NY CLS CPLR § 2212

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Consolidated Laws Service **>**

Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 22 Stay, Motions, Orders and Mandates (§§ 2201 — 2223)

§ 2212. Where motion made, in supreme court action.

(a) Motions on notice. A motion on notice in an action in the supreme court shall be noticed to be heard in the judicial district where the action is triable or in a county adjoining the county where the action is triable. Unless statute, civil practice rule or local court rule provides otherwise, the motion shall be noticed to be heard before a motion term or, upon order to show cause granted by a justice, before that justice out of court.

(b) Ex parte motions. A motion in an action in the supreme court that may be made without notice may be made at a motion term or to a justice out of court in any county in the state.

(c) Motions before a county court or judge. The chief administrator of the courts may by rule provide for the hearing of motions on notice or ex parte motions in an action or proceeding in the supreme court by a term of the county court or a county judge in the county in which venue is laid during periods in which no supreme court trial or special term is in session in the county.

(d) Rules of the chief administrator of the courts. The chief administrator may by rule exclude motions within a department, district or county from the operation of subdivisions (a), (b) and (c) of this section, provided, however, that the practice in counties within the city of New York shall be uniform.

History

Add, L 1962, ch 308, § 1, eff Sept 1, 1963; amd, L 1963, ch 807, eff Sept 1, 1963; L 1965, ch 149; L 1986, ch 355, § 2, eff July 17, 1986.

Annotations

Notes

Derivation Notes

Earlier statutes: CPA §§ 77, 115, 116, 128–130; CCP §§ 241, 768, 770, 772; Code Proc §§ 324, 401–403; 2 RS 280 §§ 18, 19.

Commentary

PRACTICE INSIGHTS:

THE DISFAVORED PRACTICE OF MAKING *EX PARTE* MOTIONS OUTSIDE THE PROPER COUNTY

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INSIGHT

CPLR 2212(b) authorizes a party to address an *ex parte* motion to any justice of the supreme court in the state. Absent court rule to the contrary, however, this provision is unlikely to be available except in rare circumstances. Although the ability to go outside the county or elsewhere to obtain *ex parte* relief seems antiquated, this practice still may prove useful in emergency situations.

ANALYSIS

Motions for *ex parte* relief are increasingly disfavored in light of concerns about forum shopping and unduly burdening courts.

CPLR 2212(b) applies to the rare situation that is appropriate for *ex parte* relief, and provides that such relief may be sought from any supreme court justice in the state. This section probably derives from the desire to provide immediate access to a supreme court justice anywhere in the state, even in rural counties, on roughly equal terms. *See, e.g., Sullivan & Donovan, L.L.P. v. Bond*, 175 Misc. 2d 386, 387, 669 N.Y.S.2d 131, 132 (Sup. Ct. Bronx County 1997). Concerns over forum shopping and unduly burdening courts, however, have made moving for *ex parte* relief a disfavored practice, and may result in the hearing court dismissing the matter or referring it back to the court where the litigation is pending. *Sullivan & Donovan, L.L.P.*, 175 Misc.2d at 387; *Cordero v. Grant*, 95 Misc. 2d 153, 155, 407 N.Y.S.2d 383, 384 (Sup. Ct. New York County 1978). *See also Cwick v. City of Rochester*, 54 A.D.2d 1078, 388 N.Y.S.2d 753 (4th Dep't 1976); *Kistenberg v Yao,* 2015 N.Y. Slip Op. 31813[U], 2015 N.Y. Misc. LEXIS 3470 (Sup. Ct, New York County 2015) (criticizing this provision as anachronistic).

Current utility of CPLR 2212(b) is questionable.

The current utility of CPLR 2212(b) is questionable. First of all, CPLR 2212(b) should not apply where a judge already is assigned to a case, which usually would be true under the individual assignment system. Only rarely would an *ex parte* application be entertained, as a practical matter, by a non-assigned judge where the case already has been assigned. In that rare instance, the application should be made to the administrative judge of the judicial district, based on genuine emergency and the unavailability of the assigned judge. This leaves CPLR 2212(b) applicable only to the unassigned case, except in the rarest of circumstances.

Most, if not all, rural counties have "multi-hat" judges, so there is at least an acting supreme court justice available in any such county. Further, access to judges for *ex parte* applications in rural counties tends to be comparatively easy and informal. Larger counties with multiple parts of supreme court have set procedures for obtaining *ex parte* relief, and a given judge usually is assigned to be available, on a periodic rotation, for such applications. In that situation, little

opportunity to seek intervention by a different judge exists because the practice in the given county dictates that the standard procedure for seeking ex parte relief be followed.

Although CPLR 2212(b) on its face authorizes a party to proceed out of county to obtain *ex parte* relief, it is likely to be interpreted to require that the application be made in the first instance in a county where venue otherwise would be proper. CPLR 2212(d) further provides that the rules of the chief administrator of the courts may limit access to other courts authorized by CPLR 2212(b). CPLR 2212(d) is express authority for the limitations on CPLR 2212(b) imposed by court rules. *See Sullivan & Donovan, L.L.P.*, 175 Misc.2d at 387-88.

CPLR 2212(b) is useful in emergency situations.

CPLR 2212(b) may prove useful in a genuine emergency because it provides the jurisdictional argument needed to support an ex parte application made anywhere in the state. In the right case, one truly involving an emergency application, any order is better than none. As a result, counsel could go to an adjacent county or further, with express CPLR authority for doing so, to obtain necessary *ex parte* relief. *See, e.g.*, *Borenstein v. Simonson*, 8 Misc. 3d 481, 489, 797 N.Y.S.2d 818, 824-25 (Sup. Ct. Queens County 2005).

