

CPLR 2214(b): Improper Notice of Motion Constitutes Jurisdictional Defect

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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).