

NY CLS CPLR § 4001

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New York

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Civil Practice Law And Rules (Arts. 1 — 100) >
Article 40 Trial Generally (§§ 4001 — 4019)

§ 4001. Powers of referees

A court may appoint a referee to determine an issue, perform an act, or inquire and report in any case where this power was heretofore exercised and as may be hereafter authorized by law.

History

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

Annotations

Notes

Prior Law:

Earlier statutes: CPA §§ 80, 464–467, 1316; CCP §§ 827, 1011–1013, 1015; Code Proc §§ 270, 271, 273; chap 280 of 1847, § 77.

Advisory Committee Notes:

This section authorizes the appointment of non-official referees. The authorization is broadly drafted to encompass the various situations in which referees have been traditionally appointed. It replaces the partial enumerations in CPA §§ 80, 464–467 and 785. Thus, for example, the functions of a referee to perform acts included the ministerial acts which were assignable to

clerks and masters in chancery, such as selling property, approving undertakings and sureties in making assessments. See Blake, Practice of the Court of Chancery in the State of New York 11,221 (1818). The operative language of the section is similar to § 301, which perpetuates the former jurisdiction of the courts.

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I. Under CPLR

1. Generally

Although 22 NYCRR § 701.5 speaks in terms of judges, it is equally applicable to referees appointed in accordance with Civil Practice Law and Rules to determine issue or perform act. *Green Point Sav. Bank v Miller*, 233 A.D.2d 292, 649 N.Y.S.2d 467, 1996 N.Y. App. Div. LEXIS 11523 (N.Y. App. Div. 2d Dep't 1996).

Court erred in granting plaintiff's motion to confirm referee's report directing sale of property and awarding parties one-half share of net proceeds of sale where court had directed referee to determine whether premises at issue was "so circumstanced" as to require sale, and referee's report clearly indicated that he was under erroneous impression that court had already determined that premises should be sold; since defendant was entitled to determination whether partition could not be made without great prejudice, order confirming awarded would be reversed and matter remitted for such determination. *Piccirillo v Friedman*, 244 A.D.2d 469, 664 N.Y.S.2d 104, 1997 N.Y. App. Div. LEXIS 11629 (N.Y. App. Div. 2d Dep't 1997).

In breach of contract action involving manufacture and distribution of controversial abortion pill, RU-486, Appellate Division, in remitting case to Supreme Court, would direct that special referee be appointed to entertain motions regarding prospective redaction from court record of trade secrets and identities of persons involved in such manufacture and distribution, and to report back to Supreme Court with recommended dispositions, where large number of anticipated redaction decisions could make process of handling those issues unwieldy and detract from Supreme Court's overall supervision of pretrial proceedings and trial. *Danco Lab., Ltd. v Chemical Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 711 N.Y.S.2d 419, 2000 N.Y. App. Div. LEXIS 8231 (N.Y. App. Div. 1st Dep't 2000).

Since stockholders of the corporation, in a stockholder's derivative action, might be substantially affected by the granting of the motion of the substitute plaintiff, the corporation, to discontinue the action with prejudice, the interests of all litigants would best be served by referring the issue

presented in the motion to a referee for his inquiry and recommendations. *Elgin Nat'l Industries, Inc. v Zale Corp.*, 71 Misc. 2d 468, 336 N.Y.S.2d 275, 1972 N.Y. Misc. LEXIS 1608 (N.Y. Sup. Ct. 1972).

In a buyer's action against the seller of allegedly defective photographic equipment, the city Civil Court judge would have the power to vacate the findings that were made at an inquest that was taken before a small claims arbitrator, to open up a default that was taken as part of an inquest, and to grant a judgment on default after judgment had been denied, since the small claims arbitrator's role, as a referee at an inquest, is only to examine the claimant's proof and to make recommended findings to the court, which can then accept or reject the arbitrator's report. *Pasamanick v 104 Camera World, Inc.*, 116 Misc. 2d 972, 456 N.Y.S.2d 977, 1982 N.Y. Misc. LEXIS 3987 (N.Y. Civ. Ct. 1982).

2. Child-related proceedings

There was no prohibition against referring child neglect proceeding to judicial hearing officer (JHO); further, proceeding was not defective, even though respondent did not consent to use of JHO, since respondent actively participated in hearing without objection. *In re Heather J.*, 244 A.D.2d 762, 666 N.Y.S.2d 213, 1997 N.Y. App. Div. LEXIS 12545 (N.Y. App. Div. 3d Dep't 1997).

