NY CLS CPLR R 3403

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

Article 34 Calendar Practice; Trial Preferences (§§ 3401 — 3410)

Notice

This section has more than one version with varying effective dates.

R 3403. Trial preferences

(a) Preferred Cases. Civil cases shall be tried in the order in which notes of issue have been filed, but the following shall be entitled to a preference:

1. an action brought by or against the state, or a political subdivision of the state, or an officer or board of officers of the state or a political subdivision of the state, in his or its official capacity, on the application of the state, the political subdivision, or the officer or board of officers;

2. an action where a preference is provided for by statute; and

3. an action in which the interests of justice will be served by an early trial.

4. in any action upon the application of a party who has reached the age of seventy years.

5. an action to recover damages for medical, dental or podiatric malpractice.

6. an action to recover damages for personal injuries where the plaintiff is terminally ill and alleges that such terminal illness is a result of the conduct, culpability or negligence of the defendant.

7. any action which has been revived pursuant to section two hundred fourteen-g or two hundred fourteen-j of this chapter.

(b) Obtaining Preference. Unless the court otherwise orders, notice of a motion for preference shall be served with the note of issue by the party serving the note of issue, or ten days after such service by any other party; or thereafter during the pendency of the action upon the application of a party who reaches the age of seventy years, or who is terminally ill.

History

Add, L 1962, ch 308, eff Sept 1, 1963; amd, L 1970, ch 907, §§ 1, 2; L 1975, ch 109, § 8; L 1979, ch 61, §§ 1, 2, eff April 9, 1979; L 1985, ch 760, § 4; L 1986, ch 485, § 5, eff July 21, 1986; L 1990, ch 670, §§ 1, 2, eff July 22, 1990; L 2019, ch 11, § 4, effective February 14, 2019; L 2022, ch 203, § 2, effective May 24, 2022.

Annotations

Notes

Prior Law:

Earlier rules: RCP 151.

Advisory Committee Notes:

This rule is the same as former rule 151 with minor language changes but no change in substance. Form §§ 139 and 140 are omitted as unnecessary. CPA § 139 provided preferences for certain actions by the state but they were covered in former rule 151. CPA § 140 permitted

the Appellate Division to adopt rules for preferences. CPLR rule 5521 (preferences on appeal) does not contain a guide on methods of obtaining a preference because the matter is covered by the rules of the various appellate courts. See, e.g., Court of Appeals Rules of Practice, Rule XIV; Appellate Division, First Department Rules, Rule V.

A preference may be obtained by a party other than the one filing the note of issue.

Editor's Notes:

Laws 1990, ch 670, § 3, eff July 22, 1990, provides as follows:

§ 3. This act shall take effect immediately and shall apply to such actions accruing on or after such date.

Laws 2019, ch 11, § 12, eff February 14, 2019, provides:

§ 12. The provisions of this act shall be severable, and if any clause, sentence, paragraph, subdivision or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Amendment Notes

The 2019 amendment by ch 11, § 4, added (a)7.

The 2022 amendment by ch 203, § 2, added “or two hundred fourteen-j” in (a)(7).

Commentary

PRACTICE INSIGHTS:

OBTAINING A TRIAL PREFERENCE IN A MATRIMONIAL ACTION.

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INSIGHT

Despite a plethora of appellate decisions championing the speedy trial as a remedy for a party's dissatisfaction with a temporary support order, and a general agreement on the necessity for expeditious resolution of custody and visitation matters in the best interests of children, it remains the rare case where years do not pass in a contested matter before a trial is actually commenced and completed. In a court without a dedicated matrimonial part, a matrimonial case may be delayed because it is to be heard with other civil matters before the court. DRL § 249 provides for the issuance of a trial preference, which counsel may apply for under CPLR 3403, to advance a matrimonial case in front of other civil matters. Even in a court that has a dedicated matrimonial part, counsel should apply for a trial preference if the client is 70 years of age or older, or where critical issues need to be imminently tried over other cases.

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I. Under CPLR

A. In General

1. Obtaining preference generally

Plaintiff's refusal to waive a jury trial is irrelevant to the determination of his right to a preference. Rosenbaum v Dornhage Realty Corp., 22 A.D.2d 772, 254 N.Y.S.2d 78, 1964 N.Y. App. Div. LEXIS 2769 (N.Y. App. Div. 1st Dep't 1964).

The mere lapse of time between the denial of the initial application for a general preference in a personal injury action and a motion for reconsideration predicated upon allegedly newly discovered evidence does not constitute a procedural bar. Kennedy v Cronin, 33 A.D.2d 564, 305 N.Y.S.2d 671, 1969 N.Y. App. Div. LEXIS 3152 (N.Y. App. Div. 2d Dep't 1969).

In a negligence action, a court cannot make a finding of bad faith under CPLR 3403 simply because it disagrees with the amount the defendant has offered for settlement. Oaklander v

Sodikoff Contracting Co., 35 A.D.2d 960, 317 N.Y.S.2d 987, 1970 N.Y. App. Div. LEXIS 3270 (N.Y. App. Div. 2d Dep't 1970).

A clear case of liability does not entitle a plaintiff to have or her action preferred for trial over the other actions on the calendar, and the remedy in such a situation is a motion for summary judgment. Turturro v Stevens, 58 A.D.2d 601, 395 N.Y.S.2d 239, 1977 N.Y. App. Div. LEXIS 12647 (N.Y. App. Div. 2d Dep't 1977).

Actions improperly brought in New York County should not be preferred over actions properly brought in New York County. Thus, an order granting a plaintiff a special preference should not have been granted and would be reversed where it appeared that the sole function of having named a national corporation as a party defendant was to import into New York County an action which belonged in Westchester County. Semper v Elmsford Transp. Corp., 83 A.D.2d 822, 442 N.Y.S.2d 513, 1981 N.Y. App. Div. LEXIS 15186 (N.Y. App. Div. 1st Dep't 1981).

In an action by a buyer of real estate against the sellers seeking to reform the contract of sale, a lease agreement, and a mortgage based upon the alleged fraud of defendants, a motion by the buyer requesting a trial preference in the interest of justice, pursuant to CPLR § 3403(a)(3), was improperly granted where plaintiff failed to establish the existence of circumstances sufficiently unusual or extreme to justify the relief sought. La Porta v Fretto Enterprises, Inc., 100 A.D.2d 713, 474 N.Y.S.2d 603, 1984 N.Y. App. Div. LEXIS 17699 (N.Y. App. Div. 3d Dep't 1984).

It was error to grant third-party defendants' motion for a trial preference, where the court had vacated a note of issue that had been filed, and had struck the case from the calendar, and where no new note of issue placing the case upon the calendar had ever been served or filed. Merchants Nat'l Bank & Trust Co. v Cargian, 101 A.D.2d 702, 476 N.Y.S.2d 43, 1984 N.Y. App. Div. LEXIS 18262 (N.Y. App. Div. 4th Dep't 1984).

Plaintiffs' speculative assertion that defendant would not survive the trial date if the case were heard in the usual order, unsupported by medical opinion or testimony, did not entitle plaintiffs to

an accelerated trial date under CPLR § 3403(a)(3). Ocera v Solomon, 110 A.D.2d 628, 487 N.Y.S.2d 117, 1985 N.Y. App. Div. LEXIS 48525 (N.Y. App. Div. 2d Dep't 1985).

Personal injury plaintiff was not entitled to special preference under CLS CPLR § 3403, although otherwise entitled because of his age, where no note of issue was served with or before notice of motion seeking preference. Tacinelli v Liberty Lines, 123 A.D.2d 756, 507 N.Y.S.2d 230, 1986 N.Y. App. Div. LEXIS 60898 (N.Y. App. Div. 2d Dep't 1986).

In most counties of New York, including Albany County, a motion for a preference may be made only at trial term, not at special term. Vinal v New York C. R. Co., 48 Misc. 2d 362, 264 N.Y.S.2d 824, 1965 N.Y. Misc. LEXIS 1335 (N.Y. Sup. Ct. 1965).

In an action to recover for personal injuries and property damage commenced following a collision involving a motor vehicle owned and driven by plaintiff and an automobile owned by defendant Port Authority and driven by another party, wherein defendant denied operation and control, plaintiff is not entitled to an accelerated trial on the issue of operation and control; CPLR 603 merely empowers the court, in a case reached for trial, to order a separate trial of any claim or issue, and CPLR 2218 merely authorizes the court to direct the trial of an issue of fact before determining a motion. Moreover, a trial preference in the interests of justice, pursuant to CPLR 3403 (subd [a], par 3) would be violative of the intendment of the statute. McKenzie v Port Authority of New York & New Jersey, 101 Misc. 2d 8, 420 N.Y.S.2d 556, 1979 N.Y. Misc. LEXIS 2618 (N.Y. Civ. Ct. 1979).

In appropriate circumstances, motion for trial preference may be entertained even though note of issue has not been filed. Hillborn v Frank, 132 Misc. 2d 726, 504 N.Y.S.2d 993, 1986 N.Y. Misc. LEXIS 2768 (N.Y. Sup. Ct. 1986).

Court granted defendant’s motion to vacate plaintiff’s note of issue and certificate of readiness, and denied defendant’s cross-motion to obtain special age preference without prejudice, where no discovery had been conducted and no preliminary conference had been held. Muller v Brailofsky, 179 Misc. 2d 634, 685 N.Y.S.2d 884, 1999 N.Y. Misc. LEXIS 24 (N.Y. Sup. Ct. 1999).

Motion court's decision to deny on the eve of trial a motion to disqualify a law firm from representing one of the parties because of a claimed conflict of interest was a proper exercise of the court's discretion because granting the eve-of-trial motion to disqualify would have caused severe prejudice to the party who was represented by the law firm as that party was 80 years old and entitled to a special trial preference and was represented by the firm for most of the time that the litigation had been pending for four years. Potters v 71st St. Lexington Corp., 8 A.D.3d 198, 779 N.Y.S.2d 473, 2004 N.Y. App. Div. LEXIS 8861 (N.Y. App. Div. 1st Dep't 2004).

2. Necessity of stenographic transcript

Trial preference granted pursuant to this rule must be vacated where there was no record or transcript showing the facts upon which the court granted the preference. Jones v Otis Elevator Co., 24 A.D.2d 451, 260 N.Y.S.2d 558, 1965 N.Y. App. Div. LEXIS 4018 (N.Y. App. Div. 2d Dep't 1965).

In the absence of a stenographic transcript of the pretrial hearing or other appropriate proof showing the facts upon which the court below exercised its discretion, the granting of a preference pursuant to CPLR 3403 cannot be sustained. Janicek v Koke, 26 A.D.2d 643, 272 N.Y.S.2d 465, 1966 N.Y. App. Div. LEXIS 3686 (N.Y. App. Div. 2d Dep't 1966).

Grant of a preference in trial will be vacated in the absence of a stenographic transcript of the pretrial hearing or other appropriate record showing a factual basis therefor. Rizzo v Groeber, 29 A.D.2d 987, 289 N.Y.S.2d 1023, 1968 N.Y. App. Div. LEXIS 4210 (N.Y. App. Div. 2d Dep't 1968).

3. —Delay in making motion

Unexplained delay of two years in moving for a preference unaccompanied by a proper affidavit of merits warrants denial of application for preference. Nazario v Martha Cab Corp., 41 Misc. 2d 1010, 247 N.Y.S.2d 6, 1964 N.Y. Misc. LEXIS 2079 (N.Y. Sup. Ct. 1964).

