NY CLS CPLR R 4402

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New York

Consolidated Laws Service **>**

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

Article 44 Trial Motions (§§ 4401 — 4406)

R 4402. Motion for continuance or new trial during trial

At any time during the trial, the court, on motion of any party, may order a continuance or a new trial in the interest of justice on such terms as may be just.

History

Formerly § 4402, add, L 1962, ch 308; amd, L 1962, ch 315, § 1, eff Sept 1, 1963.

Annotations

Notes

Advisory Committee Notes:

This rule is based upon the general pattern of former law. It makes unnecessary subd 2 of RCP 166 which gave the court the power to refuse dismissal where a defect in evidence might have been supplied and it qualifies new rule 4401 which provides for a motion to dismiss. The relief is the same as that formerly available upon a motion for withdrawal of a juror—i.e., motion for a mistrial. 6 Carmody-Wait, Cyclopedia of New York Practice 746–751 (1953). Under § 4319 a referee to determine has the same power as the court to hear the motion and grant relief.

Notes to Decisions

I. Under CPLR

1. Generally

Where trial court offered defendants a reasonable continuance so that they could reopen their cases and meet plaintiff's res ipsa loquitur claim but they rejected offer and demanded mistrial, declaration of mistrial was not warranted and trial court did not err in charging doctrine of res ipsa loquitur. Morgan v Good Humor Corp., 54 A.D.2d 560, 386 N.Y.S.2d 888, 1976 N.Y. App. Div. LEXIS 13880 (N.Y. App. Div. 2d Dep't 1976).

In an action against various city police officers for malicious prosecution, unlawful imprisonment, and assault, the trial court properly denied defendants' motion for a continuance based upon the fact that a widely publicized trial of an off-duty police officer for manslaughter had occurred, since defendants failed to show that such trial or publicity had caused them any prejudice, and also failed to explain how the prior trial of another police officer had any effect whatever on the judgment rendered against them in the current action. Kelly v Kane, 98 A.D.2d 861, 470 N.Y.S.2d 816, 1983 N.Y. App. Div. LEXIS 21177 (N.Y. App. Div. 3d Dep't 1983).

There was no abuse of discretion in denying plaintiff's application for continuance to enable him to produce as witness defendant who had defaulted in appearing in action where plaintiff, in support of application for continuance, could only speculate as to what such defendant's testimony would be. Michaels v Dalimonte, 121 A.D.2d 370, 502 N.Y.S.2d 801, 1986 N.Y. App. Div. LEXIS 58309 (N.Y. App. Div. 2d Dep't 1986).

In personal injury action, court erred in granting judgment to defendant based on plaintiff's failure to establish prima facie case of damages, and thus plaintiff would be granted new trial on issue of damages, since continuance requested by plaintiff's attorney should have been granted in view of established merit of liability phase of plaintiff's claim, diligence exercised by his attorney, and importance of testimony in issue. Sutter v Nelson, 126 A.D.2d 634, 511 N.Y.S.2d 71, 1987 N.Y. App. Div. LEXIS 41765 (N.Y. App. Div. 2d Dep't 1987).

In proceeding to stay arbitration of uninsured motorist claim, where petitioner claimed that vehicle involved in accident was insured by respondent insurance carriers based on certified records of Pennsylvania Department of Motor Vehicles, it was not abuse of discretion for court to deny respondents' motion for continuance for purpose of producing additional evidence to

refute petitioner's prima facie case where respondents sought continuance immediately after court rendered decision in favor of petitioner, and where they failed to establish that they lacked adequate pretrial notice that they would have to show that vehicle was not insured by them under policy listed in Pennsylvania records. Public Service Mut. Ins. Co. v Jacquet, 135 A.D.2d 803, 522 N.Y.S.2d 907, 1987 N.Y. App. Div. LEXIS 52734 (N.Y. App. Div. 2d Dep't 1987).

In medical malpractice action in which defendants asserted 2 ½ -year statute of limitations of CLS CPLR § 214-a as affirmative defense and parties agreed to bifurcated trial in which affirmative defense would be resolved by court without jury, Supreme Court erred in sua sponte declaration of mistrial on ground that matter involved substantial issues of credibility which should be resolved by jury since, although it had been mentioned that parties had indicated prior to trial that determination of statute of limitations question would not involve resolution of credibility issues, no such representation or agreement appeared on record, and it was court's duty to resolve credibility issues in non-jury trial. Brooks v Cheon, 142 A.D.2d 867, 531 N.Y.S.2d 64, 1988 N.Y. App. Div. LEXIS 7937 (N.Y. App. Div. 3d Dep't 1988).

In action for breach of contract and negligence in connection with defendant's installation of new septic system for plaintiff's restaurant, defendant was not entitled to declaration of mistrial based on court's remarks in presence of jury, urging plaintiff's counsel to expedite cross-examination of expert witness, characterizing witness' testimony as unresponsive and "an unnecessary lecture," and questioning relevancy of witness' testimony, since (1) witness' testimony related to city plumbing inspections, whereas lawsuit involved septic system itself, not connection to public sewer system, and (2) jury was instructed that court's remarks were not evidence; questions of materiality, competency, and relevance are for trial court to decide. Two Stables, Inc. v Cornelius, 145 A.D.2d 685, 534 N.Y.S.2d 827, 1988 N.Y. App. Div. LEXIS 12323 (N.Y. App. Div. 3d Dep't 1988).

In action to recover for personal injuries, court erred in dismissing plaintiff's case immediately following denial of her application for adjournment, particularly since defendant did not move for

dismissal. Rodriguez v Pisa Caterers, Inc., 146 A.D.2d 686, 537 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 598 (N.Y. App. Div. 2d Dep't 1989).

Trial court should have granted short adjournment during personal injury trial to permit review, by both parties, of transit authority's voluminous train maintenance records and testimony of any relevant witnesses, and thus authority was entitled to new trial on issue of liability, where plaintiff first served subpoenas seeking records only one month before trial, authority's counsel had been unable to retrieve records until second day of trial, records would take only one hour to read and review, and thus plaintiff would not have been prejudiced by adjournment and reopening of authority's case to introduce records and any pertinent testimony. Veal v New York City Transit Authority, 148 A.D.2d 443, 538 N.Y.S.2d 594, 1989 N.Y. App. Div. LEXIS 2470 (N.Y. App. Div. 2d Dep't 1989).

In personal injury action in which defendant asserted that it was alter ego of plaintiff's employer and that action was therefore barred by workers' compensation, it was improvident exercise of discretion for court to declare mistrial and order that issue be determined by Workers' Compensation Board since matter had been in litigation for several years and parties had appeared in court ready for trial; matter would be remanded for determination of issue by court. Bubnell v Holmes Ambulance Service Corp., 168 A.D.2d 408, 562 N.Y.S.2d 533, 1990 N.Y. App. Div. LEXIS 15029 (N.Y. App. Div. 2d Dep't 1990).

In bifurcated personal injury trial, court should have granted adjournment of trial on damages to permit further physical examination of plaintiff where, on eve of trial, plaintiff submitted supplemental bill of particulars alleging new injuries and that he was undergoing surgery on that very day on knee that he claimed was injured. Petti v Pollifrone, 170 A.D.2d 494, 565 N.Y.S.2d 841, 1991 N.Y. App. Div. LEXIS 2036 (N.Y. App. Div. 2d Dep't 1991).

Although application for continuance is addressed to sound discretion of trial court, it is improvident exercise of discretion to deny continuance where application is properly made, is not made for purposes of delay, evidence is material, and need for continuance does not result

from failure to exercise due diligence. Evangelinos v Reifschneider, 241 A.D.2d 508, 661 N.Y.S.2d 232, 1997 N.Y. App. Div. LEXIS 7814 (N.Y. App. Div. 2d Dep't 1997).

Where error was fundamental, it would be gross injustice to allow verdict to stand, and thus Appellate Division would order new trial even in absence of motion for mistrial. Heller v Louis Provenzano, Inc., 257 A.D.2d 378, 683 N.Y.S.2d 92, 1999 N.Y. App. Div. LEXIS 30 (N.Y. App. Div. 1st Dep't 1999), app. denied, 1999 N.Y. App. Div. LEXIS 5214 (N.Y. App. Div. 1st Dep't Apr. 22, 1999).

Failure to move for mistrial precluded review of alleged egregious conduct of counsel at trial. Moore v Bame, 257 A.D.2d 716, 682 N.Y.S.2d 472, 1999 N.Y. App. Div. LEXIS 21 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 809, 694 N.Y.S.2d 631, 716 N.E.2d 696, 1999 N.Y. LEXIS 1328 (N.Y. 1999).

