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Article 44

Motion to Dismiss for Want of Prosecution

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required that the defendant make the motion to add the omitted party even if the order directing the party to be added was futile in that the absent party was clearly not subject to the jurisdiction of the court and had refused to appear voluntarily.[223]

Since the avowed intent of the Revisers was the avoidance of delay caused by multiplicity of motions, one might assume that the CPLR would change this procedure, and allow a motion to dismiss for nonjoinder in such instance to be made immediately. There is no specific provision in the CPLR which makes a motion for joinder of the indispensable party a condition precedent to a rule 3211(a)(10) motion to dismiss on grounds of nonjoinder.[224] It is apparent that a rule 3211(a)(10) motion could be conditionally granted.[225] The court in such an order would allow a reasonable time for the absent party to be joined, after which time the order would become absolute (and the action would be dismissed) unless an extension was granted.

If it appears at the very outset, however, that the action cannot continue without the party; that such party is not subject to the jurisdiction of the court; and that he has refused to appear voluntarily, the court should order immediate dismissal.

The court in the instant case interpreted the CPLR as retaining the dual-motion procedure of the CPA. Such motion practice results in unnecessary delay. The decision appears to give the relevant CPLR provisions a construction they were not intended to have.[226] The dual-motion procedure should not be required in circumstances where it serves no useful purpose.

Motion to Dismiss for Want of Prosecution

Rule 3216 of the CPLR, which provides for the dismissal of a complaint for failure to prosecute an action, has become a strong source of controversy recently. The storm center is the first department case of *Sortino v. Fisher*,[227] which will be treated at length shortly.

Where the plaintiff has unreasonably delayed in pressing his claim to adjudication, the court, on its own initiative or upon motion, may dismiss the complaint.[228] No particular period of delay is required; if it is substantial on the facts of the case it is

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223 Carruthers v. Jack Waite Mining Co., 306 N.Y. 136, 116 N.E.2d 286 (1953).

224 See CPLR § 1001(b).

225 See 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1003.05 (1964).

226 See *Ibid.*; WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 80 (1963); *but see* 7B McKINNEY'S CPLR R. 3211, commentary 324-25.

227 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963).

228 CPLR R. 3216.

sufficient to permit a rule 3216 motion to dismiss.[229] Generally, in order to avoid such dismissal it is incumbent upon the plaintiff to show (1) a valid excuse for the delay, and (2) that his cause of action has merit.[230] In enacting rule 3216 the Legislature intended to retain the flexibility of prior practice under the CPA. Hence, a court still has the discretionary power to deal adequately with the varied situations that might constitute neglect in prosecution.[231] The new rule is practically identical to Section 181 of the CPA, with the one exception that it allows a court to dismiss on its own initiative (which had been the practice under prior case law).[232] It should be noted that at the time of this writing an amendment of rule 3216 was passed by the Legislature and is now on the Governor's desk awaiting action. If the amendment is approved by the Governor, the Appendix following this article will treat it. The amendment provides that, before a motion to dismiss for failure to prosecute can be granted, the defendant must serve upon the plaintiff, at least forty-five days prior to the making of his motion, a notice requiring the plaintiff to proceed in the action by filing and serving a note of issue. Thereafter, if the plaintiff files and serves such note of issue within the forty-five day period, and the defendant nonetheless makes the motion, the court must deny it.

Whether the amendment is signed by the Governor or not, the following discussion will remain relevant and the cases on rule 3216 will remain applicable. If the amendment is approved, the cases will still provide the criteria governing disposition of a rule 3216 motion (as where such a motion is made because plaintiff fails to take the steps that would avoid the motion under the amendment).

Sortino v. Fisher[233] involved the usual negligence action. Plaintiff commenced the action in November 1960 and issue was joined a month later. Defendant moved to dismiss for failure to prosecute in August 1962. The last activity of the plaintiff

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[229] See, *e.g.*, White v. Good Operating Corp., 19 App. Div. 2d 802, 243 N.Y.S.2d 260 (1st Dep't 1963) (73 months delay in negligence action); Noble v. Hayakawa, 16 App. Div. 2d 616, 225 N.Y.S.2d 985 (1st Dep't 1962) (20 months delay in action on note).

[230] Keating v. Smith, 20 App. Div. 2d 141, 245 N.Y.S.2d 909 (2d Dep't 1963); Powell v. Becker Truck Renting Corp., 20 App. Div. 2d 573, 245 N.Y.S.2d 910 (2d Dep't 1963); Brown v. Prezebowski, 14 App. Div. 2d 812, 221 N.Y.S.2d 256 (2d Dep't 1961).

