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CPLR 3403: Tort Action Lacking Proper Venue Denied General Preference

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the plaintiff did not entitle the defendant to summary judgment in a negligence action.

The *Jawitz* court may have overlooked the significant broadening of the applicability of summary judgments since the *Israel* decision. Under the RCP, summary judgment was unavailable in negligence actions.[129] CPLR 3212 now authorizes its use "in any action" except matrimonial actions.[130] Thus, the *Israel* court was powerless, and the *Jawitz* court was free to grant a motion for summary judgment.[131]

ARTICLE 34—CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3403: Tort action lacking proper venue denied general preference.

CPLR 3403 requires that nonpreferred civil cases be tried in the sequence in which their notes of issue are filed. Since the statute thus serves to postpone such actions indefinitely,[132] all parties seek a special preference under it, or where one is not obtainable, a general preference through compliance with the applicable appellate division rules regulating preferences.[133]

In *Chiques v. Sanso*,[134] the plaintiffs, residents of Nassau and Dutchess Counties, sought a general preference in a negligence action commenced in Westchester County against defendants who were residents of Nassau County and New Jersey.[135] In denying the plaintiffs' motion without prejudice to renewal in a proper forum, the Supreme Court, Westchester County, held that they had failed to comply with subdivision (a) of section 674.1 of the Rules and Regulations of the

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129 RCP 113. The section was amended a year after *Israel* to essentially its present form. *See* FIFTH ANNUAL REPORT OF THE N.Y. JUDICIAL CONFERENCE 20 (1960); 4 WK&M ¶¶ 3212.01, 3212.03.

130 For a discussion of the special provisions for summary judgment in matrimonial actions contained in CPLR 3212(d), see 7B MCKINNEY'S CPLR 3212, commentary at 446 (1970).

131 *See* Dent v. Baxter, 37 App. Div. 2d 908, 325 N.Y.S.2d 672 (4th Dep't 1971) (mem.); Clements v. Peters, 33 App. Div. 2d 1096, 308 N.Y.S.2d 258 (4th Dep't 1970) (mem.); Jansen's Bottled Gas Serv., Inc. v. Warren Petroleum Corp., 47 Misc. 2d 461, 262 N.Y.S.2d 768 (Sup. Ct. Albany County 1965).

132 4 WK&M ¶ 3403.04.

133 Chiques v. Sanso, 72 Misc. 2d 376, 377, 339 N.Y.S.2d 394, 397 (Sup. Ct. Westchester County 1972), *citing* Haas v. Scholl, 68 Misc. 2d 197, 199, 325 N.Y.S.2d 844, 846-47 (Sup. Ct. Westchester County 1971). Also, certain causes are preferred as of course, *e.g.*, commercial and matrimonial actions. *See* 4 WK&M ¶ 3403.03.

134 72 Misc. 2d 376, 339 N.Y.S.2d 394 (Sup. Ct. Westchester County 1972).

135 The court noted that the corporate defendant had a "nonexistent address" in the state, but was in fact incorporated in New Jersey. *Id.*, 339 N.Y.S.2d at 396.

Appellate Division, Second Department,[136] which states in part that a general preference may be obtained provided "[t]hat the venue of the action was properly laid in the county in which it is pending, within the requirements of the CPLR. . . ."[137] In so holding, the court found that the plaintiffs' choice of venue, Westchester County, was improper under CPLR 503(a) unless the action was jurisdictionally required to be tried there,[138] since Westchester was not the county where one of the parties resided at the time of the commencement of the action. The court further noted that this finding was not impeded by the defendants' failure to oppose the motion or the failure by any of the parties to request a change in venue.[139]

This decision implements the court's inherent power to control its calendar,[140] the cited appellate division rule, and the inconvenient forum policy.[141] "[W]here, as here, one or more of the parties reside in a county in the State the venue preference requirement is singularly applicable and the preference must be sought in the county in which one of the parties resides."[142]

ARTICLE 41 — TRIAL BY A JURY

CPLR 4102: Validity of jury waiver clause in lease upheld in action sounding in contract.

Prior to the 1965 enactment of section 259-c of the Real Property Law, courts frequently upheld lease provisions in which the right to a jury trial was waived by the contracting parties.[143] Section 259-c limits the efficacy of such clauses by invalidating a jury trial waiver "in any action for personal injury or property damage."[144] Recently, however, in *Lindenwood Realty Co. v. Feldman*,[145] the Appellate Division,

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136 22 NYCRR 674.1(a) (actions for damages for permanent disability or death).

137 72 Misc. 2d at 380, 339 N.Y.S.2d at 400.

138 *Id.* at 379, 339 N.Y.S.2d at 399.

139 *Id.*, 339 N.Y.S.2d at 398-99, *citing* Carbide & Carbon Chems. Co. v. Northwest Exterm. Co., 207 Misc. 548, 139 N.Y.S.2d 480 (Sup. Ct. Queens County 1955).

140 *See* 4 WK&M ¶ 3403.02.

141 *See* Asaro v. Audio by Zimet, Inc., 69 Misc. 2d 316, 330 N.Y.S.2d 25 (Dist. Ct. Suffolk County 1972) (mem.), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 161 (1972); Suriano v. Hosie, 59 Misc. 2d 973, 302 N.Y.S.2d 215 (Dist. Ct. Nassau County 1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 532, 588 (1970).

142 72 Misc. 2d at 380, 339 N.Y.S.2d at 399.

143 Lease waiver provisions have been strictly construed, however, and limited to actions seeking to enforce rights originating under the lease. *See* 14 CARMODY-WAIT 2d, § 90:262, at 211 (1967); 4 WK&M ¶ 4102.14. *See generally* 3 J. RASCH, LANDLORD AND TENANT § 1344 (2d ed. 1971).

144 N.Y. REAL PROP. LAW § 259-c (McKinney 1968).

145 40 App. Div. 2d 855, 338 N.Y.S.2d 245 (2d Dep't 1972), *rev'g mem.* 72 Misc. 2d 68, 338 N.Y.S.2d 243 (App. T. 2d Dep't 1971).