It is improvident exercise of discretion to deny adjournment where application is properly made and is not made for purposes of delay, evidence to be produced is material, and need does not result from failure to exercise due diligence. Romero v City of New York, 260 A.D.2d 461, 688 N.Y.S.2d 226, 1999 N.Y. App. Div. LEXIS 3832 (N.Y. App. Div. 2d Dep't 1999).

It was not error to direct new trial solely on defendant’s counterclaim, despite court’s declaration of mistrial wherein court stated that “we will need to retry the whole thing,” where plaintiff’s complaint had been dismissed on prior day, and only defendant’s counterclaims were at issue when mistrial was declared. Clemente v Impastato, 274 A.D.2d 771, 711 N.Y.S.2d 71, 2000 N.Y. App. Div. LEXIS 8055 (N.Y. App. Div. 3d Dep't 2000).

Court’s explicit curative instructions were sufficient to neutralize prejudicial effect of allowing police officer to testify, over plaintiffs’ objection, as to notation on his accident report referring to “bicyclist error” where court unequivocally directed jury to disregard any statement by officer as to his opinion of cause of accident and to evaluate evidence at appropriate time “as if you had never heard that statement made. It is no longer part of this case,” there was ample admissible evidence that plaintiff rode her bicycle through red light into path of bus, and officer offered no

opinion on issue of defendants' freedom from negligence. Dennis v Capital Dist. Transp. Auth., 274 A.D.2d 802, 711 N.Y.S.2d 836, 2000 N.Y. App. Div. LEXIS 8068 (N.Y. App. Div. 3d Dep't 2000).

Mere possibility of award of costs against plaintiff, in earlier discontinued federal action, was insufficient to stay present action on motion by defendants where award of costs in federal action was purely speculative. Sardanis v Sumitomo Corp., 279 A.D.2d 225, 718 N.Y.S.2d 66, 2001 N.Y. App. Div. LEXIS 242 (N.Y. App. Div. 1st Dep't 2001), overruled in part, Mutual Benefits Offshore Fund v Zeltser, 140 A.D.3d 444, 37 N.Y.S.3d 1, 2016 N.Y. App. Div. LEXIS 4192 (N.Y. App. Div. 1st Dep't 2016).

Mistrial motion brought after second alleged instance of misconduct was not untimely, where plaintiffs contended that they were denied fair trial due to cumulative effect of 2 alleged errors and thus motion could not have been brought any sooner. Sperduti v Mezger, 283 A.D.2d 1018, 724 N.Y.S.2d 250, 2001 N.Y. App. Div. LEXIS 4519 (N.Y. App. Div. 4th Dep't 2001).

Court properly denied juvenile's request for dismissal, or for adjournment in contemplation of dismissal, and properly adjudicated him delinquent and imposed conditional discharge where (1) underlying criminal conduct of third degree trespass was serious, (2) there was evidence of truancy, ineffective parental control, and lack of judgment in juvenile's selection of friends and companions, and (3) court adopted least restrictive dispositional alternative consistent with juvenile's needs. In re Jonaivy Q., 286 A.D.2d 645, 730 N.Y.S.2d 435, 2001 N.Y. App. Div. LEXIS 8821 (N.Y. App. Div. 1st Dep't 2001).

In action against nursing home by laundry service company for sum due for unpaid services rendered, in which temporary receiver was operating nursing home and controlling its assets under contract with home and State Department of Health, receiver was not entitled to stay of action pending termination of receivership where no action could be taken to enforce judgment against home by proceeding against any assets that were within control of receiver. Cortland Laundry, Inc. v Lakeside Nursing Home, Inc., 188 Misc. 2d 484, 728 N.Y.S.2d 917, 2001 N.Y. Misc. LEXIS 230 (N.Y. Sup. Ct. 2001).

In an action filed by a person who was crossing a street and was injured when two cars collided in an intersection, the trial court correctly rejected the jury's first verdict finding one motorist 90 percent at fault, the other motorist 5 percent at fault, and the injured party 5 percent at fault because the verdict was internally inconsistent, and the court also providently exercised its discretion in setting aside the jury's second verdict and ordering a new trial because the second verdict was inconsistent with the first verdict and was also internally inconsistent. Borovskaya v Herskovic, 300 A.D.2d 331, 751 N.Y.S.2d 312, 2002 N.Y. App. Div. LEXIS 12001 (N.Y. App. Div. 2d Dep't 2002).

Trial court's denial of a motion for mistrial under N.Y. C.P.L.R. 4402, which had been based on claims of improper admission and exclusion of scientific evidence, did not constitute an improvident exercise of discretion as the record showed that substantial justice had been accomplished in litigation against a cigarette manufacturer and two tobacco related entities. Frankson v Philip Morris Inc., 31 A.D.3d 372, 818 N.Y.S.2d 772, 2006 N.Y. App. Div. LEXIS 8707 (N.Y. App. Div. 2d Dep't 2006).

2. Appeals; appealability

Denial of motion for mistrial during course of trial is not appealable; review may be had on appeal from ensuing judgment. Mehar v City of New York, 260 A.D.2d 554, 688 N.Y.S.2d 617, 1999 N.Y. App. Div. LEXIS 4119 (N.Y. App. Div. 2d Dep't 1999).

Defendant's contention, that court erred as matter law in waiting until after jury verdict to rule on plaintiffs' mistrial motion, was unpreserved for review where defendant did not object when court initially reserved decision on plaintiffs' motion and when it further reserved decision after verdict. Sperduti v Mezger, 283 A.D.2d 1018, 724 N.Y.S.2d 250, 2001 N.Y. App. Div. LEXIS 4519 (N.Y. App. Div. 4th Dep't 2001).

3. Attorney-related matters, generally

It was an abuse of discretion not to grant a reasonable continuance in a custody matter and to proceed to trial over respondent's attorney's objection and in respondent's absence, where the hearing involved the health, safety and welfare of a young child and where the attorney's excusable unpreparedness deprived respondent of the meaningful representation to which she was entitled. Jackson v Lee, 96 A.D.2d 760, 465 N.Y.S.2d 314, 1983 N.Y. App. Div. LEXIS 19352 (N.Y. App. Div. 4th Dep't 1983).

Defendant tenant in eviction action was not denied due process and fair trial by Supreme Court's refusal to grant her unspecified period of adjournment following her procurement of third attorney several days before commencement of trial and in refusing to grant her continuance longer than 5 days. Schneyer v Silberg, 156 A.D.2d 200, 548 N.Y.S.2d 458, 1989 N.Y. App. Div. LEXIS 15475 (N.Y. App. Div. 1st Dep't 1989), app. dismissed, 77 N.Y.2d 872, 568 N.Y.S.2d 914, 571 N.E.2d 84, 1991 N.Y. LEXIS 133 (N.Y. 1991).

Evidence that some of plaintiff's medical expenses were paid by checks that were written from her counsel's account did not create a substantial possibility of injustice in this personal injury case; accordingly, the supreme court providently exercised its discretion in denying defendant's motion for a new trial on that basis. Buckham v 322 Equity, LLC, 229 A.D.3d 669, 215 N.Y.S.3d 463, 2024 N.Y. App. Div. LEXIS 3954 (N.Y. App. Div. 2d Dep't 2024).

4. —Attorney absent or not available

Referee, appointed by court to hold hearing on damage issues, abused his discretion in refusing to grant continuance or to reopen hearing on showing by defendants' attorney that he was engaged in complex litigation in federal court in another state on hearing date. Schroeder v Musicor Record Corp., 49 A.D.2d 560, 370 N.Y.S.2d 618, 1975 N.Y. App. Div. LEXIS 10398 (N.Y. App. Div. 1st Dep't 1975).

Where plaintiff's attorney was advised by the court on the date of trial that the case would be tried that afternoon and plaintiff's attorney did not have an actual engagement or other excuse for his absence that afternoon, it was not abuse of discretion for the trial court to refuse

substitute counsel's request for adjournment on behalf of the plaintiff. Gandelman v Gandelman, 90 A.D.2d 494, 454 N.Y.S.2d 752, 1982 N.Y. App. Div. LEXIS 18518 (N.Y. App. Div. 2d Dep't 1982).

Order awarding custody of parties' children to father is reversed and matter remitted to Family Court for new hearing, where Family Court compelled mother to proceed pro se at custody hearing when her lawyer failed to appear, as mother's exercise of her right to counsel was compromised by court's refusal to wait for her attorney to arrive. Patricia L. v Steven L., 119 A.D.2d 221, 506 N.Y.S.2d 198, 1986 N.Y. App. Div. LEXIS 57525 (N.Y. App. Div. 2d Dep't 1986).