3. Costs; fees

In proceeding under CLS Bus Corp § 1104-a for dissolution of corporation, it was proper exercise of discretion for referee to order petitioner to pay one-half copying costs spent by respondents in for failing petitioner's voluminous document request. *In re Krissler Bus. Inst.*, 244 A.D.2d 486, 664 N.Y.S.2d 112, 1997 N.Y. App. Div. LEXIS 11583 (N.Y. App. Div. 2d Dep't 1997).

Without parties' consent, Supreme Court lacked authority to appoint private attorney to serve as referee to oversee discovery and to be compensated by parties. *Csanko v County of Westchester*, 273 A.D.2d 434, 711 N.Y.S.2d 746, 2000 N.Y. App. Div. LEXIS 7390 (N.Y. App. Div. 2d Dep't 2000).

4. Effect of arbitration

In combined proceeding by Civil Service Employees Association to confirm arbitration award, and Article 78 proceeding to hold State Executive Department Division for Youth and its director in contempt for failure to comply with prior judgment, Supreme Court properly appointed referee without parties' consent, even though court cited CLS CPLR Art 43, and parties' consent would have been required under CLS CPLR § 4317, where referee was not appointed to decide legal issues under § 4317, court clearly stated that referral was for purpose of having referee "hear and report" on specific issue of proper computation of wrongfully discharged civil service employee's back pay award, referral was authorized under CLS CPLR §§ 4001 and 4212, and complexities surrounding computation issue justified referral. *Civil Serv. Emples. Ass'n, Local 1000 v State*, 273 A.D.2d 668, 711 N.Y.S.2d 41, 2000 N.Y. App. Div. LEXIS 7234 (N.Y. App. Div. 3d Dep't 2000).

II. Under Former Civil Practice Laws

5. Generally

The old chancery practice of written interrogatories was not abolished by CPA § 467 or RCP 171 but it has become obsolete. *Dowd v A. S. Hughes' Sons Towing & Transp. Co.*, 183 A.D. 580, 170 N.Y.S. 164, 1918 N.Y. App. Div. LEXIS 7925 (N.Y. App. Div. 1918).

In a proceeding against trustees of a public park, wherein the Supreme Court ordered the matter sent to a referee "to take the testimony offered by the parties and to report the same, together with his opinion," held that the order was evidently not made under CPA § 466, but apparently

under CPA § 80, pursuant to the powers conferred upon the court by § 145 of the General Municipal Law, and that as so interpreted the order was warranted. *In re Trustees of Public Park*, 205 A.D. 492, 199 N.Y.S. 574, 1923 N.Y. App. Div. LEXIS 5060 (N.Y. App. Div. 1923).

Reference to take account and report may follow the procedure prescribed by CPA §§ 80 or 467 and on coming in of the report it is not necessary, though good practice, to file written exceptions, in order to preserve the right to be heard, either at the special term or upon appeal, in opposition to its becoming effective. *Pierce v Fenno*, 224 A.D. 164, 230 N.Y.S. 39, 1928 N.Y. App. Div. LEXIS 9955 (N.Y. App. Div. 1928).

Court may in its discretion appoint referee where circumstances require, without consent of all parties. *Irving Trust Co. v Walton*, 274 A.D. 119, 79 N.Y.S.2d 858, 1948 N.Y. App. Div. LEXIS 3022 (N.Y. App. Div. 1948).

Justice of city court had power to appoint a referee before whom testimony could be taken on examination of party before trial. *Gedney v Planten*, 153 N.Y.S. 423, 90 Misc. 275, 1915 N.Y. Misc. LEXIS 863 (N.Y. App. Term 1915).

The court has no compulsory power to order that testimony to be used on a trial should be taken before a referee. *Farmers' Nat'l Bank v Houston*, 44 Hun 567, 8 N.Y. St. 557 (N.Y.).

6. Provisions of order of reference

Court was without authority to insert in order of reference to ascertain amount due on the mortgage under foreclosure, a provision that, upon the coming in of the report plaintiff should have judgment of foreclosure and sale, without notice to a tenant who had appeared and demanded notice. *Mahnk v Blanchard*, 233 A.D. 555, 253 N.Y.S. 307, 1931 N.Y. App. Div. LEXIS 11363 (N.Y. App. Div. 1931).

7. Appointment on court's motion

A court in a proper case may appoint a referee of its own motion. *Aldinger v Pugh*, 10 N.Y.S. 684, 57 Hun 181, 1890 N.Y. Misc. LEXIS 931 (N.Y. Sup. Ct. 1890), *aff'd*, 132 N.Y. 403, 30 N.E. 745, 132 N.Y. (N.Y.S.) 403, 1892 N.Y. LEXIS 1208 (N.Y. 1892).