In the absence of an explanation for the delay, a motion for a preference was denied without prejudice to renewal upon filing proper papers, where the notice of motion had not been served until six months after the notice of trial. Smyth v Dow Realty, Inc., 45 Misc. 2d 379, 256 N.Y.S.2d 685, 1965 N.Y. Misc. LEXIS 2236 (N.Y. Dist. Ct. 1965).

B. Preferred Cases

4. Generally

In view of changed circumstances and in the interests of justice, an order was warranted in granting plaintiff's motion for a preference in trial, and was not precluded by a prior order, which had not been predicated upon the same state of facts and had expressly been made "without prejudice to renewal of the motion." Braman v Auserehl & Son Contracting Corp., 22 A.D.2d 887, 255 N.Y.S.2d 313, 1964 N.Y. App. Div. LEXIS 2629 (N.Y. App. Div. 2d Dep't 1964).

The granting of a preference constituted an improvident exercise of discretion, where there was an inadequate showing of destitution and plaintiff's alleged incapacity was not such as to render him incapable of engaging in any form of income producing activity. Stentella v Levin, 25 A.D.2d 779, 269 N.Y.S.2d 529, 1966 N.Y. App. Div. LEXIS 4496 (N.Y. App. Div. 2d Dep't 1966).

It was an improvident exercise of discretion to grant a trial preference based upon a hospital record and X-ray report dated nine months earlier, without any medical proof that the present physical condition of the plaintiff is the same and that by reason thereof plaintiff is unable to gain employment. Lucas v Gorey, 26 A.D.2d 557, 271 N.Y.S.2d 446, 1966 N.Y. App. Div. LEXIS 4017 (N.Y. App. Div. 2d Dep't 1966).

The mere refusal on the part of defendant's counsel to accede to the court's specific view of a settlement is insufficient to support an affirmative finding of bad faith and a consequent preference and advancement of the trial date, even where the tactics of defendant were open to

reproach for delay. Chomski v Alston Cab Co., 32 A.D.2d 627, 299 N.Y.S.2d 896, 1969 N.Y. App. Div. LEXIS 3980 (N.Y. App. Div. 1st Dep't 1969).

A preference granted on the ground that plaintiffs as attorneys who alleged they had a cause of action in libel were entitled to a speedy determination since their professional reputation was involved was an abuse of discretion. Marks v Freidus, 32 A.D.2d 964, 303 N.Y.S.2d 21, 1969 N.Y. App. Div. LEXIS 3351 (N.Y. App. Div. 2d Dep't 1969).

A court cannot make a finding of bad faith under rule relating to trial preferences simply because court disagrees with amount which defendant has offered for settlement. Turturro v Stevens, 58 A.D.2d 601, 395 N.Y.S.2d 239, 1977 N.Y. App. Div. LEXIS 12647 (N.Y. App. Div. 2d Dep't 1977).

Party to action is not automatically entitled to multiple trial preferences pursuant to grounds set forth in CLS CPLR § 3403, as courts have traditionally emphasized exercise of restraint in granting trial preferences, and efficient and orderly calendaring of cases would be virtually impossible if multiple preferences were permitted; however, prompt trial of action which presents extraordinary or exceptional circumstances may be facilitated under Uniform Rules for New York State Trial Courts to further ends of justice. Green v Vogel, 144 A.D.2d 66, 537 N.Y.S.2d 180, 1989 N.Y. App. Div. LEXIS 5505 (N.Y. App. Div. 2d Dep't 1989).

An action to recover possession of a 1967 Ferrari automobile from an automobile restoration business, which vehicle was subject to an artisan’s lien, would be granted a special trial preference since the possession of a valuable and “unique” Ferrari motor vehicle requires in the interests of justice a speedy trial. Giordano v Grand Prix Sales, Service Restoration Co., 113 Misc. 2d 395, 449 N.Y.S.2d 127, 1982 N.Y. Misc. LEXIS 3308 (N.Y. Sup. Ct. 1982).

In an action for medical malpractice, plaintiff’s motion pursuant to CPLR § 3403 for a special trial preference would be granted, since the language of statute is mandatory; however, the action would not be entitled to a medical malpractice hearing “without undue delay” and thereafter to “immediate trial,” the action would be reached for the panel hearing in its regular order, and

upon completion of the medical malpractice panel hearing, the action would not be entitled to an immediate trial, but would have preference over other cases receiving only a general preference. Doyle v Vashi, 122 Misc. 2d 899, 472 N.Y.S.2d 294, 1984 N.Y. Misc. LEXIS 2911 (N.Y. Sup. Ct. 1984).

Plaintiff who was improperly convicted of murder and incarcerated for 6 ½ years was entitled to a trial preference under N.Y. C.P.L.R. § 3403(a)(3) in his action against a city and police officers alleging civil rights violations as plaintiff had lost sufficient job training based on his incarceration when he was 19 and was diagnosed with multiple sclerosis while in prison; additionally, 12 years had passed since the murder, and witness recollections were impacted. Gonzalez v City of New York, 850 N.Y.S.2d 868, 18 Misc. 3d 968, 239 N.Y.L.J. 23, 2008 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. 2008).

5. State, political subdivisions, boards or officers

Mt. Vernon Housing Authority is neither a state agency nor a political division of the state entitled to a preference of right. Mt. Vernon Housing Authority v American Motorists Ins. Co., 21 A.D.2d 788, 250 N.Y.S.2d 479, 1964 N.Y. App. Div. LEXIS 3635 (N.Y. App. Div. 2d Dep't 1964).

A litigant in the Court of Claims may obtain a trial preference on a proper showing by motion made after issue has been joined in the instances enumerated in CPLR § 3403, but claimant’s motion for a preference would be denied where it was supported only by conclusory allegations. Weiser v State, 123 Misc. 2d 228, 473 N.Y.S.2d 118, 1984 N.Y. Misc. LEXIS 2980 (N.Y. Ct. Cl. 1984).

New York State Dormitory Authority was entitled to trial preference under CLS CPLR § 3403(a)(1) as “board of officers” of state, although it is body corporate and politic separate and distinct from state, since it is also “board” composed entirely of CLS Pub O § 2 state officers, consisting of Commissioner of Education, State Comptroller, Director of Budget and 4 other members appointed by Governor. Dormitory Authority of State v Gruzen Partnership, 154 Misc. 2d 876, 586 N.Y.S.2d 711, 1992 N.Y. Misc. LEXIS 333 (N.Y. Sup. Ct. 1992).

6. Insurance cases

The nature of the issue of the validity of a disclaimer of coverage raised in an application for a stay of arbitration demanded under an uninsured automobile policy endorsement does not call for a trial earlier than the usual issues on the general non-jury calendar of the Supreme Court. Blondo v All City Ins. Co., 56 Misc. 2d 516, 288 N.Y.S.2d 765, 1968 N.Y. Misc. LEXIS 1774 (N.Y. Sup. Ct. 1968).

In a wrongful death action by a New York resident against a nonresident by attachment of defendant's liability insurance policy, plaintiff's application for a trial preference based on her contention that the policy limits would not cover her damages and that she intended to sue in the defendant's home state for a personal judgment for the excess and needed the preference in order to meet the bar of the statute of limitations was denied. Tjepkema v Kenney, 59 Misc. 2d 670, 299 N.Y.S.2d 943, 1969 N.Y. Misc. LEXIS 1603 (N.Y. Sup. Ct. 1969).

Trial preference under CPLR § 3403 was denied insurer in action against insured for fraudulently obtaining proceeds of fire policy where, in light of consequences of insured's invoking his privilege against self-incrimination in civil trial, it was in interest of justice to allow criminal arson charges against insured to be concluded prior to trial of civil action. Pioneer Cooperative Fire Ins. Co. v Hinkle, 73 Misc. 2d 503, 342 N.Y.S.2d 910, 1973 N.Y. Misc. LEXIS 2315 (N.Y. Sup. Ct. 1973).

7. Personal injury cases, generally

There need be no relation between the negligence of defendant and plaintiff's illness, which will prevent her from living the normal period of time for the action to be reached in its regular order for plaintiff to be entitled to a preference. Rosenbaum v Dornhage Realty Corp., 22 A.D.2d 772, 254 N.Y.S.2d 78, 1964 N.Y. App. Div. LEXIS 2769 (N.Y. App. Div. 1st Dep't 1964).

To justify a preference in a personal injury case under ¶ 3 of subd (a) of this section there must be a persuasive showing of destitution or probability of death, and fact that a property damage action brought in another state, arising out of the same accident, might go to judgment before a personal injury action in New York could be tried, to the detriment of the New York plaintiff, is insufficient to justify preference. Rothschild v Carolina Coach Co., 23 A.D.2d 729, 258 N.Y.S.2d 49, 1965 N.Y. App. Div. LEXIS 4506 (N.Y. App. Div. 1st Dep't 1965).

A clear case of liability does not warrant a preference. Binninger v Grillo (1967, 1st Dept) 28 App Div 2d 1100, 284 NYS2d 189, holding that theremedy is motion for summary judgment.

Plaintiffs in personal injury action were not entitled to preference where family had adequate income to take care of reasonable current living expenses and it did not then in fact appear that lack of funds would deprive injured wife from receiving proper medical care and attention. Martinkovic v Chrysler Leasing Corp., 29 A.D.2d 636, 286 N.Y.S.2d 195, 1968 N.Y. App. Div. LEXIS 4845 (N.Y. App. Div. 1st Dep't 1968).

Plaintiffs were entitled to a general preference under Rule 9 of the Supreme Court Rules for New York and Bronx Counties in personal injury action where one of plaintiffs was 58 years old, alleged special damages in excess of $2800, and other damages which might arguably justify recovery in excess of $10,000, the jurisdictional limit of the Civil Court. Martin v Suarez, 30 A.D.2d 947, 293 N.Y.S.2d 950, 1968 N.Y. App. Div. LEXIS 3227 (N.Y. App. Div. 1st Dep't 1968).

No higher standard of medical proof should be required on an application for general preference in a personal injury action than is required on a trial. Kennedy v Cronin, 33 A.D.2d 564, 305 N.Y.S.2d 671, 1969 N.Y. App. Div. LEXIS 3152 (N.Y. App. Div. 2d Dep't 1969).

In an action to recover damages for personal injuries, trial preference granted in view of peculiar circumstances presented in the case and the interests of justice. Kirilov v Angelich, 33 A.D.2d 572, 305 N.Y.S.2d 681, 1969 N.Y. App. Div. LEXIS 3090 (N.Y. App. Div. 2d Dep't 1969).

In action for personal injuries, in view of the extent of the claimed special damages and of the fact that such claim was uncontroverted, and that the jurisdictional monetary limitation of the

Civil Court of the City of New York might preclude adequate recovery by plaintiffs in that court, it was an improvident exercise of discretion to deny the application for a preference. Palescandolo v Mangione, 33 A.D.2d 781, 307 N.Y.S.2d 182, 1969 N.Y. App. Div. LEXIS 2670 (N.Y. App. Div. 2d Dep't 1969).

In reversing the lower court and granting the plaintiffs' motion for a general preference, the court said that neither a conflict between medical experts concerning the proximate cause of the plaintiff's diplopia nor a weighing of the evidence concerning that issue was relevant to whether a general preference should be granted. Napolitano v Alterman, 35 A.D.2d 670, 314 N.Y.S.2d 902, 1970 N.Y. App. Div. LEXIS 3911 (N.Y. App. Div. 2d Dep't 1970).