Advisory Committee Notes

Practice under the CPA and RCP generally require motions to be made to a court (CPA § 115(2)) except that the provisions governing a great many particular motions allowed them to be made alternatively to a judge; the Committee's studies disclosed that the resultant delineation between court and judge motions in former practice followed no coherent or rational pattern. Its 1960 provision, allowing all motions to be made either to a court or a judge, was criticized, however, as (1) placing a potentially onerous duty upon judges to hear any motion made at any time out of court, unless the judge refused to hear it on the ground "that the moving party will not be prejudiced"; and (2) providing no machinery for notifying the judge in advance that a motion would be made to him at a particular time and place or for assuring the opposing party that the judge will be there and hear the motion. This section is, the Committee believes, a sensible and

workable compromise: it rejects the formerly codified dichotomy between court and judge motions, allowing any motion to be made out of court upon order to show cause granted by the justice who is to hear it. The distinctions regarding form and entry of court orders and judges' orders remain abolished, as in the 1960 bill, and the exception for a statute or rule providing otherwise is also unchanged. The Appellate Division, however, has been authorized to exclude particular motions from the operation of the instant provision, within any department, district or county; this is the effect of the new subdivision (d) of the instant rule, which in the 1960 bill appeared as part of subdivision (c) and applied only to that subdivision.

Subd (a) of this section contains the venue provisions of RCP 63(1) as to motions, since the former rule apparently has not been seriously abused.

Subd (b) is based on a part of CPA § 130(2). Although § 130(2) refers to orders made out of court and without notice, the cases seem to ignore the "out of court" language and state as a general rule that ex parte motions may be made anywhere in the state. See Rhodes v Wheeler, 48 App Div 410, 63 NY Supp 184 (3d Dept 1900); Farquhar v Wisc. Cond. Milk Co. 30 Misc 270, 62 NY Supp 305 (Sup Ct), modified, 53 App Div 641, 66 NY Supp 1130 (2d Dept 1900). There is no need to impose venue limitations for such motions. The convenience of attorneys is not involved, since there is no need for the opposing party's attorney to appear and contest the motion. If the judge to whom the application is made feels too unfamiliar with the case to decide it, he can deny it on this ground. The possibility of judge-shopping does exist but the proposed provision minimizes it by dispensing with venue limitations only when no justice specified in subdivision (a) is available. The provision allows the motion to be made either to the Supreme Court or to a Supreme Court justice out of court.

Subd (c) replaces so much of CPA §§ 77 and 130 as allows county judges to make orders in actions and proceedings pending in the Supreme Court. CPA §§ 77 and 130(2) are extremely obscure and the decisions considering them have only obscured them further. Section 77 seems to give a county judge within his county *all* the powers of a Supreme Court justice at chambers, without qualification. This would authorize the county judge to make all orders that may be made

out of court in both actions and special proceedings pending in the Supreme Court, whether made with or without notice, as well as to hear special proceedings that may be instituted before a Supreme Court justice out of court. The peculiar language of the section, referring to the "power conferred by law in general language upon an officer authorized to perform the duties of a justice of the supreme court at chambers or out of court," stems from the Throop Code. As the provision first appeared in § 403 of the Field Code, it stated simply: "In an action in the supreme court, a county judge, in addition to the powers conferred upon him by this act, may exercise, within his county, the powers of a judge of the supreme court at chambers, according to the existing practice, except as otherwise provided in this act . . . ." The authors of the Throop Code made the provision apply also to a "judge of a superior city court, within his city" and utilized comments to the section, to preserve not only § 403 but "various other enactments, granting in general language, the powers of a justice of the supreme court at chambers, to several officers, including recorders of cities, etc., as well as those . . . named." NY Code Civ Proc § 241, note Throop (ed 1880). It is unlikely that this change was meant to affect the power of county judges to handle chambers business of Supreme Court justices. Thus, under the Throop Code formulation, the Court of Appeals held that the county judge had no power to determine the custody of infants after the law was changed to require that such an application be made to the Supreme Court in court rather than to a justice at Chambers; and it stated that "[t]he powers of a county judge alter with alteration of the powers of the justice of the Supreme Court at chambers, for the powers of that officer at chambers form the standard by which to measure those of the county judge in that respect." People ex rel. Parr v Parr, 121 NY 679, 680, 24 NE 481 (1880); see also People ex rel. Williams v Corey, 46 Hun 408 (NY Gen T 3d Dept 1887); Lowman v Billington, 65 Misc 111, 118, 119 NY Supp 825, 831 (Sup Ct 1909). Nevertheless, at least one decision has treated the CPA language, introduced by the Throop Code, as granting less power to county judges than the Field Code provision did. Gates v Gates, 171 NY Supp 1036 (Sup Ct 1918) (per Rodenbeck, J.). In another case Judge Rodenbeck declared that "[t]here is no provision of the Code of Civil Procedure which confers upon a county judge . . . the power exercised by a Supreme Court justice at chambers in all cases," a statement that seems to fly in

