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CPLR 3404: Automatic Dismissals

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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.[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).

In reversing the decision of the lower court, the appellate division, second department, held that CPLR 3404 does not apply where the parties are "actively engaged in settlement negotiations" and where a motion is pending. In preserving the plaintiff's cause of action, the appellate court relied primarily on *Marco v. Sachs*.[183] In that case, the Court of Appeals indicated that a case would not be automatically dismissed under RCP 302(2) (the analogue of CPLR 3404) unless there was an "intent to abandon the litigation." [184] The Court in *Marco* further stated that the wording of RCP 302(2) "suggests a presumption (of abandonment) rather than a fixed and immutable policy of dismissal, and it would seem that the rule was never intended to apply to a case where litigation in a cause was actually in progress."[185]

The above quoted language does not appear to make contemporaneous litigation a prerequisite to restoration, but rather it indicates that such litigation is merely indicative of the parties' intention not to abandon the case. The gravamen of restoration is, therefore, that by their activity the parties manifest to the court their intention not to abandon the cause. Based upon this construction, it is submitted that the court in the instant case could have vacated the dismissal solely upon the parties' engagement in settlement negotiations.

While there is no case law expressly holding that settlement negotiations in themselves would be sufficient evidence of the parties' desire to preserve the litigation so as to vacate the dismissal, dicta in several cases lend support to such a proposition.[186] As a further consideration, would it not be patently illogical and highly inequitable for a court to label "abandoned" a case in which the parties, through their active participation in serious settlement negotiations, evidence a clear intention not to abandon the case?[187] As one authority has stated, "abandonment is more than a constructive concept; it is based on an assumption of lack of concern with the outcome. . . ." [188] It would be contrary to reason to hold that parties actively engaged in settlement negotiations are *unconcerned* about the outcome of the litigation.

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[183] 10 N.Y.2d 542, 181 N.E.2d 392, 226 N.Y.S.2d 353 (1962).

[184] *Id.* at 550, 181 N.E.2d at 395, 226 N.Y.S.2d at 357.

[185] *Id.* at 550, 181 N.E.2d at 395, 226 N.Y.S.2d at 358.

[186] See American President Lines Ltd. v. J. Rich Steers, Inc., 17 Misc. 2d 490, 491, 187 N.Y.S.2d 582, 583 (Sup. Ct. Bronx County), *aff'd*, 8 App. Div. 2d 803, 188 N.Y.S.2d 950 (1st Dep't 1959); Fontheim v. French Investing Co., 13 Misc. 2d 620, 622, 177 N.Y.S.2d 77, 79 (Sup. Ct. N.Y. County 1958).

[187] See Marco v. Sachs, 10 N.Y.2d 542, 181 N.E.2d 392, 226 N.Y.S.2d 353 (1962).

[188] 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3404.03 (1965). See also *id.* at 3404.08; 7B McKINNEY'S CPLR 3404, supp. commentary 12 (1965); Marco v. Sachs, *supra* note 187, at 550, 181 N.E.2d at 395, 226 N.Y.S.2d at 358.