

## Memorandum in Opposition

### COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #18

July 1, 2008

S. 2677

By: Senator Volker

A. 750

By: M of A Wright

Senate Committee: Codes

Assembly Committee: Codes

Effective Date: Immediately

**AN ACT** to amend the civil practice law and rules, in relation to termination of an action

**LAW AND SECTIONS REFERRED TO:** CPLR 205(a), CPLR 3216

**MEMORANDUM PREPARED BY:** Committee on Civil Practice Law and Rules

### **THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES** **OPPOSES THIS LEGISLATION**

This bill seeks to amend subdivision (a) of CPLR 205 to require a judge making a dismissal for failure to prosecute to set forth fully on the record the specific conduct constituting the neglect for which dismissal is granted. The bill also requires that the conduct meriting dismissal must demonstrate a general pattern of delay in proceeding with the litigation. These requirements apply whether the dismissal is made pursuant to CPLR 3216 “or otherwise.” The bill was introduced in reaction to a concern that CPLR 205(a) is being misconstrued to allow for cases to be dismissed on the grounds of neglect to prosecute. It has the expressed intent of clarifying the standard necessary to merit dismissal for neglect to prosecute and to require that a record be made of the same.

CPLR 205(a) does not provide dismissal for neglect to prosecute. It relates to the statute of limitations and it operates to provide a litigant a six-month window after an action is terminated (in a manner other than on the merits) within which to commence another action on the same transaction or occurrence, where the original action was commenced within the applicable statute of limitations and is dismissed with less than six months remaining on or beyond the expiration of the statute of limitations. Among four classes of dismissals that are excepted from CPLR 205(a)’s window is dismissal for failure to prosecute.

As an initial matter, this bill should be disapproved because it misconstrues the purpose of CPLR 205(a) and is misplaced within the CPLR. First, CPLR 205(a) acts only to provide an additional six-months within which to commence an action that otherwise may be barred by the statute of limitations. CPLR 205(a) is a limitations provision and there is no dismissal for neglect to prosecute under CPLR 205(a). Second, the proposed amendment does not address the limitations effect of a neglect to prosecute dismissal. Rather it seeks to alter the substantive law regarding dismissal for want of prosecution. As such, it would more properly be contained in CPLR 3216.

Beyond the mistaken placement in CPLR 205(a), the bill does seek to correct an unclear area of law. Substantively, the proposed amendment should still be disapproved because its scope exceeds that necessary to correct the problem that it seeks to address.

Under current law, dismissal under CPLR 3216 and CPLR 3404 are clearly made for neglect to prosecute and, therefore, are not entitled to the CPLR 205(a) window. Dismissals made pursuant to other CPLR provisions, however, may or may not also constitute dismissal for failure to prosecute. Examples include a CPLR 3126 dismissal for failure to fully respond to disclosure, *see Abouzeid v. Cadogan*, 291 A.D.2d 423, 737 N.Y.S.2d 634 (2<sup>nd</sup> Dep't 2002), dismissal for failure to appear on a scheduled trial date, *see Morris v. Start*, 268 A.D.2d 787, 701 N.Y.S.2d 515 (3<sup>rd</sup> Dep't 2000), dismissal for failure to more definitely plead claims, *see Kelly v. Rosenthal*, 176 A.D.2d 283, 574 N.Y.S.2d 391 (2<sup>nd</sup> Dep't 1991), and dismissal for failure to comply with a demand for a complaint. *See Benedetto v. Hodes*, 112 A.D.2d 393, 492 N.Y.S.2d 52 (2<sup>nd</sup> Dep't 1985).

In these cases, whether to allow or preclude the CPLR 205(a) window is sometimes murky. Although classifying whether the dismissal was made for neglect to prosecute is a matter ultimately left to the court in the second commenced action, the Court of Appeals has indicated that the intent of the judge who dismissed the original action is a relevant factor to be considered. *See Schumann v. Hertz Corp.*, 23 A.D.2d 646, 257 N.Y.S.2d 400 (1<sup>st</sup> Dep't 1965), *rev'd*, 17 N.Y.2d 604, 268 N.Y.S.2d 563 (1966). If the record shows a willful and deliberate refusal to proceed, the court will apply the CPLR 205(a) exclusion and the second commenced action will be denied the benefit of the window.

To the extent that this legislation would require a record to be made to guide courts in deciding whether to apply the CPLR 205(a) window, the bill is aimed at a positive purpose. It may be better resubmitted as an amendment to CPLR 3216. Nevertheless, as currently drafted, the bill's provisions are also overly broad. First, the bill requires the judge to set forth the reasoning for every failure to prosecute dismissal. This requirement is unnecessary in circumstances where the CPLR has already afforded a procedural mechanism for the dismissal. CPLR 3216 generally requires, among other things, service of a ninety-day demand to resume prosecution and file the note of issue upon the dilatory party.

If the party files within the ninety-days, then a CPLR 3216 motion for want of prosecution in the pre-note of issue sphere will be denied. In the post-note of issue sphere, CPLR 3404 provides a one-year period from the time a case is stricken from the trial calendar for a prosecuting party to restore it. If not restored, the action is automatically dismissed. The substance and time periods of these provisions set forth the standard by which the Legislature has already determined a matter should be dismissed for failure to prosecute.

It is in circumstances where a party is dismissed outside of CPLR 3216 and CPLR 3404 that the classification of neglect to prosecute is potentially ambiguous and for which a record of the dismissal would be useful. However, as currently drafted, the bill unnecessarily applies to all species of want of prosecution dismissals.

Finally, although not covered in the sponsor's memorandum in support, this bill appears to overturn the holding of the Court of Appeals in Andrea v. Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C., 5 NY3d 514. In that case, the Court of Appeals held that dismissal for failure to comply with discovery orders is a dismissal for neglect to prosecute within the meaning of CPLR 205(a). If it is the purpose of this bill to overturn the holding in the Andrea case, the result would be poor public policy that would encourage dilatory practice and remove a tool that courts have used pursuant to CPLR 3126 to redress willful and contumacious behavior of a litigant during the disclosure stage of an action.

For the foregoing reasons, the Committee on Civil Practice Law and Rules **OPPOSES** this legislation.

Chair of the Committee:      Hon. Stephen Crane