the face of § 77. Matter of Parkman, 108 Misc 316, 317, 177 NY Supp 589, 590 (Sup Ct 1919) (invalidating garnishee execution issued by county judge). While § 130(2) also authorizes county judges to handle chambers business of the Supreme Court, it applies only to orders in actions that may be made out of court *and without notice.* Since not all orders that may be made at chambers may be made without notice (see, e.g., NY Civ Prac Act §§ 129, 588, 882; NY R Civ P 249), CPA § 130(2) appears to grant narrower powers than § 77. The cases have not satisfactorily dealt with the dual coverage of these sections and their forerunners. Some have emphasized the ex parte requirement of § 130(2), seeming to ignore the broader language of § 77. Thus, in Middletown v Rondount and Oswego R. R. 12 Abb Pr NS 276, 43 How Pr 144 (NY Sup Ct), affd 43 How Pr 481 (NY Gen T 4th Dept 1872), it was held that a county judge could make an ex parte injunction order in a Supreme Court action but could not require the defendants to show cause before him why it should not be continued, since this would be equivalent to a motion on notice. See also Parmenter v Roth, 9 Abb NS 385 (Ct App 1870); Rochester v Davis, 12 Abb NS 270 (Sup Ct 1872). But cf. Babcock v Clark, 23 Hun 391 (NY Gen T 4th Dept 1881); Hathaway v Warren, 44 How Pr 161 (NY Sup Ct 1872). Another line of cases holds that these sections, "being general in scope, are controlled by the special provisions" governing particular motions and stating that they shall be made to "the court or a judge thereof." Larkin v Steele, 25 Hun 254, 256 (NY Gen T 4th Dept 1881). Such language, these cases reason, evidences an intention that only the court in which the action is pending or a judge of that court should handle the motion. But the "court or a judge thereof" formulation is used in almost all the provisions that allow action out of court, except those that refer to a judge alone; it is the usual statutory formula for indicating that a motion may be heard out of court. If §§ 77 and 130(2) mean anything, they must apply to such provisions, and if the "special provision" reasoning of these cases were uniformly applied it would practically render these sections nugatory. Nevertheless, under this reasoning, the courts have invalidated county judge orders in Supreme Court cases requiring security for costs (Gates v Gates, 171 NY Supp 1036 (Sup Ct 1918); Longstreet v Sawyer, 15 NY Supp 608 (Sup Ct 1891)), directing entry of a default judgment Kline v Snyder, 133 Misc 128, 231 NY Supp 275 (Sup Ct 1928)) and even

granting an order to show cause returnable before the Supreme Court (Larkin v Steele, supra; contra: Gokey v Moate, 190 Misc 213, 74 NYS2d 32 (Sup Ct 1947)), although all of these orders may be made by a Supreme Court justice out of court. The CPA sections, then, are virtually worthless as guides to the power of county judges in Supreme Court cases. The CPLR provision rejects the criteria of these sections entirely and instead allows county judges to handle any kind of motion in a Supreme Court action, with only the specified exceptions. A similar proposal, without these exceptions, was advanced in 1915 by the Board of Statutory Consolidation. See 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York, rule 22 (1915). The committee sees no reason to circumscribe the county judge's power more narrowly. The subdivision is limited, unlike CPA §§ 77 and 130(2), to the situation where no justice of the Supreme Court is available in the county. This is the only time there is any need for the county judge to act. In those upstate counties with no resident Supreme Court justice, it will contribute greatly to the convenience of counsel.

Subd (d) conditions this broad grant of power by authorizing the Appellate Division to exclude any or all kinds of motions within a department, district or county, and thereby adapt the provision to local conditions, attitudes and needs. These vary widely throughout the state—from counties, at one extreme, where there are continuous motion terms of the Supreme Court and no need for the county judge to act, to those at the other extreme, with no resident Supreme Court justice, where the county judge's authority assumes great importance. Further, the county judge is allowed to refer the motion to a Supreme Court justice, to cover situations where he is not sufficiently familiar with the case to decide the motion or feels that it involves a matter best left to the court in which the case is triable, there being no urgency requiring immediate decision. The subdivision removes the necessity for the specific references to a county judge in provisions governing certain kinds of motions. See, e.g., NY Civ Prac Act § 151 (justification of sureties); id. § 202 (appointment of guardian ad litem); id. § 684 (garnishment). Such references in some former provisions, such as those governing service by publication (id. § 230) and the provisional remedies of arrest and attachment (NY Civ Prac Act § 817; cf. (id. § 882)) are superfluous, since such orders may be made out of court and without notice. The new CPLR refers to a county

judge in provisions governing particular applications only where it is intended that he be authorized and required to act regardless of the presence of a Supreme Court justice within the county, as in habeas corpus proceedings. Excepted from the new provision are motions in marital actions, because of the special policy considerations applicable to such actions; motions under article 44, which relate to the trial and should be made to the trial judge; and dispositive motions, such as a motion to dismiss or for summary judgment. The exception for dispositive motions, however, is made inapplicable to a motion for settlement of a claim by or against an infant or incompetent under new CPLR § 1207. In such cases there may be a special need for speedy action, and, since the former provision refers to a court or judge (NY R Civ P 294; cf. NY Civ Prac Act § 1320), it seems that a county judge would have this power under former law by virtue of CPA § 77. It is not intended that the county judge's power to order such a settlement in a Supreme Court case be limited to one within the jurisdictional limits of the county court. It is not clear whether his power would be so limited under RCP 294, although CPA § 1323 does prescribe such an express limitation where the application for settlement is made by special proceeding independent of any pending case. The power granted county judges under the new provision is limited to the county in which the action or proceeding is triable, as under CPA § 77. The additional authorization contained in CPA § 130(2), to the county judge of the county where the applicant's attorney resides, is not necessary. It was probably designed originally to serve the convenience of counsel rather than to provide an expeditious hearing, and there is little reason for it under modern conditions of transportation. The limiting phrase "and the particular judge is not specially designated by law" in § 130(2) is omitted as unnecessary, since a provision specifying a particular judge would in any event supersede the rule. See People v Windholz, 68 App Div 552, 74 NY Supp 241 (4th Dept 1902). Counties within New York city are excepted from the provision because their County Courts do not possess general civil jurisdiction.

