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CPLR 3216: Dismissal Held Available Against Third-Party Plaintiff

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forty-five day demand, he would nevertheless be immunized from a CPLR 3216 motion during the six months subsequent to joinder by virtue of the same amendment that furnished the forty-five day demand.

There are several explanations for delay which the courts will accept to overcome the motion and a strong showing of merit may also suffice as a valid defense.[175] Pursuant to the apparent meaning of *Salama,* and the more explicit statements of a few trial courts in the second department,[176] plaintiff is encouraged to rest upon his rights for so long as he might choose—even years past the expiration of the statute of limitations—and still be entitled to forty-five days to revive his claim.

CPLR 3216: Dismissal held available against third-party plaintiff.

In *New Paltz Growers, Inc. v. Jersey Ice Mach. Co.,*[177] apparently the only reported post-amendment third department case to consider the failure-to-prosecute dismissal, the Ulster County Supreme Court granted a third-party defendant's 3216 motion to dismiss the third-party claim. The court refused to consider the motion for its application to the plaintiff's main action, stating:

> The third-party plaintiff by commencing the third-party action, interjected itself as an aggressor plaintiff party and assumed the duties and responsibilities of a plaintiff in pressing its action. It had the right to bring motions for dismissal under CPLR 3216. . . . If a delay was avoidable, it is no excuse to lay it at the door of the plaintiff in the main action. The third-party plaintiff stands on his own activity or lack of activity and must justify the delay with some reasonable excuse.[178]

The court stated (following the first department holdings alluded to above) that since the dismissal was based upon general delay, the forty-five day demand was unnecessary.

Although the *Salama* case would now seem to require the forty-five day demand, the disposition of the instant case is nonetheless difficult to justify.

Since impleader in New York is available only for indemnity, it seems inappropriate to lay the burden of prosecution on the third-party plaintiff, even as to the third-party claim. In that claim, defendant (third-party plaintiff) is seeking only to be made whole for whatever the main plaintiff recovers from him. If the main claim is delayed—and *Sortino* and its progeny provides that the

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[175] Giordano v. St. Clare's Hospital, 24 App. Div. 2d 568, 262 N.Y.S.2d 61 (2d Dep't 1965). *Contra,* New Paltz Growers, Inc. v. Jersey Ice Mach. Co., *supra* note 174.

[176] See cases cited note 173 *supra.*

[177] *Supra* note 174.

[178] New Paltz Growers, Inc. v. Jersey Ice Mach. Co., *supra* note 174, at 953, 263 N.Y.S.2d at 474.

defendant is under no burden to help the plaintiff move the main case—there is nothing defendant can accomplish by advancing the indemnity claim since it *depends* upon the outcome of the main claim. The *New Paltz* result would be understandable if the main claim were ready and if it were shown that only the third-party claim had been delayed. There was, however, no such showing. Thus, *New Paltz* advocates the proposition that the defendant may be compelled to push to completion a claim for indemnity that does not have its genesis until the main claim has decided that the defendant is *entitled* to indemnity.

CPLR 3216: Failure to perfect appeal subject to dismissal for neglect to prosecute.

Attention should also be directed to laxity in the perfection of appeals. The first department, again the leader in the war on lethargic claimants, has already made clear its intolerance for unexcused delay at this stage.[179] Only recently, the fourth department which previously had, by its own admission, granted extensions to perfect appeals as a matter of course notwithstanding blatant disobedience to the rules of the department and directives of the court, altered its policy. It was held in *Caira v. McKenna*[180] that real justification, by affidavit, would be essential to resist dismissal for unexcused neglect in the process of appealing to the fourth department.

The trend by the courts toward increased dismissals for neglect to prosecute is evident from initial summons to final judgment on appeal and it would appear that this trend is continuing. It encourages the expeditious disposition of litigation and relief to overburdened calendars and offers a better opportunity for justice to all parties.

ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3404: Automatic dismissals.

In *Tactuk v. Freiberg*,[181] an action for wrongful death and personal injuries, the lower court denied plaintiff's motion to vacate an "automatic" dismissal pursuant to CPLR 3404. This section specifically states that when a case is struck from the calendar, or left unanswered and not restored within one year, it is deemed abandoned and automatically dismissed.[182]

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[179] Tonkonogy v. Jaffin, 21 App. Div. 2d 264, 249 N.Y.S.2d 934 (1st Dep't 1964).

[180] 23 App. Div. 2d 325, 261 N.Y.S.2d 365 (4th Dep't 1965).

[181] 24 App. Div. 2d 503, 261 N.Y.S.2d 438 (2d Dep't 1965).

[182] CPLR 3404. See 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3404.02 (1965).