

The Quarterly Survey of New York Practice Table of Contents

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1970) "The Quarterly Survey of New York Practice Table of Contents," *St. John's Law Review*: Vol. 44 : No. 3 , Article 6.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol44/iss3/6>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

THE QUARTERLY SURVEY OF NEW YORK PRACTICE

TABLE OF CONTENTS

ARTICLE 1 — SHORT TITLE; APPLICABILITY AND DEFINITIONS	
<i>CPLR 103(c): Motion commenced by affidavit but served upon other parties after action had been finalized, dismissed for lack of jurisdiction</i>	535
ARTICLE 2 — LIMITATIONS OF TIME	
<i>CPLR 203(b): Section's tolling provisions not rendered inoperative by General Municipal Law section 50-i</i>	537
<i>CPLR 205(a): Section liberally construed</i>	538
<i>CPLR 213: Statute of limitations held not to bar an action for declaratory judgment so long as concurrent action at law is not barred</i>	539
ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT	
<i>CPLR 302(a)(1): Validity of "agent-independent contractor" distinction questioned by federal and state courts</i>	540
<i>CPLR 302(a)(3): Guidelines established for applicability of subsection</i>	543
<i>CPLR 302(a)(3): Jurisdiction obtained in conversion action</i>	545
ARTICLE 4 — SPECIAL PROCEEDINGS	
<i>CPLR 407: Personal injury counterclaim denied in summary proceeding where "inordinate delay" would result</i>	547
ARTICLE 6 — JOINDER OF CLAIMS, CONSOLIDATION AND SEVERANCE	
<i>CPLR 602: Joint trial denied where disclosure of insurance coverage in action for declaratory judgment would prejudice defendant in negligence action</i>	549
ARTICLE 30 — REMEDIES AND PLEADING	
<i>CPLR 3018: Joint tortfeasor may offset medical insurance payments given to plaintiff by other defendant's insurer</i>	550
<i>CPLR 3020: Verification of answer permitted by associate of attorney of record</i>	551
<i>CPLR 3025(b): Leave to amend answer denied because plaintiff would be prejudiced thereby</i>	552
ARTICLE 31 — DISCLOSURE	
<i>CPLR 3101(d): Evidence gathered by insurer for defense of insured is not "material prepared for litigation" in separate action against the insurer</i>	553
<i>CPLR 3117(a)(3): Use of party's own deposition denied</i>	554
<i>CPLR 3121: Doctor-patient privilege is waived if party's physical condition is in controversy</i>	555
<i>CPLR 3121: Second department puts bar on notice that it will strictly enforce rule governing notice of availability for physical examination</i>	557
<i>CPLR 3121: Medical report not based on physical or clinical examination is not subject to disclosure</i>	557
<i>CPLR 3140: Documents supporting appraisal report held not subject to disclosure</i>	558
ARTICLE 32 — ACCELERATED JUDGMENT	
<i>CPLR 3211(c): Second department disapproves of court's sua sponte treatment of motion to dismiss as one for summary judgment</i>	560
<i>CPLR 3213: Where neither party objects, and the court has jurisdiction, any procedural device may be used in the course of a trial to effectuate justice</i>	562
<i>CPLR 3216: Cohn v. Borchard Affiliations reversed by Court of Appeals</i>	562
ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES	
<i>CPLR 3403: Special preference denied Seider-based plaintiff</i>	564

ARTICLE 41 — TRIAL BY JURY
CPLR 4102(a): Withdrawal of jury demand permissible without opposition's consent in absence of reliance 567
CPLR 4112: Proper time to request jury poll in a two-stage trial held to be at conclusion of second stage 568

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS
CPLR 5201: Constitutionality of Seider v. Roth reluctantly upheld by divided federal court 570
CPLR 5234: Stipulation between parties incorporated in court order is held to establish priority of creditor 574

ARTICLE 55 — APPEALS GENERALLY
CPLR 5514(a): Time extension unnecessary when appeal is transferred pursuant to New York State Constitution 576

ARTICLE 62 — ATTACHMENT
CPLR 6214: Property seized by sheriff pursuant to ineffective levy may be retained under valid order of attachment without loss of priority 576

ARTICLE 65 — NOTICE OF PENDENCY
CPLR 6513: Section is self-executing; court may not deny CPLR 6514 motion to cancel if notice of pendency is more than three years old 578

ARTICLE 75 — ARBITRATION
CPLR 7510: United States treaty does not supplant the common law 579

DOMESTIC RELATIONS LAW
DRL § 81: Mother liable in part for counsel fees arising from habeas corpus proceeding brought to determine child's custody 580
DRL § 211: Conflict over applications for temporary alimony continues 582

NEW YORK CITY CIVIL COURT ACT
CCA § 1804: "Substantial justice" in small-claims case 584

UNIFORM DISTRICT COURT ACT
UDCA Article 2: District court has power to adjudicate title questions for limited purposes 585

JUDICIARY LAW
Judiciary Law § 753 A: Section narrowly construed 586

ELECTION OF REMEDIES
Election of Remedies: Summary judgment against bankrupt precludes showing of fraud in subsequent action 587

FORUM NON CONVENIENS
Forum non conveniens: Doctrine invoked by Nassau County District Court on intrastate basis 588

*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-

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
<i>The Biannual Survey of New York Practice</i>	<i>The Biannual Survey</i>
<i>The Quarterly Survey of New York Practice</i>	<i>The Quarterly Survey</i>
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).