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Importance of Having Court Specify Whether Dismissal Is Pursuant to CPLR 3012 or 3216

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practice, propounds a generally liberal position.[160] The latter states that "where special damages are not an integral part of the cause of action . . . 3015(d)'s requirement of itemization should be given very little if any significance by the courts."[161] Professor Siegel indicates that the necessity for this section is obviated by the bill of particulars.

It is this obvious contrariety of opinion that is dealt with by the supreme court in *Friendly Babylon Corp. v. Locust at Ralph Corp.*[162] In this case, plaintiff moved to dismiss defendant's answer on the ground that two defenses-counterclaims were inadequately pleaded. Defendant had generally alleged special damages in pleading defamation and prima facie tort. The court granted plaintiff's motion to dismiss and indicated that of the two aforementioned views, that of Professors Weinstein, Korn and Miller was the proper one.

Unfortunately, trial counsel had inadvertently failed to call the court's attention to Professor Siegel's *full* commentary. Although Professor Siegel advocates general disregard of 3015(d) he does cite an exception:

> [D]ifferent conclusions may be warranted in those few cases in which special damages are an element of the cause of action itself, *e.g.*, libel other than libel per se . . . prima facie tort. . . .[163]

Thus, by virtue of this exception, it appears that Professor Siegel would be in agreement with the result reached by the court.

Dismissal of complaint—importance of having court specify whether dismissal is pursuant to CPLR 3012 or 3216.

CPLR 3012 provides for the dismissal of an action when plaintiff fails to serve a complaint within twenty days after a demand by the defendant. Dismissals pursuant to this section, or its predecessor, CPA § 257, have occurred where no valid excuse for the delay is indicated and no meritorious claim is shown.

In addition, CPLR 3216 provides for dismissal when a party unreasonably neglects to proceed in the prosecution of his cause.

Clearly, the distinction between the two may become clouded when there is a dismissal following an untimely service of a complaint, if the court is not explicit about the ground for its decision. This distinction is significant when the motion to dismiss is granted after the statute of limitations on the plaintiff's claim has run. If the action is then dismissed, plaintiff would

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[160] 7B McKinney's CPLR 3015, supp. commentary 57 (1964).
[161] *Id.* at 59.
[162] 44 Misc. 2d 563, 254 N.Y.S.2d 250 (Sup. Ct. 1964).
[163] *Supra* note 160, at 59.

seemingly lose his cause altogether. This potential inequity is vitiated in part by CPLR 205, which provides, that if the dismissal is for other than a want of prosecution, a six-month extension of the statute of limitations is given to the plaintiff. No such extension is given after a 3216 dismissal for failure to prosecute.

The problem is one, then, of recognition—when does the delay in serving a complaint become so inordinate as to justify a dismissal on the basis of "neglect to proceed" rather than failure to serve a complaint?

This problem is discernible in two recent appellate division cases. In *Houle v. Wilde*[164] the plaintiff had failed to serve a complaint for fifteen months after negotiations had terminated. Plaintiff was allowed, by the lower court, to open his default. The appellate division reversed on the basis that both the affidavit of merit and excuse for delay were deficient.

Similarly, in *Flannery v. Stewart,*[165] the court considered a motion to vacate a dismissal based on a delay of eight months in the service of the complaint. The motion to vacate came almost four months after the dismissal. The court held that there was neither a valid excuse shown for the delay nor an affidavit of merit and, as a result, denied the motion to vacate. In this case the court cited its own opinion in *Keogh v. New York Post Corp.*[166] which had ended with a dismissal pursuant to 3216 for neglect to prosecute. As a result, there must be some doubt as to the effect of the dismissal in *Flannery* on the 205 extension, and, by analogy, in *Houle.*[167]

A New York case which reflects the possibility of an inordinate delay in service of a complaint resulting in a neglect to proceed dismissal is *Loomis v. Girard Fire & Marine Ins. Co.,*[168] where the plaintiff's original action was dismissed when he failed to serve a complaint within three years after defendant had appeared. The third department affirmed a lower court ruling refusing to allow plaintiff to reinstitute his action on the basis that the original dismissal was one

> for failure of service [of the complaint] . . . as well as neglect to prosecute the action. Consequently the statute of jeofailes[169] does not now help the appellants . . . to the right to commence a new action . . . after the expiration of the time limited therefor.[170]

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[164] 22 App. Div. 2d 727, 253 N.Y.S.2d 234 (3d Dep't 1964).