Plaintiffs should have been granted reasonable adjournment to obtain substitute counsel after their attorney was permitted to withdraw from case, since they demonstrated genuine basis for seeking more time and record did not indicate any attempt to delay resolution of case where (1) 3 months before trial, they informed court of their difficulty in obtaining new counsel and in getting their files from their former attorney, and (2) prior to jury selection, they informed court that they had obtained their file only 3 days earlier and that they had "tried desperately for past 2 weeks" to obtain counsel, without success. Blunt v Northern Oneida County Landfill, 145 A.D.2d 913, 536 N.Y.S.2d 295, 1988 N.Y. App. Div. LEXIS 13922 (N.Y. App. Div. 4th Dep't 1988).

In proceeding to determine and enforce attorney's lien, judicial hearing officer did not abuse his discretion in denying attorney's request for adjournment to allow his own attorney to be present since attorney had represented himself in commencing proceeding, had failed to provide any reasonable excuse for his attorney's absence, and had acquiesced in referral of case for immediate hearing. Alario v De Marco, 149 A.D.2d 587, 540 N.Y.S.2d 270, 1989 N.Y. App. Div. LEXIS 5000 (N.Y. App. Div. 2d Dep't), app. dismissed, 74 N.Y.2d 791, 545 N.Y.S.2d 106, 543 N.E.2d 749, 1989 N.Y. LEXIS 2330 (N.Y. 1989).

In action to recover damages for wrongful eviction, landlord was not unfairly deprived of right to adjournment at inquest since (1) witnesses produced by tenant demonstrated meritorious cause of action, (2) had landlord exercised due diligence, application for adjournment could have been

obviated, and (3) landlord misrepresented that she had retained counsel who was otherwise engaged in another court. Borak v Karwowski, 151 A.D.2d 454, 542 N.Y.S.2d 244, 1989 N.Y. App. Div. LEXIS 7473 (N.Y. App. Div. 2d Dep't), app. dismissed, 74 N.Y.2d 893, 547 N.Y.S.2d 850, 547 N.E.2d 105, 1989 N.Y. LEXIS 3170 (N.Y. 1989).

Parties to divorce action were entitled to reasonable adjournment immediately after court granted motion by wife's counsel to withdraw from case. McGhee v McGhee, 263 A.D.2d 530, 693 N.Y.S.2d 210, 1999 N.Y. App. Div. LEXIS 8372 (N.Y. App. Div. 2d Dep't 1999).

Personal injury defendant's motion for mistrial or continuance was properly denied, even though his attorney would be unable to attend second day of trial because attorney's father had suffered heart attack, where case had been pending for 5 years, plaintiff was physically handicapped and financially unable to travel again from her Florida residence to New York, defendant rejected plaintiff's offer to consent to later trial if defendant would pay her travel expenses, and court granted 2-day adjournment to allow new attorney to obtain and review trial transcript. Stone v Hidle, 266 A.D.2d 705, 698 N.Y.S.2d 351, 1999 N.Y. App. Div. LEXIS 11843 (N.Y. App. Div. 3d Dep't 1999).

5. —Attorney's fee at issue

Despite defendant's assertion of Fifth Amendment privilege, possibility that he would be prejudiced in 2 other pending civil actions if he were called on to testify in present action was not proper ground to stay present action for legal fees. Defendant was not entitled, on ground of attorney-client privilege, to stay of present action for legal fees pending completion of 2 other pending civil actions where he waived that privilege by placing subject matter of his attorney's advice in issue by asserting malpractice counterclaim. Schulte Roth & Zabel L.L.P. v Chammah, 251 A.D.2d 132, 672 N.Y.S.2d 736, 1998 N.Y. App. Div. LEXIS 6945 (N.Y. App. Div. 1st Dep't 1998).

Court properly denied plaintiff's request for ninth adjournment in matrimonial action, as well as her later motion to reopen hearing, where hearing on defendant's entitlement to counsel fees

repeatedly had been marked “final,” and plaintiff’s request was based on unsworn letter. Goldstein v Goldstein, 251 A.D.2d 272, 675 N.Y.S.2d 64, 1998 N.Y. App. Div. LEXIS 7808 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 810, 680 N.Y.S.2d 54, 702 N.E.2d 839, 1998 N.Y. LEXIS 3198 (N.Y. 1998).

In action to recover legal fees and disbursements owed by defendants for services rendered, particular defendant, who appeared pro se, was not improperly denied opportunity to assert affirmative defenses of negligence and misrepresentation, and court did not err in failing to conform pleadings to proof, where (1) those defenses were withdrawn, with prejudice, at his request before trial, (2) he apparently elected to pursue those claim in action against plaintiff in federal court, and (3) after state court denied his motion for mistrial, he voluntarily elected to terminate his participation in trial by leaving courtroom, never to return. Mainetti & Mainetti v Brier, 281 A.D.2d 772, 722 N.Y.S.2d 279, 2001 N.Y. App. Div. LEXIS 2506 (N.Y. App. Div. 3d Dep't 2001).

6. —In-court misconduct by attorney

Court properly denied plaintiff’s motions for mistrial premised on alleged misconduct of defense counsel in violating in limine ruling pertaining to collateral source evidence, where defense counsel was entitled to introduce proof of plaintiff’s retirement in challenging seriousness of her injury, court immediately struck defense witness’ single gratuitous reference to plaintiff’s pension and gave jury appropriate instruction to disregard it, and plaintiff’s counsel, after court’s denial of motion to set aside adverse verdict as against weight of evidence, expressed no objection to court’s treatment of collateral source question and made no assertion of any impropriety by defense counsel. Kish v Board of Educ., 76 N.Y.2d 379, 559 N.Y.S.2d 687, 558 N.E.2d 1159, 1990 N.Y. LEXIS 1439 (N.Y. 1990).

Court erred in denying plaintiff’s motion for mistrial, on basis of defendant’s opening statement in civil action for assault and battery in which defendant had counterclaimed for assault, battery, false arrest and malicious prosecution, where (1) defense counsel’s remarks were concededly

inaccurate in asserting that plaintiff had been responsible for defendant's arrest and incarceration, (2) defense counsel made his remarks with utter disregard for truth, since he should have known them to be inaccurate, and (3) prejudice was not eliminated by court's curative instruction, following defendant's voluntary discontinuance of counterclaims for false arrest and malicious prosecution, which implied that such counterclaims were being removed from jury's consideration on some technical point of law. Cohn v Meyers, 125 A.D.2d 524, 509 N.Y.S.2d 603, 1986 N.Y. App. Div. LEXIS 62829 (N.Y. App. Div. 2d Dep't 1986).

Court lacked power, sua sponte, to declare mistrial of civil action on ground that plaintiff, who appeared pro se, had disregarded many of its evidentiary rulings and continually introduced extraneous and irrelevant material in evidence; parties had right to decide whether harm occurring, if any, outweighed benefits and convenience of completing trial. Muka v Cohn, 146 A.D.2d 826, 536 N.Y.S.2d 569, 1989 N.Y. App. Div. LEXIS 23 (N.Y. App. Div. 3d Dep't 1989).

Defendant in medical malpractice action was not entitled to mistrial when plaintiff's attorney asked witness—attorney member of medical malpractice panel—whether he was aware, at time of panel's recommendation, that physician member of panel was client of defendants' trial attorney where (1) no response was made to inquiry, (2) court sustained objection and instructed jury to disregard question, and (3) defendants were not prejudiced by mere asking of question since inquiry into possible bias of panel member was proper subject. Rigatti v Leventhal, 181 A.D.2d 726, 581 N.Y.S.2d 354, 1992 N.Y. App. Div. LEXIS 3269 (N.Y. App. Div. 2d Dep't 1992).

It was abuse of discretion to grant mistrial on ground that defense counsel improperly questioned nurse, first witness called by plaintiff and assistant head nurse at hospital, who had attended plaintiff in hospital's emergency room, as to settlement reached between plaintiff and hospital, since nurse clearly had motive to exonerate herself and hospital from wrongdoing in their treatment of plaintiff, and although not party, nurse had been charged as actual tortfeasor. Hill v Arnold, 226 A.D.2d 232, 640 N.Y.S.2d 892, 1996 N.Y. App. Div. LEXIS 3924 (N.Y. App. Div. 1st Dep't 1996).

In personal injury action, defendants were not entitled to mistrial or new trial as result of plaintiffs' counsel's isolated and indirect references to insurance coverage where those references did not reveal that any defendant carried liability insurance but only that injured plaintiff was examined by physician who purportedly derived some percentage of his income from performing such evaluations for insurance companies and/or law firms that performed insurance defense work. Young v Knickerbocker Arena, 281 A.D.2d 761, 722 N.Y.S.2d 596, 2001 N.Y. App. Div. LEXIS 2510 (N.Y. App. Div. 3d Dep't 2001).

