

# CPLR 3216: Failure to Perfect Appeal Subject to Dismissal for Neglect to Prosecute

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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.<sup>179</sup> 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*<sup>180</sup> 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*,<sup>181</sup> 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.<sup>182</sup>

<sup>179</sup> *Tonkonogy v. Jaffin*, 21 App. Div. 2d 264, 249 N.Y.S.2d 934 (1st Dep't 1964).

<sup>180</sup> 23 App. Div. 2d 325, 261 N.Y.S.2d 365 (4th Dep't 1965).

<sup>181</sup> 24 App. Div. 2d 503, 261 N.Y.S.2d 438 (2d Dep't 1965).

<sup>182</sup> CPLR 3404. See 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3404.02 (1965).