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CPLR 4110: Two-Year Delay in Challenging Impartiality of Jurors, While Awaiting Review of Favorable Verdict, Will Preclude Assertion of Such Claim

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Second Department, strictly construed section 259-c to uphold the validity of a broad jury waiver provision in a lease.

Therein, a landlord sued its tenants to recover for rent and property damage to the leased premises. The appellate term held that section 259-c precluded the landlord from invoking a jury waiver provision in the lease to negate the tenants' demand for a jury trial. The dissent, however, maintained that the words "personal injury or property damage" within the section "traditionally . . . refer to tort actions arising out of a liability imposed by law for negligence, or even a willful tort, but not out of a contract."[146] This and its view of section 259-c as "a companion section to"[147] section 5-321 of the General Obligations Law,[148] which invalidates an agreement exempting a lessor from liability for "injuries to person or property" caused by his negligence, led the dissent to conclude that the waiver provision in this instance was valid.

When the Second Department reversed the appellate term in a memorandum decision, it adopted the reasoning of the dissent in the lower court.[149]

CPLR 4110: Two-year delay in challenging impartiality of jurors, while awaiting review of favorable verdict, will preclude assertion of such claim.

Since parties to a civil action are entitled to have their case presented before an impartial jury, CPLR 4110 enumerates various grounds for challenging a prospective juror for cause.[150] If, after the verdict, it becomes apparent that circumstances existed which would have been grounds for exclusion of a juror before trial, a court may set the verdict aside.[151] Once his particular interest is demonstrated, whether the juror would decide the case objectively becomes a question of fact for the court provided that a prima facie disqualification does not exist.[152]

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146 72 Misc. 2d at 69, 338 N.Y.S.2d at 244 (Gulotta, J., dissenting).

147 *Id.* at 70, 338 N.Y.S.2d at 244.

148 N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 1964).

149 *But see* Swinger Realty Corp. v. A.S. Kizner Imports, Inc., 70 Misc. 2d 742, 335 N.Y.S.2d 108 (App. T. 1st Dep't 1972) (per curiam); 4 WK&M ¶ 4102.14.

150 CPLR 4110 does not exclude common-law grounds for such a challenge. *See* 7B MCKINNEY'S CPLR 4110, commentary at 138 (1963); 4 WK&M ¶ 4110.07.

151 Knickerbocker v. Erie R.R., 247 App. Div. 495, 286 N.Y.S. 1001 (4th Dep't 1936) (per curiam).

152 *See* 4 WK&M ¶¶ 4110.02, 4110.09. CPLR 4110(b) provides that a relationship "within the sixth degree by consanguinity or affinity to a party" automatically disqualifies a juror.

In *Gamell v. Mount Sinai Hospital*,[153] the Appellate Division, Second Department, unanimously reversed an order for a new trial based on the alleged partiality of two jurors in a medical malpractice action where the infant plaintiff had suffered permanent brain damage as a result of an excessive administration of demerol to her mother prior to delivery. The jury found for the defendant doctor and against the defendant hospital on the negligence question. The appellate division reversed as to the hospital and ordered a new trial.[154] Three months later the plaintiffs moved for a new trial as to the doctor, alleging that on *voir dire* examination one juror failed to disclose that her nephew and niece were in the medical profession, and that another concealed the fact that he had a retarded granddaughter. The trial court granted the plaintiffs' motion.

The appellate division justified its reversal of the order on several grounds. With respect to the juror with relatives in the medical profession, the court found the evidence insufficient to show nondisclosure on *voir dire*.[155] The other juror's bias, if any, was regarded as favorable to the plaintiffs.[156] The court, emphasizing the strong public policy against a jury's post-trial impeachment of its own verdict,[157] concluded that the plaintiffs' delay of over two years, after learning of the possible juror prejudice and until an unfavorable disposition on appeal, precluded them from asserting the claim.[158]

ARTICLE 62 — ATTACHMENT

CPLR art. 62: Ex parte *atttachment in an action based on conversion held unconstitutional.*

Recent consumer litigation has exposed provisional remedies as the procedural area most vulnerable to constitutional challenge on due process grounds.[159] Traditionally among the most potent weapons of the creditor, provisional remedies have become increasingly subject to

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153 40 App. Div. 2d 1010, 339 N.Y.S.2d 31 (2d Dep't 1972) (mem.).

154 34 App. Div. 2d 981, 312 N.Y.S.2d 629 (2d Dep't 1970) (mem.).

155 40 App. Div. 2d at 1011, 339 N.Y.S.2d at 32-33.

156 *Id.*, 339 N.Y.S.2d at 33.

157 *Id.* at 1012, 339 N.Y.S.2d at 33-34, *citing* McDonald v. Pless, 238 U.S. 264 (1915). The court indicated that the post-trial indictment of the jury was orchestrated by a juror and the infant's parents.

158 40 App. Div. 2d at 1011, 339 N.Y.S.2d at 33, *citing* Empire Crafts Corp. v. Grace China Co., 40 Misc. 2d 957, 244 N.Y.S.2d 572 (Sup. Ct. Richmond County 1963), *aff'd mem.*, 20 App. Div. 2d 851, 249 N.Y.S.2d 664 (2d Dep't 1964).

159 The provisional remedies are: attachment, arrest, preliminary injunction, receivership, and notice of pendency. CPLR 6001. Seizure of a chattel in a replevin action is technically not a provisional remedy, but is usually treated as one. *See* CPLR 203(b)(3), 6001.