Plaintiff who suffered permanent 12 ½ % loss of use of left arm and who suffered loss of earnings of $3,120 should have been granted a general preference, where fiscal loss and nature and extent of disability and functional loss claimed could reasonably warrant an evaluation in excess of the monetary jurisdiction of New York City Civil Court. Miller v A Cleaning Contractors, 42 A.D.2d 910, 347 N.Y.S.2d 732, 1973 N.Y. App. Div. LEXIS 3542 (N.Y. App. Div. 2d Dep't 1973).

Plaintiff's motion for general preference in their negligence action to recover damages for personal injuries should have been granted where undisputed injuries were comminuted intra-articular fracture of distal left radius and left ulna, where there was claim that protracted period of healing was involved, with residual stiffness and pain, likely to be of permanent nature, and where special damages of $1,476 were alleged. Negron v Samuel Feldman Poultry, Inc., 57 A.D.2d 919, 394 N.Y.S.2d 735, 1977 N.Y. App. Div. LEXIS 12164 (N.Y. App. Div. 2d Dep't 1977).

Where plaintiffs established that injuries might warrant recovery, in negligence action, in excess of $10,000 jurisdictional limitation of civil court, it was improvident exercise of discretion to deny plaintiffs' renewal motion for general preference. Jesselli v New York, 59 A.D.2d 755, 398 N.Y.S.2d 701, 1977 N.Y. App. Div. LEXIS 13780 (N.Y. App. Div. 2d Dep't 1977).

In a negligence action to recover damages for personal injuries, in which the plaintiff had previously been granted a general preference, the revocation of the preference by the transfer of the action to the Civil Court could not be upheld where no record was made of the facts upon which the Justice presiding relied in making the transfer, and where he made no statement as to his reasons for such revocation. Amato v Pultman, 79 A.D.2d 1014, 435 N.Y.S.2d 342, 1981 N.Y. App. Div. LEXIS 9919 (N.Y. App. Div. 2d Dep't 1981).

In a personal injury action on behalf of a pedestrian who was struck by a bus, the trial court did not abuse its discretion by granting plaintiff's motion for a preference under CPLR § 3403(a)(3), where plaintiff demonstrated that the injuries sued upon were extremely severe and continuing, and included a psychological illness that was aggravated by the plaintiff's concerns with respect to the litigation. Nold v Troy, 94 A.D.2d 930, 463 N.Y.S.2d 330, 1983 N.Y. App. Div. LEXIS 18380 (N.Y. App. Div. 3d Dep't 1983).

Defendant's motion to strike the case against it from the calendar would be granted, where only four months after the action was begun plaintiff served a statement of readiness and note of issue and placed the case on the trial calendar, where given such a time period plaintiff's statement that the bill of particulars and discovery proceedings had been waived and that there had been a reasonable opportunity to complete pretrial proceedings was at best inaccurate or a wildly optimistic interpretation of the facts, and where, even though by the time of appeal discovery may have been completed, plaintiff would not be allowed to obtain a calendar preference over other similar cases by the premature filing of the inaccurate statement of readiness in violation of the rules of court. 48-48 Associates v Solow, 97 A.D.2d 742, 469 N.Y.S.2d 11, 1983 N.Y. App. Div. LEXIS 20478 (N.Y. App. Div. 1st Dep't 1983).

Special trial preference should have been granted in personal injury action where plaintiff, who until date of accident had been gainfully employed, had become unable to work due to her injuries, had exhausted all her "no-fault" benefits, and was currently destitute and on welfare, especially since action was already 4 years old and no prejudice to defendants would result.

Thompson v New York, 140 A.D.2d 232, 528 N.Y.S.2d 77, 1988 N.Y. App. Div. LEXIS 5378 (N.Y. App. Div. 1st Dep't 1988).

In personal injury action, plaintiff was not entitled to trial preference in interests of justice pursuant to CLS CPLR § 3403(a)(3) on alleged representations by defendant's counsel that his client was dying of terminal illness since (1) only medical report in record did not indicate any imminent danger of death, and (2) even if defendant were to die before trial, CLS CPLR § 4519 would not bar plaintiff's trial testimony as to what happened on her visits to defendant's medical office, since defendant's version had been memorialized in pretrial deposition. Bernard v Hyman, 155 A.D.2d 403, 547 N.Y.S.2d 78, 1989 N.Y. App. Div. LEXIS 13938 (N.Y. App. Div. 2d Dep't 1989).

It was not improvident exercise of discretion for Supreme Court to grant trial preference to plaintiff in products liability action in view of psychiatric evidence and plaintiff's destitute condition. Srajer v Vanity Fair Mills, Inc., 159 A.D.2d 286, 552 N.Y.S.2d 291, 1990 N.Y. App. Div. LEXIS 2670 (N.Y. App. Div. 1st Dep't 1990).

In personal injury action, it was not abuse of discretion for court to grant special trial preference in interest of justice in light of fact that plaintiff was rendered paraplegic by her injuries and was receiving Social Security disability benefits to help meet her financial burdens. Kellman v 45 Tiemann Assocs., 213 A.D.2d 151, 622 N.Y.S.2d 958, 1995 N.Y. App. Div. LEXIS 2334 (N.Y. App. Div. 1st Dep't), aff'd, 87 N.Y.2d 871, 638 N.Y.S.2d 937, 662 N.E.2d 255, 1995 N.Y. LEXIS 4743 (N.Y. 1995).

Personal injury plaintiff was not entitled to special trial preference in interests of justice under CLS CPLR § 3403(a)(3) where he failed to prove that his injury would worsen over time or that he was indigent, unable to work, or obligated as single parent to support dependent. Personal injury plaintiff's amended motion for special trial preference was properly denied where it sought same relief as original motion, it was not served with supporting affidavits or documents, and no excuse was given for failure to timely submit those items. Betke v Archwood Estates, Inc., 266

A.D.2d 328, 698 N.Y.S.2d 172, 1999 N.Y. App. Div. LEXIS 11521 (N.Y. App. Div. 2d Dep't 1999).

Motion to vacate preference directed after a pretrial hearing was denied where 71-year-old plaintiff sustained serious permanent injuries and on the facts a recovery appeared to be certain. Spitalnick v Goldman, 55 Misc. 2d 283, 284 N.Y.S.2d 829, 1967 N.Y. Misc. LEXIS 1416 (N.Y. Sup. Ct.), aff'd, 28 A.D.2d 1211, 285 N.Y.S.2d 1010, 1967 N.Y. App. Div. LEXIS 8082 (N.Y. App. Div. 1st Dep't 1967).

A plaintiff in a personal injury action would be entitled to a special preference to recover damages for injuries sustained in an auto accident where, as a result of the injuries sustained, the plaintiff allegedly became very depressed with suicidal tendencies, since suicidal tendencies are a great a threat to life and constitute serious physical injuries which may cause death, and the probability of death before trial is a recognizable ground for granting a special preference under CPLR 3403. Strong v Baldwin, 112 Misc. 2d 242, 446 N.Y.S.2d 900, 1982 N.Y. Misc. LEXIS 3123 (N.Y. Sup. Ct. 1982).

8. —Medical malpractice

In a medical malpractice action, Trial Term improperly denied a motion pursuant to CPLR § 3403 for lack of showing of special circumstances warranting such relief since the statute is not construed as requiring any such showing and since under this statute, an action to recover damages for medical malpractice is entitled to preference. Hladik v Ellis Hospital, 90 A.D.2d 584, 456 N.Y.S.2d 129, 1982 N.Y. App. Div. LEXIS 18648 (N.Y. App. Div. 3d Dep't 1982).

Medical malpractice hearing under CLS CPLR § 3403 and CLS Jud § 148-a was not warranted in action for injuries sustained when plaintiff fell from examining table while giving blood sample, since contention that physician was negligent in failing to secure plaintiff to table alleged only simple negligence and did not allege malpractice which would require expert opinion. Rogers v Schuyler, 158 A.D.2d 318, 551 N.Y.S.2d 5, 1990 N.Y. App. Div. LEXIS 1230 (N.Y. App. Div. 1st Dep't 1990).

Podiatric malpractice action should be treated in same manner as medical malpractice action for purposes of being given special preference for trial pursuant to CLS CPLR 3403. Hillborn v Frank, 132 Misc. 2d 726, 504 N.Y.S.2d 993, 1986 N.Y. Misc. LEXIS 2768 (N.Y. Sup. Ct. 1986).

Plaintiff's motion for partial summary judgment and for trial preference to determine damages pursuant to CLS CPLR § 3403(a)(5) would be granted in medical malpractice action where defendant doctor had obtained consent to perform elective sterilization procedure on plaintiff Medicaid patient while she was in labor and on medication, since both federal and New York State Health Department regulations, 18 NYCRR 505.13(e)(1)(i) and (v) and (2), specified that absent premature delivery or emergency abdominal surgery, neither of which was involved, any consent to elective sterilization must be given at least 30 but no more than 180 days before procedure is performed. Hare v Parsley, 157 Misc. 2d 277, 596 N.Y.S.2d 313, 1993 N.Y. Misc. LEXIS 113 (N.Y. Sup. Ct. 1993).

Where a patient's medical malpractice action was based on claims that a medical center's malpractice caused her to deteriorate from a healthy, self-sufficient, and gainfully employed woman to a destitute, paralyzed invalid, where the center delayed discovery and discovery was still ongoing three years after the patient's catastrophic injuries, and where the request for a trial preference was based on the patient's desire to recover the necessary funds for the patient to be cared for at home rather than in a nursing home, the court exercised its discretion and determined, in the interest of justice under N.Y. C.P.L.R. 3403(a)(3), that the patient would be granted an additional time preference, even though the patient already had a trial preference to recover damages for medical malpractice under N.Y. C.P.L.R. 3403(a)(5). Peck v Brookdale Hosp. Med. Ctr., 787 N.Y.S.2d 859, 7 Misc. 3d 571, 233 N.Y.L.J. 16, 2005 N.Y. Misc. LEXIS 39 (N.Y. Sup. Ct. 2005).

9. Husband and wife

In an action by a wife and her husband to recover damages for personal injuries and derivative medical expenses, record examined on the merits and no abuse of discretion found in the denial

of a calendar preference. Arena v New York, 23 A.D.2d 847, 259 N.Y.S.2d 259, 1965 N.Y. App. Div. LEXIS 4309 (N.Y. App. Div. 2d Dep't 1965).

Wife's motion for a trial preference for husband's action seeking to impress a trust on real property held solely in the name of the wife should properly have been made at the trial term rather than at special term so as to enable the trial justice to maintain control over the calendar. Defendant wife's bare assertions in motion for trial preference that she was "in need of the moneys to be collected from the sale of the subject property" and that the husband's action seeking to impress a trust on real property held solely in the name of the wife was "inextricably tied to a separate action for an annulment or divorce sought by the defendant" were not sufficient, in absence of clear and explicit statement of facts, to justify the grant of a trial preference. Altieri v Altieri, 48 A.D.2d 994, 369 N.Y.S.2d 562, 1975 N.Y. App. Div. LEXIS 10300 (N.Y. App. Div. 3d Dep't 1975).

Direction that divorce case be tried 10 days after service of note of issue and certificate of readiness was proper exercise of court's discretion to grant trial preference in interests of justice. Wolf v Wolf, 232 A.D.2d 330, 648 N.Y.S.2d 611, 1996 N.Y. App. Div. LEXIS 11213 (N.Y. App. Div. 1st Dep't 1996).