Subd (d) added as new. The first clause replaces the analogous power granted in and limited to subd (c) of the 1960 provision. The proviso, though its effect may be merely precatory,

was added to express the overwhelming sentiment of the bar regarding uniformity of motion practice in the various counties within the City of New York.

Notes To Decisions

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II.Under Former Civil Practice Laws

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B.Decisions Under CPA § 130

I. Under CPLR

1. In general

Where the application for the severance of a third party action was made on insufficient notice, the defect in service was waived by opposition to the application on the merits. Todd v Gull Contracting Co., 22 A.D.2d 904, 255 N.Y.S.2d 452, 1964 N.Y. App. Div. LEXIS 2581 (N.Y. App. Div. 2d Dep't 1964).

Where a trial term justice denied a motion to consolidate several causes of action for trial, and the motion was renewed before a calendar term justice, it must be referred for decision to the justice who made the original ruling, and the calendar term justice should not rule upon the motion himself. George W. Collins, Inc. v Olsker-McLain Industries, Inc., 22 A.D.2d 485, 257 N.Y.S.2d 201, 1965 N.Y. App. Div. LEXIS 4773 (N.Y. App. Div. 4th Dep't 1965).

2. Motions on notice

An order to show cause could properly be made returnable to the justice issuing such order out of court, and when he could not be present on the return date and consequently, on that date, ordered the order to show cause transferred to another justice to be heard when the other justice might determine, there was no lapse of jurisdiction in election contest proceeding. Schick v Kane, 26 A.D.2d 386, 274 N.Y.S.2d 699, 1966 N.Y. App. Div. LEXIS 3028 (N.Y. App. Div. 3d Dep't 1966).

Special Term of Fulton County had no jurisdiction to vacate a default judgment entered in New York County, notwithstanding that a transcript of the judgment had been filed in Fulton County. CPLR 5015, subd a requires that an application to vacate a default judgment must be made in the court which rendered the judgment. Brenner v Arterial Plaza, Inc., 29 A.D.2d 815, 287 N.Y.S.2d 308, 1968 N.Y. App. Div. LEXIS 4600 (N.Y. App. Div. 3d Dep't 1968).

Supreme Court, Westchester County, erred in reaching merits of defendant’s motion for discretionary change of venue, and should have referred motion to Supreme Court, New York County, where plaintiff had commenced action in New York County; motion to change venue on discretionary grounds, unlike motions made as of right, must be made in county in which action is pending, or in any county in that judicial district, or in any adjoining county. Voorhees v Babcock & Wilcox Corp., 150 A.D.2d 677, 541 N.Y.S.2d 550, 1989 N.Y. App. Div. LEXIS 7091 (N.Y. App. Div. 2d Dep't 1989).

3. —Where action is triable

The phrase “where the action is triable” in CPLR 2212(a) means where the action is triable at the time the motion is brought; it does not allude to a county in which the action could have been commenced. Rexford Taping & Supply Co. v Maple Knoll Apartments, Inc., 65 Misc. 2d 342, 317 N.Y.S.2d 834, 1971 N.Y. Misc. LEXIS 1899 (N.Y. Sup. Ct. 1971).

4. —Adjoining county

While CPLR 2212(a) by its terms authorized plaintiff to make motion for summary judgment in the New York County action recountable at a Special Term in Queens County, an adjoining county, it was not an abuse of discretion for Special Term to refer the motion to New York County where the papers were filed and where the judgment was to be entered. Baker, Voorhis & Co. v Heckman, 28 A.D.2d 673, 280 N.Y.S.2d 940, 1967 N.Y. App. Div. LEXIS 3732 (N.Y. App. Div. 1st Dep't 1967).

The specific provision of CPLR § 8303 would dominate over the more general provisions set forth in CPLR 2212(a) which permits motions on notice to be made in an adjoining county. Phillips v Blasenheim, 32 A.D.2d 660, 300 N.Y.S.2d 800, 1969 N.Y. App. Div. LEXIS 3947 (N.Y. App. Div. 2d Dep't 1969).

Although Supreme Court, trial division, had subject matter jurisdiction to entertain discovery motion in matter pending for trial in nonadjoining county, since it possessed statewide jurisdiction, its action in entertaining such motion was “irregular” and better practice would have required that such motion be filed in county where action was pending for trial; any objection to such procedure was waived, however, when no timely objection was made and counsel for respective parties affirmatively consented to it. Cwick v Rochester, 54 A.D.2d 1078, 388 N.Y.S.2d 753, 1976 N.Y. App. Div. LEXIS 15050 (N.Y. App. Div. 4th Dep't 1976).

CPLR 2212 (subd [a]) which provides that a motion “shall be noticed to be heard in the judicial district where the action is triable or in a county adjoining the county where the action is triable”, was enacted to provide an alternative forum for resolution of motions when no motion term was being held in the county where the action was pending, such as in up-State counties, and is therefore no longer viable in counties in New York City which each maintain a weekly motion calendar, considering the numerous drawbacks to free use of the statute such as the application of different court rules pertaining to motion practice in each county in New York City, the additional administrative problems for the court clerks who must maintain duplicate files, the deleterious effect on already overburdened motion calendars, the ability of attorneys to harass their adversaries who maintain offices in the county where the action was commenced, and the

facilitation of Judge and calendar rules shopping in different counties. Accordingly, a previous order of the Supreme Court in New York County which conditionally granted plaintiff's motion to strike the answers of both defendants for failure to appear for an oral examination by reason of the technical default by defendants in not complying with the court rules requiring that all contested motions "be attended by counsel who shall be prepared to argue orally" (22 NYCRR 660.8 [b] [6] [ii]), is vacated and the motion is dismissed without prejudice to renewal in Bronx County where the action is pending. Cordero v Grant, 95 Misc. 2d 153, 407 N.Y.S.2d 383, 1978 N.Y. Misc. LEXIS 2397 (N.Y. Sup. Ct. 1978).

