

## CPLR 7801: Supreme Court Issues Order in Nature of Mandamus Directing Justice Court to Set a Trial Date

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## ARTICLE 78—PROCEEDING AGAINST BODY OR OFFICER

*CPLR 7801: Supreme court issues order in nature of mandamus directing justice court to set a trial date.*

Article 78 of the CPLR, which embodies the common-law writs of mandamus, certiorari and prohibition, was intended to alter the form rather than the substance of the writs.<sup>193</sup> Since these writs are discretionary remedies, they will not lie where another remedy is provided by law.<sup>194</sup> Mandamus will issue where the relief requested involves a direction to an official or judicial body to perform a ministerial act which does not require the exercise of judgment or discretion.<sup>195</sup> Although an order may be directed to compel an official or an inferior court to perform an administrative function, it may not contain a direction controlling judicial judgment or discretion.<sup>196</sup> Mandamus, however, will lie to compel performance of a discretionary act where refusal to perform such an act is capricious, arbitrary or unreasonable as a matter of law.<sup>197</sup> Hence, the court has issued a writ of mandamus substituting its own determination for that of a planning board which acted arbitrarily and capriciously when it enacted a zoning ordinance.<sup>198</sup>

Under Article 78, the petitioner in *Keen v. Mirabile*<sup>199</sup> sought an order in the nature of mandamus directing an acting police justice to bring his case on for trial. Although petitioner had served the summons and complaint on February 13, 1965, the case was transferred to several police justices, each of whom declined to set a trial date. The respondent tentatively set a trial date, September 21, 1965, the delay being attributable to his vacation plans. Upon request of the defendant in the action set down for trial, a new trial date was set for September 28, 1965. On September 27, respondent granted an indefinite adjournment solely because he had received a letter, apparently signed by defendant's physician, stating that defendant was to undergo surgery eighteen days hence.

<sup>193</sup> 7B MCKINNEY'S CPLR 7801, *supp. commentary* 11 (1965).

<sup>194</sup> CPLR 7801; see also *Kahn v. Backer*, 21 App. Div. 2d 171, 249 N.Y.S.2d 572 (1st Dep't 1964).

<sup>195</sup> *People ex rel. Elmira Advertiser Ass'n v. Gorman*, 169 App. Div. 891, 155 N.Y. Supp. 727 (3d Dep't), *appeal dismissed*, 222 N.Y. 712, 119 N.E. 113 (1915).

<sup>196</sup> *E.g.*, *People ex rel. Lewis v. Fowler*, 229 N.Y. 84, 127 N.E. 793 (1920); *Knight v. Howell*, 262 App. Div. 759, 27 N.Y.S.2d 654 (2d Dep't 1941).

<sup>197</sup> *Rosenthal v. Stickman*, 82 N.Y.S.2d 22 (Sup. Ct. Queens County), *aff'd mem.*, 274 App. Div. 804, 81 N.Y.S.2d 147 (2d Dep't 1948).

<sup>198</sup> *Diocese of Rochester v. Planning Bd.*, 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956).

<sup>199</sup> 48 Misc. 2d 382, 264 N.Y.S.2d 995 (Sup. Ct. Rockland County 1965).

The court held that this postponement was a clear case of arbitrary action resulting in inordinate delay since respondent's action was based solely upon the contents of the letter, which was not authenticated, and which failed to specify the nature or degree of the defendant's illness. The court ordered the case to be tried on a specific date unless the defendant could supply affidavits relating to the nature, extent and duration of the illness. It expressly noted that mandamus will lie to compel an inferior tribunal to perform a ministerial act.

#### DOMESTIC RELATIONS LAW

*Dom. Rel. Law § 243: Motion for sequestration subsequent to separation action in which defendant has appeared held "a motion in the action."*

In *Robinson v. Robinson*,<sup>200</sup> a recent first department case, defendant-husband appeared in and contested a judicial action for separation. Subsequent to a judgment for plaintiff which provided for periodic payments of alimony, defendant defaulted, announced his intention not to comply with the terms of the judgment and departed to Denmark. Plaintiff thereupon moved, pursuant to Section 243 of the Domestic Relations Law, for an order of sequestration. Service was made in New York upon defendant's attorneys and in Denmark upon defendant personally. In reversing special term, the first department did not decide the extent of the authority of defendant's attorneys to represent him as agents after final judgment,<sup>201</sup> but found the personal service in Denmark to be sufficient to bring him before the court for the purposes of plaintiff's motion. The court held that since the defendant appeared in the separation action, no further original process was necessary to enforce the judgment.<sup>202</sup> With a valid basis for jurisdiction, the mode of service was within the discretion of the trial court,<sup>203</sup> and since the defendant was advised of the relief sought and was given

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<sup>200</sup> 24 App. Div. 2d 138, 264 N.Y.S.2d 816 (1st Dep't 1965).

<sup>201</sup> Service upon the attorneys who represented a defendant in a matrimonial action has been held insufficient for the purposes of subsequent contempt proceedings. *Rosenthal v. Rosenthal*, 201 App. Div. 27, 193 N.Y. Supp. 702 (1st Dep't 1922); *Keller v. Keller*, 100 App. Div. 325, 91 N.Y. Supp. 528 (1st Dep't 1905).

<sup>202</sup> *Accord*, *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 454 (1932); *Karpf v. Karpf*, 260 App. Div. 701, 703, 23 N.Y.S.2d 745, 748 (1st Dep't 1940).

<sup>203</sup> See *Burstein v. Burstein*, 12 Misc. 2d 521, 523, 155 N.Y.S.2d 288, 290 (Sup. Ct. Bronx County 1956), *aff'd*, 2 App. Div. 2d 879, 156 N.Y.S.2d 996 (1st Dep't 1957); see also *Pitt v. Davison*, 37 N.Y. 235, 241 (1867).