground relied upon, the amendment was inapplicable. This construction preserved the force of the pre-amendment *Sortino*[222] case. Subsequently, in *Fischer v. Pan American World Airways, Inc.*,[223] the first department dismissed for failure to prosecute though defendant had not complied with the amendment. The Court of Appeals reversed,[224] holding that the appellate division lacked the power to grant a motion to dismiss for failure to file a note of issue where defendant had not complied with the amendment.

Plaintiff's bar treated *Fischer* as an overruling of the *Brown* and *Mulinos* decisions.[225] The appellate division, first department, however, in *Roberts v. New York Post Corp.*,[226] held that the *Fischer* case left the prior holding of *Mulinos* unaffected since the motion to dismiss in both *Fischer* and *Mulinos* was for failure to file a note of issue whereas in *Roberts,* dismissal was based on general delay. Consequently, in the first department, even though a note of issue is filed by plaintiff in response to defendant's demand, a motion to dismiss may nevertheless be granted on the ground of general delay.

Thus, the ambiguity of the *Fischer* case has been tentatively resolved by the first department in *Roberts* as retaining the efficacy of *Mulinos* and *Brown.* The second department, however, has taken a stand which seems to require that the 1964 amendment be

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[219] See *The Biannual Survey of New York Practice,* 38 ST. JOHN'S L. REV. 406, 461 (1964).

[220] Mulinos v. Coliseum Constr. Corp., 22 App. Div. 2d 163, 254 N.Y.S.2d 282 (1st Dep't 1964).

[221] Brown v. Weissberg, 22 App. Div. 2d 282, 254 N.Y.S.2d 628 (1st Dep't 1964).

[222] Sortino v. Fisher, 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963). The court struck down several hereinbefore recognized defenses to dismissals for failure to prosecute. See *The Biannual Survey of New York Practice,* 38 ST. JOHN'S L. REV. 406, 449 (1964).

[223] 22 App. Div. 2d 642, 252 N.Y.S.2d 883 (1st Dep't 1964).

[224] Fischer v. Pan Am. World Airways, Inc., 16 N.Y.2d 725, 209 N.E.2d 725, 262 N.Y.S.2d 108 (1965).

[225] The President of the Trial Lawyers Association stated: "it would seem that the decision necessarily renders obsolete the contrary holding in Mulinos . . . as well as Brown. . . ." 154 N.Y.L.J., July 15, 1965, p. 1, col. 6.

[226] (1st Dep't) 154 N.Y.L.J., Oct. 1, 1965, p. 15, col. 7.

complied with on all motions, even those based on general delay.[227] This issue has not been passed upon by either the third or fourth department and will undoubtedly require further resolution by the Court of Appeals.[228]

ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3402: Alleged conflict between court rules and the CPLR.

In *Bedingfield v. Dairymaid Farms, Inc.*,[229] the court declared plaintiff's note of issue, filed without a statement of readiness, premature under the applicable rules of the appellate division, second department.[230] Plaintiff contended that this conclusion was in conflict with CPLR 3402 which allows the filing of the note of issue forty days after the completion of the service of summons since the CPLR does not specifically mention the requirement of a statement of readiness. The court ruled that the CPLR authorizes the adoption of rules pertaining to calendar practice. In holding that the CPLR is "consistent with the inherent power of the court to control its business," [231] the case confirms the view that unless the practitioner can point to an unambiguous clash between court rule and CPLR provision, the rule is not likely to be upset.

ARTICLE 41 — TRIAL BY A JURY

CPLR 4103: Liberally construed.[232]

In *Vinlis Constr. Corp. v. Roreck*,[233] the plaintiff originally sought an accounting and thereafter amended his complaint to include an action for money damages. Since a new note of issue was not filed, the defendant was precluded from exercising the statutory

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[227] The approach taken by the second department can be traced in McLoughlin v. Weiss, 23 App. Div. 2d 881, 259 N.Y.S.2d 941 (2d Dep't 1965); Gilligan v. Farmers Co-op. Marketing Assoc., 23 App. Div. 2d 850, 259 N.Y.S.2d 219 (2d Dep't 1965); Tex Mode Inc. v. Dogmar Bag, Inc., 23 App. Div. 2d 652, 257 N.Y.S.2d 516 (2d Dep't 1965); Devita v. Metropolitan Dist. Inc., 45 Misc. 2d 761, 257 N.Y.S.2d 618 (Sup. Ct. Nassau County 1965); Kalning v. New York Cent. R.R., 45 Misc. 2d 1036, 258 N.Y.S.2d 743 (Sup. Ct. Queens County 1965).

[228] For a more thorough treatment of the repercussions of the 1964 amendment, see 7B MCKINNEY'S CPLR 3216, supp. commentary 160 (1965).

[229] 46 Misc. 2d 146, 259 N.Y.S.2d 292 (Sup. Ct. Suffolk County 1965).

[230] N.Y. App. Div. R. I(a), pt. 7 (2d Dep't 1964).

[231] Bedingfield v. Dairymaid Farms, Inc., 46 Misc. 2d 146, 147, 259 N.Y.S.2d 292, 294 (Sup. Ct. Suffolk County 1965).

[232] Under CPLR 4103, if it appears during the trial of an action that the adverse party is entitled to a jury trial on any legal question, then the court shall give that party an opportunity to demand a jury.

[233] 23 App. Div. 2d 895, 260 N.Y.S.2d 245 (2d Dep't 1965).