St. John's Law Review

Volume 43
Number 4 *Volume 43, April 1969, Number 4*

Article 7

December 2012

CPLR 103(c): Proceeding Will Not Be Dismissed Because Brought in Improper Form

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ARTICLE 1 — SHORT TITLE; APPLICABILITY AND DEFINITIONS

CPLR 103(c): Proceeding will not be dismissed because brought in improper form.

CPLR 103(c) provides that once a court has jurisdiction over the parties to a civil judicial proceeding, that proceeding shall not be dismissed solely because it is brought in the improper form. A recent illustration of the usefulness of this provision is provided by *Victor J. Georgetti, Inc. v. City of Long Beach.*[1]

Petitioner, a government contractor, instituted an Article 78 proceeding seeking a judgment compelling the City Council of Long Beach to enact a resolution for the payment of monies due him. Without deciding whether a money judgment must be obtained against the city before mandamus will lie, the Supreme Court, Nassau County, held that the pleadings could be treated as a demand for an interlocutory judgment against the city for the amount owing, and, should the city council refuse to appropriate the owed funds, petitioner could then apply, in this proceeding, for a judgment in mandamus.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 205(a): Relief available when application for adjournment on grounds of actual engagement is denied.

Under CPLR 205(a), a plaintiff, who has timely commenced an action that is subsequently terminated for reasons other than a voluntary discontinuance, a dismissal for neglect to prosecute or a final judgment on the merits, may commence a new action within six months after the termination. Dismissals for failure to answer a calendar call and failure to select a jury do not usually amount to neglect to prosecute unless there is a pattern of dilatory tactics or a contumacious refusal to proceed with the litigation. In determining whether the dismissal is for neglect to prosecute, the key factor is apparently the intention of the trial judge who grants the motion to dismiss.[2]

In *Cordova v. City of New York*,[3] plaintiff's first action was dismissed when an application for adjournment on the ground of actual engagement was denied. Upon the commencement of a

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[1] 58 Misc. 2d 275, 295 N.Y.S.2d 155 (Sup. Ct. Nassau County 1968).

[2] 7B McKINNEY'S CPLR 205, supp. commentary 45 (1966). *See* Schuman v. Hertz Corp., 17 N.Y.2d 604, 215 N.E.2d 683, 268 N.Y.S.2d 563 (1966) (mem.), *rev'g* 23 App. Div. 2d 646, 257 N.Y.S.2d 400 (1st Dep't 1965). *See also* 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶205.06 (1968).

[3] 57 Misc. 2d 823, 293 N.Y.S.2d 673 (Sup. Ct. Bronx County 1968).