Special trial preference would be granted in an action by husband to impress a trust on certain funds in savings account, and there was a counterclaim by wife for support, and life savings of parties were tied up during the trial. Healy v Dollar Sav. Bank, 57 Misc. 2d 834, 293 N.Y.S.2d 682, 1968 N.Y. Misc. LEXIS 1338 (N.Y. Sup. Ct. 1968).

10. Poverty and welfare recipients

Where the moving papers of the plaintiff in an action to recover damages for personal injuries established that he had been receiving welfare from the city of New York since October 10, 1966, a date subsequent to the accident from which the cause of action arose, and the papers also alleged that as a result of the accident he had been unable to work since March 3, 1966,

these factors warranted the granting of a preference. Quinones v Hunchak, 28 A.D.2d 997, 283 N.Y.S.2d 447, 1967 N.Y. App. Div. LEXIS 3386 (N.Y. App. Div. 2d Dep't 1967).

Plaintiff's representation that unless he was granted a preference, he could not soon become economically self-sufficient and might become a public charge was not a sufficient compliance with the requirements necessary to grant a preference, where there was no current medical affidavit with respect to plaintiff's present physical condition, nor an affidavit of merit. Pagliocca v M. Grossman Lumber Corp., 29 A.D.2d 520, 285 N.Y.S.2d 905, 1967 N.Y. App. Div. LEXIS 2791 (N.Y. App. Div. 1st Dep't 1967).

The fact that plaintiff received public assistance prior to his accident, and that there was no causal relationship between his welfare status and his accident should not deprive him of a trial preference based on indigency. Matheson v Joy-Kar Taxi, Inc., 32 A.D.2d 544, 299 N.Y.S.2d 660, 1969 N.Y. App. Div. LEXIS 4247 (N.Y. App. Div. 2d Dep't 1969).

Where plaintiff as the result of injuries suffered in an accident was unable to work and had become a recipient of welfare, his application for a special preference should have been granted. Beltran v Borstein, 32 A.D.2d 954, 303 N.Y.S.2d 9, 1969 N.Y. App. Div. LEXIS 3328 (N.Y. App. Div. 2d Dep't 1969).

Special preference will be granted in a negligence action in "interests of justice" upon showing of indigency by plaintiff; there is no requirement that plaintiff show causal connection between indigency and injuries sustained in accident which resulted in action. Biengardo v Ter Bush, 54 A.D.2d 570, 387 N.Y.S.2d 133, 1976 N.Y. App. Div. LEXIS 13904 (N.Y. App. Div. 2d Dep't 1976).

In a negligence action, plaintiff's submission of lien filed against him by county commissioner of social services in amount of $707.01 for injuries sustained did not, in and of itself, establish that such plaintiff was currently on welfare rolls, and thus additional requirement of affidavit in support of claimed indigency of plaintiff, who had moved for special preference and who to obtain such preference did not have to show causal connection between indigency and injuries,

was within sound discretion of the court. Biengardo v Ter Bush, 54 A.D.2d 570, 387 N.Y.S.2d 133, 1976 N.Y. App. Div. LEXIS 13904 (N.Y. App. Div. 2d Dep't 1976).

In an action to recover damages by a person who suffered the loss of his leg after being struck by a subway train owned and operated by defendant municipality, an application by plaintiff for a trial preference was improperly denied where, at the time of the accident, the injured party was a self-employed cab driver who, prior to that time, had been employed as a taxi driver on a commission basis, and where at the time of the application the injured party was destitute, unable to work, and a recipient of public assistance. Sabater v New York City Transit Authority, 102 A.D.2d 804, 477 N.Y.S.2d 165, 1984 N.Y. App. Div. LEXIS 18965 (N.Y. App. Div. 1st Dep't 1984).

Personal injury plaintiff’s application for trial preference should have been granted where it was undisputed that he was receiving Supplemental Security Income benefits and food stamps owing to his indigency. Hoyt v Kazel, 265 A.D.2d 527, 697 N.Y.S.2d 135, 1999 N.Y. App. Div. LEXIS 10842 (N.Y. App. Div. 2d Dep't 1999).

That plaintiff was on home relief prior to accident does not entitle him to a special preference on ground that he is a public charge. Nazario v Martha Cab Corp., 41 Misc. 2d 1010, 247 N.Y.S.2d 6, 1964 N.Y. Misc. LEXIS 2079 (N.Y. Sup. Ct. 1964).

It is an established rule that where a person is on relief, he is entitled to a preference in the trial of a tort action on the grounds of destitution. Harvin v Chiusano, 52 Misc. 2d 836, 276 N.Y.S.2d 701, 1967 N.Y. Misc. LEXIS 1866 (N.Y. Sup. Ct. 1967).

There is no fixed rule which allows a preference per se because a party is receiving welfare assistance. Nor does the old age of the plaintiff alone warrant the court in exercising in its discretion to grant a preference. There must be an unequivocal showing that plaintiff will not survive the normal calendar delay. Plaintiff was not entitled to a preference because she was being treated at the expense of the county and had executed an assignment of any recovery which she might gain to the Social Services Department. Smith v Schnabel, 61 Misc. 2d 628,

307 N.Y.S.2d 557, 1969 N.Y. Misc. LEXIS 1223 (N.Y. Sup. Ct. 1969), aff'd, 34 A.D.2d 603, 308 N.Y.S.2d 502, 1970 N.Y. App. Div. LEXIS 5348 (N.Y. App. Div. 3d Dep't 1970).

If plaintiff in podiatric malpractice is entitled to preference in interest of justice based upon destitution, plaintiff is also entitled to preference for malpractice panel hearing. Hillborn v Frank, 132 Misc. 2d 726, 504 N.Y.S.2d 993, 1986 N.Y. Misc. LEXIS 2768 (N.Y. Sup. Ct. 1986).

11. Old age and infirmity

Eighty-one-year-old plaintiff entitled to preference where physician’s affidavit unequivocally states that she is suffering from arteriosclerosis with varicose veins, has a history of myocardial infarction, and his opinion that she will not live the normal period of time for the case to be reached in its regular order. Rosenbaum v Dornhage Realty Corp., 22 A.D.2d 772, 254 N.Y.S.2d 78, 1964 N.Y. App. Div. LEXIS 2769 (N.Y. App. Div. 1st Dep't 1964).

On the basis of medical proof submitted, the trial court properly exercised its discretion in denying plaintiff’s application for a preference in trial. Gilmour v Manhattan Center, Inc., 23 A.D.2d 782, 259 N.Y.S.2d 234, 1965 N.Y. App. Div. LEXIS 4402 (N.Y. App. Div. 2d Dep't 1965).

A preference will not be granted in the absence of facts showing that death is imminent, or that the plaintiff will not live until the time of trial, or that plaintiff is otherwise entitled to a preference in trial pursuant to paragraph 3 of subd (a) of this section. Schapira v Beth Israel Hospital, 24 A.D.2d 503, 261 N.Y.S.2d 558, 1965 N.Y. App. Div. LEXIS 3904 (N.Y. App. Div. 2d Dep't 1965).

Trial preference should have been granted 70-year-old plaintiff where the uncontroverted opinion of her physician was that she would not survive the waiting period caused by the calendar delay in Kings County. Soto v Maschler, 24 A.D.2d 893, 264 N.Y.S.2d 770, 1965 N.Y. App. Div. LEXIS 2982 (N.Y. App. Div. 2d Dep't 1965).

The purpose of CPLR 3403(a)(4) is not to give a person over 75 a Supreme Court forum for a Civil Court action but, rather, the purpose is to give such a person a prompt trial in the appropriate court and it must be read to apply to cases which are properly on the Supreme

Court calendar. Rab v Colon, 37 A.D.2d 813, 324 N.Y.S.2d 809, 1971 N.Y. App. Div. LEXIS 3333 (N.Y. App. Div. 1st Dep't 1971).

The nature and extent of the injuries and disabilities claimed to have resulted from the accident were sufficient to warrant a possible evaluation in excess of the jurisdiction of the Civil Court of the City of New York, and in view of the fact that plaintiff was over 75 years of age, she qualified for a special trial preference pursuant to CPLR 3403, subd [a], ¶ 4. Bladt v New York, 38 A.D.2d 954, 331 N.Y.S.2d 496, 1972 N.Y. App. Div. LEXIS 5101 (N.Y. App. Div. 2d Dep't 1972).

Purpose, spirit, and intent of CPLR § 3403, subd a(4) dictated that trial preference be granted in wrongful death action wherein decedent’s 78-year-old mother, who had received her sole support from decedent, and who was the major beneficiary of any possible recovery in wrongful death action under EPTL § 4-1.1 and § 5-4.4, was the real party in interest. Campbell v Kelly, 42 A.D.2d 601, 345 N.Y.S.2d 448, 1973 N.Y. App. Div. LEXIS 4067 (N.Y. App. Div. 2d Dep't 1973).

In an action to foreclose a mortgage, plaintiffs would be entitled to a preference where plaintiff corporation had assigned a portion of the mortgage to its attorney as payment of part of his legal fees, and where the coplaintiff attorney had reached the age of 70 years. Milton Point Realty Co. v Haas, 91 A.D.2d 678, 457 N.Y.S.2d 333, 1982 N.Y. App. Div. LEXIS 19554 (N.Y. App. Div. 2d Dep't 1982).

In an action against a municipality to recover for injuries sustained by a 70-year-old woman in a “slip and fall” accident in which plaintiff filed a supplemental bill alleging additional injuries and expenses caused by the fracture of a device implanted in her hip at a hospital as part of her treatment after the fall, and in which defendant city later commenced a third-party action against the hospital, its staff doctors, and others allegedly responsible for control of the premises where the accident occurred, as well as the manufacturer of the implanted device, denial of the hospital’s motion, in which plaintiff joined by way of a supporting affirmation, to sever the third-party action constituted an improvident exercise of the court’s discretion since, notwithstanding that the city might not be guilty of laches, as a matter of law, in failing to commence its third-party action until five months after receiving notice of plaintiff’s additional injuries or three

months from plaintiff's note of issue and statement of readiness, the delay involved was prejudicial to the injured party, especially in view of her age. Gardner v New York, 102 A.D.2d 800, 477 N.Y.S.2d 159, 1984 N.Y. App. Div. LEXIS 18961 (N.Y. App. Div. 1st Dep't 1984).

Court erred in denying 75-year-old plaintiff's request for trial preference; CLS CPLR § 3403(a)(4), in providing for such preference in any case on application of party who has reached age 70, is mandatory. Tytel v Battery Beer Distribs., 194 A.D.2d 330, 598 N.Y.S.2d 227, 1993 N.Y. App. Div. LEXIS 5523 (N.Y. App. Div. 1st Dep't 1993).

Court improperly denied plaintiffs' motion for trial preference where injured plaintiff's husband, who was over 70 years of age, possessed recognizable cause of action. Borenstein v City of New York, 248 A.D.2d 425, 668 N.Y.S.2d 949, 1998 N.Y. App. Div. LEXIS 2331 (N.Y. App. Div. 2d Dep't 1998).

Claimant against state in eminent domain proceeding was not entitled to trial preference on ground that its president, who was 35 percent stockholder, was 74 years old and in poor health where president did not have cognizable cause of action and was not real party in interest. EFCO-FA Dev. Corp. v State, 266 A.D.2d 338, 698 N.Y.S.2d 53, 1999 N.Y. App. Div. LEXIS 11559 (N.Y. App. Div. 2d Dep't 1999).

