

# CPLR 3403: Special Preference Denied Seider-Based Plaintiff

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On the other hand, the Court of Appeals based its finding of constitutionality upon the mandate of article VI, section 30 of the constitution.<sup>154</sup> "[T]he language of the Constitution leaves little room for doubt that the authority to regulate practice and procedure in the courts lies principally with the Legislature,"<sup>155</sup> since the procedure of dismissing complaints for undue delay was legislatively created and did not arise from the inherent power of the court.<sup>156</sup>

The Court has thus put to rest any questions as to the constitutionality of a rule designed to insure that a plaintiff be given every possible opportunity to prosecute a meritorious claim. Although the courts and several authorities may be displeased with the result,<sup>157</sup> the only way to effectuate any desired reform is through constitutional amendment, and this course does not appear likely.

#### ARTICLE 34—CALENDAR PRACTICE; TRIAL PREFERENCES

##### *CPLR 3403: Special preference denied Seider-based plaintiff.*

In denying an application for a special preference under CPLR 3403, in *Tjepkema v. Kenney*,<sup>158</sup> Justice Gold pointed out another in the myriad of problems generated by *Seider*-based<sup>159</sup> attachments of insurance policy proceeds. The action was brought against the non-resident defendant to recover damages for the wrongful death of a New York decedent in an out-of-state automobile accident. Quasi in rem jurisdiction was predicated upon the attachment of the defendant's liability insurance policy through his insurance company's New York office. This fact pattern, of course, precisely parallels that which existed in *Seider*.

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1019 (4th Dep't 1969); *Kull v. City of New York*, 31 App. Div. 2d 638, 295 N.Y.S.2d 959 (2d Dep't 1968); *Johnson v. Parrow*, 56 Misc. 2d 863, 291 N.Y.S.2d 175 (Sup. Ct. Ontario County 1968). For a discussion of the reaction of the third department to *Cohn*, see *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 151-53 (1969).

<sup>154</sup> N.Y. CONST. art. VI, § 30:

The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and equity that it has heretofore exercised. The legislature may . . . delegate . . . any power possessed by [it] . . . to regulate practice and procedure in the courts.

See *Johnson v. Parrow*, 56 Misc. 2d 863, 291 N.Y.S.2d 175 (Sup. Ct. Ontario County 1968), where this section of the constitution was first cited in support of the validity of CPLR 3216. See also *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 498, 517-18 (1969).

<sup>155</sup> 25 N.Y.2d at 247, 250 N.E.2d at 695, 303 N.Y.S.2d at 640.

<sup>156</sup> *Id.* at 298-99, 250 N.E.2d at 695-96, 303 N.Y.S.2d at 640-41. See also 7B MCKINNEY'S CPLR 3216, supp. commentary 336, 339, 345 (1967-68).

<sup>157</sup> See, e.g., 25 N.Y.2d at 251, 250 N.E.2d at 697, 303 N.Y.S.2d at 643; 7B MCKINNEY'S CPLR 3216, supp. commentary 336, 339 (1968).

<sup>158</sup> 59 Misc. 2d 670, 299 N.Y.S.2d 943 (Sup. Ct. N.Y. County 1969).

<sup>159</sup> See *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). See also Note, *Seider v. Roth: The Constitutional Phase*, 43 ST. JOHN'S L. REV. 58 (1968).

