NY CLS CPLR, Art. 22

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

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

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History

Add, L 1962, ch 308, § 1, eff Sept 1, 1963.

Annotations

Notes

Advisory Committee Notes:

Generally. This title applies to motions and orders generally; its rules would be superseded by any specific rules that apply to particular motions or orders.

Motions and orders are treated separately in the former CPA and rules (NY Civ Prac Act §§ 113–119, 127–132; NY R Civ P 60–67, 70–75). It has been decided that both should be treated together, as they were in the Field and Throop Codes.

Every motion is an application for an order and every order is the determination of a motion. The two must ordinarily correspond in such matters as venue, what judges may act and whether in court or at chambers. Yet the present CPA and rules (NY Civ Prac Act §§ 113–119, 127–132; NY R Civ P 60–67, 70–75) treat these matters partly in the motion provisions and partly in the order provisions. Compare NY Civ Prac Act §§ 115, 116, with id. §§ 128, 129; compare id. §

130, with NY R Civ P 63. In the corresponding new provisions reference is made only to the motions and it is understood that the resulting order is covered too.

Where motions made generally, form, entering and filing of order. The new CPLR provisions, while retaining a distinction between motions which must be made to a court and those which may be made to a judge out of court or at chambers, makes provision for the bringing on of any motion before a judge out of court upon order to show cause granted by such judge. The form of the order is the same whether made by a court or a judge out of court. Also, any order determining a motion is required to be entered and filed, whereas under former law only court orders were entered.

Powers of Supreme Court and County judges to make orders in each other's courts. The confusing provisions governing the reciprocal powers of Supreme Court justices and County Court judges to make orders in cases pending in each other's court (CPA §§ 77, 130) have been omitted in favor of an approach which permits a county judge to make any order in a Supreme Court action where a Supreme Court justice is not available in the county, with certain specified exceptions; a Supreme Court justice is given equally broad powers in County Court actions.

Authority of Appellate Division on Appellate Term to make orders in Supreme Court actions. CPA §§ 66 and 132, which provide that the Appellate Division or Appellate Term or a justice thereof may grant, vacate or modify orders in Supreme Court actions under certain circumstances, have been omitted. Both sections derive from a sentence added to § 1348 of the Throop Code by amendment in 1895. NY Laws 1895, c. 946. Section 1348 appeared in a title of the Throop Code governing appeals to the Appellate Division, and originally it simply contained the provision in CPA § 610 that an appeal may be taken from an order made on notice by a judge out of court. The sentence added in 1895 apparently was viewed as providing a procedure analogous to appeal for orders made or denied without notice by the lower court.

The drafters of the civil practice act placed the portion of the sentence dealing with the granting of orders in § 66, in the article governing "Courts, Judges and Referees," and the portion relating to vacation and modification of orders in § 132, in the title governing "Orders"—a division difficult

to explain. Section 66 remained the same as originally enacted, but § 132 has been amended to allow vacation or modification by any justice of the Appellate Division (as distinguished from the court en banc); and a second subdivision has been added allowing the Appellate Term or a justice thereof to exercise the same powers with respect to ex parte orders of a justice of the City Court or the Municipal Court of the City of New York. NY Laws 1932, c. 402; NY Laws 1935, c. 333; NY Laws 1951, c. 161.