Claimant against state in eminent domain proceeding was not entitled to trial preference on ground of financial hardship, absent proof of fiscal condition of claimant corporation. EFCO-FA Dev. Corp. v State, 266 A.D.2d 338, 698 N.Y.S.2d 53, 1999 N.Y. App. Div. LEXIS 11559 (N.Y. App. Div. 2d Dep't 1999).

In light of the 1970 addition of subd a (4) to CPLR 3403 granting a trial preference to parties 75 years of age, CPLR 3101 should be construed to permit plaintiff 75 years of age to perpetuate her testimony solely by reason of her advanced age. Boyo v New York City Transit Authority, 72 Misc. 2d 165, 339 N.Y.S.2d 501, 1972 N.Y. Misc. LEXIS 1266 (N.Y. Sup. Ct. 1972).

Plaintiff husband's motion for a special preference by reason of his having reached the age of 70 years (CPLR 3403, subd [a], par 4) is denied, since the plaintiff wife, who is under the age of

60, is the injured party and the real party in interest, and the husband's cause of action is one for loss of services only. Longo v Equitable Life Assurance Soc., 100 Misc. 2d 606, 420 N.Y.S.2d 123, 1979 N.Y. Misc. LEXIS 2513 (N.Y. Sup. Ct. 1979).

In an action in which a wife sought to recover for injuries she suffered in an automobile accident and her 70-year-old husband sought to recover for his loss of his wife's consortium, the husband's motion for a trial preference would be granted pursuant to CPLR § 3403, although his claim was derivative, since he was a real party in interest. Bobowski v Toomey, 108 Misc. 2d 1061, 439 N.Y.S.2d 239, 1981 N.Y. Misc. LEXIS 2334 (N.Y. Sup. Ct. 1981).

Plaintiffs, under age of 70 years, would not be entitled to a special preference pursuant to CPLR § 3403 based on the fact that defendant was over 70 years of age, since that preference is designed to benefit the person who is 70 years or older and is personal to such person. Libow v Brill, 127 Misc. 2d 661, 486 N.Y.S.2d 648, 1985 N.Y. Misc. LEXIS 2929 (N.Y. Sup. Ct. 1985).

Party afflicted with AIDS (Acquired Immune Deficiency Syndrome) was entitled to same early trial preference as any other litigant suffering from severe illness, and special preference would be granted where plaintiff submitted physician's affidavit that he had been diagnosed as having AIDS more than 2 years before, and that he was "in imminent danger of death." Schneider v Flowers, 137 Misc. 2d 512, 521 N.Y.S.2d 647, 1987 N.Y. Misc. LEXIS 2612 (N.Y. Sup. Ct. 1987).

II. Under Former Civil Practice Laws

A. In General

12. Generally

Plaintiffs' motion for an order directing the court clerk to place his personal injury action on the trial calendar in its normal position was denied since the court had the power and the

responsibility to control by preference and classification, through judicious selection, the trial of all cases. Plachte v Bancroft, Inc., 3 A.D.2d 437, 161 N.Y.S.2d 892, 1957 N.Y. App. Div. LEXIS 5701 (N.Y. App. Div. 1st Dep't 1957).

In a matrimonial action where support is sought a preference order is improper where at the time the order preferring the cause of action was made no certificate of readiness had been filed in accordance with the special rule regarding calendar practice. Friedman v Friedman, 5 A.D.2d 864, 171 N.Y.S.2d 695, 1958 N.Y. App. Div. LEXIS 6606 (N.Y. App. Div. 1st Dep't 1958).

There is no authority in the Supreme Court of Orange County to grant a trial preference on oral application, but only on formal motion. Hedges v Warwick-Green-Wood Lake & New York Stages, Inc., 12 A.D.2d 640, 208 N.Y.S.2d 481, 1960 N.Y. App. Div. LEXIS 6501 (N.Y. App. Div. 2d Dep't 1960).

An application for a preference will be denied without prejudice to review where statement of readiness is insufficient and plaintiff must show that settlement discussions initiated by either party have terminated unsuccessfully or that plaintiff has made a reasonable effort to have such discussions but was unable to initiate them because of a positive refusal to do so by defendant. Lush v Daniels, 14 Misc. 2d 71, 178 N.Y.S.2d 148, 1958 N.Y. Misc. LEXIS 2712 (N.Y. Sup. Ct. 1958).

In Second Department granting a preference in City Court because a party has refused to waive a jury trial is unwarranted. Klein v National Dye Works, Inc., 17 Misc. 2d 516, 191 N.Y.S.2d 397, 1959 N.Y. Misc. LEXIS 4340 (N.Y. App. Term 1959).

An administratrix may seek and be granted a preference. Marquardt v McLean, 23 Misc. 2d 998, 203 N.Y.S.2d 931, 1960 N.Y. Misc. LEXIS 2740 (N.Y. Sup. Ct. 1960).

13. Application, term to which made

Preference in trial should not be granted until action is properly on calendar after note of issue is duly filed. Roman v Caputo, 278 A.D. 327, 104 N.Y.S.2d 749, 1951 N.Y. App. Div. LEXIS 3802 (N.Y. App. Div. 1951).

Special Term has power to grant preference in trial of action for personal injuries on sufficient showing of indigence and special circumstances to warrant granting of motion in interests of justice, and where motion, properly returnable at Special Term, was referred to Trial Term on request of defendant, he was barred from contending that Trial Term lacked power to grant preference. Hanley v Byrne Bros., Inc., 2 A.D.2d 873, 154 N.Y.S.2d 594, 1956 N.Y. App. Div. LEXIS 4483 (N.Y. App. Div. 2d Dep't 1956).

Where, on the merits, there were sufficient showings of indigence and special circumstances to warrant granting of motion in interests of justice, motion was properly made at Special Term, Part I of Supreme Court, Westchester County which has power to grant motions for preferences under RCP 151(3) of the Rules of Civil Practice and Westchester County Supreme Court Rules, Rule 6, subdivision (a). Hanley v Byrne Bros., Inc., 2 A.D.2d 873, 154 N.Y.S.2d 594, 1956 N.Y. App. Div. LEXIS 4483 (N.Y. App. Div. 2d Dep't 1956).

Special Term for motions may not grant preference for trial at Trial Term, though parties so stipulate. Wicks v Wolcott, 107 N.Y.S.2d 931, 200 Misc. 621, 1951 N.Y. Misc. LEXIS 2447 (N.Y. Sup. Ct. 1951).

A motion for preference under RCP 151 must be made at Trial Term, and not at Special Term. Brown v Upfold, 123 N.Y.S.2d 342, 204 Misc. 416, 1953 N.Y. Misc. LEXIS 1971 (N.Y. Sup. Ct. 1953).

Plaintiff was not precluded from obtaining preference merely because she had not sought it at opening of or during term for which case had been noticed. Marquardt v McLean, 23 Misc. 2d 998, 203 N.Y.S.2d 931, 1960 N.Y. Misc. LEXIS 2740 (N.Y. Sup. Ct. 1960).

14. Revocation of preference

Where the parties had proceeded on the basis that the action was preferred, the revocation of the preference when the case was ready for trial was not justified though the grounds for preference had ceased to exist shortly after the preference was granted. Nissenblatt v Doyle, 3 A.D.2d 822, 160 N.Y.S.2d 974, 1957 N.Y. App. Div. LEXIS 5931 (N.Y. App. Div. 1st Dep't 1957).

Where after an action had been granted a preference a different justice revoked the preference but there was no showing of the reason for the revocation and no record of facts relied on in making the revocation, the action must be restored to the ready-jury calendar. Ivory v Widaben Realty Corp., 5 A.D.2d 266, 171 N.Y.S.2d 431, 1958 N.Y. App. Div. LEXIS 6595 (N.Y. App. Div. 1st Dep't 1958).

Where plaintiff’s attorney deliberately withheld from doctor his impartial status upon pretrial examination as to injuries, motion to revoke plaintiff’s preference will be denied where this would constitute undue punishment of the parties rather than of the attorney, even though the court has the power to revoke the Rule 9 calendar preference granted under Kings County Supreme Court Trial Term Rules. Friedman v Linsay, 10 Misc. 2d 849, 176 N.Y.S.2d 424, 1958 N.Y. Misc. LEXIS 3907 (N.Y. Sup. Ct. 1958).

15. Appeals from preference orders

Appellate Division will disturb the discretion exercised by Special Term in passing on preference only in unusual circumstances. Jacobs v Milazzo, 9 A.D.2d 950, 195 N.Y.S.2d 679, 1959 N.Y. App. Div. LEXIS 5260 (N.Y. App. Div. 2d Dep't 1959).

Where defendant, although he had had physical examination of plaintiff by his own physician, failed to submit any papers in opposition to application for preference, and the medical proof submitted by plaintiff was sufficient to warrant preference, denial of preference was held unwarranted exercise of discretion, and was reversed. Jacobs v Milazzo, 9 A.D.2d 950, 195 N.Y.S.2d 679, 1959 N.Y. App. Div. LEXIS 5260 (N.Y. App. Div. 2d Dep't 1959).

B. Grounds For Preference

16. Generally

Preference granted pursuant to RCP 151(3). Sheridan v Salvatore, 284 A.D. 986, 136 N.Y.S.2d 371, 1954 N.Y. App. Div. LEXIS 4315 (N.Y. App. Div. 1954).

Plaintiff, needing only temporary relief, generally has no standing to obtain preference. Di Carpio v Babylon Milk & Cream Co., 143 N.Y.S.2d 38, 208 Misc. 80, 1955 N.Y. Misc. LEXIS 3595 (N.Y. Sup. Ct. 1955).

Former deputy sheriff was not entitled to preference in his action against sheriff to recover monies he allegedly had been compelled to pay following discovery of shortage in accounts of under-sheriff’s office merely because there was an indictment for trial pending against him involving the same monies. Hazlett v Bullis, 25 Misc. 2d 1001, 202 N.Y.S.2d 545, 1960 N.Y. Misc. LEXIS 2696 (N.Y. County Ct. 1960), rev'd, 12 A.D.2d 784, 209 N.Y.S.2d 601, 1961 N.Y. App. Div. LEXIS 13441 (N.Y. App. Div. 2d Dep't 1961).

17. State, political subdivisions, boards, or officers

In action by laborer for personal injuries received in demolishing building owned by State on land owned by City of New York, defendant, where after joinder of issue plaintiff filed claim against State in Court of Claims, which is still pending, granting of preference to plaintiff was improvident exercise of discretion. Rodman v New York, 285 A.D. 1166, 140 N.Y.S.2d 391, 1955 N.Y. App. Div. LEXIS 7027 (N.Y. App. Div. 1955).

In action to recover damages for wrongful death and conscious pain and suffering, the court affirmed an order which granted a motion by the public administrator for a preference since the public administrator prosecuted the action in his official capacity within the meaning of this section. In re Ringblom's Estate, 3 A.D.2d 941, 164 N.Y.S.2d 996, 1957 N.Y. App. Div. LEXIS 5306 (N.Y. App. Div. 2d Dep't 1957).

Commissioners of such fund, suing as subrogees of employee for negligent injuries by third party, were entitled to preference as state “board” within subd. 1. Commissioners of State Ins. Fund v Dinowitz, 39 N.Y.S.2d 34, 179 Misc. 278, 1942 N.Y. Misc. LEXIS 2289 (N.Y. Sup. Ct. 1942).

