

## CPLR 2212(a): "Adjoining County" Theory Not Utilized by New York City Civil Court

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CPLR 506(b)(2) is substantially a restatement of CPA 1287.<sup>99</sup> However, under the CPLR an article 78 proceeding against certain bodies or officers must be brought in Albany County,<sup>100</sup> whereas the CPA laid venue in any county within the third judicial district. This statutory innovation is applicable only to article 78 proceedings;<sup>101</sup> other causes of action against those designated in 506(b)(2) have different venue requirements.<sup>102</sup>

In *Posner v. Rockefeller*,<sup>103</sup> the appellate division, characterizing the lower court's order as one flying in the face of the statute, reasoned that CPLR 506(b)(2) was the controlling venue provision despite the fact that only one of the respondents, the Comptroller, was within its ambit, and therefore held that the motion for a change of venue to Albany County should have been granted.

It should be remembered that the motion for a change of venue cannot be made by a court sua sponte; hence, there is danger of an inadvertent waiver.<sup>104</sup> It should also be noted that where there are two or more express venue provisions which conflict,<sup>105</sup> CPLR 502 governs and the court "shall order as the place of trial one proper . . . as to at least one of the parties or claims."

#### ARTICLE 22 — STAY, MOTIONS, ORDERS AND MANDATES

*CPLR 2212(a): "Adjoining county" theory not utilized by New York City Civil Court.*

Motion practice in the New York City Civil Court is, for the most part, governed by the CPLR.<sup>106</sup> Nonetheless, CPLR 2212(a) which provides that a motion in an action in the supreme court may be heard "in the judicial district where the action is triable or in any county adjoining the county where the action is triable," has not been made applicable to the city court.<sup>107</sup> An examination of a recent case, *Fox v. Montenegro*,<sup>108</sup> raises the question whether the section should so apply.

<sup>99</sup> FIRST REP. 21.

<sup>100</sup> The provision is made explicit in CPLR 7804(b).

<sup>101</sup> It is not applicable, for example, to a declaratory judgment action, *New York Central R.R. v. Lefkowitz*, 12 N.Y.2d 305, 189 N.E.2d 695, 239 N.Y.S.2d 341 (1963); nor, a garnishment proceeding, *Butler v. State*, 47 Misc. 2d 365, 262 N.Y.S.2d 705 (Broome County Ct. 1965).

<sup>102</sup> See, e.g., CPLR 7002(b).

<sup>103</sup> 33 App. Div. 2d 683, 305 N.Y.S.2d 852 (1st Dep't 1969).

<sup>104</sup> CPLR 511.

<sup>105</sup> An action against the Public Service Commission triable in Albany County (CPLR 506) and the New York City Transit Authority triable in New York County (CPLR 505) would present such a conflict.

<sup>106</sup> CCA 1001.

<sup>107</sup> See 29A MCKINNEY'S CCA 1001, commentary 159 (1963). See also SECOND REP. 182.

<sup>108</sup> 61 Misc. 2d 1, 304 N.Y.S.2d 624 (N.Y.C. Civ. Ct. Kings County 1969).

In *Fox*, the plaintiff had commenced an action in the Kings County Division of the New York City Civil Court which was dismissed from the trial calendar because of plaintiff's nonappearance. Due to a clerical error in his venue caption, the plaintiff's subsequent motion to restore the case to the calendar was heard in the New York County Division. Failing to notice the error, defendants' attorneys contested the motion on the merits. However, defendants later contended that the New York County Division did not have jurisdiction to grant plaintiff's motion.

In rejecting this argument, the court reiterated the distinction between jurisdiction and venue: the entire New York City Civil Court had jurisdiction over the cause of action;<sup>109</sup> the defendants' contention that the motion was heard in an improper division of the court was a venue objection.<sup>110</sup> As such, the failure to properly raise it was deemed a waiver.<sup>111</sup>

The "adjoining county" theory contained in CPLR 2212(a) was not discussed by the court.<sup>112</sup> This theory can serve a two-fold purpose: it may be used to alleviate the heavy motion calendar of a particular court while safeguarding against motions being made returnable in a distant court which is inaccessible to a practitioner. Its employment in the supreme court is conceptually sound in view of the jurisdictional relationship between the various courts: namely, the New York Supreme Court as a single entity has jurisdiction over an action brought in any of its parts.<sup>113</sup> In contrast, the adjoining county theory could not be utilized in one of the county courts since such court has jurisdiction only of matters pending within the county wherein it is situated.<sup>114</sup> However, since the composite of the New York City Civil Court is analogous to that of the supreme court, it seems that an "adjoining district" theory could validly be posited.