Although motion to change venue from Westchester county to New York county was properly brought in Bronx county as "adjoining" county under CLS CPLR § 2212(a), court would exercise its authority to transfer motion to proper court under CLS CPLR § 2217(c), and thus motion would be denied without prejudice to renewal in Westchester county. Sullivan & Donovan, L.L.P. v Bond, 175 Misc. 2d 386, 669 N.Y.S.2d 131, 1997 N.Y. Misc. LEXIS 659 (N.Y. Sup. Ct. 1997).

5. —Change of venue motions; generally

Motion for change of venue must be noticed to be heard in the judicial district where the action is triable or in a county adjoining which means the place where the action is pending thus, where one action pending in New York county and three actions pending in Onondaga county, all arising out of the same accident, were ordered to be tried together in Onondaga county pursuant to a motion made in such county, the order was fatally defective as the motion to change the place of trial of the action in New York county to Onondaga county should have been made in New York county. Barch v Avco Corp., 30 A.D.2d 241, 291 N.Y.S.2d 422, 1968 N.Y. App. Div. LEXIS 3552 (N.Y. App. Div. 4th Dep't 1968), app. dismissed, 23 N.Y.2d 865, 298 N.Y.S.2d 73, 245 N.E.2d 805, 1969 N.Y. LEXIS 1640 (N.Y. 1969).

The trial court erred in granting the defendants' motion for change of venue since the plaintiff timely served an affidavit alleging that the county selected by the plaintiff was the proper county, which required the defendants to make their motion for change of venue in the county

designated by the plaintiff or in an adjoining county. Tri-City Furniture Dist., Inc. v Reubens, 79 A.D.2d 886, 434 N.Y.S.2d 532, 1980 N.Y. App. Div. LEXIS 14327 (N.Y. App. Div. 4th Dep't 1980).

In a personal injury action against a city the court improperly granted the city's oral motion to change venue from Kings County to New York County, where, although the cause of action arose in New York County, the city was not entitled to relief under CPLR § 511 by reason of its having allowed more than 15 days to pass after service on plaintiff of a written demand for a change of venue, where there was no stipulation entered into at the precalendar conference dispensing with usual formalities, and where the city's oral motion did not satisfy the requirements of CPLR §§ 510, 2212 providing that a venue motion must be on papers. Korman v New York, 89 A.D.2d 888, 453 N.Y.S.2d 452, 1982 N.Y. App. Div. LEXIS 18062 (N.Y. App. Div. 2d Dep't 1982).

Where an action is instituted in the Supreme Court, a notice of motion for change of venue must be held in the judicial district where the action was triable or in a county adjoining the county where the action is triable. Commissioners of State Ins. Fund v Hoyt, 53 Misc. 2d 342, 278 N.Y.S.2d 472, 1966 N.Y. Misc. LEXIS 1911 (N.Y. Sup. Ct. 1966).

Defendant's motion for change of venue was properly noticed to be heard in Madison County, which adjoins Onondaga County wherein plaintiff commenced action, even though plaintiff filed affidavit controverting defendant's motion within 5 days as required by CPLR § 511, subd b. Pickard v Krugger, 74 Misc. 2d 618, 344 N.Y.S.2d 496, 1973 N.Y. Misc. LEXIS 1855 (N.Y. Sup. Ct. 1973).

Supreme Court of Ulster County where one action was venued had jurisdiction to order joint trial, without consolidation, of five actions, four of which were venued in other counties, and to determine venue for trial. Velasquez v Pine Grove Resort Ranch, Inc., 77 Misc. 2d 329, 354 N.Y.S.2d 65, 1974 N.Y. Misc. LEXIS 1132 (N.Y. Sup. Ct. 1974).

Defendants' motion to change venue from the Supreme Court, New York County, to the Supreme Court, Westchester County, as of right was properly denied where plaintiffs' affidavits and documents showed their intent to retain New York County as their residence with some degree of permanency at the time the case was filed; however, the denial of that branch of defendants' motion under N.Y. C.P.L.R. 510(3) for a discretionary change of venue from the Supreme Court, New York County, should have been done with leave to renew in the Supreme Court, New York County. Ellis v Wirshba, 18 A.D.3d 805, 796 N.Y.S.2d 388, 2005 N.Y. App. Div. LEXIS 5886 (N.Y. App. Div. 2d Dep't 2005).

6. —Change of venue motions; convenience of witnesses and impartial trial

Application for change of venue for convenience of witnesses and in interests of justice should be made in county where action is triable as designated by plaintiff or in one of alternate counties permitted by CPLR 2212, subdivision a. Wachunas v Demas, 43 A.D.2d 979, 352 N.Y.S.2d 505, 1974 N.Y. App. Div. LEXIS 5722 (N.Y. App. Div. 2d Dep't 1974).