"Unit of time" measure of damages argument made by plaintiff's counsel in his opening statement in personal injury action, whereby he told jury that he intended to ask them to award plaintiff specific dollar amount broken down by unit and multiples thereof, warranted declaration of mistrial in defendant's favor because (1) jury's mind was infected with respect to its essential task of using its own judgment, and (2) curative instruction would be rendered meaningless when plaintiff, on summation, would be entitled to renew his request for certain monetary damages. Miller v Owen, 184 Misc. 2d 570, 709 N.Y.S.2d 378, 2000 N.Y. Misc. LEXIS 217 (N.Y. Sup. Ct. 2000).

In a personal injury suit by an injured party against a city transit authority after the injured party fell on a platform at the base of a set of steps leading up to an elevated subway station, the trial court properly exercised its discretion in denying the transit authority's motion for a mistrial, which was based on the summation remarks of the injured party's attorney alluding to a supposed conspiracy to cover up the facts surrounding the fall; although the remarks were deplorable, the injured party's case was strong, and the net effect of the improper, but largely isolated, conspiracy allusion had to have been minimal. Calzado v N.Y. City Transit Auth., 304 A.D.2d 385, 758 N.Y.S.2d 303, 2003 N.Y. App. Div. LEXIS 3872 (N.Y. App. Div. 1st Dep't 2003).

Defendant individual's motion for a mistrial in a personal injury suit by plaintiff individual was properly denied, as the opening comment by plaintiff's counsel during the liability phase of the trial that the accident changed plaintiff's life forever, did not deprive defendant of a fair trial.

Lavaud v Nixon, 305 A.D.2d 376, 758 N.Y.S.2d 682, 2003 N.Y. App. Div. LEXIS 5119 (N.Y. App. Div. 2d Dep't 2003).

7. Juror-related matters, generally

Mistrial should have been declared in medical malpractice action where, in presence of jury, defendant doctor administered emergency aid to juror apparently stricken with stroke or heart attack and court informed remaining jurors next morning that juror in question was doing fine, since likely conclusion to be drawn was that defendant had competently administered emergency medical care; although court received negative responses to questions regarding juror bias as result of incident, unconscionably low verdict against defendant suggested that jury was subliminally influenced to view defendant favorably at plaintiff's expense. Reome v Cortland Memorial Hospital, 152 A.D.2d 773, 543 N.Y.S.2d 552, 1989 N.Y. App. Div. LEXIS 9327 (N.Y. App. Div. 3d Dep't 1989).

In action arising from slip and fall in puddle of water on floor of airline terminal, plaintiff was not entitled to mistrial when, during break in jury deliberations as some of jurors were leaving rest room, they saw unknown woman lying on floor in courthouse, and one juror remarked that there was no water on floor, since court explained to jurors that woman had fainted and asked if incident would influence them, and jurors unequivocally stated that it would not. Taylor v Port Auth., 202 A.D.2d 414, 608 N.Y.S.2d 499, 1994 N.Y. App. Div. LEXIS 1972 (N.Y. App. Div. 2d Dep't 1994).

Medical malpractice plaintiffs were not entitled to mistrial based on jury selection process whereby their counsel was permitted 30 minutes (subsequently enlarged to 60 minutes) to question first round of 12 prospective jurors and was required to exercise peremptory challenges prior to similar questioning and peremptory challenges by defendants' counsel, whereupon process then continued with round 2 conducted in same fashion except that each side was limited to 30 minutes, as court did not lack power to direct manner of jury selection or impose time limits, and plaintiffs failed to show that they were prejudiced by time limits actually fixed by

court. Horton v Associates in Obstetrics & Gynecology, P.C., 229 A.D.2d 734, 645 N.Y.S.2d 354, 1996 N.Y. App. Div. LEXIS 7816 (N.Y. App. Div. 3d Dep't 1996).

Juror's failure to meet appropriate statutory residence requirement did not affect his intelligence and fairness, and thus was not sufficient reason to grant mistrial. Mehar v City of New York, 260 A.D.2d 554, 688 N.Y.S.2d 617, 1999 N.Y. App. Div. LEXIS 4119 (N.Y. App. Div. 2d Dep't 1999).

Medical malpractice plaintiff was not entitled to mistrial where (1) there was no evidence that other jurors saw involvement of defendant physicians in care provided to juror who left courtroom and became ill in hallway, and (2) even if one or more jurors observed intervention, defendants' involvement was minimal and did not influence them, as was confirmed by each juror's statement during in camera interviews in presence of counsel. Chung v Shakur, 273 A.D.2d 340, 709 N.Y.S.2d 590, 2000 N.Y. App. Div. LEXIS 7043 (N.Y. App. Div. 2d Dep't 2000).

Actions of juror, who speaks Spanish and is familiar with dialect spoken by plaintiff, in passing note to court to advise court that he felt that there was discrepancy in what plaintiff actually said and what was communicated by Spanish interpreter to jury did not prejudice jury panel so as to warrant mistrial since juror did not speak to any other jurors concerning matter and stated that he would be capable and willing to rely solely on interpreter's words rather than on his own knowledge of language but that he would bring any large discrepancies to attention of court. Santana v New York City Transit Authority, 132 Misc. 2d 777, 505 N.Y.S.2d 775, 1986 N.Y. Misc. LEXIS 2777 (N.Y. Sup. Ct. 1986).

8. —Jury deliberations

Plaintiff's request for mistrial, made after it became known that juror brought pamphlet published by State Department of Motor vehicles into jury room, was properly denied since juror was dismissed, and there was no indication that other jurors either read, discussed, or were in some manner influenced by pamphlet. Vail-Beserini v Rosengarten, 267 A.D.2d 812, 701 N.Y.S.2d 159, 1999 N.Y. App. Div. LEXIS 13545 (N.Y. App. Div. 3d Dep't 1999).

In action involving issue of whether plaintiff sustained “serious injury” under CLS Ins § 5102(d), plaintiff was not entitled to mistrial after it was discovered that jury was briefly exposed, at outset of its deliberations, to 3 documents that were not received in evidence where Appellate Division’s review of those documents revealed no likelihood of prejudice resulting from jury’s observation of them, if jury viewed them at all. Pola v Nycz, 281 A.D.2d 839, 722 N.Y.S.2d 818, 2001 N.Y. App. Div. LEXIS 3002 (N.Y. App. Div. 3d Dep't 2001).

Brevity of jury deliberations alone provided no basis to declare mistrial or set aside verdict in personal injury action. Young v Tops Mkts., Inc., 283 A.D.2d 923, 725 N.Y.S.2d 489, 2001 N.Y. App. Div. LEXIS 4433 (N.Y. App. Div. 4th Dep't 2001).

9. Litigant-related matters, generally

Notwithstanding that defendant’s application for an adjournment based on his supposed illness represented an effort to mislead the court in that defendant was not too ill to go to his law office and to conduct his normal business, and that defendant’s application was made following the denial of a prior motion for adjournment, the trial court erred in denying defendant’s motion to vacate a default judgment in the action where the trial court granted defendant’s counsel’s motion to be relieved as counsel on the basis that defendant’s actions had placed him in a false position, in that when the court granted the application of counsel to be relieved it then became impossible to proceed with the trial. J.C.S. Design Associates, Inc. v Vinnik, 85 A.D.2d 572, 445 N.Y.S.2d 717, 1981 N.Y. App. Div. LEXIS 16368 (N.Y. App. Div. 1st Dep't 1981).

It is improvident exercise of discretion for trial court to deny motion to vacate prior order denying motion for continuance where plaintiff’s absence was due to recurrence of osteoarthritis of the spine and plaintiff’s physician verified condition and advised plaintiff not to travel from Florida to New York. Englert v Hart, 112 A.D.2d 3, 490 N.Y.S.2d 473, 1985 N.Y. App. Div. LEXIS 50626 (N.Y. App. Div. 4th Dep't 1985).

Trial court’s refusal to grant plaintiff adjournment or mistrial next trial day after jury selection and openings, on ground that she was too ill to appear, was not abuse of discretion where note from

her physician was ambiguous as to her ability to attend court, and she appeared on following day and testified extensively so that there was no deprivation of opportunity to present key testimony; constitutional right to be present at all stages of trial is not absolute. Maloney v Shoparama Inv. Associates, Ltd., 144 A.D.2d 112, 534 N.Y.S.2d 451, 1988 N.Y. App. Div. LEXIS 10112 (N.Y. App. Div. 3d Dep't 1988), app. dismissed, 74 N.Y.2d 642, 541 N.Y.S.2d 982, 539 N.E.2d 1110, 1989 N.Y. LEXIS 605 (N.Y. 1989).

