"POTPOURRI OF MISCELLANEOUS MOTIONS"

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I. TRIAL PREFERENCES

A. Types of Trial Preferences:

Trial preferences are governed by CPLR 3403. In pertinent part, CPLR 3403 provides for a preference under the following circumstances:

> "1. an action brought by or against the state. . .
>
> 2. an action where a preference is provided for by statute . . .;
>
> 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."

With respect to actions by or against the state, only the government can request a preference.

Preferences provided for by statute pertain to actions pursuant to Election Law 16-116. *See also* motion to dismiss and summary judgment preferences granted under CPLR 3211(g) and 3212(h), respectively addressing preferences in SLAPP suits (aka Strategic Lawsuits Against Public Participation).

The "interests of justice" preference under CPLR 3403(3) normally pertains to the terminal illness of a party not caused by the defendant's negligence. If the terminal illness was caused by a defendant's negligence, then the preference sought in a personal injury case is under CPLR 3403(6). Terminal illness

applications should be accompanied by a medical affirmation detailing the nature of the terminal illness, whether it was proximately caused by the claimed negligence of defendant, and the likelihood of imminent death.

Anyone who has obtained the age of 70 years is entitled to a trial preference. Therefore, if a spouse possessing a derivative loss of consortium action is 70 years of age, he/she may obtain the trial preference for the entire action, even if the injured spouse is younger. *Borenstein v. City of New York*, 248 A.D.2d 425, 668 N.Y.S.2dd 949 (2d Dep't 1998). When you move for an age-based preference, it would be wise to submit proof of age (i.e., birth certificate) as an exhibit to your affidavit.

Either side in a medical, dental and/or podiatric malpractice action may seek a preference. No preference is granted to a chiropractic, pharmaceutical and or other profession malpractice action (i.e., legal malpractice).

B. <u>How to Apply for a Trial Preference</u>:

Serve a notice of motion for a preference at the time you file your note of issue. If you were not the party filing the note of issue, you then have ten (10) days from the time the note of issue is served upon you to file such a notice of motion. However, these time periods do not apply to situations in which a party has turned seventy (70) years of age or became terminally ill after the note of issue has been filed. Once a party turns 70 or becomes terminally ill, the notice of motion seeking a preference based upon CPLR 3403(3), (4) or (6), can be made without regard to when the note of issue was filed.

> "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."

CPLR 3403(b).

The Uniform Rules of Court also focus on the time in which to object to preference motions. Pursuant to 22 NYCRR §202.25, you have twenty (20) days to put in opposition papers to a preference motion filed with the note of issue or ten (10) days to object to all other preference motions filed subsequent to the filing of the note of issue (i.e., age, terminal illness). Movant then has five (5) days to put in a rebuttal. *See also* CPLR 2103(b)(2)(5 days added to service by mail). If there is no opposition to the motion for a preference, a preference cannot be granted upon default unless the court finds that "the action is entitled to a preference." 22 N.Y.C.R.R. §202.25(c).

The Uniform Rules of Court allow the trial judge, *sua sponte*, to strike a preference that was previously granted by motion if the court finds that a preference should not have been granted. 22 N.Y.C.R.R. §202.25(b).

II. VENUE

A. Generally:

Venue is based "in the county in which one of the parties resided **when it was commenced**. . . ", not where that party resided when the cause of action accrued. CPLR §503 (emphasis added). Therefore, if a party moved prior to the commencement of the action and that move just so happened to be to a favorable forum, then venue in that new county is proper. *See Fortune v. Palomino*, 287 A.D.2d 361, 731 N.Y.S.2d 440 (1st Dep't 2001)(plaintiff moved from Bronx County to Manhattan immediately prior to commencing action; venue proper only in New York County).

Venue is based upon actual residence, not simply on the address stated on a party's motor vehicle operator's license and accident report. *Herrera v. A. Pegasus Limo. Corp.*, 34 A.D.3d 267, 825 N.Y.S.2d 183 (1st Dep't 2006)(license and accident report listed a Bronx address, but defendant actually resided in New Jersey; venue not properly placed in the Bronx).

