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CPLR 3017(a)--Judgment May Be Rendered on the Proof, Though Relief of Different Nature than that Prayed For

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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,

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[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).

fourth department, affirmed, disposing of the appellant's contention in a review of the procedural principles upon which the relief was granted.

The court pointed out that as a result of the interplay of sections 103(b), (c)[120] and 3017(a), special term had the statutory authority in this Article 78 proceeding to grant the relief it had patterned; it was apparently influenced by the fact that there was an immediate need for the preparation and adoption of a budget for the city's forthcoming fiscal year.

Section 3017(a) provides in part that "the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded. . . ." This section is applicable to special proceedings, as well as actions, because section 103(b) provides in part that "except where otherwise prescribed by law, procedure in special proceedings shall be the same as in actions. . . ."

The grant of power contained in section 3017(a) to render a judgment appropriate to the *proof,* rather than requiring that the judgment be wholly responsive to the relief demanded in the complaint (as was required by Section 479 of the Civil Practice Act), bestows upon the courts discretion to pattern a judgment consistent with the facts proved at trial. Under prior law, some courts had taken the position that they did not possess the discretion to render relief that was inconsistent with that demanded in the complaint, even though such relief was warranted by the proof. For example, where the complaint requested only legal relief, the courts refused to grant equitable relief even though it would have been consistent with the proof.[121] *Jackson v. Strong,*[122] decided by the court of appeals in 1917, is the leading New York case adopting this view.

In 1960, the court of appeals handed down the landmark case of *Diemer v. Diemer.*[123] *Diemer* involved an action for separation, the ground alleged being cruel and inhuman treatment by defendant wife. The court of appeals looked at the record and concluded that the proof would support a separation on the ground that the defendant had *abandoned* the plaintiff (the cruel and inhuman treatment ground had failed of proof). Judge Fuld, writing for the majority, granted the separation on the abandonment ground, although unpleaded, holding that "it is enough . . . that a pleader state the facts making out a cause of action, and it matters

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[120] The court pointed out that under the authority of section 103(c) an application for relief brought in the wrong form could be corrected by the court without a dismissal.

[121] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3017.06 (1963).

[122] 222 N.Y. 149, 118 N.E. 512 (1917).

[123] 8 N.Y.2d 206, 168 N.E.2d 654, 203 N.Y.S.2d 829 (1960).

not whether he gives a name to the cause of action at all or even that he gives it a wrong name."[124]

Today the explicit grant of power contained in the last sentence of section 3017(a) permits the court to grant relief that is "appropriate to the proof." It is therefore clear that a court possesses the power to award legal or equitable relief whenever it is "within its jurisdiction" to do so.[125] This section has the effect of eliminating the law-equity distinction espoused in *Jackson* and followed in many subsequent decisions.[126] This is one of the important changes wrought by the CPLR.

There is no danger of the right to trial by jury being lost here, if such right exists. To the extent that the right to legal relief appears at a later juncture of the action—it having been assumed up to then that only equitable relief was being sought so that trial by jury was neither demanded nor demandable—the court must at that time afford to the party against whom the legal relief is sought "an opportunity to demand a jury trial of such issues."[127]

Effectiveness of bill of particulars limited by permitting proof of allegations not included therein.

In the case of *Pogor v. Cue Taxi Serv., Inc.*,[128] the only allegation of negligence appearing in the bill of particulars was that the defendant's cab driver went through a stop sign. When it later became clear that the stop sign in issue did not in fact exist, plaintiff gave evidence of other acts of purported negligence. Objections to the testimony were overruled on the basis that the additional allegations were, in fact, implied amendments to the pleadings that served to conform the pleadings to the proof.

"The object of a bill of particulars is to amplify a pleading, to limit proof and to prevent surprise. . . ." [129] As a result of the purpose of avoiding surprise at trial, the bill of particulars, of necessity, adds rigidity to the amendment of pleadings. "Restriction of a party to the legal theory . . . stated in a bill of particulars seems antithetical to the elimination of the theory-of-the-pleadings doctrine, which was one of the purposes of CPLR 3013."[130] Perhaps it was for that reason that the bill of particulars was eliminated from federal practice in 1948.

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[124] *Id.* at 212, 168 N.E.2d at 658, 203 N.Y.S.2d at 834.

[125] *Supra* note 121.

[126] See Nelson v. Schrank, 273 App. Div. 72, 75 N.Y.S.2d 761 (2d Dep't 1947).

[127] CPLR 4103.

[128] — Misc. 2d —, 251 N.Y.S.2d 635 (Civ. Ct. 1964).

[129] Elman v. Ziegfeld, 200 App. Div. 494, 497, 193 N.Y. Supp. 133, 136 (1st Dep't 1922).

[130] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3041.22 (1963).