The problem in *Tjepkema* was precipitated by the notorious calendar delay for tort actions in New York County. For, the relatively short statute of limitations for wrongful death actions<sup>160</sup> operative in most jurisdictions would probably have expired in any other state in which plaintiff could have acquired in personam jurisdiction well before the New York action culminated in a judgment. Therefore, if the res in the New York action (the attached insurance policy) was insufficient to cover the entire judgment, it would be too late for plaintiff to attempt to commence a second action elsewhere.<sup>161</sup> In *Tjepkema*, the plaintiff argued that a second action could not be commenced until the conclusion of the New York *Seider*-based suit since only then would it be known if her claim had been fully satisfied. Rule 3403(a) grants a trial preference "[in] an action in which the interests of justice will be served by an early trial." However, due to calendar congestion and local calendar control rules, few preferences are granted and, when they are, it is only after a showing of destitution or probability of death before trial.<sup>162</sup> Justice Gold emphatically closed the judicial door on any preferential treatment to a *Seider*-based plaintiff. He pointed out that if a preference was to be granted in the instant case because of the possibility of a bar by a statute of limitations in another state, an identical preference would be available to every *Seider*-based plaintiff who claimed that the defendant was potentially liable for damages in excess of his policy limitations.<sup>163</sup> This would have the effect of giving every *Seider*-based plaintiff, who has the most

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<sup>160</sup> See, e.g., N.Y. ESTATES, POWERS AND TRUSTS LAW § 5-4.1 (McKINNEY 1967) which provides for a two-year statute of limitation within which the wrongful death action must be commenced. It may be interesting to note that the other jurisdiction having a jurisdictional basis in this action was Missouri, which also has a two-year statute of limitation. See VERNON'S ANN. MO. STATS. § 537.100 supp. (1967).

<sup>161</sup> Justice Gold pointed out, however, that even a special preference may be unavailable to avoid the bar of the statute of limitations where the action was commenced some time after the accident with prolonged pretrial proceedings or intermediate appeals. 59 Misc. 2d at 672, 299 N.Y.S.2d at 944-45.

<sup>162</sup> See generally 4 WK&M ¶ 3403.10 (1968) (interests of justice). See also 7B McKINNEY'S CPLR 3403, supp. commentary 14, 19 (1964).

Mere old age is insufficient; there must be an additional showing that plaintiff will not survive the normal calendar delay. *Brier v. Plaut*, 37 Misc. 2d 476, 235 N.Y.S.2d 37 (Sup. Ct. Kings County 1962). Or, in the alternative, there must be a showing that plaintiff is impoverished and will otherwise likely become a public charge. *Kerry v. American Warm Air Heating Co.*, 32 Misc. 2d 935, 223 N.Y.S.2d 946 (Sup. Ct. Monroe County 1961).

<sup>163</sup> See 7B McKINNEY'S CPLR 3403, supp. commentary 14, 15-18 (1969) in which *Tjepkema v. Kenney* is given an extensive treatment and some of the problems suggested by the decision are explored.

It would now appear that the policy limits of a defendant's insurance coverage are available upon a disclosure application. *Mirabile v. Fitzmaurice*, 59 Misc. 2d 239, 298 N.Y.S.2d 568 (Sup. Ct. Kings County 1969). See also 7B McKINNEY'S CPLR 5201, supp. commentary 17, 29 (1969).

tenuous of jurisdictional ties to begin with, preferential treatment over all other plaintiffs who have legitimate recourse to our courts, by placing the latter class that much further back on the calendar.<sup>164</sup>

The tenor of the *Tjepkema* decision is one of judicial resignation to *Seider* coupled, however, with a determination that the theory of the case should be limited where possible. Justice Gold goes so far as to suggest that if the plaintiff will have to prosecute an in personam claim against the defendant in his own state anyway, he might as well do so in the first instance by bringing an action for full relief in that state.<sup>165</sup>

If one chooses not to follow this course, however, the practical solution to the problem of the running of the statute of limitations in the foreign jurisdiction, as suggested by Justice Gold, is simply to commence the action in the foreign jurisdiction and delay prosecution until a final determination of the New York *Seider*-based action is attained. This procedure may succeed in New York if it is the forum in which the in personam action was delayed, but it is fraught with danger if tried elsewhere. The foreign court may decline to accept plaintiff's explanation of the statute of limitations problem and may demand that plaintiff proceed with the prosecution of the in personam action. It may even dismiss the action on a motion by the defendant which is based upon the pendency of the New York action. But the instant decision suggests that these problems will not arise. The court refers to rule 3211(a)(4)<sup>166</sup> and states that a

[r]easonable disposition to permit the continuance of the subsequent in personam action, brought when it was to avoid the bar of the

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<sup>164</sup> A prior case rejecting preferential treatment for a *Seider*-based plaintiff, upon other grounds, was *Margulies v. Boverman*, 56 Misc. 2d 507, 288 N.Y.S.2d 732 (Sup. Ct. N.Y. County 1968); see *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 338-39 (1968). See also 7B MCKINNEY'S CPLR 3403, supp. commentary 14, 18-19 (1968) (a decisive treatment of plaintiff's endeavors to get preferential treatment).

