

Party Applying for Issuance of Arbitrator's Subpoena Is Proper Party to Petition for Judicial Enforcement Thereof

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especially after accepted and acted upon by the Suffolk Sheriff, who would appear to be the only one so positioned as to refuse an execution improperly captioned—thereafter fell into the category of mere irregularity and would, under present law and the liberal intent underlying it, have been best disregarded. A great deal of time and effort, involving considerable expense, was overturned at bar because, at bottom, of use of the wrong word. CPLR 2001 could reasonably have been held to control here, with the irregularity being ignored. The court might have so held had the foregoing factors been called to its attention.

ARTICLE 23—SUBPOENAS, OATHS AND AFFIRMATIONS

Party applying for issuance of arbitrator's subpoena is proper party to petition for judicial enforcement thereof.

Petitioner moved pursuant to CPLR 2308(b) to compel compliance with a subpoena which had been issued by an arbitrator at the request of petitioner and served upon respondent. Respondent contended that only the "issuer may move . . . to compel compliance"¹¹⁷ with the subpoena and that the issuer here was the arbitrator and not petitioner.¹¹⁸

The court, in a brief opinion, indicated that respondent's contention was clearly incorrect and that the term "issuer" embraces the one who applied for the subpoena in a nonjudicial proceeding. The order of compliance issued upon petitioner's application was therefore valid, and respondent's disobedience of it punishable by contempt. The instant application for a warrant of commitment against respondent for disobeying that order was granted.

ARTICLE 30—REMEDIES AND PLEADINGS

CPLR 3017(a) — Judgment may be rendered on the proof, though relief of different nature than that prayed for.

*Nowak v. Wereszynski*¹¹⁹ involved a proceeding in the nature of mandamus, instituted by the Comptroller of the City of Utica, in order to compel the Common Council of the City to adopt a budget providing for the transfer of certain funds by the water board to the city. Special term denied the petition and directed that respondents prepare a new estimate with the objectionable funds deleted therefrom. In addition, the Common Council, upon the receipt of such estimate, was directed to adopt a new budget. Appellant-Comptroller contended that the relief granted was improper, since it was not requested in the pleadings. The appellate division,

¹¹⁷ CPLR 2308(b).

¹¹⁸ Application of Nelson, 43 Misc. 2d 132, 249 N.Y.S.2d 971 (Sup. Ct. 1964).

¹¹⁹ 21 App. Div. 2d 427, 250 N.Y.S.2d 981 (4th Dep't 1964).