Court properly denied defendant third adjournment on basis of alleged mental illness where (1) counsel did not outline steps he had taken to secure defendant’s appearance and did not provide medical affidavits or other documents to demonstrate that client was unable to attend because of illness, and (2) there was no indication as to when client would be ready to proceed. Terio v Terio, 190 A.D.2d 665, 593 N.Y.S.2d 288, 1993 N.Y. App. Div. LEXIS 838 (N.Y. App. Div. 2d Dep't), app. dismissed, 81 N.Y.2d 994, 599 N.Y.S.2d 799, 616 N.E.2d 154, 1993 N.Y. LEXIS 1247 (N.Y. 1993), app. denied, 82 N.Y.2d 778, 604 N.Y.S.2d 548, 624 N.E.2d 685, 1993 N.Y. LEXIS 3361 (N.Y. 1993).

It was abuse of discretion warranting new trial for court to deny defendant’s application for adjournment for few days so as to allow him to appear for trial with attorney where only prior adjournments requested by defendant were related to his cancer treatment and consequent hospitalization, and there was no indication that his request was dilatory litigation tactic. Jadar Dev. Corp. v Greenspan, 230 A.D.2d 828, 646 N.Y.S.2d 828, 1996 N.Y. App. Div. LEXIS 8592 (N.Y. App. Div. 2d Dep't 1996).

Motion for new trial or continuance based on party’s illness was properly denied where counsel made no claim that party would testify or that his testimony was material to issues being litigated, counsel did not proffer sum and substance of any such testimony, there was no indication of when party would be available if continuance were granted, and it was clear that party could not have testified by reason of parol evidence rule. New York TRW Title Ins. v Wade's Canadian Inn & Cocktail Lounge, 241 A.D.2d 845, 660 N.Y.S.2d 491, 1997 N.Y. App.

Div. LEXIS 8161 (N.Y. App. Div. 3d Dep't), app. dismissed, 91 N.Y.2d 848, 667 N.Y.S.2d 683, 690 N.E.2d 492, 1997 N.Y. LEXIS 4129 (N.Y. 1997).

10. Witness-related matters, generally

Where Special Referee had improvidently exercised his discretion in refusing to grant appellant a reasonable adjournment, and had erred in communicating with a prospective witness by telephone in order to ascertain what the witness knew about the pending litigation, as a matter of law and in the interest of justice, a new trial was required. Rosenberg v Rae, 24 A.D.2d 612, 262 N.Y.S.2d 407, 1965 N.Y. App. Div. LEXIS 3610 (N.Y. App. Div. 2d Dep't 1965).

In a proceeding to judicially settle the account of an executor of an estate, the trial court properly exercised its discretion in refusing a continuance where the objectant had been afforded more than ample time within which to prepare a case for trial, offered no reasonable excuse for flouting the surrogate’s directions, and had appeared at various times both pro se and by a number of different attorneys during the passage of six years from the issuance of the letters. Given the passage of time, the lack of progress in litigation and objectant’s repeated claims that she was being denied her day in court, the position taken by the surrogate was entirely understandable and a proper exercise of his discretion. In re Bales, 93 A.D.2d 861, 461 N.Y.S.2d 365, 1983 N.Y. App. Div. LEXIS 17729 (N.Y. App. Div. 2d Dep't), app. dismissed, 60 N.Y.2d 554, 1983 N.Y. LEXIS 5589 (N.Y. 1983), app. dismissed, 60 N.Y.2d 701, 1983 N.Y. LEXIS 6251 (N.Y. 1983).

Trial court abused its discretion in denying mistrial on discovery that plaintiff’s “expert” witness in wrongful death action presented fraudulent qualifications where witness’ testimony was highly credible and concerned central issue of whether defendant police officer’s conduct was negligent in approaching decedent with drawn gun; striking witness’ testimony and instructing jury to disregard it, without informing them of reason, prejudiced defendant. Santos v New York, 135 A.D.2d 426, 522 N.Y.S.2d 538, 1987 N.Y. App. Div. LEXIS 52390 (N.Y. App. Div. 1st Dep't

1987), app. denied, 71 N.Y.2d 806, 530 N.Y.S.2d 109, 525 N.E.2d 754, 1988 N.Y. LEXIS 739 (N.Y. 1988).

Defendant was not entitled to mistrial on ground that its expert witness, in response to question as to who was paying his fee, said that he was to be paid by insurance company, where other evidence clearly established defendant's negligence. Div-Com, Inc. v F.J. Zeronda, Inc., 136 A.D.2d 844, 523 N.Y.S.2d 687, 1988 N.Y. App. Div. LEXIS 456 (N.Y. App. Div. 3d Dep't 1988).

Trial court erred by granting two separate motions for judgment as a matter of law because a continuance should have been granted to secure the attendance of a police officer; the trial court was not required to gain the consent of the opposing party before aiding in the enforcement of a subpoena. Papoutsis v NOV Trans. Corp., 309 A.D.2d 841, 766 N.Y.S.2d 52, 2003 N.Y. App. Div. LEXIS 10895 (N.Y. App. Div. 2d Dep't 2003).

11. —Witness absent or not available

Trial court did not abuse its discretion in refusing to grant defendant an adjournment of trial after case had been set down peremptorily. Glow-Brite Electrical Service Corp. v Frocol Restaurant Corp., 56 A.D.2d 909, 392 N.Y.S.2d 695, 1977 N.Y. App. Div. LEXIS 11310 (N.Y. App. Div. 2d Dep't), app. denied, 42 N.Y.2d 807, 1977 N.Y. LEXIS 3808 (N.Y. 1977).

It was an abuse of the court's discretion to dismiss a neglect petition without hearing the testimony of two witnesses named in the petition, one of whom had agreed to appear and the other of whom was in the hospital, and not to grant a reasonable continuance since the hearing involved the health, safety and welfare of a young child. In re G., 79 A.D.2d 881, 434 N.Y.S.2d 536, 1980 N.Y. App. Div. LEXIS 14303 (N.Y. App. Div. 4th Dep't 1980).

In a personal injury action against the transit authority which had resulted in a jury verdict in favor of the plaintiff, a retrial was required where the trial court abused its discretion in denying the transit authority's motion for a continuance or mistrial on account of a subway strike in order to enable witnesses, whose materiality was recognized by the court, to be present, and where

the court gave a missing records instruction in connection with records which had in fact never been demanded by plaintiff. Rolon v New York City Transit Authority, 79 A.D.2d 926, 434 N.Y.S.2d 408, 1981 N.Y. App. Div. LEXIS 9798 (N.Y. App. Div. 1st Dep't 1981).

Trial court abused its discretion in refusing to grant a continuance to allow a husband to produce a witness with whom he had lived in New Jersey at the time he was served, where the witness was critical to the husband’s contention that at the time he was served his domicile was in New Jersey, and the husband had exercised due diligence in attempting to contact the witness, and where the expense and inconvenience to the wife of another trip from her home in Florida to New York was outweighed by the substantial prejudice suffered by the husband when he was prevented from calling a potentially decisive witness. Chodos v Chodos, 91 A.D.2d 1030, 458 N.Y.S.2d 621, 1983 N.Y. App. Div. LEXIS 16353 (N.Y. App. Div. 2d Dep't 1983).

The trial court properly found that a Mexican decree purporting to dissolve the marriage between the parties was void on the ground that the Mexican court lacked jurisdiction over plaintiff wife without first granting defendant’s motion for continuance to obtain the presence of two witnesses who would offer testimony that plaintiff knew of the Mexican divorce decree earlier than she had claimed, since some of defendant’s witnesses had already so testified, so that testimony would have been merely cumulative, and since, as to the ultimate question whether defendant had obtained plaintiff’s signature on a power of attorney authorizing a Mexican attorney to appear on her behalf before the court in Mexico by fraud, the witnesses defendant sought to obtain were not present at the signing of the document and their testimony was thus not crucial or important. Chumsky v Chumsky, 108 A.D.2d 714, 484 N.Y.S.2d 879, 1985 N.Y. App. Div. LEXIS 43052 (N.Y. App. Div. 2d Dep't 1985).

In paternity proceeding, it was abuse of discretion to deny request by putative father (respondent) for continuance of hearing to produce witness where (1) witness’ testimony was material to crucial issue in case, (2) hearing was non-jury, (3) application was made very shortly after respondent’s attorney learned that witness would be needed, (4) requested adjournment amounted to 4 days, most of which occurred during weekend, and (5) there was no indication of

prejudice to mother. Buscaglia v Ruh, 140 A.D.2d 996, 531 N.Y.S.2d 146, 1988 N.Y. App. Div. LEXIS 6249 (N.Y. App. Div. 4th Dep't 1988).

In action to recover for personal injuries, court should have granted plaintiff's application for adjournment where witness who was essential to plaintiff's ability to establish prima facie case had recently become unavailable, counsel for plaintiff had made efforts to contact witness, and defendant did not raise any objection to adjournment or set forth any claim of prejudice. Rodriguez v Pisa Caterers, Inc., 146 A.D.2d 686, 537 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 598 (N.Y. App. Div. 2d Dep't 1989).