8. Accounting

In an action for an accounting on the breach of a contract by the defendant to pay royalties to the plaintiff for the manufacture and sale of a patented article, and for an injunction restraining the further manufacture of the article by the defendant, the court against objection has no power to establish the defendant's liability by an interlocutory judgment, appoint a referee to take proof upon the question of damage and direct final judgment upon the coming in of such report. *Russell Hardware & Implement Mfg. Co. v Utica Drop Forge & Tool Co.*, 112 A.D. 703, 98 N.Y.S. 777, 1906 N.Y. App. Div. LEXIS 753 (N.Y. App. Div. 1906).

9. Determination of custody of child

A reference to an official referee to whom a Special Term, under Sections 115 and 116 of the Judiciary Law, referred to hear and determine a proceeding concerning the custody of a child, is valid, and the order of the referee determining the custody of the child is valid. *In re Starr*, 245 A.D. 5, 280 N.Y.S. 753, 1935 N.Y. App. Div. LEXIS 10205 (N.Y. App. Div. 1935).

10. Action to restrain maintenance of elevated railroad

In an action to restrain the maintenance of an elevated railroad and for damages, the court has no power to send the case to a referee, to take testimony as to the value of the easements or property taken and amount of rental loss, and to report to the court with his opinion thereon; nor is a party estopped from questioning the validity of the order, by proceeding with the trial before the referee. *Doyle v Metropolitan E. R. Co.*, 20 N.Y.S. 865, 1 Misc. 376, 1892 N.Y. Misc. LEXIS 117 (N.Y.C.P. 1892), *aff'd*, 136 N.Y. 505, 32 N.E. 1008, 136 N.Y. (N.Y.S.) 505, 1893 N.Y. LEXIS 621 (N.Y. 1893).

11. Summary proceeding against attorney

The city court of New York has power, under §§ 80, 467, to direct a reference in a summary proceeding against an attorney, whether such proceeding is to be regarded as a motion in the action or as a special proceeding. *Gillespie v Mulholland*, 33 N.Y.S. 33, 12 Misc. 40, 1895 N.Y. Misc. LEXIS 312 (N.Y.C.P. 1895).

12. Termination of reference

The failure of a referee, appointed to determine an attorney's compensation as a referee, to report within 60 days, does not entitle a party to end the reference by a notice given under CPA 470 (§§ 4319, 4320(b) herein); such a reference is deemed one made under CPA § 80 and not under CPA § 467. *Doyle v New York*, 56 N.Y.S. 441, 26 Misc. 61, 1899 N.Y. Misc. LEXIS 1151 (N.Y. Sup. Ct. 1899).

13. Fees and costs

The court has power under CPA §§ 80, 467, 1486, 1504, 1505, 1507–1510 (§§ 4001, 4212, 4301, 8106, 8201–8203 herein), to provide for the payment of the fees of a referee out of the moneys in the hands of the receiver for the examination by the referee of the accounts of the receiver. *In re Merry*, 11 A.D. 597, 42 N.Y.S. 617, 1896 N.Y. App. Div. LEXIS 3142 (N.Y. App. Div. 1896).

Research References & Practice Aids

Cross References:

Trial by a referee, CLS CPLR Art 43.

Advisory jury; referee to report, CLS CPLR § 4212.

Federal Aspects:

Masters in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 53.

Jurisprudences:

54 NY Jur 2d Enforcement and Execution of Judgments § 230. .

92 NY Jur 2d References §§ 2., 3. .

66 Am Jur 2d, References §§ 26., 27.

75 Am Jur 2d, Trial §§ 354.– 361.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4001, Powers of Referees.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 36.10; 3 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 47.04.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 23.05. Referees and trial by referees.

CPLR Manual § 27.15. Installment payment order.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 9.24. Trial by Referee.

Warren's Weed New York Real Property:

Warren's Weed: New York Real Property §§ 116.01, 116.13, 116.24.

Annotations:

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time. 32 ALR4th 840.

Duty of District Court to hold evidentiary hearing before acting upon magistrate's findings of fact and recommendations submitted pursuant to 28 USCS § 636(b)(1)(B). 49 ALR Fed 763.

Matthew Bender's New York Checklists:

Checklist for Conducting Trial Before Referee LexisNexis AnswerGuide New York Civil Litigation § 9.23.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 4001:1 et seq.

LexisNexis Forms FORM 380-18:101.—Order of Reference to Appoint Receiver.

LexisNexis Forms FORM 380-18:102.—Report by Referee of Appointment of Receiver.

2 Medina's Bostwick Practice Manual (Matthew Bender), Forms 18:101 et seq .(trial generally).

Hierarchy Notes:

NY CLS CPLR, Art. 40

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