

CPLR 3012: Service of Pleadings and Demand for Complaint

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The court's rejection of the arithmetical approach of dividing the total recovery by the number of defendants in favor of a more equitable division has long-standing judicial acceptance in the area of derivative liability.⁸⁴ The majority noted that it was not to be confined to such situations, but rather was to be utilized when the nature of the association of the defendants involved allowed the imposition of a more equitable result.⁸⁵

Thus, the practitioner should be sensitive to the strict interpretation accorded the term "defendant" in CPLR 1401, and to the possibility of a judicial determination of pro rata share at variance with the arithmetical formula.

ARTICLE 30 — REMEDIES AND PLEADING

CPLR 3012: Service of pleadings and demand for complaint.

In *Waldron v. Ward*,⁸⁶ plaintiff appealed from an order which granted defendant's motion to dismiss the complaint for neglect to prosecute. The appellate division affirmed, holding, however, that the action should have been dismissed under CPLR 3012(b) for failure to serve a complaint and proceed with the action. The court noted that the motion to dismiss was for failure to serve a complaint⁸⁷ and not for neglect to prosecute.⁸⁸ After serving the summons, the plaintiff did nothing for forty months and the appellate division found that there was nothing in the record to justify such delay. The instant case was an action to recover for personal injuries. Presumably, the three-year statute of limitations had expired at the time of the dismissal for the forty-month delay.

CPLR 3012(b) provides for the dismissal of an action when a plaintiff fails to serve a complaint within twenty days after a written demand by the defendant. Under a similar provision in the CPA, dismissals were generally granted when there was no valid excuse for the delay and no meritorious claim was shown.⁸⁹ CPLR

⁸⁴ *Wold v. Grozalsky*, 277 N.Y. 364, 178 N.E. 389 (1938).

⁸⁵ *Lyons v. Provencal*, 20 App. Div. 2d 875, 248 N.Y.S.2d 663 (1st Dep't 1964).

⁸⁶ 24 App. Div. 2d 470, 260 N.Y.S.2d 850 (2d Dep't 1965).

⁸⁷ CPLR 3012(b) provides: "If the complaint is not served with the summons, the defendant may serve a written demand for the complaint. If the complaint is not served within twenty days after service of the demand, the court upon motion may dismiss the action."

⁸⁸ CPLR 3216 provides for the dismissal, upon motion, or on the court's own initiative, of an action for unreasonable neglect to prosecute. This section does not speak expressly in terms of a *complaint*, but speaks in terms of a general neglect to prosecute, and of a failure to timely file and serve a note of issue.

⁸⁹ CPA § 257. See *The Biannual Survey of New York Practice*, 39 ST. JOHN'S L. REV. 406, 441 (1965).

3216, provides for the dismissal of an action when a party unreasonably neglects to proceed with the prosecution of his cause. It is vitally important for courts to carefully indicate the ground upon which a dismissal is granted. CPLR 205(a)⁹⁰ provides that a plaintiff may commence a new action within six months after the termination of a prior action if it is dismissed for other than *neglect to prosecute*, voluntary discontinuance, or final judgment on the merits. Therefore, where a cause of action is dismissed for neglect to prosecute under CPLR 3216, the CPLR 205(a) extension of the statute of limitations would not apply.⁹¹

Would the six-month extension be afforded a plaintiff where his action was dismissed for failure to serve a complaint under the provisions of CPLR 3012(b)? This is a rather difficult problem. It would seem that the provisions of CPLR 205(a) excepting a dismissal for neglect to prosecute from the extension of the statute of limitations is not limited to a CPLR 3216 dismissal. *Loomis v. Girard Fire & Marine Ins. Co.*⁹² held that a dismissal for failure to serve a complaint under the predecessor of CPLR 3012(b) was the equivalent of a dismissal for failure to prosecute and, as such, the statute of limitations was not tolled as permitted by the analogue of CPLR 205(a). It might reasonably be argued that inasmuch as a dismissal for failure to prosecute is still excluded by CPLR 205(a), the result should be the same under CPLR 3012(b). However, due to the difference in terminology between CPLR 3012(b) and CPLR 3216, some authorities are of the opinion that not every dismissal for failure to comply with a demand under CPLR 3012(b) should constitute a failure to prosecute within the scope of CPLR 205(a). According to this view, when the period of time that has elapsed between the demand for the complaint and the motion to dismiss the action is so considerable that it equates with the kind of neglect to prosecute portrayed in CPLR 3216, there should be no extension of the statute of limitations under CPLR 205(a). If the delay is of shorter duration, and if there is no substantial prejudice to the defendant, the benefit of the six-month extension of the statute of limitations should be permitted. As one authority states: "An overzealous defendant

