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Article 68

CPLR 6111: Full Hearing Required to Prove Extrinsic Facts Relied Upon to Procure Civil Arrest

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ARTICLE 55 — APPEALS GENERALLY

CPLR 5520(a): Extension of time granted to cure inadvertent filing and service omissions of notice of appeal.

In *Gamble v. Gamble,*[260] appellant served timely notice of appeal upon respondent's attorney, but inadvertently failed to serve the receiver in the original action [261] and to file such notice in the trial court.[262] The appellate division held that these inadvertent omissions were excusable under CPLR 5520(a) and an extension of time was granted to cure the defects.

Basically, three elements are required to come within the purview of 5520(a): (1) filing or service on at least one essential party; (2) within the time limited; and (3) omissions having been caused by "mistake or excusable neglect." [263] Although this statute is substantially similar to its predecessor, CPA § 107, the changes made [264] were intended to liberalize its operation,[265] and this sentiment was captured by the court in the instant case. However, care should be taken to comply with all filing and service requirements; "mistake or excusable neglect" are tenuous grounds upon which to rely to perfect an appeal.

ARTICLE 61 — ARREST

CPLR 6111: Full hearing required to prove extrinsic facts relied upon to procure civil arrest.

Under the CPA, affidavits were sufficient to establish an order of arrest.[266] If a defendant sought to contest the validity of a civil arrest, he had the burden of initiating a hearing.[267] Under CPLR 6111, an order of arrest must state, *inter alia,* that a court hearing will be held within 48 hours of arrest and must specify the amount of bail.

In *De Bierre v. Darvas,*[268] an order of arrest was appropriately formed and served with several supporting affidavits produced by

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[260] 23 App. Div. 2d 887, 259 N.Y.S.2d 910 (2d Dep't 1965).
[261] See CPLR 2103(e).
[262] See CPLR 5515.
[263] CPLR 5520(a).
[264] Under the CPLR, it is now possible, *inter alia,* to cure other omissions such as failure to serve or file the record and to obtain the extension of time from the trial court. See 7 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 216, ¶ 5520.01.
[265] *Ibid.*
[266] Burns v. Newman, 274 App. Div. 301, 83 N.Y.S.2d 285 (1st Dep't 1948).
[267] 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 6111.08 (1964).
[268] 22 App. Div. 2d 550, 257 N.Y.S.2d 179 (1st Dep't 1965).

the plaintiff. However, defendant was granted a hearing at which he was only permitted to contest bail. Upon formal re-application, a hearing was denied on the ground that the first hearing was sufficient.

The appellate division held that there was no hearing within the contemplation of the statute. The burden was upon the plaintiff to establish,[269] by a preponderance of the proof, that the extrinsic facts relied upon to procure the arrest actually existed.[270] The requirement of a full hearing was imposed to protect the unwary defendant.[271] It has been, as this case indicates, and will continue to be, strictly construed.

ARTICLE 75 — ARBITRATION

CPLR 7503(c): Mislabelling of notice of intention to arbitrate held not fatal: non-compliance with time and service requirements for stay held fatal.

In a recent case,[272] respondent served a "demand for arbitration" (CPLR 7503(a)) upon petitioner, when a "notice of intention to arbitrate" (CPLR 7503(c)) was appropriate. Eleven days thereafter, petitioner served, by ordinary mail, an application to stay arbitration. The supreme court held that the mislabelling by respondent was not fatal inasmuch as it contained all the essential elements of the appropriate notice.[273] It further held that petitioner was now precluded from litigating the issue of the existence of the contract because of non-compliance with the time and service requirements for stays of arbitration.[274] The statute, it seems, was construed in perfect accord with its plain intent.

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[269] See CPLR 6113(b).

[270] De Bierre v. Darvas, 22 App. Div. 2d 550, 553, 257 N.Y.S.2d 179, 181 (1st Dep't 1965). Although affidavits were sufficient to detain defendant under the CPA, this same standard of proof was employed. See Burns v. Newman, *supra* note 266, at 302, 83 N.Y.S.2d at 287.

[271] See THIRD REP. 325.

[272] Beverley Cocktail Lounge, Inc. v. Emerald Vending Machines, Inc., 45 Misc. 2d 376, 256 N.Y.S.2d 812 (Sup. Ct. Kings County 1965).

[273] CPLR 7503(c).

[274] An application to stay arbitration must be served within ten days after service of the notice of intention to arbitrate. Notice of such application must be "served in the same manner as a summons or by registered or certified mail, return receipt requested." CPLR 7503(c). It should be noted that the appropriate procedure for stays is outlined in CPLR 7503(c) (entitled "notice of intention to arbitrate") rather than in CPLR 7503(b) (entitled "application to stay arbitration"). It is then evident that when recourse is had to this area, the entire statute must be consulted.