

December 2012

CPLR 2214(b): Failure To Serve Notice of Motion Within Statutory Time Held a Non-Jurisdictional Defect

St. John's Law Review

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Recommended Citation

St. John's Law Review (1968) "CPLR 2214(b): Failure To Serve Notice of Motion Within Statutory Time Held a Non-Jurisdictional Defect," *St. John's Law Review*. Vol. 43 : No. 1 , Article 15.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol43/iss1/15>

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ARTICLE 12—INFANTS AND INCOMPETENTS

CPLR 1201: *Beyer limited to special circumstance situation.*

In *Application of Pugach*,⁴⁸ the appellate division was concerned with the jurisdiction of the trial court and the propriety of its appointment of a guardian ad litem under CPLR 1201.⁴⁹ The case involved an application to vacate a trust indenture created by an incompetent. Upon the presentation of the order to show cause, a guardian ad litem was appointed for the infant beneficiary of the trust.

The court held that there was jurisdiction both to make the appointment and to provide compensation for the guardian. However, the court noted that the better procedure would have been to defer appointment of the guardian ad litem until the infant failed to appear by her natural guardian.

In the prior first department case of *In re Beyer*,⁵⁰ the court, confronted with a situation somewhat similar to *Pugach*, said that a court should wait for application by the persons entitled to move for an appointment of a guardian ad litem, before making an appointment on its own initiative. However, the court added that appointment is permitted without prior applications by the persons so entitled where the infant's interests would be endangered if the usual procedure were employed.

As a result of *Pugach* and *Beyer*, it seems that the natural guardian should be given the opportunity to appear on behalf of the infant.⁵¹ Then, if no appearance is made by the natural guardian, a guardian ad litem should be appointed. However, in a situation where there are special circumstances presented, the court has the power to designate a guardian ad litem to appear for the infant or incompetent.

ARTICLE 22—STAY, MOTIONS, ORDERS AND MANDATES

CPLR 2214(b): *Failure to serve notice of motion within statutory time held a non-jurisdictional defect.*

In *Coonradt v. Walco*,⁵² the supreme court, Albany County, held that the failure to serve a notice of motion for a bill of par-

⁴⁸ 29 App. Div. 2d 518, 285 N.Y.S.2d 258 (1st Dep't 1967).

⁴⁹ CPLR 1201 provides for the appointment of a guardian ad litem for an infant, who has no parent or guardian of his property, and for an infant or incompetent where there is a conflict of interest or other cause.

⁵⁰ 21 App. Div. 2d 152, 249 N.Y.S.2d 320 (1st Dep't 1964).

⁵¹ "CPLR 1201 and 1202, effecting a change from the practice under the Civil Practice Act, indicates a legislative preference for the appearance of the natural guardian." *In re Legget's Trust*, 25 App. Div. 2d 727, 728, 268 N.Y.S.2d 911, 913 (1st Dep't 1966) (mem.).

⁵² 55 Misc. 2d 557, 285 N.Y.S.2d 421 (Sup. Ct. Albany County 1967).

particulars and supporting affidavits for at least the statutory time is a non-jurisdictional defect which will be disregarded absent prejudice to the complaining party.

CPLR 2214(b) requires service of a notice of motion and the supporting affidavits "at least eight days before the time at which the motion is noticed to be heard." An additional three days is added when the service is by mail.⁵³

Although the appellate division, second department, in *Morabito v. Champion Swimming Pool Corp.*,⁵⁴ has held an insufficient notice of motion a jurisdictional defect,⁵⁵ recently, in *Baciagalupo v. Baciagalupo*,⁵⁶ the supreme court, Suffolk County, disregarded such failure as a mere procedural irregularity. In reaching this decision, the court relied heavily on its discretionary power to hear a jurisdictional motion without notice. Since there was no prejudice to the defendant, and since there was no apparent denial of due process, reason dictated the sustaining of the use of this discretion.

In the instant case, it appearing, among other things, that the motion was returnable originally on September 22, 1967, and thereafter adjourned to a Special Term held on October 13, 1967, no substantial right of the plaintiffs had been prejudiced.

Thus, when no harm will result by failure to serve proper notice, authority appears to be accumulating in opposition to the *Champion* case. This trend is in accordance with the philosophy underlying the CPLR, "that it is primarily a means to the end of securing the just resolution of controversies on the merits, and at a minimum of expense and delay."⁵⁷

⁵³ CPLR 2103(b)(2).

⁵⁴ 18 App. Div. 2d 706, 236 N.Y.S.2d 130 (2d Dep't 1962) (mem.).

⁵⁵ For subsequent decisions similarly holding the insufficiency a jurisdictional defect see *Matter of Beck v. Goodday*, 24 App. Div. 2d 1016, 265 N.Y.S.2d 916 (2d Dep't 1965) (mem.); *Miot v. Jo Carl Realty Corp.*, 19 App. Div. 2d 889, 244 N.Y.S.2d 721 (2d Dep't 1963) (mem.), *modified*, 20 App. Div. 2d 664, 246 N.Y.S.2d 542 (1964) (mem.); *Doran Lumber Corp. v. James Talcott, Inc.*, 19 App. Div. 2d 791 (2d Dep't 1963) (mem.); *Thrasher v. United States Liab. Ins. Co.*, 45 Misc. 2d 681, 257 N.Y.S.2d 366 (Sup. Ct. N.Y. County 1965).

⁵⁶ 53 Misc. 2d 13, 277 N.Y.S.2d 760 (Sup. Ct. Suffolk County 1967). For a further discussion of this case, see *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 283, 294 (1967).

⁵⁷ 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶2001.01 (1967).