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CPLR 4103: Untimely Demand Results in Waiver

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destitution is plaintiff's ground for a preference, it must be shown that defendant's negligence was the cause of plaintiff's destitution.¹¹⁸

In a recent case, *Tintner v. Marangi*,¹¹⁹ plaintiff, 72 years of age, had made two prior motions for a trial preference but was unable to make a showing of "destitution" or to comply with the "stringent provisions of the rules of the Appellate Division." In the instant action, plaintiff based his motion on a change of circumstances, *i.e.*, due to the loss of a part-time job because of superannuation he was forced to share a small bedroom with his wife and two grandchildren in his son's home. In sustaining plaintiff's motion on the ground of changed circumstances and in the interests of justice, the court explicitly added a new criterion to be considered in determining whether a special trial preference should be granted:

if a litigant's resources are inadequate to permit living in dignity and self-respect—commensurate with age and prior milieu—it is both just and meet that we grant a special trial preference.¹²⁰

It was a *change* in plaintiff's circumstances that entitled him to a trial preference here. It should be noted that had plaintiff and his wife been sharing a small bedroom with their grandchildren prior to the superannuation, it is perhaps doubtful that this motion would have been granted.

ARTICLE 41 — TRIAL BY A JURY

CPLR 4103: Untimely demand results in waiver.

CPLR 4103 provides that, when it appears during the course of a non-jury trial¹²¹ that the relief required, although not originally demanded, entitles the adverse party to a trial by jury, the court must give such party an opportunity to demand a jury trial.¹²² However, an untimely demand results in a waiver.

In *Northern Operating Corp. v. Anopol*,¹²³ the appellate division, second department, dismissed defendant's appeal from an order denying a motion for a jury trial. Although the court held

¹¹⁸ See *Nazario v. Martha Cab Corp.*, 41 Misc. 2d 1010, 247 N.Y.S.2d 6 (Sup. Ct. Kings County 1964).

¹¹⁹ 57 Misc. 2d 318, 292 N.Y.S.2d 779 (Sup. Ct. Rockland County 1968).

¹²⁰ *Id.* at 320, 292 N.Y.S.2d at 780-81.

¹²¹ When it is apparent before trial that there exists a legal issue, triable by jury, CPLR 4102 is applicable.

¹²² For the rationale behind this provision, see 4 WEINSTEIN, KORN & MILLER, *NEW YORK CIVIL PRACTICE* ¶4103.01 (1965) and *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 166-67 (1965).

¹²³ 30 App. Div. 2d 690, 291 N.Y.S.2d 831 (2d Dep't 1968).

that no appeal lies from an order made on a ruling given during the course of trial,¹²⁴ it proceeded to discuss the case as if the merits were before it.

Plaintiff sued for specific performance of a contract for the sale of real property and for damages. At the close of plaintiff's main case, subject to the calling of an additional witness, defendant moved to dismiss. Plaintiff then indicated that he would pursue only the cause for damages. The trial court did not dismiss the first cause and defendant proceeded with his case. During examination of his first witness defendant moved for a jury trial of the second cause. The court ruled that this was not a timely motion within the meaning of 4103.¹²⁵

Anopol provides one of the first illustrations of what will be deemed a waiver under 4103.

CPLR 4111: Jury may impeach its own verdict in respect to misconduct outside jury room.

At common law it was settled that jurors could not by affidavit impeach their own verdict, even if misconduct outside of the jury room was involved.¹²⁶ A recent case, *Bainton v. The Board of Education of the City of New York*,¹²⁷ illustrates that the common-law rule has been eroded. In *Bainton*, a personal injury action, two jurors made separate and unauthorized visits to the scene of the accident. The court held that this highly improper conduct was so inherently prejudicial as to require a new trial.

The court relied heavily upon the Court of Appeal's decision in *People v. DeLucia*,¹²⁸ which was decided in light of the United States Supreme Court's decision in *Parker v. Gladden*.¹²⁹ In *DeLucia* the Court of Appeals stressed that the purpose of the common-law rule was to prevent juror harassment but reasoned that the sixth amendment right to a trial by a fair and impartial jury must be counterbalanced against the older rationale. The result of the misconduct in *DeLucia*, (i.e., several jurors visited the scene of the crime and re-enacted it), was that these jurors became, in reality, unsworn witnesses against the defendants in violation of the sixth amendment.

Since the court in the instant case deemed the visit in and of itself to be inherently prejudicial, it is arguable that several older

¹²⁴ See 10 CARMODY-WAIT 2d, CYCLOPEDIA OF NEW YORK PRACTICE §§ 70:37, 70:38.

¹²⁵ Actually, it appeared unlikely that defendant had such right anyway for the major thrust of the case was in equity. See 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶4101.37 (1965).

¹²⁶ *People v. Sprague*, 217 N.Y. 373, 111 N.E. 1077 (1916).

¹²⁷ 57 Misc. 2d 140, 292 N.Y.S.2d 229 (App. T. 2d Dep't 1968).

¹²⁸ 20 N.Y.2d 275, 229 N.E.2d 211, 282 N.Y.S.2d 526 (1967).

¹²⁹ 385 U.S. 363 (1966).