State Insurance Fund commissioners, suing as statutory assignee of cause of action of injured employee carrying workmen’s compensation insurance, was preferred in trial, though employee had no right of preference. Commissioners of State Ins. Fund v Statland, 45 N.Y.S.2d 517, 181 Misc. 117, 1943 N.Y. Misc. LEXIS 2651 (N.Y. Sup. Ct. 1943).

That early trial would save claimant $7000 in costs of an appeal, which then might be unnecessary, is insufficient to prefer cause over others and to prejudice of state. Case would be placed at head of calendar for next term. Ellis v State, 18 Misc. 2d 528, 191 N.Y.S.2d 195, 1959 N.Y. Misc. LEXIS 2965 (N.Y. Ct. Cl. 1959).

18. Discretion

Where record does not show what cause of action was or whether order was granted as of right or discretion, order was reversed. McCarthy v Great Lakes Towing Co., 275 A.D. 888, 90 N.Y.S.2d 714, 1949 N.Y. App. Div. LEXIS 4888 (N.Y. App. Div. 1949).

Discretion in granting preference, will be exercised only on sufficient showing. Braver v Davis, 277 A.D. 879, 97 N.Y.S.2d 766, 1950 N.Y. App. Div. LEXIS 3706 (N.Y. App. Div. 1950).

Order granting preference for trial is discretionary, and will be upheld unless abuse of discretion is shown. Gladstone v Killian, 278 A.D. 736, 103 N.Y.S.2d 38, 1951 N.Y. App. Div. LEXIS 4521 (N.Y. App. Div. 1951).

In action for personal injuries, where there was sufficient showing of indigence and special circumstances to warrant granting preference in interests of justice, denial of motion was abuse of discretion. Cohen v King Toys & Stationery Co., 284 A.D. 1050, 135 N.Y.S.2d 688, 1954 N.Y. App. Div. LEXIS 4533 (N.Y. App. Div. 1954).

In action for malicious prosecution, where plaintiff is gainfully employed at salary of $100 per week, it was abuse of discretion to grant him a preference because he had incurred great expense and indebtedness by confinement of his wife for mental illness in private institutions. Balestrero v Prudential Ins. Co., 285 A.D. 835, 137 N.Y.S.2d 134, 1955 N.Y. App. Div. LEXIS 5740 (N.Y. App. Div. 1955).

Insufficient showing of destitution or indigence did not warrant exercise of discretion in favor of granting plaintiff preference in action for personal injuries. Hamill v New York State Gas & Electric Co., 1 A.D.2d 1020, 151 N.Y.S.2d 442, 1956 N.Y. App. Div. LEXIS 5398 (N.Y. App. Div. 2d Dep't 1956).

Where the papers failed to establish that the interest of justice would be served by an early trial, order for a preference was reversed. Capone v Briante, 4 A.D.2d 838, 167 N.Y.S.2d 436, 1957 N.Y. App. Div. LEXIS 4466 (N.Y. App. Div. 2d Dep't 1957).

The denial of a preference was a proper exercise of discretion where the application had not been made until nine months after issue was joined, and the papers failed to include an affidavit by plaintiff and a showing of a meritorious cause of action. Meyers v New York, 7 A.D.2d 903, 182 N.Y.S.2d 373, 1959 N.Y. App. Div. LEXIS 9893 (N.Y. App. Div. 1st Dep't 1959).

That early trial would save claimant $7000 in costs of an appeal, which then might be unnecessary, is insufficient to prefer cause over others and to prejudice of state. Case would be placed at head of calendar for next term. Ellis v State, 18 Misc. 2d 528, 191 N.Y.S.2d 195, 1959 N.Y. Misc. LEXIS 2965 (N.Y. Ct. Cl. 1959).

19. Non-residence

One plaintiff was denied preference in airplane crash case, where none of plaintiffs nor defendant resided in county of venue. Fuchs v Nation Wide Air Transp., Inc., 274 A.D. 808, 79 N.Y.S.2d 743, 1948 N.Y. App. Div. LEXIS 3455 (N.Y. App. Div. 1948).

Plaintiff who moves from Connecticut into particular county of New York for sole purpose of obtaining quick trial therein was not litigant who was entitled to exercise of court's discretion in granting preference pursuant to RCP 151. Johnson v Lichtenburg, 3 Misc. 2d 353, 150 N.Y.S.2d 902, 1956 N.Y. Misc. LEXIS 2174 (N.Y. Sup. Ct. 1956).

Where plaintiff in action for personal injuries against nonresident defendant failed for 18 months after service of answer to serve note of issue, claiming she could not determine when she would recover completely from her injuries, motion to dismiss for lack of prosecution was granted unless she serve and file note of issue within 5 days and apply for preference under RCP 151(3) at stated term of court. La Fica v Blake, 25 N.Y.S.2d 886, 1941 N.Y. Misc. LEXIS 1512 (N.Y. Sup. Ct. 1941), aff'd, 264 A.D. 945, 36 N.Y.S.2d 800, 1942 N.Y. App. Div. LEXIS 5452 (N.Y. App. Div. 1942).

Plaintiff in tort action, not resident of county of venue, was denied preference. Burton v Long Island R. Co., 89 N.Y.S.2d 583, 1949 N.Y. Misc. LEXIS 2302 (N.Y. Sup. Ct. 1949).

Nonresident of state was granted preference in tort action commenced in New York county, where accident occurred in county and defendants resided there. Yates v John J. Casale, Inc., 89 N.Y.S.2d 583, 1949 N.Y. Misc. LEXIS 2303 (N.Y. Sup. Ct. 1949).

County residence may be required as condition of granting trial preference. Bonnano v National Foundry of New York, Inc., 127 N.Y.S.2d 70, 1953 N.Y. Misc. LEXIS 2522 (N.Y. Sup. Ct. 1953).

20. Service in armed forces

Where defendant soldier could obtain furlough, if preference be granted, and operator of guest car was prospective soldier, preference in trial of automobile collision action was granted. Relman v Wiener, 33 N.Y.S.2d 117 (N.Y. Sup. Ct. 1942).

Imminence of induction of plaintiff's attorney into military service is no basis upon which to predicate order preferring trial of plaintiff's cause of action. Kessler v Chetcuti, 37 N.Y.S.2d 375, 1942 N.Y. Misc. LEXIS 2032 (N.Y. Sup. Ct. 1942).

Plaintiff's application to advance for trial his action for personal injuries, for unexpected furlough from armed forces, was denied where defendants would be prejudiced by their inability to be ready for trial within only few days. Kagan v New York, 44 N.Y.S.2d 893, 1943 N.Y. Misc. LEXIS 2541 (N.Y. Sup. Ct. 1943).

21. Matrimonial actions

In wife's action to annul marriage for husband's physical incapacity, where he showed no sufficient reason to try issues out of regular order, he was denied preference. Kempler v Kempler, 97 N.Y.S.2d 637, 198 Misc. 200, 1950 N.Y. Misc. LEXIS 1681 (N.Y. Sup. Ct. 1950).

Early trial of divorce action will not be granted because of threat of foreign suit where temporary injunction to restrain its prosecution is not warranted. Ratcliffe v Ratcliffe, 126 N.Y.S.2d 870, 1954 N.Y. Misc. LEXIS 1926 (N.Y. Sup. Ct. 1954).

22. Personal injury actions

In action for personal injuries and property damages from negligent operation of automobile, order denying plaintiff's motion for preference under circumstances entitling plaintiff to early trial was reversed. Feuer v Walworth, 265 A.D. 836, 37 N.Y.S.2d 594, 1942 N.Y. App. Div. LEXIS 6040 (N.Y. App. Div. 1942), modified, 266 A.D. 798, 42 N.Y.S.2d 933, 1943 N.Y. App. Div. LEXIS 4529 (N.Y. App. Div. 1943).

Where plaintiff was seriously injured but true nature and permanence of injury could not presently be established, and where defendant conditionally offered to prepay $10,000 as advance payment in partial satisfaction of final judgment or settlement, without obligation to repay, motion for preference was denied. Johnson v Pennsylvania Greyhound Lines, Inc., 282 A.D. 709, 122 N.Y.S.2d 44, 1953 N.Y. App. Div. LEXIS 4756 (N.Y. App. Div. 1953).

Denial of motion for preference was affirmed where affidavits on motion did not show any causal connection between accident and plaintiff's ailments. Teitelbaum v Colin, 2 A.D.2d 879, 156

N.Y.S.2d 232, 1956 N.Y. App. Div. LEXIS 4018 (N.Y. App. Div. 1st Dep't), reh'g denied, 2 A.D.2d 966, 158 N.Y.S.2d 740, 1956 N.Y. App. Div. LEXIS 3625 (N.Y. App. Div. 1st Dep't 1956).

Mere severity of injuries has been held insufficient to warrant a preference. Lehman v Lichtenstein, 12 A.D.2d 502, 207 N.Y.S.2d 42, 1960 N.Y. App. Div. LEXIS 7114 (N.Y. App. Div. 2d Dep't 1960).

In absence of medical proof showing present physical condition or inability to work, complete factual detail showing destitution or indigence, or other unequivocal proof of requisite special circumstances, a preference is not warranted. Smith v Horn Constr. Co., 12 A.D.2d 739, 208 N.Y.S.2d 1003, 1961 N.Y. App. Div. LEXIS 13390 (N.Y. App. Div. 1st Dep't 1961).

Preference should be only most sparingly granted in personal injury action. Healy v Healy, 99 N.Y.S.2d 874, 198 Misc. 688, 1950 N.Y. Misc. LEXIS 2043 (N.Y. Sup. Ct. 1950).

23. Infants

Preference granted action for infant’s personal injuries caused by negligent operation of automobile held improvident exercise of discretion. Lavicka v National Transp. Co., 264 A.D. 785, 34 N.Y.S.2d 892, 1942 N.Y. App. Div. LEXIS 4727 (N.Y. App. Div. 1942).

Indigence of plaintiffs in action by two infants for injuries and by father for expenses, as ground for preference, must be established else granting preference is improvident exercise of discretion. Thomas v Green Bus Lines, Inc., 276 A.D. 922, 94 N.Y.S.2d 489, 1950 N.Y. App. Div. LEXIS 5145 (N.Y. App. Div. 1950).

24. Recipients of compensation awards

Receipt by plaintiff of payments under workmen’s compensation law did not bar preference if other circumstances establish basis therefor. Abraskin v Heilweil, 278 A.D. 858, 104 N.Y.S.2d 498, 1951 N.Y. App. Div. LEXIS 4989 (N.Y. App. Div. 1951).

Plaintiff who is entitled to workmen's compensation and who elects to sue third party for injuries sustained, is not entitled to a preference. Esposito v Star Corrugated Box Co., 47 N.Y.S.2d 202, 1944 N.Y. Misc. LEXIS 1743 (N.Y. Sur. Ct. 1944).

That plaintiff had been awarded compensation and so was not destitute, did not require vacation of preference granted her, innocent bystander, who was hit by bullet fired by policeman. Coopersmith v New York, 92 N.Y.S.2d 684, 1949 N.Y. Misc. LEXIS 2877 (N.Y. Sup. Ct. 1949).

25. Poverty, generally

Destitution of plaintiff in tort action, where showing of destitution is complete, held to require preference. Whithers v News Syndicate Co., 265 A.D. 868, 37 N.Y.S.2d 780, 1942 N.Y. App. Div. LEXIS 6247 (N.Y. App. Div. 1942).

