

CPLR 5221(a): County in Which Money Judgments Are To Be Enforced; Defect in Venue Is Waivable

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instant case involved a remedial trust. Thus, the Court has shown its reluctance to expand the term fiduciary to the constructive or remedial fiduciary situation. In addition, the Court has not found a situation such as the present one to be sufficiently reprehensible to warrant characterizing it as "willful default or dereliction" of duty. This being so, enforcement of the judgment in such a case can be brought by execution only.

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5221(a): County in which money judgments are to be enforced; defect in venue is waivable.

In *Silbert v. Silbert*,²²² the corporate garnishee had been served with a restraining order issued by the Supreme Court, of Westchester County, in a separation action instituted by a wife against her spouse, an employee of the garnishee. The corporate garnishee, however, despite the restraining order, paid the husband over \$30,000 of which \$6,000 was in dividends. Upon the wife's motion, the court held the garnishee, whose only place of business was in New York County, guilty of contempt for its violation of the restraining order. The appellate division, second department, affirmed the lower court on this issue stating that although CPLR 5221(a) requires that such a proceeding be brought in the county in which the garnishee resides, which in this instance was New York County and not Westchester County, such defect in venue was waived by the garnishee's failure to take timely exception thereto. It reversed in part, however, holding that the restraining order did not reach wages and certain of the dividends which had been assigned to other judgment creditors.

CPLR 5221(a) specifically requires that a proceeding under Article 52 must be commenced in "a county in which the respondent resides or is regularly employed or has a place for the regular transaction of business."²²³ "Unless it meets the test of subdivision (a), the county in which the judgment was rendered is not a proper place for an Article 52 special proceeding."²²⁴ Generally this rule takes into account the convenience of the respondent (the garnishee here) and the probability that he will be more apt to be present in the county where he conducts his business.²²⁵

²²² 25 App. Div. 2d 570, 267 N.Y.S.2d 744 (2d Dep't 1966).

²²³ See 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5221.04 (1965).

²²⁴ *Ibid.* See *Manufacturers Trust Co. v. Valenti*, 17 Misc. 2d 386, 186 N.Y.S.2d 363 (Sup. Ct. N.Y. County 1959).

²²⁵ 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5221.04 (1965).

Where the special proceeding is instituted in the wrong county, authorities have considered the error to be either a jurisdictional defect or a defect in venue. Thus, in adopting the former position, the City Court of New York has held a contempt order not enforceable against a judgment debtor who was outside that court's jurisdiction.²²⁶ Similarly, a contempt order issued by the Supreme Court, New York County,²²⁷ was held to be invalid since proper venue would have been in Kings County. The order was considered void because it was entered without jurisdiction. This view was also adhered to in a case holding that an order issuing from a county where the debtor had neither residence nor place of business was void and defendant could not be punished for contempt of that order.²²⁸

In contradistinction to the jurisdictional defect argument, it has been contended that such an error is a mere defect in venue. The basic New York approach to venue is that it relates merely to the place of trial and not jurisdiction, and that improper venue may be waived unless objection is properly and timely made.²²⁹ The validity of such a resulting judgment will in no way be impaired by improper venue. CPLR 2001 lends support to this argument by stating that if a substantial right of a party is not prejudiced, the defect or irregularity shall be disregarded by the court.²³⁰

In stating that the defect in venue was waived by the garnishee's failure to take timely exception, the court in the instant case held that it was not a jurisdictional defect causing invalidity. If the respondent in a special proceeding considers the county to be inappropriate, inconvenient, or otherwise undesirable, he should challenge it at its commencement. Failure to do so will be deemed a waiver of any right to object to the county where the proceeding is being heard, and the subsequent order will be jurisdictionally valid.²³¹

²²⁶ *Matter of Cedar Management Corp.*, 27 Misc. 2d 609, 212 N.Y.S.2d 437 (Sup. Ct. Nassau County 1961).

²²⁷ *Aluminum Fabricators Inc. v. Apex Window Co.*, 4 App. Div. 2d 939, 167 N.Y.S.2d 579 (1st Dep't 1957). See *Northville Dock Corp. v. Aller Oil Co.*, 19 Misc. 2d 558 (Sup. Ct. Nassau County 1959).

²²⁸ *Manufacturers Trust Co. v. Valenti*, *supra* note 224.

²²⁹ 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 509.01 (1965).

²³⁰ Thus "slight mistakes or irregularities not affecting the merits or the substantial right of a party shall not become fatal in their consequences." 7B MCKINNEY'S CPLR 2001, commentary 558 (1965); *Commercial Credit Corp. v. Colegrove*, 37 Misc. 2d 781, 219 N.Y.S.2d 971 (Sup. Ct. Oneida County 1961).

²³¹ 6 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5221.08 (1965).