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CPLR 602: Place Where Motion for Joint Trial or Consolidation Is Made

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of judicial power. Since this is the only method of commencing an action under the CPLR, the case was accordingly remanded to special term for proceedings to complete service on the infant in accordance with CPLR 309.[22]

In *Matter of Beyer*, the appointment of a guardian ad litem was made in conjunction with a show cause order.[23] The issue to which the supreme court addressed itself was:

> the power of the court to designate or require the designation of a guardian ad litem in an order to show cause prior to the service thereof.[24]

On review, the appellate division responded that indeed "the court possesses the express discretionary power to appoint, in the first instance, a guardian in an order to show cause. . . ." [25]

The language of CPLR 403(d) clearly allows judicial discretion in a special proceeding that could not be countenanced in an action where there is a strict requirement of service of process. This discretionary leeway permitted in a show cause order appears to offer a palatable reconciliation of the ostensible conflict between the instant case and *Matter of Beyer*.[26]

ARTICLE 6 — JOINDER OF CLAIMS, CONSOLIDATION AND SEVERANCE

CPLR 602: Place where motion for joint trial or consolidation is made.

Barch v. Avco,[27] one of four wrongful death actions arising out of the same airplane crash, was commenced in New York County, while the other three were commenced in Onondaga County. Defendant moved in Onondaga County for a joint trial

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[22] "As in any proceeding, jurisdiction must be established before the court can act. It is sound principle to hold that a court cannot appoint a guardian ad litem for an infant until it acquires jurisdiction over that infant. . . ." 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶309.04 (1964).

[23] CPLR 403(d) provides that "[t]he court may grant an order to show cause to be served, in lieu of a notice of petition at a time and in a manner specified therein."

[24] *In re* Beyer, 42 Misc. 2d 113, 247 N.Y.S.2d 358, 359 (Sup. Ct. N.Y. County 1964).

[25] *In re* Beyer, 21 App. Div. 2d 152, 249 N.Y.S.2d 320, 322 (1st Dep't 1964).

[26] "Although the court did not mention the cases holding that a court cannot appoint a guardian ad litem until it has acquired jurisdiction over the person of the ward, its decision and reasoning seem to preclude the invocation of those cases as an obstacle to the use of the procedure outlined by the court in this type of case under the CPLR." 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶1202.02 (1964).

[27] ..... App. Div. 2d ....., 291 N.Y.S.2d 422 (4th Dep't 1968).

determination of all four actions, and the supreme court granted the motion. The appellate division, fourth department, reversed the order because the movant failed to make his motion in New York County[28] according to CPLR 2212(a) which requires that a motion "shall be noticed to be heard in the judicial district where the action is triable. . . ."

The court further stated that the order was defective "for there were no grounds asserted in any of the supporting affidavits to justify a change of venue even if it had been permissible for such relief to be granted. . . . [A]ll elements necessary for a motion for a change of venue were absent. . . ." [29]

It is submitted that, while the court was correct in reversing the lower court's order because the movant did not follow the letter of CPLR 2212(a), the result was perhaps harsh in this case. If the movant, who was also a defendant in the Onondaga actions, had captioned his motion in one of those actions there would have been no defect because CPLR 2212(a) would have been adhered to. The defendant, however, erred in using the New York caption when he introduced his motion in Onondaga County.

Furthermore, the court's statement that venue requirements were not met (apparently the court believed that the movant by noticing his motion in Onondaga County was really moving for a change of venue under CPLR 510) made unnecessary capital out of the movant's error in his motion for joint trial under CPLR 602. In *Smith v. Witteman*,[30] this same court responded to the plaintiffs who opposed consolidation upon the ground that there had been no showing of circumstances warranting a change of venue:

> This was not a valid ground for objection. The court has the power, in an appropriate case, to order a consolidation or a joint trial of actions pending in two counties and to direct the trial to be held in one of the counties, thus incidentally changing the venue of the actions pending in the other county without necessarily requiring a showing of circumstances which would have independently justified the change of venue.[31]

In *Kiamesha v. Greenman*,[32] the court cited the above language of the fourth department and confirmed the court's "discretion in selecting the venue when consolidation is granted pursuant to

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[28] *Id.* at —, 291 N.Y.S.2d at 425.
[29] — App. Div. 2d —, —, 291 N.Y.S.2d 422, 425 (4th Dep't 1968).
[30] 10 App. Div. 2d 793, 197 N.Y.S.2d 877 (4th Dep't 1960).
[31] *Id.* at —, 197 N.Y.S.2d at 879.
[32] 29 App. Div. 2d 904, 287 N.Y.S.2d 972 (3d Dep't 1968).

CPLR 602." [33] The court further stated that the factors involved which relate to a change of venue under CPLR 510 are relevant in the exercise of the court's discretion under CPLR 602.[34] Therefore, while the same factors may be inherent in a motion under CPLR 510 and CPLR 602, in the former these factors are controlling, whereas in the latter they are not.

ARTICLE 10 — PARTIES GENERALLY

CPLR 1007: Third party action based on subrogation where no payment has been made allowed.

CPLR 1007 provides in part that "a defendant may proceed against a person not a party who is or may be liable to him for all or part of the plaintiff's claim against him. . . ."

In *Krause v. American Guar. & Liab. Ins. Co.*,[35] plaintiff, trustee in bankruptcy for one of the victims of the great "salad oil swindle," sought recovery on broker's bonds issued by the defendant insurance company. The insurance company sought to implead the American Express Company and the issue was raised as to whether CPLR 1007 permits a third-party action based on subrogation where no payment has been made. The appellate division held that impleader was permissible under the statute and the Court of Appeals affirmed.

In its opinion the Court of Appeals distinguished *Ross v. Pawtucket Mut. Ins. Co.*[36] and apparently limited it to automobile collision cases. In *Ross*, the plaintiff-insured's contract with the defendant-insurer provided that the defendant's right to subrogation would not mature until payments were made under the policy. In *Krause* there was no such policy term. However, *Ross* also rested on the broader ground that impleader under CPLR 1007 should not be permitted to an insurer whose claim is based upon rights to be gained by subrogation. This concept is based on the reasoning of the dissent in *Madison Ave. Props. Corp. v. Royal Ins. Co.*[37] which required that "[t]he third party plaintiff must have, at least, some color of a present cause of action." [38]

The Court rejected this rationale finding it inappropriate to the realities of the commercial type of litigation presented in *Krause*. But, the *Ross* precedent was left undisturbed to govern

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[33] *Id.* 287 N.Y.S.2d at 974.
[34] *Id.*
[35] 22 N.Y.2d 147, 239 N.E.2d 175, 292 N.Y.S.2d 67 (1968).
[36] 13 N.Y.2d 233, 195 N.E.2d 892, 246 N.Y.S.2d 213 (1963).
[37] 281 App. Div. 2d 641, 120 N.Y.S.2d 626 (1st Dep't 1953).
[38] *Id.* at 646, 120 N.Y.S.2d at 631.