

CPLR 2221: Motion Made to Two Justices Sitting in the Same Court

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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).

the law of the case and was therefore binding upon all courts of co-ordinate jurisdiction.¹³⁵

The court's refusal to sanction this procedure, which involves, in effect, taking an appeal to a justice sitting in the same court, is supported by the tenor of CPLR 2221 and 2217(a). These sections provide that "any motion may be referred to a judge who decided a prior motion in the action,"¹³⁶ and that a motion affecting a prior order "shall be made . . . to the judge who signed the order. . . . A motion made to other than a proper judge under this rule shall be transferred to the proper judge."¹³⁷

While the above cited sections did not bind the court in this situation, they evidence a legislative intention to prohibit the procedure employed by the petitioner in the instant case.

ARTICLE 26 — PROPERTY PAID INTO COURT

CPLR 2606: Obtaining order for payment out of court.

The application for obtaining a court order for the payment of property previously paid into court can be made either by motion or by special proceeding.¹³⁸ In the case of *Application of Godfrey*,¹³⁹ the petitioner utilized the special proceeding. The court considered this procedure preferable because the court-designated custodian, the county treasurer, no longer had possession of the property but had erroneously released the money to the state comptroller and thus was not a party to the application. As a result of this voluntary relinquishment, the supreme court noted that although the order withdrawing the funds should emanate from the court which directed that the property be paid into court,¹⁴⁰ here, the action of the treasurer removed it from the exclusive control of the county court and thus allowed the supreme court to assume jurisdiction. Although CPLR 2606 and 2607 require the petitioner to show that he is the person entitled to payment, it does not specify the manner of proof formerly required by RCP

¹³⁵ *Id.* at 489, 257 N.Y.S.2d at 205.

¹³⁶ CPLR 2217(a).

¹³⁷ CPLR 2221.

¹³⁸ CPLR 2606. The purpose of this rule and rule 2607 is to prevent the property from being released upon unlawful claims. *County of Tompkins v. Ingersoll*, 81 App. Div. 344, 347, 81 N.Y. Supp. 242, 245-46 (3d Dep't 1903), *aff'd*, 177 N.Y. 543, 69 N.E. 1132 (1904).

¹³⁹ 46 Misc. 2d 452, 259 N.Y.S.2d 953 (Sup. Ct. Nassau County 1965).

¹⁴⁰ *Zirinsky v. Pesce*, 188 Misc. 539, 68 N.Y.S.2d 309 (N.Y. City Ct. 1947); *People v. Brown*, 83 Misc. 495, 146 N.Y. Supp. 123 (Sup. Ct. 1914). This procedure is continued under CPLR 2606(2). See 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶2606.01 (1964).