Destitution, or probable death before trial, must be shown; else granting preference was improvident exercise of discretion. O'Callaghan v Brawley, 276 A.D. 908, 94 N.Y.S.2d 16, 1950 N.Y. App. Div. LEXIS 5094 (N.Y. App. Div. 1950).

Granting preference in trial of personal injury case on an insufficient showing in moving papers of plaintiff's indigence was abuse of discretion. Svei v Minck Bros. & Co., 279 A.D. 597, 107 N.Y.S.2d 327, 1951 N.Y. App. Div. LEXIS 3140 (N.Y. App. Div. 1951).

Indigence must be shown to warrant preference in trial of action for wrongful death. Malek v New York, 279 A.D. 929, 110 N.Y.S.2d 818, 1952 N.Y. App. Div. LEXIS 5342 (N.Y. App. Div. 1952).

In action for wrongful death of plaintiff's husband, where plaintiff with her young child depends upon neighbors for clothing and food, has no means or income or relatives, and is unable to work because of necessity of caring for her child, such facts constitute destitution, though she is not on relief. Utnicki v New York, 285 A.D. 1069, 139 N.Y.S.2d 548, 1955 N.Y. App. Div. LEXIS 6694 (N.Y. App. Div. 1955).

Where wife had income of $37 per week, three children, husband unable to work, and their sole assets were surrender value of $459 on insurance policies, insufficient showing to warrant exercise of discretion by granting preference. Di Carpio v Babylon Milk & Cream Co., 285 A.D. 1084, 140 N.Y.S.2d 43, 1955 N.Y. App. Div. LEXIS 6730 (N.Y. App. Div.), reh'g denied, 285 A.D. 1158, 141 N.Y.S.2d 821, 1955 N.Y. App. Div. LEXIS 7000 (N.Y. App. Div. 1955).

In action for personal injuries, where there was insufficient showing of destitution, or probability of death before trial in regular order, to warrant exercise of discretion in favor of granting preference, preference was improperly granted. Mullally v Cornish, 1 A.D.2d 1034, 152 N.Y.S.2d 126, 1956 N.Y. App. Div. LEXIS 5305 (N.Y. App. Div. 2d Dep't 1956).

In action for personal injuries, where destitution and incapacity to work are insufficiently shown, trial preference was improperly granted. Mullally v Cornish, 1 A.D.2d 1034, 152 N.Y.S.2d 126, 1956 N.Y. App. Div. LEXIS 5305 (N.Y. App. Div. 2d Dep't 1956).

Plaintiff in personal injury action, without funds or income, is not compelled to sell his home and automobile and thereafter apply for home relief, before court can award preference. Bernstein v Strammiello, 120 N.Y.S.2d 490, 202 Misc. 823, 1952 N.Y. Misc. LEXIS 2276 (N.Y. Sup. Ct. 1952).

Mere showing that plaintiff is heavily indebted and presently lacks sufficient income to meet current living expenses will not justify granting preference. In action for injury to person and property, where husband is seriously injured and wife sacrifices home life with her children of tender age to help with living expenses and her earnings are insufficient to meet such expenses and were much less than family would be entitled to if on public relief, preference was granted. Di Carpio v Babylon Milk & Cream Co., 143 N.Y.S.2d 38, 208 Misc. 80, 1955 N.Y. Misc. LEXIS 3595 (N.Y. Sup. Ct. 1955).

A preference may be awarded on ground of plaintiff’s destitution even though plaintiff had not sought public assistance. Bernstein v Weinberg, 4 Misc. 2d 72, 155 N.Y.S.2d 904, 1956 N.Y. Misc. LEXIS 1962 (N.Y. Sup. Ct. 1956).

In a condemnation proceeding where the claimants produced evidence establishing physical and financial hardship they were granted a preference. Ham v State, 18 Misc. 2d 356, 185 N.Y.S.2d 940, 1957 N.Y. Misc. LEXIS 2234 (N.Y. Ct. Cl. 1957).

An application for preference must be denied where there is no showing of indigence or imminence of death of the injured plaintiffs and the stated grounds for preference are unsubstantiated and insufficient. Goyco v Bencivengo, 14 Misc. 2d 72, 178 N.Y.S.2d 53, 1958 N.Y. Misc. LEXIS 2673 (N.Y. Sup. Ct. 1958).

Elderly plaintiff was denied preference where there was no persuasive showing of destitution, or probability of death before trial in the regular order. Kerry v American Warm Air Heating Co., 32 Misc. 2d 935, 223 N.Y.S.2d 946, 1961 N.Y. Misc. LEXIS 2230 (N.Y. Sup. Ct. 1961).

Where father of two minor children, both attending college, was seriously injured in automobile accident, and only family income was that of wife’s earnings amounting to $47 per week, which was insufficient for minimum needs of family of four, preference was granted. Haynie v Strong, 143 N.Y.S.2d 98, 1955 N.Y. Misc. LEXIS 3610 (N.Y. Sup. Ct. 1955).

26. Recipients of public relief

Person on relief and therefore public charge is entitled to preference in trial of tort action, and denial thereof held improvident exercise of discretion. Stevens v Bridge Auto Renting Corp., 262 A.D. 872, 28 N.Y.S.2d 326, 1941 N.Y. App. Div. LEXIS 6341 (N.Y. App. Div. 1941).

Public assistance from county did not require preference to be given in trial of plaintiff’s civil action. Ploof v Somers, 277 A.D. 1076, 100 N.Y.S.2d 583, 1950 N.Y. App. Div. LEXIS 4531 (N.Y. App. Div. 1950).

Denial of motion to prefer action for personal injury was improvident exercise of discretion where plaintiff was on relief rolls of City of New York. Rogers v Derris, 281 A.D. 697, 117 N.Y.S.2d 594, 1952 N.Y. App. Div. LEXIS 3284 (N.Y. App. Div. 1952).

Where father of four young children was disabled in automobile collision and received from welfare department $161 per month, he was not indigent or destitute, and so was denied preference in trial of his action for personal injuries. Brown v Upfold, 123 N.Y.S.2d 342, 204 Misc. 416, 1953 N.Y. Misc. LEXIS 1971 (N.Y. Sup. Ct. 1953).

In action by father and infant child injured in automobile accident, where father is unable to work and received public assistance and public interest requires that welfare recipients be removed from relief rolls as soon as reasonably possible, they should be granted preference in their trial, though relief received equals or exceeds father's working wages. Morales v Rosalt Taxi Corp., 147 N.Y.S.2d 847, 208 Misc. 967, 1955 N.Y. Misc. LEXIS 3215 (N.Y. Sup. Ct. 1955).

Where totally disabled veteran applied for home relief, but was relegated for assistance to Veterans Administration and was awarded disability pension based on disability and destitution, he was public charge and entitled to preference in trial. Bacon v Lehman, 1 Misc. 2d 366, 144 N.Y.S.2d 224, 1955 N.Y. Misc. LEXIS 2369 (N.Y. Sup. Ct. 1955).

27. Old age and infirmity

In action for personal injuries it was improvident exercise of discretion to deny preference to plaintiff in view of physical condition of plaintiff who was 76 years old. Hyman v National Transp. Co., 260 A.D. 869, 22 N.Y.S.2d 683, 1940 N.Y. App. Div. LEXIS 5148 (N.Y. App. Div. 1940).

Where it appears without dispute that plaintiff is 75 years of age and, in opinion of her physician, will not survive period within which action will be reached for trial in regular order, preference should be granted. Walsh v Federated Dep't Stores, Inc., 283 A.D. 896, 129 N.Y.S.2d 599, 1954 N.Y. App. Div. LEXIS 5682 (N.Y. App. Div. 1954).

Where injured plaintiff was 73 years old and would not live beyond current year and her physician testified that she would not survive period in which action would be reached for trial in regular order under general preference alone, special preference was granted. Hamilton v H. C.

Bohack Co., 284 A.D. 808, 132 N.Y.S.2d 103, 1954 N.Y. App. Div. LEXIS 3538 (N.Y. App. Div. 1954).

Advanced age alone was held insufficient to warrant preference. Bitterman v 2007 Davidson Ave., 278 A.D. 759, 104 N.Y.S.2d 81, 1951 N.Y. App. Div. LEXIS 4630 (N.Y. App. Div. 1951).

In action for personal injuries where plaintiff was 68 years old and would, in uncontroverted opinion of her physicians, not survive period in which her action will be reached for trial in regular order under general preference pursuant to Rule 9 of Kings County Supreme Court, special preference should be granted. Migliorisi v RKO-Keith-Orpheum Theatres, Inc., 1 A.D.2d 836, 148 N.Y.S.2d 705, 1956 N.Y. App. Div. LEXIS 6384 (N.Y. App. Div. 2d Dep't 1956).

Seriousness of injuries claimed by plaintiff warranted granting of preference under Rule V. Press v Gofferman, 1 A.D.2d 949, 151 N.Y.S.2d 604, 1956 N.Y. App. Div. LEXIS 5698 (N.Y. App. Div. 1st Dep't 1956).

In action for personal injuries, where affidavit of plaintiff’s doctor was uncontroverted that her physical condition will become progressively worse and that her survival until time of trial is not likely, provident exercise of discretion required granting of motion for preference. Mannina v Quilas, 2 A.D.2d 682, 152 N.Y.S.2d 379, 1956 N.Y. App. Div. LEXIS 5135 (N.Y. App. Div. 2d Dep't 1956).

In action for wrongful death, where uncontroverted medical evidence established improbability of survival until time of trial in regular order, preference was proper. Cava v John W. McGrath Corp., 2 A.D.2d 686, 152 N.Y.S.2d 367, 1956 N.Y. App. Div. LEXIS 5078 (N.Y. App. Div. 2d Dep't 1956).

Where plaintiff, eighty-three years of age, made a strong showing supported by an unreserved and unequivocal affidavit by a physician that because of the serious injuries received from the accident, he would not survive for the length of time it would take for his case to come to trial, his motions for a trial preference under RCP 151 be granted. Kuznetz v Neuman, 3 A.D.2d 743, 160 N.Y.S.2d 800, 1957 N.Y. App. Div. LEXIS 6031 (N.Y. App. Div. 1st Dep't 1957).

Where uncontroverted medical evidence established improbability of survival of plaintiff until trial in regular order, preference should be granted. Sugarman v Froom, 8 A.D.2d 857, 190 N.Y.S.2d 717, 1959 N.Y. App. Div. LEXIS 7760 (N.Y. App. Div. 2d Dep't 1959).

73-year-old plaintiff was granted preference where her physician’s affidavit stated that two strokes she suffered since accident were direct result of accident and that her physical condition was rapidly deteriorating. Lieberman v Coral Reef Club, Inc., 11 A.D.2d 678, 202 N.Y.S.2d 392, 1960 N.Y. App. Div. LEXIS 8903 (N.Y. App. Div. 1st Dep't 1960).

Plaintiff, 78 years old, was granted preference on basis of her physician’s uncontroverted affidavit that she had suffered severe and permanent disability and was unlikely to survive waiting period before trial in regular order. Kramer v Leon, 12 A.D.2d 303, 210 N.Y.S.2d 877, 1961 N.Y. App. Div. LEXIS 12523 (N.Y. App. Div. 1st Dep't 1961).

Where plaintiff was 71 years old, destitute, and both legs gone, preference was granted. Conroy v Erie R. Co., 66 N.Y.S.2d 433, 188 Misc. 59, 1946 N.Y. Misc. LEXIS 3074 (N.Y. Sup. Ct. 1946).

