

# The Amendment of CPLR Rule 3216--The 45-Day Demand

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*Chs.*

- 322 Amends § 7701 regarding special proceedings as to express trusts.
- 342 Amends § 6218(b) to give the sheriff fifteen instead of ten days to file his inventory in connection with an attachment.
- 347 Amends § 5236(c) to make certain changes in the time provisions applicable to the publishing of notice in connection with a sheriff's sale of realty.
- 349 Amends § 2105 to permit an attorney to certify papers only if he is admitted to practice in New York.
- 388 This is a big bill submitted by the Judicial Conference. It consists of mechanical corrections in the CPLR which were overlooked at the 1963 session of the Legislature.
- 405 Amends § 6111 to wipe out the last vestige of the body execution from New York practice. It provides that an order of arrest *after* judgment is available only in an equity action, and not in a law action (where an order of arrest *is* allowed prior to judgment).
- 422 Amends § 2701 to insert a subdivision regarding court disposition of property which is in the possession of a party.
- 477 Amends § 408 to make it clear that disclosure in a surrogate court, where most litigation consists of "proceedings," is not to be governed by § 408, *i.e.*, does not require a court order. The usual notice procedures of Article 31 of the CPLR may be used.
- 485 Amends § 5014(2) regarding when an action on a judgment may be maintained.
- 511 Amends § 321(b) to require that other parties be notified of a change of attorney.
- 519 Amends § 2302(a) to allow the attorney general to issue subpoenas.

*The Amendment of CPLR Rule 3216—The 45-Day Demand*

On April 24, 1964, the eve of the expiration of the 30-day bill period, the Governor signed into law an amendment to rule 3216 which the plaintiffs' bar had been advocating for many months. It is Chapter 974 of the Laws of 1964. The amendment is chiefly the result of efforts by the New York State Association of Trial Lawyers and the association's president, Herman B. Glaser, Esq.; it was in great measure motivated by the impact of the *Sortino* decision on the disposition of rule 3216 motions. The main survey article to which this list of amendments is appended treats the *Sortino* case.

The amendment adds a paragraph to rule 3216, providing in essence as follows. If the motion to dismiss for want of prosecution is predicated on the plaintiff's failure to file a note of issue within six months after the joinder of issue, the rule 3216 motion to dismiss does not lie and if the motion is made it must be denied. The amendment so provides notwithstanding any time limitations that may come from any other "law or rule;" that appears to be aimed chiefly at the rules of the individual courts, precluding such rules from interfering with the purpose of the amendment.

The foregoing is only the first part of the amendment. It then goes on to require that, in any event, no rule 3216 motion lies (and if made must be denied)

unless the defendant shall have served a written demand requiring the plaintiff to serve and file such a note of issue and stating that the default by the plaintiff in complying with such demand within forty-five days after the service of such demand. . . .

If the plaintiff files the note of issue within the 45 days, no rule 3216 motion lies and, if the motion is made, it must be denied.

But where it is not served and filed within the 45 days—and many a plaintiff may be confronted with obstacles in the circumstances of his particular case that will preclude the service and filing—the situation reverts to exactly what it was prior to the amendment. That is, the defendant may then make the rule 3216 motion and the factors that determine its disposition will be the same as those that governed before the 1964 amendment to rule 3216. For that reason, the Bar should not lose sight of the *Sortino* case or assume that the amendment for some reason overrules the case. It does not. The amendment merely precludes the motion at certain times relative to the joinder of issue and the defendant's making of a 45-day demand. The passing of those time periods without the requisite action on the part of the plaintiff enables the defendant to make his rule 3216 motion and requires the court to dispose of it by the same criteria that have always governed. Nothing in the amendment purports to change those criteria, and the *Sortino* case is the principal exposition of them. Indeed, the amendment even codifies the two basic showings that plaintiff had to make under case law prior to the amendment in order to defeat a rule 3216 motion: "justifiable excuse for delay and a good and meritorious cause of action."

The plaintiff's bar has gotten a legislative reprieve. If a plaintiff without good reason fails to perform the obligations imposed on him by the new rule, after the defendant has performed *his* obligations under it, the plaintiff will have no standing to blame the *Sortino* case for what is likely to follow.

One problem suggests itself. The amendment is effective September 1, 1964. Plaintiffs will be wondering what the results will be prior to that date. Defendants, on the other hand, may flock

to the courts with rule 3216 motions prior to September 1 in the hope that the amendment will not be given any effect before that time. It would appear, however, that we are dealing here with what is generally characterized (whether accurately or not) as "procedure." On strictly procedural matters, retroactivity is not a constitutional problem. Matters as substantial as those involved in the long-arm statute, Section 302 of the CPLR, have been held retroactive. Section 10003 of the CPLR mandates the general retroactivity of the entire CPLR. Though one may wonder whether that provision was intended to apply to *amendments* of the CPLR, it would appear to furnish some ground for a judicial determination that the rule 3216 amendment is retroactive. A contrary indication appears, however, from the very fact that the Legislature made the amendment effective September 1, 1964; it could as readily have made it effective immediately if it particularly considered that point.

The amendment represents a policy statement of the Legislature in which there appears to be no inherent factor that makes the policy more important after September 1 than before. The effective date actually used should not be taken as automatic indication of a legislative intent *not* to make the amendment retroactive. The first of September is the traditional starting time for procedural changes in our law. It may well be that it was used for the rule 3216 amendment more out of habit than deliberation. If so, the policy specifically to be enforced after September 1 might be given some impetus before then. The very presence of the amendment makes it susceptible of implementation immediately, were the courts so disposed. An early indication of such judicial attitude would likely discourage the numerous rule 3216 motions that defendants might be expected to make prior to September 1 to avoid the 45-day demand provision of the amendment.

#### *Legislative Amendments Other Than CPLR*

The following chapters of the Laws of 1964 affect practice and procedure in the courts. For the reasons previously specified, the list is not exhaustive, though it contains the most significant procedural activities of the Legislature.

#### *Chs.*

- 200 Raises the jurisdiction of the justice of the peace in first class towns to \$1,000.
- 204 } Raises to \$10,000 the monetary jurisdiction, respectively, of
- 243 } the county courts of Saratoga, Franklin and Suffolk
- 255 } Counties.
- 230 Amends § 231(2) of the RPAPL to omit reference to § 5236 of the CPLR which reference caused serious difficulties to