

CPLR 3403(a)(4): Right to a General Preference Held Prerequisite to Right to a Special Preference

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the other hand, adoption of the in rem technique of constructive notice will at least put potential claimants to the choice of litigating their claims in one action, or waiving the right to assert collateral estoppel against the common defendant in a subsequent action. In any event, the temptation to sit on the sidelines in hopes of reaping a windfall by way of a prior trial would be gone.

ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3403(a)(4): Right to a general preference held prerequisite to right to a special preference.

CPLR 3403(a)(4) enables a seventy-five-year-old plaintiff to apply for a special preference in any action. The purposes of this device are to afford an elderly party a measure of financial comfort in his remaining years and to further insure his ability to personally testify in the action.⁶⁵ Must the requirements for a general preference be satisfied before a party becomes entitled to a special preference?

In *Rab v. Colon*,⁶⁶ the Appellate Division, First Department, answered this question in the affirmative. It affirmed a decision holding that a seventy-five year old plaintiff could not be granted a special preference once his application for a general preference had been denied.⁶⁷ One judge dissented, on the ground that the special preference was mandatory by legislative fiat.⁶⁸

The court's inherent right⁶⁹ to control its calendar would be restricted if the right to a special preference constituted satisfaction of the requirements for a general preference. CPLR 3403(a)(4) was intended to grant an individual a prompt trial in the proper court. The dissent is contradictory to the appellate division's purpose in instituting a general preference.⁷⁰

⁶⁵ 7B MCKINNEY'S CPLR 3403, supp. commentary at 13 (1970).

⁶⁶ 37 App. Div. 2d 813, 324 N.Y.S.2d 809 (1st Dep't 1970).

⁶⁷ Article VI, section 7, of the state constitution grants the New York Supreme Court general original jurisdiction in all actions regardless of monetary value. CPLR 3401 allows the appellate division to adopt rules to regulate the supreme court's calendar. The court's refusal to grant a general preference, in effect, "place[s] cases which [it] believe[s] should [be] brought in a lower court in an inferior calendar status, making it virtually impossible to obtain a trial in the supreme court. . . ." 4 WK&M ¶ 3401.04.

⁶⁸ The dissent cited 4 WK&M ¶ 3403.19(a) and Professor Siegel's statement in 7B MCKINNEY'S CPLR 3403, supp. commentary at 13 (1970). However, the determination of whether the supreme court will consider the case should be determined by the cause of action and not the age of the plaintiff. Professor Siegel has stated that the eligibility for a special preference does not waive the necessity of obtaining a general preference. 4 WK&M ¶ 3403.06 states that "once a civil action is placed on a calendar . . . a special preference may be granted by placing the action . . . in an advanced position" (Emphasis supplied).

⁶⁹ *Plachte v. Bancroft, Inc.*, 3 App. Div. 2d 437, 161 N.Y.S.2d 892 (1st Dep't 1957).

⁷⁰ See 4 WK&M ¶ 3403.04.