

CPLR 2303: Payment of Required Fees to Subpoenaed Witness Must Be Made at a Reasonable Time Prior to the Return Date of the Subpoena

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Co. v. Unczur,⁷⁷ the Appellate Division, Fourth Department, held that "where the defendant is an adult incapable of adequately protecting his rights. . .," sections 1201 and 1203 of the CPLR⁷⁸ "are to be read together and interpreted as requiring the appointment of a guardian ad litem . . . before a default judgment may be entered against him."⁷⁹

In *Oneida*, the plaintiff-bank had served the incompetent defendant, a patient at a mental hospital, without complying with the rules and regulations applicable to service of process upon patients so confined.⁸⁰ Had these rules been complied with, the court "presumably would have arranged for the appointment of a guardian ad litem . . . [or] would have made inquiry to ascertain her mental condition and ability to protect her own interests."⁸¹ In ordering that the default judgment procured against the defendant be vacated, this court has given notice to all plaintiffs

who [have] notice that a defendant in his action is under mental disability to bring that fact to the court's attention and permit the court to determine whether a guardian ad litem should be appointed to protect such defendant's interests.⁸²

In so holding, this court has placed plaintiffs on notice that a failure to so comply will result in vacatur of their judgments if it is shown that guardians ad litem should indeed have been appointed for their adversaries.

ARTICLE 23 — SUBPOENAS, OATHS AND AFFIRMATIONS

CPLR 2303: Payment of required fees to subpoenaed witness must be made at a reasonable time prior to the return date of the subpoena.

Like its predecessor,⁸³ CPLR 2303⁸⁴ provides that subpoenaed witnesses be provided with traveling expenses and one day's witness fees.⁸⁵

incompetent defendant required the reversal of a judgment against him).

⁷⁷ 37 App. Div. 2d 480, 326 N.Y.S.2d 458 (4th Dep't 1971).

⁷⁸ CPLR 1201 provides in pertinent part that

[a] person shall appear by his guardian ad litem . . . if he is an adult incapable of adequately protecting or defending his rights.

CPLR 1203 similarly provides that

[n]o default judgment may be entered against an adult incapable of adequately protecting his rights for whom a guardian ad litem has been appointed unless twenty days have expired since the appointment.

⁷⁹ 37 App. Div. 2d at 483, 326 N.Y.S.2d at 461.

⁸⁰ 14 N.Y.C.R.R. § 22.1 provides that service of process on patients in mental hospitals shall not be permitted without an order of a judge of a court of record.

⁸¹ 37 App. Div. 2d at 483, 326 N.Y.S.2d at 461.

⁸² *Id.* at 484, 326 N.Y.S.2d at 461-62.

⁸³ See CPA §§ 404, 783(3).

⁸⁴ See 2A WK&M ¶ 2303.01.

⁸⁵ The travel fee is eight cents for each mile in both directions. In addition, a fee of two dollars per day for each day of attendance is also required. CPLR 2303. However,

Before the CPLR became effective, it was held that witness fees must be tendered with the service of the subpoena⁸⁶; CPA 783(3)⁸⁷ provided specifically that "a witness shall be paid his witness fee and mileage at the time of service."⁸⁸ In contrast, CPLR 2303 and 5224 state that the fees must "be paid or tendered in advance. . . ."⁸⁹

The significance of this change in statutory language was determined in *Osborne v. Miller*.⁹⁰ A motion was made therein for an order punishing the defendant-judgment debtor and his wife for their failure to comply with subpoenas duly served upon them.⁹¹ The wife contended that there was no lawful service upon which a contempt finding against her could be based, because the required fees were not tendered when the subpoena was served. Instead, a check in payment of such fees was sent to and received by the wife prior to the return date of the subpoena. In determining that the service was valid, the court found that the "clear mandate" in CPA 783(3), *i.e.*, that the fees be paid at the time of service, does not appear in either CPLR 5224(b) or CPLR 2303, which merely provide that the fee "be paid . . . in advance. . . ."⁹² Without legislative history to explain the purpose of the change in language,⁹³ the court reasoned that the change in statutory language implied that CPLR sections 5224(b) and 2303 do not require that witness fees be tendered at the time of service, as long as they are tendered *within a reasonable time in advance of the return date of the subpoena*.⁹⁴ In the interest of justice, however, the court declined to punish the defendant's wife for contempt, but directed her instead to appear and submit to examination or face a renewed contempt motion.

While the court's interpretation of the change in statutory lan-

no fee is required for travel "wholly within a city." H. WACHTELL, *NEW YORK PRACTICE UNDER THE CPLR* 279 (3d ed. 1970).

⁸⁶ *Circle Floor Co. v. Siltan Corp.*, 36 Misc. 2d 634, 233 N.Y.S.2d 158 (Sup. Ct. Queens County 1962).