Court, in matrimonial action, properly denied husband's motion for continuance which was sought for purpose of producing one of his co-workers who was allegedly present during attempted service of process where husband's offer of proof showed that testimony of proffered witness would have merely confirmed husband's own testimony in which he admitted that wife's process server approached him at work and attempted to serve him, and that he avoided such service. Menderis v Menderis, 148 A.D.2d 427, 538 N.Y.S.2d 581, 1989 N.Y. App. Div. LEXIS 2463 (N.Y. App. Div. 2d Dep't 1989).

Trial court properly refused defendant's request for 2-day continuance to secure testimony of witness who, at time of trial, was fulfilling his military reserve obligation outside state where defendant made no effort to obtain witness' return to New York, and his testimony could have been timely secured by merely delivering judicial subpoena to Provost Marshall at military station; thus, need for continuance resulted from defendant's failure to exercise due diligence in securing testimony of witness. Waters v Silverock Baking Corp., 172 A.D.2d 984, 568 N.Y.S.2d 668, 1991 N.Y. App. Div. LEXIS 4544 (N.Y. App. Div. 3d Dep't), app. dismissed, 78 N.Y.2d 1071, 576 N.Y.S.2d 221, 582 N.E.2d 604, 1991 N.Y. LEXIS 4758 (N.Y. 1991).

Court properly refused to grant plaintiff trial adjournment when both she and her expert witness failed to appear on first day of trial given inordinate delays in case (most of which were caused by plaintiff's actions or inaction), and fact that plaintiff had 2 months' advance warning as to

when trial would commence. Wren v Lawrence Hosp., 203 A.D.2d 559, 612 N.Y.S.2d 933, 1994 N.Y. App. Div. LEXIS 4338 (N.Y. App. Div. 2d Dep't 1994).

In pedestrian's action against owner and driver of taxi that struck him, owner's request for continuance to procure driver's testimony at trial was properly denied where driver's deposition did not refute pedestrian's allegations of negligence, and owner failed to exercise diligence in securing driver's presence at trial. Razzaque v Krakow Taxi, 238 A.D.2d 161, 656 N.Y.S.2d 208, 1997 N.Y. App. Div. LEXIS 3192 (N.Y. App. Div. 1st Dep't 1997).

It was reversible error to deny continuance to defendant in bifurcated trial on issue of liability in personal injury action where trial had progressed at unusually rapid pace, there was offer of proof regarding unavailability of nonparty witnesses whose depositions had been denied admission into evidence for lack of foundation, foundation witness was available following morning, proffered testimony went to heart of liability issue and was therefore material, and grant of continuance would have resulted in delay of only several hours and would still have enabled court to have summations and give its charge on day jury was in fact charged. Evangelinos v Reifschneider, 241 A.D.2d 508, 661 N.Y.S.2d 232, 1997 N.Y. App. Div. LEXIS 7814 (N.Y. App. Div. 2d Dep't 1997).

Court properly denied adjournment after mother failed to appear in child protection proceeding where she was in court when adjourned date was given and was scheduled to testify, no explanation for her absence was ever provided, her willful failure to appear manifested desire not to testify, and she did not move for rehearing under CLS Family Ct Act § 1042. In re Doran J., 266 A.D.2d 99, 698 N.Y.S.2d 853, 1999 N.Y. App. Div. LEXIS 11649 (N.Y. App. Div. 1st Dep't 1999).

Because an owner failed to make an expert available after an adjournment and thereafter failed to outline the steps taken to secure the expert witness, assert that the owner had made reasonable efforts to produce the witness, or offer any explanation beyond mere speculation for the witness's unavailability, the trial court properly denied the owner's N.Y. C.P.L.R. 4402 motion for a second adjournment and dismissed the complaint against a veterinarian clinic for

failure to establish a prima facie case. Newmark v Animal Emergency Clinic of Hudson Val., 38 A.D.3d 1110, 832 N.Y.S.2d 322, 2007 N.Y. App. Div. LEXIS 3642 (N.Y. App. Div. 3d Dep't), app. denied, 9 N.Y.3d 815, 849 N.Y.S.2d 31, 879 N.E.2d 171, 2007 N.Y. LEXIS 3745 (N.Y. 2007).

12. — —Eyewitness

In two consolidated actions for personal injuries the trial court erred in denying plaintiffs' motion for a trial continuance where counsel did not learn until after the trial had started that an eyewitness whose testimony was crucial to plaintiffs' cases would be unavailable for several days and where defendants would not have been prejudiced by granting the continuance until the witness could appear pursuant to CPLR § 4402; additionally, it was error to dismiss plaintiffs' cases immediately following denial of the application for continuance where no motion to dismiss had been made by defendant and where the trial judge relinquished his exclusive judicial authority over the proceeding and the statutory power vested in him to make such decisions pursuant to the statute by deferring to an Administrative Judge with respect to whether to grant the application for a continuance. Balogh v H.R.B. Caterers, Inc., 88 A.D.2d 136, 452 N.Y.S.2d 220, 1982 N.Y. App. Div. LEXIS 16594 (N.Y. App. Div. 2d Dep't 1982).

13. — —Medical expert witness

In an action for personal injuries sustained by a passenger on a motorcycle when it collided with an automobile, the trial court did not abuse its discretion in denying a motion for a one-day continuance so that defendant could call a medical expert where there was already more than ample medical evidence in the record at the time of the motion. Cornier v Spagna, 101 A.D.2d 141, 475 N.Y.S.2d 7, 1984 N.Y. App. Div. LEXIS 17796 (N.Y. App. Div. 1st Dep't 1984).

Repeated insistence of plaintiff's counsel that expert witness would be available to testify during following week was clearly request for adjournment, and thus there was no need to formally invoke CLS CPLR § 4402. Court abused its discretion in granting defendant's motion to dismiss medical malpractice complaint with prejudice due to unavailability of plaintiff's expert witness,

rather than granting continuance, where witness (who resided outside state) had been ready to testify on proposed second day of trial, trial date was reset due to court scheduling problem, witness could not testify on rescheduled date due to surprise inspection at his hospital, and there was no evidence of bad faith. Cirino v St. John, 146 A.D.2d 912, 536 N.Y.S.2d 901, 1989 N.Y. App. Div. LEXIS 330 (N.Y. App. Div. 3d Dep't 1989).

In view of fact that plaintiff had previously been granted numerous adjournments of her medical malpractice trial, including 2 after attorneys had been sent out for jury selection, on assertion that unidentified medical expert was unavailable, court did not improvidently exercise discretion in denying another such request made in mid-trial for adjournment so lengthy that it would have necessitated mistrial. Scarola v St. Vincent's Medical Center, 154 A.D.2d 364, 545 N.Y.S.2d 840, 1989 N.Y. App. Div. LEXIS 12262 (N.Y. App. Div. 2d Dep't 1989).

Imposition of sanction of dismissal was abuse of discretion where (1) plaintiff was ready to proceed to trial on 13 prior court dates over 6-year period and defendant was granted adjournments on each occasion, even after “final” markings, (2) court’s direction to bifurcate trial accorded extremely short notice to plaintiff, who had developed trial strategy and picked jury with expectation of single trial covering damages as well as liability, and (3) plaintiff’s need for short continuance was caused by unavailability of her medical expert witness, which was circumstance over which she had no control, and defendant neither objected to continuance nor moved to dismiss. Stabler v Manhattan & Bronx Surface Transit Operating Authority, 155 A.D.2d 390, 548 N.Y.S.2d 17, 1989 N.Y. App. Div. LEXIS 15071 (N.Y. App. Div. 1st Dep't 1989).

Court erred in dismissing plaintiff’s complaint after her attorney asserted that he was unable to proceed to trial on last scheduled trial date due to unavailability of expert witness without whose testimony plaintiff could not establish prima facie case of malpractice, since expert had been available on all earlier scheduled trial dates, which were postponed for reasons not directly attributable to plaintiff, and plaintiff’s attorney had made reasonable efforts to secure presence of expert. Goichberg v Sotudeh, 187 A.D.2d 700, 590 N.Y.S.2d 283, 1992 N.Y. App. Div. LEXIS 13423 (N.Y. App. Div. 2d Dep't 1992).

It was abuse of discretion to deny defendant's application for brief continuance when one of her medical experts was unable to appear at scheduled time for his testimony because he had been subpoenaed by another court to testify in another action that morning, especially since there was sharply-contested issue as to cause of plaintiff's injuries. Josephson v Higgins, 243 A.D.2d 444, 663 N.Y.S.2d 65, 1997 N.Y. App. Div. LEXIS 9347 (N.Y. App. Div. 2d Dep't 1997).

