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# CPLR 103(c): Motion Commenced by Affadavit But Served Upon Other Parties After Action Had Been Finalized, Dismissed for Lack of Jurisdiction

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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).

applied for a temporary injunction with an order to show cause supported by an affidavit instead of properly commencing a special proceeding. CPLR 304 provides that special proceedings are commenced and jurisdiction acquired by service of a notice of petition or an order to show cause. Although the *Regal Gardens* court held that the order to show cause ostensibly met the requirement of CPLR 304, the court added:

> However that may be, we are directed by CPLR 103 [subd. (c)], where the parties are before the court, not to dismiss solely because the proceeding "is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution." Hence, the affidavit in this case may be deemed a petition for the purposes of this proceeding.[6]

Thus it should be recognized that although the dismissal in *Kreindler* may be supported by a prior decision of the appellate division wherein it was held that jurisdiction is not obtained where a special proceeding is commenced by service of a petition instead of a notice of petition or order to show cause,[7] it would also be possible, by utilizing the rationale of *Regal Gardens,* to view the affidavit in *Kreindler* as a petition. Since at the time the affidavit was served, it had the same effect as a notice of petition, should not the court have recognized that jurisdiction was thereby acquired? If it were recognized that jurisdiction did exist, the court would then have been required to correct any defects of form pursuant to CPLR 103(c). As indicated above, this could have been accomplished by viewing the affidavit as a petition and changing the form of the proceeding from a special proceeding to an action. The only crucial distinction between a motion and a special proceeding is the requirement that the latter must be commenced by obtaining jurisdiction while the former is proper if the jurisdiction has previously been obtained in the action or special proceeding in which it is made.[8] With this in mind, when a motion is made in a manner that would satisfy jurisdictional requirements if a special proceeding were involved, is there any real distinction remaining which should require a dismissal in one instance and full adjudication in the other?

Finally, the question arises as to whether jurisdiction should really be lost for purposes of moving for counsel fees merely because the

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[6] 53 Misc. 2d at 320, 278 N.Y.S.2d at 741.

[7] New York State Restaurant Ass'n, Inc. v. Board of Standards and Appeals, 19 App. Div. 2d 912, 244 N.Y.S.2d 15 (3d Dep't 1963).

[8] WK&M ¶ 103.06 (1969).

action was "finalized." There are instances when a court retains jurisdiction for specific purposes even though it has rendered a "final" judgment. CPLR 4404, for example, permits post-trial motions for judgment and/or a new trial. And New York courts have long retained jurisdiction for matters incidental to the judgment in matrimonial actions.[9]

It must be concluded that to subject both the movants and the state to the costs rising from a completely new action seems unnecessary and unfortunate in light of the alternatives available to the court.

### ARTICLE 2 — LIMITATIONS OF TIME

*CPLR 203(b): Section's tolling provisions not rendered inoperative by General Municipal Law section 50-i.*

Prior to the amendment of the General Municipal Law in 1959, the tolling provisions pertaining to municipal tort liability were so varied as to render unclear exactly what tolls a plaintiff was entitled to invoke.[10]

For purposes of uniformity and clarity, the Legislature enacted section 50-i of the General Municipal Law, which extends the period within which an action must be brought against municipalities[11] to one year and ninety days. The section further provides that this time limitation "shall be applicable notwithstanding any inconsistent provisions of law. . . ."[12] The legislative intent behind the enactment of the section was not only to extend the time limitation for actions within its scope but also to render inoperative the various tolls which were available under CPA 24 (now CPLR 204(a)), as that section applied to actions against municipalities.[13] It must be remembered, however, that section 50-i is a statute of limitations, and computation of the time period under it should otherwise follow applicable law.[14]

A 1968 case, *Family Bargain Centers, Inc. v. Village of Herkimer*,[15] seemingly violated this principle by holding that section 50-i obviates

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9 *See, e.g.*, Fox v. Fox, 263 N.Y. 68, 188 N.E. 160 (1933); Freund v. Burns, 268 App. Div. 989, 51 N.Y.S.2d 642 (2d Dep't 1944).

10 McLaughlin, *Civil Practice, 1967 Survey of New York Law*, 19 SYRACUSE L. REV. 501, 508 (1967).

11 The word "municipalities" is here employed in its broadest sense. Section 50-i encompasses actions against a "city, country, town, village, fire district or school district."

12 N.Y. GEN. MUNIC. LAW § 50-i (2) (McKinney 1965).

13 Joiner v. City of New York, 26 App. Div. 2d 840, 274 N.Y.S.2d 362 (2d Dep't 1966).

14 McLaughlin, *Civil Practice, 1968 Survey of New York Law*, 20 SYRACUSE L. REV. 449, 455 (1968).

15 56 Misc. 2d 768, 290 N.Y.S.2d 207 (Sup. Ct. Herkimer County 1968). *See also* McLaughlin, *supra* note 14, at 455; 7B MCKINNEY'S CPLR 203, supp. commentary 34 (1965); 1 WK&M ¶ 203.13 (1969).