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THE QUARTERLY SURVEY OF NEW YORK PRACTICE

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*Introduction**

Three very significant cases construing CPLR 302 highlight this issue of the *Survey*: two courts have independently reexamined the validity of the "agent-independent contractor" test utilized to deter-

* The following abbreviations will be used uniformly throughout the *Survey*:
New York Civil Practice Law and Rules ..... CPLR
New York Civil Practice Act ..... CPA
New York Rules of Civil Practice ..... RCP
New York City Civil Court Act ..... CCA

mine whether a nondomiciliary has transacted business within the state, and each of them rejected it in favor of a "purposeful acts" criterion; a federal court has provided some meaningful guidelines for the application of CPLR 302(a)(3)(i) and (ii); and, in accord with the intent of the Advisory Committee on Practice and Procedure, the section has been found applicable to conversion actions.

Several other decisions which have been examined warrant special mention. The Court of Appeals has sustained CPLR 3216's constitutionality by reversing the first department's decision in *Cohn v. Borchard Affiliations*. This decision terminates the conflict among the several departments which had existed on this question. In a decision reported under article 52, the Second Circuit has found the *Seider v. Roth* doctrine constitutional although the court did not hesitate to criticize it. And, in a case reported under article 34, the New York supreme court refused to grant a trial preference to a *Seider*-based plaintiff. Both cases reflect the current judicial attitude to limit *Seider* whenever the opportunity arises. Finally, in a novel decision which concludes this issue, a lower court applied the doctrine of forum non conveniens on an intrastate basis to dismiss the claim of a New York resident. This is the first reported decision on the use of the doctrine in this manner.

The *Survey* sets forth in each installment those cases which are deemed to make the most significant contribution to New York's procedural law. Due to limitations of space, however, many other less important, but, nevertheless, significant cases cannot be included. While few cases are exhaustively discussed, it is hoped that the *Survey* accom-

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Uniform District Court Act ..... UDCA
Uniform City Court Act ..... UCCA
Real Property Actions and Proceedings Law ..... RPAPL
Domestic Relations Law ..... DRL
WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ..... WK&M
The Biannual Survey of New York Practice ..... *The Biannual Survey*
The Quarterly Survey of New York Practice ..... *The Quarterly Survey*

Extremely valuable in understanding the CPLR are the five reports of the Advisory Committee on Practice and Procedure. They are contained in the following legislative documents and will be cited as follows.

1957 N.Y. LEG. DOC. NO. 6(b) ..... FIRST REP.
1958 N.Y. LEG. DOC. NO. 13 ..... SECOND REP.
1959 N.Y. LEG. DOC. 17 ..... THIRD REP.
1960 N.Y. LEG. DOC. NO. 20 ..... FOURTH REP.
1961 FINAL REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE ..... FINAL REP.

Also valuable are the two joint reports of the Senate Finance and Assembly Ways and Means Committees:

1961 N.Y. LEG. DOC. NO. 15 ..... FIFTH REP.
1962 N.Y. LEG. DOC. NO. 8 ..... SIXTH REP.

plishes its basic purpose, viz., to key the practitioner to significant developments in the procedural law of New York.

The Table of Contents is designed to direct the reader to those specific areas of procedural law which may be of importance to him. The various sections of the CPLR which are specifically treated in the cases are listed under their respective titles.

ARTICLE 1 — SHORT TITLE; APPLICABILITY AND DEFINITIONS

CPLR 103(c): Motion commenced by affidavit but served upon other parties after action had been finalized, dismissed for lack of jurisdiction.

Although CPLR 103(c) directs that a civil proceeding "shall not be dismissed solely because it is not brought in the proper form" and that a court "shall make whatever order is required for its proper prosecution," these provisions are naturally conditioned upon the court's having obtained jurisdiction over the parties.[1] In *Kreindler v. Irving Trust Co.*,[2] decided by the supreme court, a motion for attorney's fees was dismissed on the ground that, since the initial action had been finalized, jurisdiction to entertain the motion, without the commencement of a new action, was lacking. This determination was arrived at even though the motion, commenced by affidavit, was served upon the other parties and answering affidavits were submitted in response thereto. Moreover, the court opined that "even assuming that the answering affidavits were an appearance, the court lacks jurisdiction of an action or special proceeding begun by inappropriate process and this jurisdictional defect could not be waived by an appearance."[3]

Under the facts present in this case, the court's statement regarding waiver by appearance is questionable. CPLR 320(b) clearly establishes that any objection regarding the sufficiency of process is waived by a general appearance.[4] However, even if jurisdiction could not have been obtained through an "appearance," it would have been possible for the court to exercise it by construing CPLR 103(c) in a liberal manner.

An apt illustration of this approach appears in *City Commission on Human Rights v. Regal Gardens, Inc.*[5] The plaintiff there had

1 *See* 7B MCKINNEY'S CPLR 103, supp. commentary 12 (1969); 1 WK&M ¶ 103.08 (1969).

2 60 Misc. 2d 441, 303 N.Y.S.2d 421 (Sup. Ct. Sullivan County 1969).

3 *Id.* at 442, 303 N.Y.S.2d at 423. The court, however, did not in fact make this assumption. *See id.*

4 *See In re* Dell, 56 Misc. 2d 1017, 290 N.Y.S.2d 287 (Family Ct. Monroe County 1968).

5 53 Misc. 2d 318, 278 N.Y.S.2d 739 (Sup. Ct. Queens County 1967). *See The Quarterly Survey*, 42 ST. JOHN'S L. REV. 283, 309 (1967).