Preference will be granted only where facts show that plaintiff will not likely survive trial in its regular order because of age or physical condition. Rinzler v Manufacturers Trust Co., 75 N.Y.S.2d 867, 190 Misc. 710, 1947 N.Y. Misc. LEXIS 3498 (N.Y. Sup. Ct. 1947).

Widow, 78 years old, in poor health, and without money or means except old-age assistance, was granted preference in action for personal injuries. Case preferred for financial and physical disability, age 78, was placed on reserve calendar to permit defendant to enforce demand for particulars and to obtain physical examination. Silverberg v Manzo, 83 N.Y.S.2d 381, 193 Misc. 62, 1948 N.Y. Misc. LEXIS 3356 (N.Y. Sup. Ct. 1948).

Age 60, serious injury, inability to work and reduced finances, did not entitle plaintiff in personal injury action to preference. Healy v Healy, 99 N.Y.S.2d 874, 198 Misc. 688, 1950 N.Y. Misc. LEXIS 2043 (N.Y. Sup. Ct. 1950).

Where plaintiffs, husband and wife, ages 63 and 53 respectively, both seriously injured when struck by automobile, have set forth sufficient facts to show complete or near complete destitution without any hope of earning livelihood, their motion for preference was granted, though they had not applied for relief. Hunter v Marchmon, 1 Misc. 2d 23, 146 N.Y.S.2d 124, 1955 N.Y. Misc. LEXIS 2262 (N.Y. Sup. Ct. 1955).

In personal injury action, preference was denied where movant failed to submit affidavit that it was unlikely he would live until trial, or affidavit of his financial status. Latta v Hockmeyer, 5 Misc. 2d 175, 164 N.Y.S.2d 329, 1956 N.Y. Misc. LEXIS 1257 (N.Y. Sup. Ct. 1956).

Plaintiff's request for preference was granted where evidence disclosed that 81-year-old female plaintiff, who was injured by fall on a public sidewalk, would not survive waiting period. Goldman v New York, 8 Misc. 2d 105, 166 N.Y.S.2d 866, 1957 N.Y. Misc. LEXIS 2515 (N.Y. Sup. Ct. 1957).

Elderly plaintiff was denied preference where there was no persuasive showing of destitution, or probability of death before trial in the regular order. Kerry v American Warm Air Heating Co., 32 Misc. 2d 935, 223 N.Y.S.2d 946, 1961 N.Y. Misc. LEXIS 2230 (N.Y. Sup. Ct. 1961).

In action by brother's siblings against him to rescind deed by them to him, conveying half of their interest inherited from their mother in equal shares, wherein defendant counterclaimed for partition and plaintiffs replied thereto, raising issues as to degree of ownership and contract by brother not to seek partition, plaintiffs were entitled to jury trial thereof and to preference where brother was 63 years old and in poor health, though they invited delay by insisting on jury trial of counterclaim. Tornamme v Tornabe, 153 N.Y.S.2d 823 (N.Y. Sup. Ct. 1956).

28. Imminence of death

Twenty-three-year-old plaintiff was granted a preference where her severe injuries had so aggravated an existing diabetic condition as to make it improbable that she would survive

another two years. De Lisle v Rodriguez, 7 A.D.2d 710, 180 N.Y.S.2d 106, 1958 N.Y. App. Div. LEXIS 4053 (N.Y. App. Div. 1st Dep't 1958).

To obtain a preference on the ground that plaintiff is in imminent danger of death, the physician’s supporting affidavit must be unequivocal and based on credible medical facts. Clarke v Sharp Trading Corp., 19 Misc. 2d 555, 196 N.Y.S.2d 134, 1959 N.Y. Misc. LEXIS 2701 (N.Y. Sup. Ct. 1959)(preference denied in suit where affidavit stated that plaintiff’s previous heart condition had been aggravated by fall and that she might not be alive if action proceeded to at later date).

29. Financial ability of defendant

In action for libel, motion for preference on ground that corporate defendant will liquidate its affairs and have no funds left to pay any judgment if case proceeds to judgment in regular order under normal calendar conditions was denied. Kent v Brooklyn Eagle, Inc., 2 A.D.2d 699, 153 N.Y.S.2d 592, 1956 N.Y. App. Div. LEXIS 4979 (N.Y. App. Div. 2d Dep't 1956).

Preference was granted in personal injury action where plaintiff’s injuries were very serious and permanent and it appeared that plaintiff might not be able to collect judgment if his trial was delayed. Block v Metropolitan Elevator Co., 4 Misc. 2d 1068, 163 N.Y.S.2d 61, 1957 N.Y. Misc. LEXIS 3729 (N.Y. Sup. Ct. 1957).

An application for a preference is not a remedy against wrongful dissipation of funds by a defendant. Goyco v Bencivengo, 14 Misc. 2d 72, 178 N.Y.S.2d 53, 1958 N.Y. Misc. LEXIS 2673 (N.Y. Sup. Ct. 1958).

30. Liquidating foreign corporations

A defendant, in action to appoint receiver to liquidate local assets of foreign corporation, by filing an answer promptly may obtain an early trial of the issues, and is entitled to a preference for a

day certain. Manalich v Compania Cubana De Aviacion, 28 Misc. 2d 136, 209 N.Y.S.2d 225, 1960 N.Y. Misc. LEXIS 2308 (N.Y. Sup. Ct. 1960).

Opinion Notes

Agency Opinions

I. UNDER CPLR

A. In General

1. Obtaining preference generally

The provisions of Public Health Law, § 2805-d and CPLR, §§ 208, 214-a, 4401-a and Rule 3403, dealing with various aspects of medical malpractice actions, do not apply to dentists. 1979 NY Ops Atty Gen October 23 (Formal).

Research References & Practice Aids

Cross References:

This rule referred to in CLS Dom Rel § 249; CLS Men Hyg § 80.09.

Speedy trial; in general, CLS CPL § 30.20.

Speedy trial; time limitations, CLS CPL § 30.30.

Trial preferences in matrimonial action, CLS Dom Rel § 249.

Judicial review, CLS EDPL § 207.

Court proceedings; preferences; venue, CLS Pub A §§ 2420., 2451.

Court proceedings; preferences, CLS Trans § 91.

United Nations development district: court proceedings; preferences; venue, CLS Unconsol Ch 316 § 10-i.

Zoning board of appeals, CLS Vill § 7-712.

Objections to applications for special preference, CLS Unif Civ Rls NYC Civ Ct §§ 208.20., 208.21 [22 NYCRR §§ 208.20, 208.21] .

Special preferences, CLS Unif Civ Rls for Dist Cts § 212.20.

Federal Aspects:

Assignment of cases for trial in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 40.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 3403, Trial Preferences.

1 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 1.03; 2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 36.06.

4 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶1803.05.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 22.01. (Calendar Practice and Trial Preference) Overview.

CPLR Manual § 22.03. Trial preferences.

Matthew Bender's New York Practice Guides:

1 New York Practice Guide: Domestic Relations § 5.05.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 8.04. Filing Note of Issue and Certificate of Readiness.

LexisNexis AnswerGuide New York Civil Litigation § 8.06. Seeking a Trial Preference.

Matthew Bender's New York Checklists:

Checklist for Filing Note of Issue and Certificate of Readiness LexisNexis AnswerGuide New York Civil Litigation § 8.02.

Checklist for Moving for Trial Preference LexisNexis AnswerGuide New York Civil Litigation § 8.05.

Forms:

Bender’s Forms for the Civil Practice Form No. CPLR 3403:1 et seq.

LexisNexis Forms FORM 521-20-59.— Order to Show Cause Why Preference Should Not Be Granted To Public Administrator in Wrongful Death Action.

LexisNexis Forms FORM 380-17:301.— Affidavit in Support of Motion for Preference Because Party Has Reached Seventy Years of Age.

LexisNexis Forms FORM 380-17:302.— Affidavit in Support of Motion for Preference in Action to Recover Damages for Medical Malpractice.

LexisNexis Forms FORM 380-17:303.— Affidavit in Support of Motion for Preference in Personal Injury Action Involving Terminally Ill Party.

LexisNexis Forms FORM 380-17:304.— Affidavit in Opposition to Plaintiff’s Motion for Preference Where Terminal Illness is Alleged.

LexisNexis Forms FORM 380-17:305.— Notice of Motion for Trial Preference.

LexisNexis Forms FORM 380-17:402.— Affidavit in Support of Motion to Reinstate Note of Issue and Restore Case to Trial Calendar.

LexisNexis Forms FORM 521-20-51.— Notice of Motion for Preference by Party Serving Note of Issue.

LexisNexis Forms FORM 521-20-52.— Affidavit in Support of Motion for Preference Where Plaintiff Is Destitute.

LexisNexis Forms FORM 521-20-53.— Affirmation in Support of Motion for Preference Where Plaintiff Is Not Likely to Live.

LexisNexis Forms FORM 521-20-54.— Notice of Motion for a Preference on Grounds That Speedy Trial is Necessary for Plaintiff's Physical and Emotional Recovery.

LexisNexis Forms FORM 521-20-55.— Affirmation of Plaintiff's Attorney in Support of Motion For a Preference on Grounds That Speedy Trial Is Necessary for Plaintiff's Physical and Emotional Recovery.

LexisNexis Forms FORM 521-20-56.— Physician's Affirmation in Support of Motion for Preference on Grounds that Speedy Trial is Necessary for Plaintiff's Physical and Emotional Recovery.

LexisNexis Forms FORM 521-20-57.— Physician's Affirmation in Support of Motion for Preference on Grounds that Speedy Trial Is Necessary for Plaintiff's Physical and Emotional Recovery.

LexisNexis Forms FORM 521-20-58.— Order Granting Preference.

LexisNexis Forms FORM 521-20-60.— Affidavit of Public Administrator in Support of Order to Show Cause Why Preference Should Not Be Granted to Him in Wrongful Death Action.

LexisNexis Forms FORM 521-20-61.— Affidavit in Support of Order to Show Cause for Preference in Wrongful Death Action Where Only Witness, Decedent's Sole Distributee, Must Return to Native Country.

LexisNexis Forms FORM 521-20-62.— Affidavit in Support of Motion for Preference Where Plaintiffs Are Destitute.

LexisNexis Forms FORM 521-20-63.— Order Granting Preference Where Plaintiffs are Destitute.

LexisNexis Forms FORM 521-20-64.— Notice of Motion For Preference Where Party Has Reached Seventy Years of Age.

LexisNexis Forms FORM 521-20-65.— Affidavit in Support of Motion for Preference On Grounds Party Has Reached Seventy Years of Age.

LexisNexis Forms FORM 521-20-66.— Order Granting Preference to Party Who Has Reached Seventy Years of Age.

LexisNexis Forms FORM 521-20-67.— Affidavit of Plaintiff in Support of Motion for Preference in Medical Malpractice Action.

LexisNexis Forms FORM 521-20-68.— Notice of Motion For A Preference In Action For Medical Malpractice.

LexisNexis Forms FORM 521-20-69.— Affidavit of Plaintiff in Support of Motion for a Preference in a Medical Malpractice Action.

2 Medina’s Bostwick Practice Manual (Matthew Bender), Forms 17:101 et seq .(calendar practice; trial preference).

Hierarchy Notes:

NY CLS CPLR, Art. 34

New York Consolidated Laws Service

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