Failure to Contest the Form of Litigation (Here a Special Proceeding Which Should Have Been a Plenary Action) at Trial Is Deemed a Waiver of Objection to Form

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Introduction

This is the third installment of "The Biannual Survey" which was commenced in December of 1963. The Survey sets forth in this installment those cases which are deemed to make the most significant contributions to New York's procedural law under the new provisions of the New York Civil Practice Law and Rules and other practice and procedure provisions which have been recently enacted. Many additional cases might have been treated—the cases chosen are surely not the only cases of significance—but limitations of space require resort to the difficult process of selection. The treatment has been of reported cases only, since unreported cases are generally unavailable to the practitioner.

The Table of Contents is designed to key the reader quickly to the specific areas of procedural law which are treated in this Survey in order that he may, by just a glance, note such areas of treatment as may be of importance to him without having to wade through matter that does not particularly affect his practice.

ARTICLE 1—SHORT TITLE; APPLICABILITY AND DEFINITIONS

Failure to contest the form of litigation (here a special proceeding which should have been a plenary action) at trial is deemed a waiver of objection to form.

Petitioner moved to enforce by contempt a judgment granted in a special proceeding for money wrongfully withheld under an
escrow agreement. Respondent defended on the ground that the
relief could be sought only in a plenary action and that a special
proceeding would not lie. The supreme court, special term, held
that the respondent had waived his right to object as to form by
not raising an objection to the form of the procedure at trial; 2
that the objection could not be raised initially on a motion for leave to
re-argue. Because of the procedural distinctions that existed between
actions and special proceedings, applications brought in the wrong
form under prior law were dismissed on that ground alone. Appliance
of this rule became "absurd when made in a case in which
the court could dispose of the issues equally well, and without
prejudice to the rights of the respondent . . . .": 3 In the enactment
of CPLR 103(c), the CPLR recognizes that fact and changes that
prior law rule. Under CPLR 103(c), if a court obtains "jurisdiction
over the parties, a civil judicial proceeding shall not be dismissed
solely because it is not brought in the proper form . . . ." The
court is directed instead to make whatever order is required for its
prosecution. The instant decision further indicates that whatever
defense is left to defendants (or respondents) under this liberal
CPLR provision may be lost by an untimely objection to form.
The court, in its opinion, indicated that because there was no
attorney-client relationship between petitioner and respondent a
plenary action and not a special proceeding would have been appro-
priate. But since the respondent did not raise the objection to
form in the original special proceeding, he was held to have waived
it. The court noted that under CPLR 103 the distinction between
an action and a proceeding is not a jurisdictional one.
The implications of CPLR 103 carry even further. The
practitioner should note that even if the respondent had raised the
objection timely (i.e., in the proceeding itself and prior to disposition
of it), the result would not have been a dismissal. It would have
been, at most, a conversion of the special proceeding into an action
with pleadings and time periods adjusted accordingly. 4

ARTICLE 2 — LIMITATIONS OF TIME

Court of Appeals confirms that recoupment counterclaim against
assignee is valid although arising after assignment and
notice thereof.

In an action by an assignee of a claim arising out of a contract
between defendant and plaintiff's assignor, defendant, after he had

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2Avalon E., Inc. v. Monaghan, 43 Misc. 2d 401, 251 N.Y.S.2d 290 (Sup.
Ct. 1964).
4See the initial installment of the Biannual Survey of New York Practice,