Rank forum shopping will not be tolerated if it turns out that a party deliberately moved from one county (usually an unfavorable venue) into another simply to obtain a favorable forum (i.e., Bronx County). *See Koschak v. Gates Const. Corp*., 225 A.D.2d 315, 639 N.Y.S.2d 10 (1st Dep't 1996)(attorney owned a building in Bronx County where he moved his injured Staten Island plaintiffs to fraudulently set up residence there prior to commencing action in Bronx County).

The legislature recognized that a party can have more than one residence. "A party resident in more than one county shall be deemed a resident of each such county." CPLR §503(a). Residence is distinguished from domicile. *Antone v. Gen'l Motors Corp*., 64 N.Y.2d 20, 473 N.E.2d 742, 484 N.Y.S.2d 514 (1984). A party can have only one domicile, but more than one residence. *Id*.

> "Although a person may have more than one residence for venue purposes . . . , to consider a place as such, he must stay there for some time and have the bona fide intent to retain the place as a residence for some length of time and with some degree of permanency. . . . Residence requires more stability than a brief sojourn for business, social or recreational activities. . . ."

Katz v. Siroty, 62 A.D.2d 1011, 403 N.Y.S.2d 770 (2d Dep't 1978)(citations omitted).

B. Corporate Venue:

A corporation's venue is based upon where "its principal office is located". CPLR 503(c). Courts look not to where the actual place of business is physically located, but to the listed designation on file with the New York Secretary of State to determine venue. *See Job v. Subaru Leasing Corp*., 30 A.D.3d 159, 817 N.Y.S.2d 9 (1st Dep't 2006); *Marko v. Culinary Instit. of America*, 245 A.D.2d 212, 666 N.Y.S.2d 608 (1st Dep't 1997). *See also*, Bus. Corp. Law §102(a)(10)("'Office of a corporation' means the office the location of which is stated in the certificate of incorporation of a domestic corporation, or in the application for authority of a foreign corporation or an amendment thereof. Such office need not be a place where business activities are conducted by such corporation.").

C. Venue of Representatives:

Venue of an executor or Article 81 guardian is based upon the "county of his appointment as well as the county in which he actually resides". CPLR §503(b).

Class action venue is based upon the county of residence of the named representative member of the class. *See Kidd v. Delta Funding Corp*., 270 A.D.2d 81, 704 N.Y.S.2d 66 (1st Dep't 2000).

D. Stipulated Venue Provisions in Contracts:

The parties can agree, in writing, to venue. CPLR §501.

> "[A] written agreement fixing [the]place of trial, made before an action is commenced, shall be enforced . . . ."

CPLR §501.

E. Objections to Venue:

"[T]he place of trial of an action shall be in the county designated by the plaintiff", unless objected to and granted. CPLR §509. *See Lucchese v. Rotella*, 97 A.D.2d 645, 468 N.Y.S.2d 948 (3d Dep't), *affirmed*,60 N.Y.2d 815, 469 N.Y.S.2d 690, 457 N.E.2d 796 (1983). Therefore, the failure to object to improper venue constitutes a waiver. *Id*.

F. Change of Venue Motion:

A defendant can move to change venue based upon the following grounds:

1. improper designation of county by plaintiff;

2. impartial trial cannot be had in the proper county; or

3. convenience of material witnesses.

CPLR §510. Since the plaintiff originally selected venue, if the venue selected was improper, plaintiff has forfeited the right to select another one. Therefore, only the defendant can move to change venue based upon improper designation of county by plaintiff. *See Llorca v. Manzo*, 254 A.D.2d 396, 679 N.Y.S.2d 83 (2d Dep't 1998). However, either party can move to change venue based upon the lack of "impartial trial" or convenience of material witnesses" exception. *See Kenford Co. v. County of Erie*, 38 A.D.2d 781, 328 N.Y.S.2d 69 (4th Dep't 1972).

With respect to the "convenience of material witness" exception to the venue rules, the court requires the following detailed evidentiary showing to be made in the moving affidavit before a discretionary change will be entertained:

1. set forth the witnesses names, addresses and occupations;

2. set forth the anticipated factual testimony of each witness;

3. state that witness is willing to testify; and

4. show how the witness would be inconvenienced if venue were not changed.

See O'Brien v. Vassar Bros. Hosp., 207 A.D.2d 169, 622 N.Y.S.2d 284 (2d Dep't 1994). Not necessary to have sworn affidavits from the witnesses themselves. Simply need a sworn affidavit stating what the witnesses have indicated they will testify to rather than an affidavit from the witness him/herself. *See Soufan v. Argo Pneumatic Co., Inc.*, 170 A.D.2d 289, 566 N.Y.S.2d 17 (1st Dep't 1991).