⁸⁷ The court in the instant case stated that CPA 783(3) is one of the sections upon which CPLR 5224 is based. *Osborne v. Miller*, 67 Misc. 2d 824, 325 N.Y.S.2d 150 (Sup. Ct. N.Y. County 1971).

⁸⁸ *Id.* (emphasis in original).

⁸⁹ *Id.*

⁹⁰ 67 Misc. 2d 824, 325 N.Y.S.2d 150 (Sup. Ct. N.Y. County 1971).

⁹¹ The motion for an order punishing the contempt of the judgment debtor was granted. However, this action was not at issue as CPLR 5224(b) provides that "a judgment debtor served with a subpoena under this section shall not be entitled to any fee."

⁹² 67 Misc. 2d at 825, 325 N.Y.S.2d at 152 (emphasis in original).

⁹³ The court cited *State Comm'r v. Marrano*, 45 Misc. 2d 1092, 259 N.Y.S.2d 49 (Sup. Ct. Erie County 1965), which held that the fees should be paid at the time of service. However, the court distinguished the *Marrano* case, where it was not necessary to consider the impact of the change in statutory language because the amount of the fee to be paid, and not the time of payment, was at issue.

⁹⁴ 67 Misc. 2d at 825, 325 N.Y.S.2d at 152 (emphasis added).

guage seems correct, the practitioner is advised to approach this case with caution. The court made no mention of the significance of the fact that the tender of the fees was made by check.⁹⁵ The law is well settled that a check is not legal tender when it is refused on the express ground that it is not the accepted mode of payment.⁹⁶ The practitioner is advised to tender cash at the time of service regardless of the holding in the instant case.

ARTICLE 30 — REMEDIES AND PLEADING

CPLR 3020: Action dismissed on the ground of defective verification.

Since 1965, RPAPL section 741 has required verification of complaints served in summary proceedings. Presumably, the purpose of this requirement is to subject the affiant to prosecution for perjury⁹⁷ if he willfully misstates the facts. However, "[w]ith rare exceptions, district attorneys will not undertake to prosecute a perjury alleged to emanate from a civil proceeding."⁹⁸

In *46 Downing Street Corp. v. Loren*,⁹⁹ the defendant-tenant moved to dismiss a summary holdover proceeding on the ground that verification of the petition was defective. It was discovered that the signature of the landlord's agent was not genuine. In dismissing the action under CPLR 3020,¹⁰⁰ Judge Lane addressed himself to the pernicious practice under which city marshalls complete standard petitions and notices of petition in summary proceedings in lieu of the plaintiff or his attorney. While acknowledging that this procedure is not illegal, he stressed its inherent dangers.¹⁰¹ Specifically, he warned

⁹⁵ While a valid tender must ordinarily be made in money, a tender by check is valid if not objected to on that ground. *E.g.*, *Mitchell v. Vermont Copper Mining Co.*, 67 N.Y. 280, 282 (1876); *Murphy v. Mahoney*, 187 Misc. 316, 63 N.Y.S.2d 912 (Sup. Ct. Broome County 1946).

⁹⁶ *In re Collyer*, 124 App. Div. 16, 108 N.Y.S. 600 (2d Dep't 1908). It appears that one who is subpoenaed as a witness would succeed on a motion to quash the subpoena on the ground that payment of the witness fees were tendered by check where such tender was refused for the stated reasons that payment in cash is desired and that a check is not legal tender. *Grussy v. Schneider*, 50 How. Pr. 134 (Sup. Ct. N.Y. County 1875), *aff'd*, 55 How. Pr. 188 (1st Dep't 1876).

⁹⁷ N.Y. PENAL LAW art. 210 (McKinney 1967).

⁹⁸ 7B MCKINNEY'S CPLR 3020, commentary at 200 (Supp. 1971).

⁹⁹ 67 Misc. 2d 737, 324 N.Y.S.2d 932 (N.Y.C. Civ. Ct. N.Y. County 1971).

¹⁰⁰ *Id.*, citing *Sandy Mark Realty Corp. v. Creswell*, 67 Misc. 2d 630, 324 N.Y.S.2d 504 (N.Y.C. Civ. Ct. N.Y. County 1971).

¹⁰¹ Marshalls may make incurable jurisdictional errors or use improper forms, necessitating recommencement of actions. 67 Misc. 2d at 738, 324 N.Y.S.2d at 933, citing *Kings East v. Crowell*, 161 N.Y.L.J. 113, June 11, 1969, at 17, col. 4 (Sup. Ct. N.Y. County). In the latter case, the petition did not state that the apartment in issue was decontrolled, as required by RPAPL § 741. This defect was deemed jurisdictional, and the court warned of the danger in merely "filling in the blanks on a printed form." *Id.*