One caveat: it is doubtful whether CPLR 2212(a) will be applied by the New York City Civil Court in cases similar to *Fox* since one court is asked to pass upon intimate calendar questions of another

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<sup>109</sup> *Id.* at 3, 304 N.Y.S.2d at 636. *Cf.* *Revona Realty Corp. v. Wasserman*, 4 App. Div. 2d 444, 166 N.Y.S.2d 960 (3d Dep't 1957). In *Revona* it was indicated that the New York State Supreme Court is a single entity. Thus, when jurisdiction of an action is invoked by one division, the court as an entity obtains jurisdiction. *See also* THIRD REP. 178.

<sup>110</sup> *See* FIRST REP. 16.

<sup>111</sup> *Cf.* *Powers v. Delaware & Hudson R.R.*, 15 App. Div. 2d 620, 222 N.Y.S.2d 362 (3d Dep't 1961).

<sup>112</sup> Nevertheless, reference to the theory was made by the parties; *see* Affidavit in Support of Defendants' Motion at 3; Affidavit in Opposition to Defendants' Motion at 3, *Fox v. Montenegro*, 61 Misc. 2d 1, 304 N.Y.S.2d 624 (N.Y.C. Civ. Ct. Kings County 1969).

<sup>113</sup> *See* note 109 *supra*.

<sup>114</sup> THIRD REP. 178.

court.<sup>115</sup> Nevertheless, by analogy, CPLR 2212(a) should be utilized by the civil court in those instances where motion practice in the supreme court would warrant its application. The jurisdictional justification is present; a literal interpretation of CPLR 2212(a) should not be employed to prevent its adoption in the New York City Civil Court.

#### ARTICLE 31 — DISCLOSURE

*CPLR 3101(a): Courts continue to grant liberal disclosure of witnesses' names.*

Prior to the enactment of the CPLR, the names of witnesses were rarely the proper subject of disclosure.<sup>116</sup> Nevertheless, various exceptions to this stringent approach arose.<sup>117</sup> In recognition of the logic underlying these exceptions, CPLR 3101(a), as originally proposed,<sup>118</sup> emulated the "relevancy" standard utilized in the federal courts.<sup>119</sup> Although rejected legislatively, the federal standard was gradually adopted by the judiciary. This liberal construction of the disclosure article was ultimately sanctioned by the New York Court of Appeals' decision in *Allen v. Crowell-Collier Publishing Co.*<sup>120</sup> where "material and necessary" was virtually interpreted to mean "relevant."<sup>121</sup> In short, the trend is now clearly toward an interpretation of CPLR 3101 providing for prolific disclosure.<sup>122</sup>

Continuing this trend, the New York City Civil Court, in *Beyer v. New York Telephone Co.*,<sup>123</sup> recently permitted disclosure of the identity of a witness who, though not present at the time of the accident, arrived five to ten minutes thereafter and drove the plaintiff home. The witness was deemed to be so closely related to the occur-

<sup>115</sup> Discretion permits the "motion court" to transfer the motion to the trial court in a supreme court action. See *Baker, Voorhis & Co. v. Heckman*, 28 App. Div. 2d 673, 280 N.Y.S.2d 940 (1st Dep't 1967); 7B MCKINNEY'S CPLR 2212, supp. commentary 14 (1969).

<sup>116</sup> *Hartley v. Ring*, 58 Misc. 2d 618, 620, 296 N.Y.S.2d 394, 395 (Sup. Ct. Queens County 1969). See *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 140 (1969).

<sup>117</sup> For example, in *Pistana v. Pangborn*, 2 App. Div. 2d 643, 151 N.Y.S.2d 742 (3d Dep't 1956), disclosure was permitted on the theory that the witness was an "active participant" in the events upon which plaintiff relied.

<sup>118</sup> See FIRST REP. 117.

<sup>119</sup> See FED. R. CIV. P. 26(b): "the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including . . . the identity . . . of persons having knowledge of relevant facts." (Emphasis added.) See also 4 J. MOORE, FEDERAL PRACTICE ¶ 26.19, at 1241-42 (2d ed. 1968).

<sup>120</sup> 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968). See also *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 324 (1968).

<sup>121</sup> See 7B MCKINNEY'S CPLR 3101, commentary 11 (1970).

<sup>122</sup> See 3 W. K. & M. ¶ 3101.11.

<sup>123</sup> 61 Misc. 2d 222, 305 N.Y.S.2d 265 (N.Y.C. Civ. Ct. Queens County 1969).