Motion based upon improper venue chosen by plaintiff (CPLR §510(1)), must be preceeded by a demand to change venue to a proper county named by the defendant. That demand is served by defendant either prior to service of the answer or it must accompany the answer. CPLR §511(a) and (b). Failure to demand that plaintiff consent to change venue will defeat defendant's motion to change venue.

Fifteen (15) days after such a demand has been made, defendant may move to change venue. That motion can be returnable in the county specified by the defendant, unless plaintiff within five (5) days of service of the demand, "serves an affidavit showing either that the county specified by the defendant [in its demand] is not proper or that the county designated by [plaintiff] is proper." CPLR §511(b). If plaintiff serves such an affidavit within five (5) days of defendant's demand, defendant must make its motion returnable in the venue originally selected by plaintiff.

G. Inconvenient Forum:

> "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action."

CPLR 327. The burden lies with the defendant to persuade the court that the case would best be tried in a jurisdiction outside of New York. Although no one factor is controlling, a defendant must show the following: (1) burden on New York courts to retain the case; (2) potential hardship to defendant if case is kept in New York; (3) availability of another forum that would not only be more convenient to try the case but that the judicial system in that other forum is equipped to hear and render a fair verdict in such a case; (4) residency of the parties (i.e., both parties are nonresidents) and (5) where the cause of action arose (i.e., it arose in a foreign jurisdiction). See *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478-84, 478 N.Y.S.2d 597, 599-602, 467 N.E.2d 245, 247-50 (1984), *cert. denied,* 469 U.S. 1108, 105 S.Ct. 783, 83 L.Ed.2d 778 (1985).

H. Removal to Federal Court based upon Diversity Jurisdiction:

If it turns out that the citizenship of the parties differs (i.e., New Jersey vs. New York citizen) and the amount in controversy exceeds $75,000.00 (28 U.S.C. §1332(a)), then the defendant may want to consider removing the action to federal court, pursuant to 28 U.S.C. §1441.

1) In removal under diversity jurisdiction, none of the defendants can be a citizen of the state in which the state court action was originally brought. 28 U.S.C. §1441(b).
2) In removal under federal question jurisdiction based upon a cause of action arising under the Constitution or federal law or treaty, the entire case, including non-removable causes of action, may be removed. 28 U.S.C. §1441(c).

PROCEDURE FOR FEDERAL REMOVAL

a. Defendant has 30 days from service of the state court pleadings in which to file a notice of removal with the federal district court.[1] 28 U.S.C. §1446. No court order or any permission from any party is required to remove a proper case to federal court. Removal takes place immediately upon filing the notice of removal with the federal court. File

[1] Similar to hand filing of the Summons, Complaint and Civil Docket Sheet, the Notice of Removal must be hand filed with the Clerk of the U.S. District Court. Thereafter, all other filings must be done electronically.

notice of removal along with a Civil Cover Sheet and pay the $350.00 filing fee. 28 U.S.C. §1446 states, in pertinent part, the following:

i. Notice of Removal must contain a "short and plain statement of the grounds for removal" (i.e., diversity jurisdiction based upon New Jersey plaintiff suing New York defendant);
ii. Copies of all pleadings and orders served upon defendant in state court action must be attached to the notice.
iii. Defendant must sign notice of removal, pursuant to Rule 11, FRCP.

28 U.S.C. §1446.

b. After notice of removal is filed with the federal district court and a docket number purchased, defendant simply files the notice of removal with the state court and serves all other parties with a copy. Once that is done, the state court is powerless to do anything further on the removed action, unless it is subsequently remanded back to state court. 28 U.S.C. §1446(d).
c. If removal jurisdiction based on diversity, the notice of removal must state the following:
    i. States of citizenship, residence and address of each party, whether or not yet served;
    ii. State of incorporation of a corporate party and its principal place of business; and
    iii. Date upon which each party was served with process.