Insofar as CPA §§ 66 and 132 relate to the Appellate Division en banc they are unnecessary, for the power granted the Appellate Division by § 2 of article VI of the Constitution encompasses, and indeed is much broader than that granted by these sections. It has repeatedly been held that the Appellate Division, as successor to the powers of the old General Term, has the power to exercise all the original jurisdiction of the Supreme Court. See e.g., Matter of the Ass'n of the Bar of the City of N. Y., 222 App Div 580, 227 NY Supp 1 (1st Dept 1928); Mitchel v Cropsey, 177 App Div 663, 164 NY Supp 336 (2d Dept 1917); People ex rel. Patrick v Frost, 133 App Div 179, 117 NY Supp 524 (2d Dept 1909); Matter of Barkley, 42 App Div 597, 59 NY Supp 742 (4th Dept 1899), appeal dismissed, 161 NY 647, 57 NE 1103 (1900). This includes the power to hear and determine in the first instance any motion, contested or ex parte, that a Special Term may determine. Matter of Barkley, 42 App Div at 608, 59 NY Supp at 750. The Appellate Division is of course not required to exercise such original jurisdiction and as a matter of sound judicial administration will not "except in cases where some exigency seems to require that they shall do so in the interest of justice." Matter of Barkley, 42 App Div at 609–10, 59 NY Supp at 750; see Matter of Ass'n of the Bar of the City of N. Y. 222 App Div 580, 227 NY Supp 1 (1st Dept 1928); cf. Matter of Both, 200 App Div 423, 192 NY Supp 822 (2d Dept 1922). Since Special Term may vacate or modify its own orders and may reconsider on reargument its refusal to grant an order the Appellate Division has the power to do so under the Constitution and the power granted it by CPA §§ 66 and 132 is superfluous.

Sound judicial administration particularly calls for restraint by the Appellate Division in the situations covered by CPA §§ 66 and 132; for these sections allow what is in effect a direct

appeal from ex parte determinations of the Special Term, contrary to traditional procedure for ex parte determinations requiring application to the same court or judge to vacate or set aside the order and, if that be denied, appeal from the order of denial. See Carmody, New York Practice 649 (7th ed Forkosch 1956). That being so, there is no reason for giving these situations undue prominence, in the total scheme of Appellate Division power to exercise the original jurisdiction of Special Term, by treating only them in the practice statutes.

Insofar as CPA § 132, as amended, also allows a single justice of the Appellate Division to vacate or modify a Special Term order, it is even more questionable on policy grounds. It may also conflict with the Constitution to the extent that it allows vacation or modification of ex parte orders that may not be made by a justice at chambers. Section 132 refers to “any order” made by the Supreme Court or a justice thereof “without notice to the adverse party.” Section 2 of article 6 of the Constitution, however, states that “[n]o justice of the Appellate Division shall, within the department to which he may be designated to perform the duties of an appellate justice, exercise any of the powers of a justice of the supreme court, other than those of a justice out of court. . . .” Although most orders that may be made ex parte may be made by a judge out of court, this is not true of all such orders and to this extent there is an apparent conflict between § 132 and the language of the Constitution.

Subd 2 of CPA § 132 presents a more difficult problem. The power it grants would not be possessed by the Appellate Term without it. However, here too there is a serious question whether the provision is consistent with the judiciary article of the Constitution. Section 3 of that article, authorizing the establishment of Appellate Terms, states that they “shall have jurisdiction to hear and determine all appeals now or hereafter authorized by law to be taken to the supreme court or to the appellate division . . . as may from time to time be directed by the appellate division establishing such appellate term.” A comparison with the grant of the Appellate Division’s jurisdiction in section 2 of the judiciary article (“such original or appellate jurisdiction as is now or may hereafter be prescribed by law”) indicates that the jurisdiction of the Appellate Terms extends only to appeals and would not encompass motions to vacate a lower court order

under § 132. Under the forerunner of section 132, before the second subdivision was added, it was held that the Appellate Term's jurisdiction was so limited (Bimboni v McCormack, 157 NY Supp 299 (Sup Ct App T 1916)) but no case has been found discussing the constitutionality of subd 2. In view of this serious constitutional question, and since little purpose is served by the provision, the committee recommends that it too be omitted.

Research References & Practice Aids

Cross References:

Costs upon motion, CPLR § 8106.

Stay or vacation, CLS Correc §§ 553., 558.

Stay of action to enforce rule of industrial board, CLS Labor § 112.

Stay of federal action, CLS Pub Ser § 112.; Trans § 192.

Jurisprudences:

23 NY Jur 2d Conversion, and Action for Recovery of Chattel § 132. .

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