Trial court in wrongful death action erred in entertaining motion to change venue, on ground of convenience of witnesses, from county in which plaintiff resided and where venue of action was properly laid. Markey v Brooks Memorial Hospital, 46 A.D.2d 1010, 361 N.Y.S.2d 785, 1974 N.Y. App. Div. LEXIS 3397 (N.Y. App. Div. 4th Dep't 1974).

Where a motion for a change of venue is founded upon more than one of the grounds permitted by CPLR section 510, and one of the grounds is that the designated county is not the proper one and the other ground is either the convenience of witnesses or inability to obtain an impartial trial, the court in the new and otherwise improper county would under this section be permitted to consider only that part of the motion based on the ground that the county designated is not the proper county, and should deny that part of the motion being made on the other grounds, but without prejudice to its being re-made in the proper county. People v Archie, 52 Misc. 2d 129, 275 N.Y.S.2d 217, 1966 N.Y. Misc. LEXIS 1355 (N.Y. Sup. Ct. 1966).

The procedures specified in CPLR 511(b) have no application to motions under CPLR 510(2) and 510(3) and there is no means of having the motion heard in the county to which movant seeks to have the venue changed, unless it is one of the alternative counties permitted for motions generally by CPLR 2212(a). Furie v Furie, 54 Misc. 2d 966, 283 N.Y.S.2d 709, 1967 N.Y. Misc. LEXIS 1180 (N.Y. Sup. Ct. 1967).

Even though first action was commenced in Kings County and plaintiffs alleged that they and other witnesses resided within Kings County, where cause of action arose in Ulster County, law enforcement and public officials whom defendants sought to call as witnesses lived in Ulster County and calendar in Ulster County was less congested than calendars in New York County or Kings County, venue for joint trial of actions would be in Ulster County. Velasquez v Pine Grove Resort Ranch, Inc., 77 Misc. 2d 329, 354 N.Y.S.2d 65, 1974 N.Y. Misc. LEXIS 1132 (N.Y. Sup. Ct. 1974).

7. Motions before county court or judge

The Allegany County Court did not have jurisdiction to issue a writ of habeas corpus for the custody of children under the provisions of CPLR 2212(c), where the Appellate Division of the Fourth Judicial Department had not authorized the County Judge to assume jurisdiction in Supreme Court matters which were contested or on notice, but only in ex parte matters. People ex rel. Burke v Burke, 47 Misc. 2d 276, 262 N.Y.S.2d 613, 1965 N.Y. Misc. LEXIS 1591 (N.Y. County Ct. 1965).

II. Under Former Civil Practice Laws

A. In General

8. Generally

When a plaintiff had begun two actions by separate attorneys against the same defendant for personal injuries, the attorneys in the second action could not by motion in that action set aside the service of process in the first action; if the authority of the attorneys in the first action was to be questioned, the motion must be made in that action. Toma v Foundation Co., 119 A.D. 151, 104 N.Y.S. 263, 1907 N.Y. App. Div. LEXIS 3896 (N.Y. App. Div. 1907).

Any order that may be signed by a judge may also be signed by the court. Rockwood & Co. v Trop, 211 A.D. 421, 207 N.Y.S. 507, 1925 N.Y. App. Div. LEXIS 10640 (N.Y. App. Div.), different results reached on reh'g, 212 A.D. 883, 208 N.Y.S. 459, 1925 N.Y. App. Div. LEXIS 10392 (N.Y. App. Div. 1925).

A party was not required to move to open a default in a proceeding which was not properly before the court. Finsilver, Still & Moss, Inc. v Elias Janan, Inc., 224 A.D. 26, 229 N.Y.S. 338, 1928 N.Y. App. Div. LEXIS 9916 (N.Y. App. Div. 1928).

Where court had jurisdiction of action, it had jurisdiction of any motions pertaining thereto. Ozorowski v Pawloski, 139 N.Y.S.2d 31, 207 Misc. 407, 1955 N.Y. Misc. LEXIS 3416 (N.Y. County Ct. 1955), app. dismissed, 2 A.D.2d 905, 157 N.Y.S.2d 923, 1956 N.Y. App. Div. LEXIS 3905 (N.Y. App. Div. 3d Dep't 1956).

What justice of Supreme Court could direct out of court he could do in court, such as overlooking notice that proponent “will move this Court at Special Term Part I for order transferring” cause from City Court to Supreme Court, rather than applying “to judge or justice of court,” as was provided in CPA § 110-a (§ 325, Rule 326 herein). Helfgott v Tannen, 141 N.Y.S.2d 307, 208 Misc. 335, 1955 N.Y. Misc. LEXIS 2519 (N.Y. Sup. Ct. 1955).

9. Orders of court and of judge

An order granted in a proceeding for the voluntary dissolution of a corporation by a justice of the supreme court at his private residence in the city of New York and signed “Enter, Wm. N. Cohen, J. S. C.,” was an order of a court of record, and did not become operative so as to entitle

the receivers appointed thereby to moneys of the corporation on deposit with a bank until entered in the county clerk's office. Wilcox v National Shoe & Leather Bank, 67 A.D. 466, 73 N.Y.S. 900, 1902 N.Y. App. Div. LEXIS 8 (N.Y. App. Div. 1902).

An order for examination before trial noticed to be heard by judge in chambers, but heard by him at a special term for motions, could be treated as a court order in view of CPA §§ 130, 131 (Rule 2221 herein). Behl v Greenbaum, 183 A.D. 238, 171 N.Y.S. 129, 1918 N.Y. App. Div. LEXIS 5999 (N.Y. App. Div. 1918).

An order made by a judge, though in form a court order, could be treated as a judge's order, if necessary to sustain it. Behl v Greenbaum, 183 A.D. 238, 171 N.Y.S. 129, 1918 N.Y. App. Div. LEXIS 5999 (N.Y. App. Div. 1918).

