

CPLR 2219(a): Case Illustrates the Futility of Seeking to Compel a Judge to Render a Decision

St. John's Law Review

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Recommended Citation

St. John's Law Review (1972) "CPLR 2219(a): Case Illustrates the Futility of Seeking to Compel a Judge to Render a Decision," *St. John's Law Review*: Vol. 46 : No. 3 , Article 37.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol46/iss3/37>

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indemnified party.³⁰ The respective clauses in *Levine* and *Redding* are semantically distinct but not substantively different. It is puzzling that the *Redding* court recognized "that the words 'any and all' were sufficient to cover the owner's active negligence"³¹ in *Levine*, but found them insufficient in the instant case. Since *Levine* indicated that no further evidence is required to establish the requisite intent under these circumstances, the court should have decided in favor of Gulf on this point.³²

ARTICLE 22 — STAY, MOTIONS, ORDERS AND MANDATES

CPLR 2219(a): Case illustrates the futility of seeking to compel a judge to render a decision.

CPLR 2219(a) provides that an order determining a motion shall be made within sixty days. Should a court fail to comply with this rule, any party to the action can commence an article 78 proceeding to compel the judge to file a decision. The practical outcome of this proceeding, however, leaves much to be desired.

In October 1970, a proceeding was commenced in family court to terminate a mother's parental rights in her daughter. The mother moved to dismiss the case, and the judge reserved his decision. When, after six months, no decision was forthcoming, the mother initiated an article 78 proceeding to compel him to render a decision. In *Rothman v. Thurston*,³³ the Supreme Court, New York County, granted the petition. It noted that the respondent's delay was inexcusable and far in excess of the 60-day time limit of CPLR 2219(a).³⁴ In light of the fact that an infant's welfare was at stake, prompt disposition was deemed necessary. Therefore, the court ordered the respondent to decide the case within 10 days. If the respondent continued to withhold a decision

³⁰ 28 N.Y.2d at 212, 269 N.E.2d at 803, 321 N.Y.S.2d at 86.

³¹ 67 Misc. 2d at 466, 324 N.Y.S.2d at 492.

³² The *Redding* court stated:

No more is submitted in support of Gulf's position than an affidavit of an attorney who points to the clause and submits a memorandum of law devoted to a discussion of the opinion in *Levine*. There has not been offered an affidavit of an officer, agent, employee, etc. of the Company with knowledge of the facts which would demonstrate the intention to indemnify against injury to the lessee.

Id. at 467, 324 N.Y.S.2d at 493.

However, *Levine* indicated that further evidence need not be proffered. 28 N.Y.2d at 212, 269 N.E.2d at 803, 321 N.Y.S.2d at 86.

³³ 67 Misc. 2d 543, 324 N.Y.S.2d 331 (Sup. Ct. N.Y. County 1971).

³⁴ The 60-day time limit has been held to be merely directory and not mandatory. *Kaminsky v. Abrams*, 51 Misc. 2d 5, 272 N.Y.S.2d 530 (Sup. Ct. N.Y. County 1965). See 2A WK&M ¶ 2219.01, which also points out that "no sanction is imposed under this rule for failure of the judge to decide the motion within the specified time."

beyond the 10-day limit, a mistrial would be declared and a rehearing ordered.³⁵

The futility of an article 78 proceeding to order a judge to comply with CPLR 2219(a) is apparent. Presently, the most effective pressure upon a judge comes from an administrative board ruling which requires him to submit a statement "indicating the matters which have been pending undecided before him for a period of 60 days after final submission and the reasons therefor."³⁶ It seems that some sanction, in addition to the scrutiny of his superiors, should be available against a recalcitrant judge.

ARTICLE 32 — ACCELERATED JUDGMENT

Collateral Estoppel: Thoughts on mass tort cases and the "multiple plaintiff anomaly."

An adjudication of certain questions actually litigated and determined in a civil action may be binding in subsequent litigation under the doctrine of collateral estoppel.³⁷ Until recently the principle of mutuality of estoppel precluded a party not bound by a prior judgment from benefiting from that judgment by pleading it in a subsequent action.³⁸ The premise upon which mutuality of estoppel was based concerned an apprehension that unjust results could occur if the benefit of collateral estoppel were extended to persons not parties to the original action.³⁹ However, some exceptions to the mutuality rule developed as

³⁵ Professor McLaughlin stated: "If a party wishes to insist upon literal compliance with the sixty-day rule he must call this to the court's attention before the period expires." He does not indicate, however, what effective measure, if any, can be taken should the judge nevertheless delay beyond the sixty days. 7B MCKINNEY'S CPLR 2219, *supp. commentary* at 20 (1967).

³⁶ 22 N.Y.C.R.R. § 20.2.

³⁷ Collateral estoppel must be distinguished from the principle of total *res judicata*, which prevents a party from relitigating the same cause of action against his opponent following a final judgment rendered on that cause of action. Collateral estoppel renders a final judgment conclusive as to issues necessarily decided in the determination of an action before a competent court. RESTATEMENT OF JUDGMENTS § 68, *comment a*, at 294 (1942). In order for an adjudication to be binding in subsequent litigation, the issue presented in the prior action must be identical to that raised in the subsequent suit and the issue presented must have been actually litigated. In addition, it must have been essential to the prior determination and ultimate in both suits. *See Rosenberg, Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165 (1969) [hereinafter Rosenberg].

³⁸ *See Neenan v. Woodside Astoria Transp. Co.*, 261 N.Y. 159, 184 N.E. 744 (1933); *Atlantic Dock Co. v. Mayor, Alderman & Commonalty of City of New York*, 53 N.Y. 64 (1873). *See generally* 2 BLACK, JUDGMENTS § 548 (2d ed. 1902).

³⁹ *See Moore & Currie, Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961); *Seavey, Res Judicata with Reference to Persons Neither Parties Nor Privies—Two California Cases*, 57 HARV. L. REV. 98 (1943); *von Moschzisker, Res Judicata*, 38 YALE L.J. 299 (1929).