⁹⁰ The predecessor of CPLR 205(a) was CPA § 23.

⁹¹ 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 205.06 (1965); see also 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3216.14 (1965); *Sorinto v. Fisher*, 20 App. Div. 2d 25, 245 N.Y.S.2d 193 (1st Dep't 1963); *Parshall v. Grand Leasing Corp.*, 17 App. Div. 2d 953, 233 N.Y.S. 2d 777 (2d Dep't 1962).

⁹² 256 App. Div. 443, 10 N.Y.S.2d 283 (3d Dep't 1939); see generally *Houle v. Wilde*, 22 App. Div. 2d 727, 253 N.Y.S.2d 234 (3d Dep't 1964); *Flannery v. Stewart*, 22 App. Div. 2d 786, 254 N.Y.S.2d 130 (1st Dep't 1964); *Simmons v. New York City Trans. Auth.*, (Sup. Ct. Kings County), 153 N.Y.L.J., March 5, 1965, p. 18, col. 2.

should not reap the benefit of a statute of limitations defense because of a minor defalcation on the part of the plaintiff."⁹³

In opposition to the foregoing view, it is submitted that a dismissal under CPLR 3012(b) should be the equivalent of a dismissal for neglect to prosecute under CPLR 3216. If a plaintiff does not deem it worthwhile to serve a complaint, this, in itself would seem to be a neglect to prosecute as a matter of law. Such neglect to prosecute should not warrant the six-month extension provided by CPLR 205(a). So holding would serve as a sufficient stimulus to plaintiffs who fail to serve their complaint. If, however, the court finds that the failure to serve the complaint was excusable, it would not dismiss the action under CPLR 3012(b).

It should be further noted that if the CPLR 3012(b) dismissal is independent of a CPLR 3216 dismissal, the plaintiff would not be able to rely upon the forty-five day notice provision of CPLR 3216 to resist a motion under CPLR 3012(b). In any case, it seems that as soon as a substantial period of time expires after a defendant demands a complaint under CPLR 3012(b), the defendant may move under that section to dismiss the complaint. He may then label the motion one to dismiss for neglect to prosecute, or have the motion so treated without labeling it as such. In either case, the plaintiff would not have to serve a forty-five day demand as a condition to his motion.⁹⁴

CPLR 3013: Particularity of statements in pleadings.

In *Loudin v. Mohawk Airlines, Inc.*,⁹⁵ plaintiff sued for defamation and other injuries. The appellate division held that the complaint purporting to allege malicious intent to interfere with plaintiff's right to employment was insufficient because it stated neither facts sufficient to show that plaintiff would have obtained employment but for defendant's interference nor did it plead special damages by reason of such interference.

Under the CPA, a pleading had to state "material facts."⁹⁶ The present requirement under the CPLR requires statements sufficiently particular to give the court and parties notice of the transactions, and the material elements of each cause of action.⁹⁷ The stress of the new statutory provisions seems to be placed on the requirement that the pleadings be sufficiently detailed to give the parties and the court notice of the event relied upon as a cause of action and of the rule of law being invoked.⁹⁸ On the one

⁹³ 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3012.15 (1965).

⁹⁴ 7B MCKINNEY'S CPLR 3012, supp. commentary 49-50 (1965).

⁹⁵ 24 App. Div. 2d 447, 260 N.Y.S.2d 899 (1st Dep't 1965).

⁹⁶ CPA § 241.

⁹⁷ CPLR 3013.

⁹⁸ FIRST REP. 261-65.