The archaic distinction between court and judge's orders has been abolished. Rockwood & Co. v Trop, 211 A.D. 421, 207 N.Y.S. 507, 1925 N.Y. App. Div. LEXIS 10640 (N.Y. App. Div.), different results reached on reh'g, 212 A.D. 883, 208 N.Y.S. 459, 1925 N.Y. App. Div. LEXIS 10392 (N.Y. App. Div. 1925).

An order of arrest, when so made by a judge, should not be in form an order of the court, or recite that it was made at special term. Lachenmeyer v Lachenmeyer, 26 Hun 542 (N.Y.), app. dismissed, 89 N.Y. 632, 89 N.Y. (N.Y.S.) 632, 1882 N.Y. LEXIS 314 (N.Y. 1882).

10. Notice

An application to extend life or term of office of appraisal commissioners in proceeding to acquire realty for New York City could be made ex parte. In re Gillespie, 271 A.D. 767, 65 N.Y.S.2d 113, 1946 N.Y. App. Div. LEXIS 2908 (N.Y. App. Div. 1946), aff'd, 296 N.Y. 989, 73 N.E.2d 567, 296 N.Y. (N.Y.S.) 989, 1947 N.Y. LEXIS 1728 (N.Y. 1947).

Where stipulation in certiorari proceedings to review franchise tax assessment on relator's property provided that referee's fees be "fixed by Court", ex parte order fixing referee's fees was vacated. People ex rel. New York C. R. Co. v State Tax Com., 280 A.D. 627, 116 N.Y.S.2d 595,

1952 N.Y. App. Div. LEXIS 3539 (N.Y. App. Div. 1952), aff'd, 305 N.Y. 613, 111 N.E.2d 733, 305 N.Y. (N.Y.S.) 613, 1953 N.Y. LEXIS 1187 (N.Y. 1953).

Ex parte order, fixing fees and disbursements of referee appointed to hear and determine issues, was valid. People ex rel. New York C. R. Co. v State Tax Com., 115 N.Y.S.2d 883, 201 Misc. 976, 1952 N.Y. Misc. LEXIS 1778 (N.Y. Sup. Ct. 1952), rev'd, 280 A.D. 627, 116 N.Y.S.2d 595, 1952 N.Y. App. Div. LEXIS 3539 (N.Y. App. Div. 1952), aff'd, 282 A.D. 1002, 125 N.Y.S.2d 564, 1953 N.Y. App. Div. LEXIS 5658 (N.Y. App. Div. 1953), aff'd in part, modified, 282 A.D. 1007, 125 N.Y.S.2d 577, 1953 N.Y. App. Div. LEXIS 5659 (N.Y. App. Div. 1953).

11. Arrest orders

Under CPA § 116 a judge out of court could in the first judicial district grant an order of arrest. Lachenmeyer v Lachenmeyer, 26 Hun 542 (N.Y.), app. dismissed, 89 N.Y. 632, 89 N.Y. (N.Y.S.) 632, 1882 N.Y. LEXIS 314 (N.Y. 1882).

12. Certiorari

An application for a writ of certiorari in the first judicial district could be made to the justice of the supreme court at chambers, and the granting of such application was, nevertheless, the act of the court, and should have been entered in the minutes of the clerk, but a failure to make such entry did not invalidate the writ. People ex rel. Grout v Stillings, 76 A.D. 143, 78 N.Y.S. 942, 1902 N.Y. App. Div. LEXIS 2501 (N.Y. App. Div. 1902).

13. Mandamus

A judge at chambers in the city of New York was held not to have jurisdiction to issue a writ of mandamus. People ex rel. Lower v Donovan, 135 N.Y. 76, 31 N.E. 1009, 135 N.Y. (N.Y.S.) 76, 1892 N.Y. LEXIS 1595 (N.Y. 1892).

B. Decisions Under CPA § 130

14. Disqualification of judge

A judge is disqualified from acting upon appeal from a judgment entered upon a referee's report, where he settled the form of such judgment or granted an allowance. Murdock v International Tile & Trim Co., 35 N.Y.S. 668, 14 Misc. 225, 1895 N.Y. Misc. LEXIS 823 (N.Y. City Ct. 1895).

The disqualification of a judge cannot be waived. Murdock v International Tile & Trim Co., 35 N.Y.S. 668, 14 Misc. 225, 1895 N.Y. Misc. LEXIS 823 (N.Y. City Ct. 1895).

15. Actions in supreme court

A special county judge had no power to issue a garnishee execution against a judgment recovered in supreme court. In re Parkman, 177 N.Y.S. 589, 108 Misc. 316, 1919 N.Y. Misc. LEXIS 899 (N.Y. Sup. Ct. 1919).

A county judge has no authority to make an order requiring the plaintiff in an action pending in the supreme court to give security for costs. Such an order can only be made by the court or judge of the court, in which the action is pending. Longstreet v Sawyer, 15 N.Y.S. 608, 1891 N.Y. Misc. LEXIS 70 (N.Y. Sup. Ct. 1891).

A county judge had no power to grant an order requiring security for costs in an action pending in the supreme court. Gates v Gates, 171 N.Y.S. 1036 (N.Y. Sup. Ct. 1918).

16. Consolidation of actions

Where two parties to an automobile collision each sought to recover damages sustained in the collision by reason of the negligence of the other, one bringing his action in the county court and the other in a Justice Court, held that neither CPA §§ 96 (§§ 407, 602(a) herein), 97 (§ 602(b) herein), nor 130 authorized the Supreme Court to make an order consolidating the two actions.