[165] 22 App. Div. 2d 786, 254 N.Y.S.2d 130 (1st Dep't 1964).

[166] 22 App. Div. 2d 659, 253 N.Y.S.2d 140 (1st Dep't 1964).

[167] Analogy may be drawn to the *Houle* case since the court in that case cited neither section 3012 nor rule 3216, and since the facts in both *Houle* and *Flannery* show similar long delays.

[168] 256 App. Div. 443, 10 N.Y.S.2d 283 (3d Dep't 1939).

[169] This refers to CPA § 23, which was the predecessor of CPLR 205.

[170] Loomis v. Girard Fire & Marine Ins. Co., 256 App. Div. 443, 443-44, 10 N.Y.S.2d 283, 284 (3d Dep't 1939).

This case highlights the problem of whether a practitioner can determine the statutory cause of his dismissal if the court is not explicit. Neither *Houle* nor *Flannery* comes to grips with this problem. Both illustrate the need for some judicial determination so that the practitioner can judge how long a delay will change a 3012 dismissal into a 3216 dismissal, and thereby cause a plaintiff to lose the six-month extension granted by CPLR 205.[171]

CPLR 3019(c): Setoff counterclaim on assigned claim.

Until 1936 the Civil Practice Act divided counterclaims into two categories: the setoff and the recoupment.[172] The setoff could be asserted by an obligor against a plaintiff if the claim matured before assignment, and if defendant had knowledge of the claim prior to notice of the assignment. On the other hand, a recoupment counterclaim could be asserted although maturing after assignment.[173]

After 1936 there was some doubt as to whether an amendment to the section eliminated this division. CPLR 3019(c) retained this confusion. All doubt was ended in 1964 by the court of appeals which, in the case of *James Talcott, Inc. v. Winco Sales Corp.*,[174] confirmed the recoupment-setoff distinction.

In the recent appellate division case of *Chatham Sec. Corp. v. J.R. Williston & Beane*,[175] defendant asserted a claim against the plaintiff arising out of a separate transaction with plaintiff's principal-assignor. That case was resolved on principles of agency. The court held that "it is well-established law that an agent who acquires an interest in his principal's contract takes subject to defenses available against this principal even as any assignee. . . ." [176] With the case so resolved, the court chose to discuss plaintiff's contention that it was an assignee.[177] The court indicated that the counterclaim was a setoff since it arose from a transaction other than the one sued upon by the plaintiff.

Since the court acknowledged that the counterclaim was a setoff, the dictates of *Talcott* demanded that it could only be raised against the plaintiff if it existed *prior to the assignment,* and if

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[171] For an excellent illustration of the lack of clarity that marks this area see Simmons v. New York City Transit Authority (Sup. Ct. Kings County) 153 N.Y.L.J., March 5, 1965, p. 18, col. 2.

[172] CPA § 266 as amended.

[173] CPA § 267 as amended.

[174] 14 N.Y.2d 227, 199 N.E.2d 499, 250 N.Y.S.2d 416 (1964). This case is analyzed in *The Biannual Survey of New York Practice,* 39 ST. JOHN'S L. REV. 181, 182-83 (1964).

[175] 22 App. Div. 2d 260, 254 N.Y.S.2d 436 (1st Dep't 1964).

[176] *Id.* at 265, 254 N.Y.S.2d at 440.

[177] After indicating that Chatham was liable for the setoff, the court introduced its conclusion as to plaintiff's rights as an assignee: "If Chatham is treated as an assignee of Arlee, its position is worsened." *Ibid.*