

## CPLR 103(c): Proceeding Commenced in Improper Form Will Not Be Dismissed on That Ground Alone

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Since the last installment of the *Survey*, the appellate division, third department, has held that no jurisdictional "gap" exists in CPLR 302—a discussion of the controversy surrounding this problem is found under Article 3 of the *Survey*. The reader is also directed to a treatment of the doctrine of collateral estoppel listed under Article 32. Under Article 52, the reader will note that there have been significant developments affecting the income execution device.

The cases discussed in the *Survey* are those deemed to be of the most importance in the procedural area. Many other cases would be included, but limitations of space prevent the treatment of those less important but nevertheless significant cases. Although few cases are exhaustively discussed, it is hoped that the *Survey* accomplishes 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 articles.

#### ARTICLE 1—SHORT TITLE, APPLICABILITY AND DEFINITIONS

*CPLR 103(c): Proceeding commenced in improper form will not be dismissed on that ground alone.*

The petitioner, in *Mandis v. Gorski*,<sup>1</sup> initially brought an Article 78 proceeding to declare invalid a city ordinance which gave the city council power to allow variances in the heights of certain buildings. However, Article 78 proceedings are not available to attack an ordinance since an exercise of a legislative function may not be attacked through an Article 78 proceeding.<sup>2</sup>

Rather than dismiss the action merely for proceeding in the wrong form, the court availed itself of CPLR 103(c) which states that "if a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form. . . ."<sup>3</sup>

This section, in addition, provides authorization for the court to make an order directing the action to proceed in the proper form without dismissing it.<sup>4</sup> Thus, in the instant case, the court ordered the action to continue as if brought in the form of a declaratory judgment.

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<sup>1</sup> 24 App. Div. 2d 181, 265 N.Y.S.2d 210 (2d Dep't 1965).

<sup>2</sup> *Neddo v. Schrade*, 270 N.Y. 97, 103, 200 N.E. 657, 659 (1936); *Paliotto v. Cohalan*, 6 App. Div. 2d 886, 177 N.Y.S.2d 553 (2d Dep't), *aff'd*, 8 N.Y.2d 1065, 170 N.E.2d 413, 207 N.Y.S.2d 281 (1960).

<sup>3</sup> CPLR 103(c).

<sup>4</sup> *Ibid.*; 7B MCKINNEY'S CPLR 103, commentary 13 (1963).