Court erred in denying plaintiffs' application at trial for continuance where, 2 days prior to start of trial, plaintiffs' attorney first learned that office of his medical expert had failed to diary trial date and that consequently, expert had made travel plans out of country during month at same time trial was scheduled to take place, there had been no other delays in case attributable to plaintiffs, and plaintiffs submitted affidavit sworn by their expert substantiating their allegations and indicating that she would be available to testify if trial were rescheduled. Mura v Gordon, 252 A.D.2d 485, 675 N.Y.S.2d 142, 1998 N.Y. App. Div. LEXIS 8021 (N.Y. App. Div. 2d Dep't 1998).

Court properly denied defendant's adjournment application so that he might attempt to secure testimony of plaintiff's private physician where defendant had notice of more than one year before trial that physician was plaintiff's private physician, and defendant took no steps until trial on issue of damages to subpoena physician's records or to secure his presence at trial. Herbert v Edwards Super Food Stores-Finast Supermarkets, 253 A.D.2d 789, 677 N.Y.S.2d 617, 1998 N.Y. App. Div. LEXIS 9573 (N.Y. App. Div. 2d Dep't 1998).

Adjournment should have been granted to defendants so they could call their medical expert witness where trial had progressed at unusually rapid pace, offer of proof showed that witness would be available in day or two, and proffered testimony went to heart of damages issue. Romero v City of New York, 260 A.D.2d 461, 688 N.Y.S.2d 226, 1999 N.Y. App. Div. LEXIS 3832 (N.Y. App. Div. 2d Dep't 1999).

Court properly denied medical malpractice plaintiffs' motion for adjournment, which was made on eve of trial and was predicated on unavailability of plaintiffs' expert medical witness, since plaintiffs' attorney had known for at least 8 months that medical expert, who had moved to New

Mexico, would not come to New York for trial, and plaintiffs failed to exercised due diligence to remedy unavailability of that expert. Harper v Han Chang, 267 A.D.2d 1011, 700 N.Y.S.2d 317, 1999 N.Y. App. Div. LEXIS 13757 (N.Y. App. Div. 4th Dep't 1999).

Workers' Compensation Law Judge properly denied employer's request for adjournment for purpose of having medical experts testify as to causal relationship between claimant's psoriasis and his employment where (1) claimant's expert filed numerous reports establishing such relationship, (2) CLS Work Comp § 21(5), which creates presumption that medical reports are prima facie evidence of their contents, was intended to reduce need for expert testimony, (3) report by employer's expert was reasonably construed as conceding causal relationship, and (4) employer's reliance on CLS Work Comp Bd Rules § 300.10(c), 12 NYCRR § 300.10(c), was misplaced, absent timely request to cross-examine expert. McDonald v Danforth, 286 A.D.2d 845, 730 N.Y.S.2d 571, 2001 N.Y. App. Div. LEXIS 8853 (N.Y. App. Div. 3d Dep't 2001).

In medical malpractice action for injuries sustained by plaintiff's baby during birth, defendant physician was not entitled to dismissal of complaint on grounds of plaintiff's lack of expert disclosure and lack of readiness for trial where (1) plaintiff's failure to serve defendant with expert disclosure notice was inadvertent, (2) plaintiff's requests for 2 adjournments were made so that discovery issue could be resolved and expert could travel from Florida, and they did not result from failure to exercise due diligence, (3) no other delays were attributable to plaintiff, and (4) expert's testimony was material. Stevens v Auburn Mem'l Hosp., 286 A.D.2d 965, 730 N.Y.S.2d 608, 2001 N.Y. App. Div. LEXIS 8920 (N.Y. App. Div. 4th Dep't 2001).

Although a neuropsychologist was qualified to render an opinion about a child's traumatic brain injury, the expert failed to support conclusion that the child's alleged brain injury and resulting cognitive problems were caused by the incident in question; accordingly, the child was entitled to a continuance pursuant to N.Y. C.P.L.R. 4402 to retain another expert witness to establish the nature of the child's physical injury and its cause. Guzman v 4030 Bronx Blvd. Assoc. L.L.C., 54 A.D.3d 42, 861 N.Y.S.2d 298, 2008 N.Y. App. Div. LEXIS 5488 (N.Y. App. Div. 1st Dep't 2008).

Trial court did not err in directing parties whose expert witness suddenly became unavailable to testify in a medical malpractice action, which led to the grant of an application for a mistrial, to reimburse the opposing parties for one-half of the sums they had paid to expert witnesses. Johnson v Aguwa, 176 A.D.3d 1039, 2019 N.Y. App. Div. LEXIS 7649 (N.Y. App. Div. 2d Dep't 2019), app. denied, 36 N.Y.3d 905, 160 N.E.3d 1282, 136 N.Y.S.3d 833, 2021 N.Y. LEXIS 34 (N.Y. 2021).

Because a patient's expert witness improvidently was precluded from testifying as to whether the health care providers departed from the accepted standard of care in a medical malpractice action, the patient's application for a new trial in the interest of justice should have been granted and the trial court should have denied the separate applications of the health care providers for judgment as a matter of law dismissing the complaint insofar as asserted against each of the providers. Johnson-Hendy v Mosu, 201 A.D.3d 896, 160 N.Y.S.3d 111, 2022 N.Y. App. Div. LEXIS 405 (N.Y. App. Div. 2d Dep't 2022).

Supreme court providently exercised its discretion in denying a new trial per CPLR 4402 where the primary care physician was properly permitted to present the challenged evidence showing, among other things, that both the surgeon and the anesthesiologist knew of the patient's respiratory condition and associated medications prior to surgery, there was no attempt by the primary care physician or the hospital to directly impute liability to the dismissed defendants, and the primary care physician was appropriately permitted to show that her failure to list those medications on the presurgical clearance form was not a factor in the medical decisions made at the hospital. Angieri v Musso, 225 A.D.3d 43, 206 N.Y.S.3d 316, 2024 N.Y. App. Div. LEXIS 974 (N.Y. App. Div. 2d Dep't 2024).

14. — —Non-medical expert witness

Where proponent in will contest produced a handwriting expert and had notice that propriety of subscription of will would be in issue, it was not error to refuse a continuance to enable proponent to obtain a handwriting expert of similar reputation to that of contestants' expert. In re

Will of Potter, 24 A.D.2d 812, 263 N.Y.S.2d 910, 1965 N.Y. App. Div. LEXIS 3125 (N.Y. App. Div. 3d Dep't 1965).

In personal injury action, court properly denied defense counsel's application for continuance for purpose of calling social worker who had interviewed plaintiff at hospital since both sides had been informed 2 months previously of trial date, no arrangements were made to procure witness' appearance, and counsel could not assure court that witness would be present on requested adjourned date. Vogelhut v Waldbaum's Supermarket, 127 A.D.2d 590, 511 N.Y.S.2d 647, 1987 N.Y. App. Div. LEXIS 43059 (N.Y. App. Div. 2d Dep't 1987).

Court did not abuse its discretion in denying defendant's motion for continuance due to inability of medical expert to testify on scheduled date where defendant failed to provide explanation of expert's sudden unavailability or to explain importance of expert's testimony. Hayles v Malachi, 145 A.D.2d 536, 536 N.Y.S.2d 978, 1988 N.Y. App. Div. LEXIS 13636 (N.Y. App. Div. 2d Dep't 1988).

In negligence action to recover for damages to property, court should have granted continuance of trial for reasonable time to enable plaintiff to produce his expert witness to testify as to reasonable value of repairs to plaintiff's building where (1) defendant conceded issue of liability, (2) expert's testimony was necessary to plaintiff's proof, (3) there was no allegation that defendant would be prejudiced by delay aside from having incurred additional day's attendance fees for its 2 witnesses, and (4) witness who was in court pursuant to subpoena served by defendant disappeared shortly after plaintiff informed defendant that he would call that witness in order to establish prima facie case. Klein v New York Tel. Co., 155 A.D.2d 644, 548 N.Y.S.2d 236, 1989 N.Y. App. Div. LEXIS 15135 (N.Y. App. Div. 2d Dep't 1989).

Divorce court's refusal to grant one-day adjournment to permit pension appraiser to testify constituted clear abuse of discretion; on remittitur, parties would be granted opportunity to present evidence as to value of pensions. Feldman v Feldman, 204 A.D.2d 268, 611 N.Y.S.2d 879, 1994 N.Y. App. Div. LEXIS 4562 (N.Y. App. Div. 2d Dep't 1994).