Curry v Earll, 209 A.D. 205, 203 N.Y.S. 750, 1924 N.Y. App. Div. LEXIS 8586 (N.Y. App. Div. 1924).

17. Lien proceedings

CPA § 130 did not authorize proceedings for extension of lien under § 18 of the Lien Law to be brought in any other county than that in which the lien was filed. Grimmer v Warren, Moore & Co., 206 N.Y.S. 63, 123 Misc. 737, 1924 N.Y. Misc. LEXIS 1177 (N.Y. Sup. Ct. 1924).

18. Justification of sureties

Sureties on an undertaking on appeal may justify before county judge where they lived, though action was brought in another county. Boss v Hutchinson, 166 N.Y.S. 448, 101 Misc. 1, 1917 N.Y. Misc. LEXIS 491 (N.Y. Sup. Ct. 1917).

19. Order for examination

An order for examination before trial noticed to be heard by a judge in chambers, but heard by him at a special term for motions, could be treated as an order of the court. Behl v Greenbaum, 183 A.D. 238, 171 N.Y.S. 129, 1918 N.Y. App. Div. LEXIS 5999 (N.Y. App. Div. 1918).

20. Extending time to answer

An ex parte order of a county court extending the time to answer is valid; an order made upon an order to show cause of a supreme court justice under the caption of the county court is invalid if made at the special term of the supreme court if the order to show cause was returnable at a special term of this court, which was the county court, and was further invalid because the special term of the supreme court had no jurisdiction to make such an order in a county court action. Edwards v Shreve, 83 A.D. 165, 82 N.Y.S. 514, 1903 N.Y. App. Div. LEXIS 1454 (N.Y. App. Div. 1903).

21. Injunction

A county judge had no power to grant an injunction under § 10 of the Agricultural Law to restrain the defendant from further violations of that law, as such injunction was within the exception in CPA §§ 817 (§ 6211 herein), 880 (§ 5518 herein), and must be granted by the supreme court or a justice thereof, and therefore neither CPA § 77, relating to the powers of county judges to grant injunctions, nor CPA § 130, specifying who may grant orders when not specifically designated by law, applied. People v Windholz, 68 A.D. 552, 74 N.Y.S. 241, 1902 N.Y. App. Div. LEXIS 148 (N.Y. App. Div. 1902).

22. Stay of execution

The power of a court to stay execution of its own judgments is recognized by CPA § 130 and former § 551. Margolies v Ernst, 69 N.Y.S. 646, 34 Misc. 405, 1901 N.Y. Misc. LEXIS 260 (N.Y. City Ct. 1901).

Research References & Practice Aids

Cross References:

Definition of “court”, CPLR § 105(g).

Where motion made in county court action, CPLR § 2213.

Powers of county judges, CLS Jud § 190-d.

Service and filing of motion papers, CLS Family Ct R § 205.11.

Motion parts; motion calendars; motion procedure, CLS Unif Rls for NYC Civil Ct § 208.11.

Calendaring of motions; uniform notice of motion form, CLS UDCR § 212.10.

Motion parts; motion calendars; motion procedure, CLS UDCR § 212.11.

Calendaring of motions; uniform notice of motion form; affirmation of good faith, CLS Unif Tr Ctr Rls § 202.7.

Motion procedure, CLS Unif Tr Ctr Rls § 202.8.

Federal Aspects:

Defenses and objections presented by motions in United States District Courts, Rule 12 of Federal Rules of Civil Procedure, USCS Court Rules.

Motion to terminate or limit oral examination in United States District Courts, Rule 30(d) of Federal Rules of Civil Procedure, USCS Court Rules.

Motion for order compelling discovery in United States District Courts, Rule 37(a) of Federal Rules of Civil Procedure, USCS Court Rules.

Motion for judgment as a matter of law in United States District Courts, Rule 50 of Federal Rules of Civil Procedure, USCS Court Rules.

Motion for summary judgment in United States District Courts, Rule 56(c) of Federal Rules of Civil Procedure, USCS Court Rules.

Motion day in United States District Courts, Rule 78 of Federal Rules of Civil Procedure, USCS Court Rules.

Motion for change of venue in United States District Courts, 28 USCS § 1404.

Application to United States court for making and hearing of motion relating to arbitration, 9 USCS § 6.

Treatises

Matthew Bender’s New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 2212, Where Motion Made, in Supreme Court Action.

3 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶1110.02; 6 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶2701.08.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 5.06. Change of venue.

CPLR Manual § 15.01. Motions and orders — in general.

CPLR Manual § 15.08. Reargument and renewal of motions.

CPLR Manual § 28.04. Attachment – in general.

CPLR Manual § 28.18. Temporary restraining order; grounds.

CPLR Manual § 28.19. Procedure for obtaining preliminary injunction.

Matthew Bender's New York Practice Guides:

2 New York Practice Guide: Domestic Relations § 34.16.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 7.03. Making Pretrial Motions Generally.

Warren's Weed New York Real Property:

Warren's Weed: New York Real Property §§ 3.46, 3.47.

Matthew Bender's New York Checklists:

Checklist for Pretrial Motions Generally LexisNexis AnswerGuide New York Civil Litigation § 7.02.

Forms:

1 Medina's Bostwick Practice Manual (Matthew Bender), Forms 11:101 et seq .(stays, motions, orders and mandates).

§ 2212. Where motion made, in supreme court action.

Hierarchy Notes:

NY CLS CPLR, Art. 22

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