[231] FIRST REP. 101-03; see 1960 N.Y. LEG. DOC. No. 20, FOURTH PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 194 [hereinafter cited as FOURTH REP.].

[232] Frederick v. Oliver & Burr, 154 App. Div. 346, 139 N.Y. Supp. 320 (3d Dep't 1912); Sulzer v. Fontheim, 170 Misc. 552, 10 N.Y.S.2d 527 (Sup. Ct. 1939).

[233] 20 App. Div. 2d 25, 245 N.Y.S.2d 186 (1st Dep't 1963).

prior to defendant's motion was in March 1962, when the examination before trial was completed. The appellate division reversed the order of the lower court (which denied the motion) and held that, although the delay since the last step in the instant case was only five months, it was two and one-half years since joinder of issue. The delay was held substantial and unreasonable. Plaintiff's excuse, viz., that she was waiting for court reorganization to take effect on September 1, 1962 so that the case could be transferred to the civil court, was held insufficient, as were her affidavits showing the merits of her cause of action, which contained nothing but hearsay reference to the facts.

The court's dismissal in *Sortino,* though not on the merits (rule 3216 specifically provides that the dismissal is not on the merits unless the court so indicates) is in *effect* with prejudice, since the statute of limitations on the tort has generally expired when the motion is made (the defendant withholds the motion until its expiration) and the plaintiff is thereby barred from bringing a new suit on the same cause of action.[234]

As already mentioned, the plaintiff must offer an excuse for his delay. The court in *Sortino* indicates that any "Law Office Failures," that is, excuses which merely shift the blame for delay from the plaintiff to his lawyer or to other associated counsel, will be rejected.[235] Thus, excuses based on negligence and mistakes of the plaintiffs' lawyers are inadequate.[236] Herman Glaser, the president of the New York State Association of Trial Lawyers, in an editorial criticizing the court's decision in *Sortino,* disagrees with this view and takes the position that the court is being unrealistic in not taking into account the problems of the practicing lawyer and his overburdened schedule.[237]

The court, in *Sortino,* rejects also any excuse based on the defendant's acquiescence in plaintiff's neglect to proceed, maintaining that the duty to prosecute the action rests solely on the plaintiff.[238] However, in *Carbonel v. Ocasio,*[239] the court took a

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234 DeMarco v. Boghossian, 37 Misc. 2d 701, 236 N.Y.S.2d 585 (Westchester County Ct. 1962); Berman v. Esposito, 35 Misc. 2d 59, 228 N.Y.S.2d 18 (Nassau County Dist. Ct. 1962).

235 Sortino v. Fisher, 20 App. Div. 2d 25, 29, 245 N.Y.S.2d 186, 192 (1st Dep't 1963).

236 Berger v. Colrick, 20 App. Div. 2d 639, 246 N.Y.S.2d 366 (2d Dep't 1964); Rodriguez v. Martinez, 20 App. Div. 2d 632, 246 N.Y.S.2d 267 (1st Dep't 1964); Wilson v. Whitehall Hotel Corp., 20 App. Div. 2d 525, 245 N.Y.S.2d 204 (1st Dep't 1963); Maloney v. Springfield Dev. Co., 20 App. Div. 2d 526, 245 N.Y.S.2d 209 (1st Dep't 1963); Valentin v. Ina Holding Corp., 20 App. Div. 2d 525, 245 N.Y.S.2d 206 (1st Dep't 1963).

237 151 N.Y.L.J., Feb. 6, 1964, p. 4, col. 1.

238 Sortino v. Fisher, *supra* note 235, at 30, 245 N.Y.S.2d at 193.

239 41 Misc. 2d 33, 245 N.Y.S.2d 670 (Sup. Ct.), *aff'd,* 19 App. Div. 2d 799, 243 N.Y.S.2d 421 (2d Dep't 1963).

contrary view, stating that if the defendant deliberately acquiesces in the plaintiff's delay until the statute of limitations has expired and then moves for dismissal, such conduct should not be rewarded by granting his motion. The fact that the *Sortino* decision allows the defendant to use rule 3216 in this manner, has evoked much criticism.[240] Furthermore, *Sortino* says, "the running of the statute of limitations should re-enforce the view that the action should be dismissed," [241] in that the statute of limitations indicates the legislative policy as to when claims have become too stale to be litigated. On the other hand, *Carbonel* indicates that the expiration of the statute should act as an additional factor against ordering dismissal, because the granting of the motion will deprive the plaintiff "of her day in court." [242]

Mr. Glaser feels that the sole test for granting a motion to dismiss under rule 3216 should be whether prejudice resulted to the defendant because of the delay.[243] The cases often indicate that once the plaintiff has neglected to proceed for an unreasonable length of time he can not excuse his neglect by showing that the defendant has not been substantially prejudiced.[244]