In personal injury action, court properly denied defendant's application for adjournment to secure testimony of police officer to whom plaintiff allegedly gave inconsistent statement concerning manner in which accident occurred where there were numerous instances of defendant's lack of preparedness in presentation of its case, and it was particularly evident that defendant failed to exercise due diligence in procuring testimony of officer. Zavurov v City of New York, 241 A.D.2d 491, 659 N.Y.S.2d 897, 1997 N.Y. App. Div. LEXIS 7385 (N.Y. App. Div. 2d Dep't 1997).

Defendants should have been granted continuance in action for breach of fiduciary duty in which valuation of corporation was in issue, where their attorney made good faith and diligent effort to produce accountant witness, whose testimony was material and relevant, and adjournment for few days in nonjury trial was not likely to cause prejudice to plaintiff. Wai Ming Ng v Tow, 260 A.D.2d 574, 688 N.Y.S.2d 647, 1999 N.Y. App. Div. LEXIS 4069 (N.Y. App. Div. 2d Dep't 1999).

Divorce action would be remitted for hearing to determine wife's equitable share of husband's business where wife was unable to submit evidence of value of that business because (1) retained expert could not testify due to conflict of interest, (2) conduct of trial during tax season prevented retention of another financial expert on short notice, and (3) wife's request for adjournment was improvidently denied. Sutka v Sutka, 281 A.D.2d 470, 722 N.Y.S.2d 52, 2001 N.Y. App. Div. LEXIS 5558 (N.Y. App. Div. 2d Dep't 2001).

II. Under Former Civil Practice Laws

15. Generally

The granting of a continuance is in the discretion of the court, and dilatory tactics on the part of a defendant will not incline the court to listen to a later motion for continuance that has some appearance of merit. Bellinger v Gallo, 221 A.D. 482, 224 N.Y.S. 162, 1927 N.Y. App. Div. LEXIS 6473 (N.Y. App. Div. 1927).

After a plaintiff has made several applications for postponement, which were denied and the cause was finally reached, when her attorney made an application for further postponement on the ground of her illness which was granted, but subsequently upon proofs the trial judge being satisfied that her application was for delay only refused a further postponement and permitted defendant to take a dismissal of the complaint, this was no unwarrantable exercise of the discretionary power of the trial judge. Schaffer v Schaffer, 5 N.Y.S. 544, 53 Hun 630, 1889 N.Y. Misc. LEXIS 2508 (N.Y. Sup. Ct. 1889).

An important witness being unexpectedly absent in another state upon a trial, the defendants applied for a postponement which was denied, whereupon an inquest was taken and judgment entered for the plaintiff. Held the special term properly set aside the inquest and vacated the judgment, and granted a new trial upon payment of costs by defendant, although no appeal had been taken from the order denying the motion for postponement. Cahill v Hilton, 31 Hun 114 (N.Y.), aff'd, 96 N.Y. 675, 96 N.Y. (N.Y.S.) 675, 1884 N.Y. LEXIS 612 (N.Y. 1884).

Upon proof that defendant expected to have the testimony of the superintendent of his factory in an action for personal injuries upon the elevator therein, and that he was sick and not able to leave his room for two or three weeks, the application for adjournment should have been granted, and judgment against defendant will be reversed and a new trial ordered. Obart v Simmons Soap Co., 11 N.Y. St. 890.

A party is not entitled to an adjournment on account of the absence of a material witness, unless it can be made to appear that his attendance can be procured within a reasonable time. Brown v Moran, 65 How. Pr. 349, 1883 N.Y. Misc. LEXIS 138 (N.Y.C.P. May 1, 1883).

That a cause is irregularly on the calendar is waived by a motion to adjourn. Smith v Grant.

Research References & Practice Aids

Cross References:

Continuance where attorney is member of legislature, CLS Jud § 469.

Calendar default; restoration; dismissal, see CLS Unif Civ Rls NYC Civ Ct § 208.14 [22 NYCRR § 208.14].

Federal Aspects:

Form of motions in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 7.

Motion for new trial in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 59.

Time of motion for new trial in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 59(b).

Jurisprudences:

92 NY Jur 2d References § 33. .

105 NY Jur 2d Trial §§ 161., 165., 166., 168.– 170., 278., 280., 308., 309., 312., 313., 626.

58 Am Jur 2d, New Trial §§ 1 et seq.

7A Am Jur Pl & Pr Forms (Rev ed), Continuance, Forms 1.– 12.

18B Am Jur Pl & Pr Forms (Rev ed), New Trial, Forms 26 et seq.

23B Am Jur Pl & Pr Forms (Rev ed), Trial, Forms 368.– 375.

Law Reviews:

Motion practice under the CPLR. 9 NY L Forum 317.

Treatises

Matthew Bender’s New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4402, Motion for Continuance or New Trial During Trial.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 23.06. Trial and post-trial motions.

Matthew Bender's New York Civil Practice:

CPLR Manual § 26.03 .Appealability — Appellate Division.

Matthew Bender's New York Civil Practice:

CPLR Manual § 31.16 .An alternative to arbitration: simplified procedure for judicial determination of disputes.

Matthew Bender's New York AnswerGuides:

Matthew Bender's New York Practice Guides:

LexisNexis AnswerGuide New York Civil Litigation § 9.04 .Seeking Motion In Limine.

LexisNexis AnswerGuide New York Civil Litigation § 9.27. Moving for Continuance or for New Trial.

Annotations:

Propriety of limiting, to issue of damages alone, new trial granted on ground of inadequacy of damages awarded. 29 ALR2d 1199.

Evidence as to physical condition after trial as affecting right to new trial. 31 ALR2d 1236.

Grant of new trial on issue of liability alone, without retrial of issue of damages. 34 ALR2d 988.

Facts or evidence forgotten at trial as newly discovered evidence which will warrant grant of new trial in civil case. 50 ALR2d 994.

Contact or communication between juror and outsider during trial of civil case as grounds for mistrial, new trial, or reversal. 64 ALR2d 158.

Limitation of new trial in tort action to issue of damages. 85 ALR2d 19.

Perjury or wilfully false testimony of expert witness as basis for new trial on ground of newly discovered evidence. 38 ALR3d 812.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial. 64 ALR3d 126.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trail. 57 ALR4th 1049.

Matthew Bender's New York Checklists:

Checklist for Submitting Pre-Trial Memorandum of Law, Marked Pleadings, and Other Papers to Court LexisNexis AnswerGuide New York Civil Litigation § 9.02.

Checklist for Making Trial and Post-Trial Motions LexisNexis AnswerGuide New York Civil Litigation § 9.25.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 4402:1.

LexisNexis Forms FORM 75-CPLR 4402:1.—Order on Motion for New Trial During Trial.

LexisNexis Forms FORM 380-21:301.—Order on Motion for New Trial During Trial.

2 Medina's Bostwick Practice Manual (Matthew Bender), Forms 21:101 et seq .(trial motions).

Texts:

1 New York Trial Guide (Matthew Bender) §§ 1.01, 1.10, 3.32.

Hierarchy Notes:

NY CLS CPLR, Art. 44

Forms

Forms

Body of Affidavit on Application for Adjournment on Various Grounds

_____, being duly sworn, deposes and says that he is the attorney for the plaintiff [defendant] in the above-entitled action.

Deponent is also the attorney for the plaintiff [defendant] in the case of _____ , now actually on trial before Mr. Justice _____ and a jury in Trial Term [Part _____], of the Supreme Court, _____ County [or otherwise state the place where counsel is engaged]. Said trial commenced [or will commence] _____ _____, 20_____, and is expected to last until approximately _____ _____, 20_____.

[or]

Immediately upon being advised that this case would be on the day calendar for the _____ day of _____, deponent caused to be prepared the subpoenas to serve on _____ and _____, two material and necessary witnesses in the trial of said action. Said witnesses, as deponent has been advised by them, will give testimony in relation to the cause of action stated in the complaint as they were eyewitnesses to the accident which forms the basis of the cause of action [or otherwise state facts showing how the witnesses are material]. Deponent learned, however, that both of said witnesses were without the state on business trips, and one of them would not return until

the _____ day of _____, and the other would not return until the _____ day of _____. Deponent is reliably informed that the witnesses will be available on or about the dates indicated, and that their presence at the trial [or the taking of their depositions] may be assured at that time.

It would be highly prejudicial to the interest of the plaintiff [defendant] if the case were forced to trial without the presence of these witnesses or their depositions [state facts showing why].

[or]

That the plaintiff, _____, is confined in the _____ Hospital and is too ill to be present at the trial, or to have his testimony taken by deposition, as appears by the affidavit of his physician, _____, which is submitted herewith. It would be highly prejudicial to the plaintiff to proceed to the trial without the presence of the plaintiff, and it would be impossible to prove the case without his testimony [state facts to show vital necessity of plaintiff's testimony]. Deponent is advised by said physician that the plaintiff will in all likelihood be able to be present at the trial approximately one month from this date or at that time have his testimony taken by deposition.