<sup>165</sup> It should be noted at this juncture that under Missouri law the maximum damages in a wrongful death action at the time of this accident were limited to \$25,000. (Now \$50,000.) VERNON'S ANN. MO. STATS. § 537.090 supp. (1967). Therefore, this holding denying the special preference is meaningful solely for the difference between the insurance policy limit and \$25,000. And any New York judgment in excess of \$25,000 would preclude suit in Missouri.

<sup>166</sup> See *Tjepkema v. Kenney*, 31 App. Div. 2d 908, 298 N.Y.S.2d 175 (1st Dep't 1969). See also 7B MCKINNEY'S CPLR 5201, supp. commentary 17, 29-30 (1969).

CPLR 3211(a):

A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

4. There is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires. . . .

statute [of limitations], is to be expected of any court cognizant of the nature of the problem.<sup>167</sup>

Notwithstanding this sound advice, it is patently clear that one cannot anticipate this specific reaction from any given court, particularly since the validity of *Seider* attachments in other states is at best questionable. Furthermore, the court is assuming that the foreign forum has a statutory provision similar to CPLR 3211(a)(4) and, that if it does, it will construe it as we construe that section. Upon reflection, perhaps the best advice offered by the court is to have the plaintiff sue originally where he can get in personam jurisdiction over the defendant. This assumes, of course, that the defendant has assets in another jurisdiction over and above the insurance policy coverage which could be attached in a New York *Seider*-based action. However, if there are no other assets or if the judgment sought in New York will not exceed the policy limits, there is no need for the second action. And using the quasi in rem *Seider*-based action initially, a New York resident plaintiff receives the benefit of a New York jury and the exceptionally large verdicts for which they are notorious.

#### ARTICLE 41 — TRIAL BY JURY

*CPLR 4102(a): Withdrawal of jury demand permissible without opposition's consent in absence of reliance.*

A party to a civil action must assert his right to a jury trial by including an appropriate demand in his note of issue at the time it is filed.<sup>168</sup> If none of the parties makes such a demand pursuant to CPLR 4102(a), the right will be deemed waived by all. However, once either party so reserves his right to a jury trial, it is unnecessary for the opponent to assert the right on his own behalf since “[a] party may not withdraw a demand for trial by jury without the consent of the other parties.”<sup>169</sup> Thus, if a demand has been made by one party, the other may rely upon it as if he had made it in the first instance.<sup>170</sup>

In *Downing v. Downing*,<sup>171</sup> the first department found it necessary to examine the purpose behind 4102(a)'s stipulation that all parties

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<sup>167</sup> 59 Misc. 2d at 673, 299 N.Y.S.2d at 945.

<sup>168</sup> CPLR 4102(a). The party must also serve all other parties with his demand. Any party served a note of issue not including a demand for a trial by jury may demand such, by serving every party with demand, and filing the demand within fifteen days. *Id.*

<sup>169</sup> CPLR 4102(a).

<sup>170</sup> *Schnur v. Gajewski*, 207 Misc. 637, 140 N.Y.S.2d 82 (Sup. Ct. Bronx County 1955) (assent of all parties must be obtained before demand for jury trial may be withdrawn by plaintiff since court is unable to speculate whether or not objecting defendant would have independently demanded this right).

<sup>171</sup> 32 App. Div. 2d 350, 302 N.Y.S.2d 334 (1st Dep't 1969).