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CPLR 205(a): Relief Available When Application for Adjournment on Grounds of Actual Engagement Is Denied

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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).

second action the defense contended that the prior dismissal constituted a dismissal for "neglect to prosecute" thus rendering the six month saving period provided by CPLR 205(a) unavailable. In holding against this contention the court stated that the record did not show, nor did the trial justice intend, the consequences of a dismissal for neglect to prosecute.

When counsel has acted in good faith and has not willfully or deliberately refused to go to trial, the potentially disastrous effect of a dismissal after the statute of limitations has run will be alleviated by the provisions of 205(a).

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 302(a)(1): Husband's implied promise to pay for necessaries is not a transaction of business.

In *Inkelas v. Inkelas*,[4] an action for support and necessaries, plaintiff-wife attempted to secure personal jurisdiction over her non-resident husband on the basis of an implied promise to pay for necessaries. Plaintiff contended that, since she resided in New York when the promise was made requiring her husband to perform here, the obligation constituted her an agent to make purchases on his behalf. Each purchase, it was argued, constituted a transaction of business under CPLR 302(a)(1).

The Supreme Court, Bronx County, rejected plaintiff's argument and dismissed for lack of jurisdiction. Reasoning that plaintiff's husband had not committed any "purposeful act" [5] within New York, the court distinguished those situations in which a separation agreement is executed in New York.[6]

While the rationale of *Inkelas* appears to be sound, its result is contrary to *Venizelos v. Venizelos*,[7] recently decided by the appellate division, second department. Unfortunately, however, the court in *Venizelos* does not specifically identify the statute it is invoking to supply jurisdictional basis. In view of the confusion created, it would be helpful to watch for further developments in the *Venizelos* case.

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[4] 58 Misc. 2d 340, 295 N.Y.S.2d 350 (Sup. Ct. Bronx County 1968).

[5] The "purposeful act" criteria was first promulgated in Hanson v. Denkla, 357 U.S. 235 (1958). It was applied to 302 in Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965) and re-applied in McKee Elec. Co. v. Rauland-Borg Corp., 20 N.Y.2d 377, 382, 229 N.E.2d 604, 607, 283 N.Y.S.2d 34, 37 (1967).

[6] *See, e.g.*, Kochenthal v. Kochenthal, 28 App. Div. 2d 117, 282 N.Y.S.2d 36 (2d Dep't 1967).

[7] 30 App. Div. 2d 856, 293 N.Y.S.2d 20 (2d Dep't 1968). *See The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 498, 503 (1969).