It would appear that what the courts will accept as circumstances excusing a delay are occurrences beyond the plaintiff's control, such as personal catastrophes which make it impossible for the plaintiff to continue the suit.[245] Of course the fact that settlement negotiations are being conducted or other pretrial activity is in progress may excuse a delay in the action, but the excuse ends a short time after the last communication.[246]

In order to avoid dismissal for an unreasonable delay, plaintiff has the additional requirement of showing that his cause of action has merit. In theory, if the plaintiff has a meritorious claim, he will actively prosecute it, but once he delays in prosecuting his claim it becomes suspect as to its merits.[247] In order to fulfill this requirement, plaintiff must submit an affidavit of merits which contains evidentiary statements under oath by one with knowledge

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[240] *Supra* note 236.

[241] Sortino v. Fisher, *supra* note 235, at 30, 245 N.Y.S.2d at 193.

[242] Carbonel v. Ocasio, 41 Misc. 2d 33, 34, 245 N.Y.S.2d 670 (Sup. Ct. 1963).

[243] *Supra* note 236.

[244] Reilly v. Mirailh, 20 App. Div. 2d 526, 245 N.Y.S.2d 207 (1st Dep't 1963); Garcia v. Sentry Norden Oil & Heating Co., 18 App. Div. 2d 789, 236 N.Y.S.2d 633 (1st Dep't 1963); *but see* Zeiger v. Kew Towers, Inc., 8 App. Div. 2d 827, 190 N.Y.S.2d 93 (2d Dep't 1959); Bull v. Westchester County, 4 App. Div. 2d 690, 164 N.Y.S.2d 181 (2d Dep't 1957). Note that the proposed amendment of rule 3216 expressly provides what the plaintiff must show to avoid dismissal and makes no mention of prejudice to defendant.

[245] Sortino v. Fisher, *supra* note 235, at 31, 245 N.Y.S.2d at 194.

[246] *Id.* at 29, 245 N.Y.S.2d at 192.

[247] *Id.* at 31, 245 N.Y.S.2d. at 194.

of the facts.[248] As pointed out in *Sortino*, hearsay reference to the facts is insufficient. However, even though the plaintiff establishes that his claim has great merit, it does not mean that he has avoided dismissal. On the contrary, even an action of great merit may be forfeited by a prolonged delay.[249]

The many recent cases granting motions to dismiss indicate the strict attitude the courts exhibit to any delay in the prosecution of an action. The harsh results of dismissal are not apparent from these decisions since they usually do not mention whether the applicable statute of limitations has expired (which would bar the plaintiff from bringing another suit on the same cause of action).

Although a prime aim of the CPLR is to avoid delay and secure the speedy disposition of litigation, it is also important that all litigants have their day in court. If a defendant to succeed on the motion were required to show prejudice to his position even though the plaintiff's delay be prolonged, such a requirement would work effectively in insuring that both these considerations are met.

NEW YORK CITY CIVIL COURT ACT

Summons Must Be Served With Either Formal Complaint or Indorsement

Plaintiff commenced his action in the New York City Civil Court by service upon the defendant of a summons without either a formal complaint or an indorsement on the summons. Defendant moved to dismiss the summons and vacate service on the ground that the summons did not contain the indorsement required by Section 902(a)(1) of the Civil Court Act.[250] The court held that since neither a formal complaint nor an informal complaint by way of indorsement accompanied the summons, it was void and, hence, could not be cured by amendment.[251] It therefore dismissed the action.

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[248] Sortino v. Fisher, *supra* note 235, at 32, 245 N.Y.S.2d at 194; *accord*, Powell v. Becker Truck Renting Corp., 20 App. Div. 2d 573, 245 N.Y.S.2d 910 (2d Dep't 1963); Milligan v. Hycel Realty Corp., 20 App. Div. 2d 527, 245 N.Y.S.2d 210 (1st Dep't 1963); Keating v. Smith, 20 App. Div. 2d 141, 245 N.Y.S.2d 909 (2d. Dep't 1963).

[249] Hoffman v. Cafanella, 20 App. Div. 2d 524, 245 N.Y.S.2d 203 (1st Dep't 1963).

[250] CCA § 902(a)(1): "All pleadings shall be formal pleadings, as in supreme court practice, except that: (1) If the plaintiff's cause of action is for money only and the summons is served by personal delivery to the defendant within the city of New York, the cause of action may be set forth by indorsement upon the summons."

[251] Paskus, Gordon & Hyman v. Peck, 246 N.Y.S.2d 874 (N.Y. City Civ. Ct. 1964).