

CPLR 2003: Irregularity in Judicial Sale

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these circumstances from obtaining this relief could not have been intended by the legislature.

CPLR 1207: Settlement of action or claim by infant or incompetent.

CPLR 1207 provides the defendant with the only sure method whereby he can obtain a release from an infant or incompetent for a claim settled out of court.¹²⁶ The section prescribes two procedures: (1) when an action is pending, a motion should be made, and (2) where this is not the case, the section provides for the commencement of a special proceeding. While this distinction appears to be only formal, it has been enforced by denying the application for approval of a settlement when the wrong procedure was utilized.¹²⁷

The practitioner should note that this section alters prior law in that it extends coverage to the judicially declared incompetent, prohibits the parent from moving or petitioning for a settlement when he is not the child's legal guardian and does not require an infant to join in the motion or petition.¹²⁸

ARTICLE 20—MISTAKES, DEFECTS, IRREGULARITIES AND EXTENSIONS OF TIME

CPLR 2003: Irregularity in judicial sale.

A foreclosure sale scheduled for January 6, 1965, was postponed to the following day due to the referee's illness. An order to that effect was signed by the court. The defendant-owner's motion to set aside the sale on the ground that there was no publication of the substituted date was denied. The court held that under CPLR 2003, the omission was a mere irregularity which could be the basis for setting aside the sale only if substantial rights of a party were prejudiced.¹²⁹ In the instant case no prejudice was shown. In fact, approximately fourteen bids were received and the bidding was described as "spirited."

This decision is in accord with prior law,¹³⁰ the attitude of the CPLR as expressed in sections 2001 and 2003, and the reports

¹²⁶ 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1207.06 (1964).

¹²⁷ *Bittner v. MVAIC*, 45 Misc. 2d 584, 257 N.Y.S.2d 521 (Sup. Ct. N.Y. County 1965).

¹²⁸ 7B MCKINNEY'S CPLR 1207, commentary 512 (1963).

¹²⁹ *Criterion Capital Corp. v. Valven Holding Corp.*, 23 App. Div. 2d 878, 259 N.Y.S.2d 946 (2d Dep't 1965).

¹³⁰ CPA § 109-a(1); 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 2003.01, .03 (1964).

of the Advisory Committee¹³¹ — all of which allow the court to disregard defects which do not prejudice substantial rights of a party. It should also be noted that a one-year limitation in which to make a motion to set aside a judicial sale is applicable under CPLR 2003.

ARTICLE 22 — STAYS, MOTIONS, ORDERS AND MANDATES

CPLR 2214(b): Improper notice of motion constitutes jurisdictional defect.

CPLR 2214(b) requires that notice of motion and the supporting affidavits be served at least eight days before the return date, and CPLR 2103(b)(2) requires that three additional days be added to this period when service is by mail. In *Thrasher v. United States Liab. Ins. Co.*,¹³² the defendant moved to consolidate two actions; only ten days notice of motion was given and service was made by mail. The court denied the motion because of the one day service defect holding that the plaintiff's failure to appear on the return date did not constitute a waiver of the improper notice. Since improper notice is a jurisdictional defect, it cannot be waived by default.¹³³

It appears, however, unduly harsh to make improper notice of motion a jurisdictional defect in view of the fact that a show cause order under CPLR 2214(d) might have been obtained and the period of notice drastically reduced.

It is submitted, therefore, that the better rule would be to make improper notice of motion a procedural irregularity which would be deemed waived unless an objection was raised thereto.

CPLR 2221: Motion made to two justices sitting in same court.

In *Collins, Inc. v. Olsker-McLain Indus., Inc.*,¹³⁴ a motion to consolidate certain actions was denied by a justice sitting in special term. However, the order denying consolidation was neither signed nor entered. Subsequently, the petitioner moved to consolidate before a different justice sitting in calendar term of the same court. The motion was then granted. On appeal, the order granting the second motion was vacated, the appellate division ruling that the decision of the first justice established

¹³¹ FOURTH REP. 54.

¹³² 45 Misc. 2d 681, 257 N.Y.S.2d 360 (Sup. Ct. N.Y. County 1965).

¹³³ *Accord, Morabito v. Champion Swimming Pool Corp.*, 18 App. Div. 2d 706, 236 N.Y.S.2d 130 (2d Dep't 1962).

¹³⁴ 22 App. Div. 2d 485, 257 N.Y.S.2d 201 (4th Dep't 1965).