    Local Civil Rule 81.1(a).
d. Within 20 days of filing the notice of removal, the removing defendant must file with the district court clerk a copy of all records and proceedings in the state court. Local Civil Rule 81.1(b).
e. If at the time of removal, the defendant has not answered, defendant has the longer of 20 days from date of service or 5 days from removal to answer or move against the complaint. Rule 81(c), FRCP.
f. **CAVEAT**: Plaintiff has 10 days from service of notice of removal to file Rule 38, FRCP, demand for jury trial. If demand not filed in 10 day period, trial by jury waived. Rule 81(c), FRCP.

III. ARBITRATION AWARDS

(a) To collect upon a favorable award in arbitration, you must convert it to a judgment. In order to accomplish this, you have one (1) year in which to bring on a special proceeding to have the court confirm the award. CPLR §7510. If

your adversary brings on a special proceeding to vacate or modify the award, it is not necessary to cross-move to confirm, because "denial of a motion to vacate or modify, [the court] shall confirm the award." CPLR §7511(e).

Once an award has been confirmed by the court, then judgment can be entered upon it. CPLR §7514. Once this is done, you may then proceed to file a proposed judgment along with an affirmation in support and a copy of the decision confirming the award with the court. If everything is in order, the court should sign your proposed judgment, thereby transforming it into an actual judgment.

(b) A motion to vacate or modify an arbitration award must be made within 90-days after delivery. CPLR §7511.

Grounds to vacate: fraud, partiality of the arbitrator, arbitrator exceeded his power, failure to abide by Article 75 of the CPLR. CPLR §7511(b)(1). If you were not served with a notice to arbitrate and you did not participate in the arbitration process and an award was entered against you, you may seek to vacate the award on the ground that a valid arbitration agreement was not made or complied with or the claim was barred by the applicable statute of limitations. You can also claim that your rights were prejudiced by fraud, partiality, etcetera. CPLR §7511(b)(2).

Modification of Award: An award can be modified without having to be vacated if it simply involves a miscalculation of figures or a mistake in the description of a person or property referred to in the award. CPLR §7511(c). A party can apply directly to the arbitrator to modify the award upon notice to all other parties made within 20-days after delivery of the award (CPLR §7509) or by a special proceeding filed within 90-days of delivery of the award (CPLR §7511(a) and (c)). Only the court has the power to vacate an award; the arbitrator can only modify his award pursuant to CPLR §7509 and must do so within 30-days of such application.

IV. WITHDRAWAL FROM EMPLOYMENT AS ATTORNEY

1) DR 2-110. [22 NYCRR § 1200.15]

> "A. In General. 1. If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.
>
> 2. Even when withdrawal is otherwise permitted or required under DR 2-110 [1200.15] (A)(1), (B) or (C), a lawyer shall not withdraw from employment until the lawyer has taken steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of

other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules.

3. A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

B. Mandatory Withdrawal. A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

1. The lawyer knows or it is obvious that the client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

2. The lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule.

3. The lawyer's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

4. The lawyer is discharged by his or her client.

C. Permissive Withdrawal. Except as stated in DR 2-110 [1200.15] (A), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

1. The client:

a. Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

b. Persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

c. Insists that the lawyer pursue a course of conduct which is illegal or prohibited under the Disciplinary Rules.

d. By other conduct renders it unreasonably difficult for the lawyer to carry out employment effectively.

e. Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct which is contrary to the judgment and advice of the lawyer but

not prohibited under the Disciplinary Rules.

f. Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

g. Has used the lawyer's services to perpetrate a crime or fraud.

2. The lawyer's continued employment is likely to result in a violation of a Disciplinary Rule.

3. The lawyer's inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

4. The lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively.

5. The lawyer's client knowingly and freely assents to termination of the employment.

6. The lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal."

DR 2-110 (22 NYCRR §1200.15).

2) CPLR §321(b)

"1. Unless the party is a person specified in section 1201 [guardian *ad litem* for infant or Article 81 guardian for an alleged incapacitated person], an attorney of record may be changed by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party. Notice of such change of attorney shall be given to the attorneys for all parties in the action or, if a party appears without an attorney, to the party.

2. An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.

CPLR §321(b). Therefore, if you are seeking to withdraw as the attorney for a client, you must focus on both the Disciplinary Rules as well as CPLR §321(b). If you consent to the substitution, a change of attorney form can be filed with the court. However, if there is no in-coming attorney to replace you and your relationship with your client has deteriorated to such an extent that you can no longer represent him/her, then you must move, by order to show cause to be

relieved as his/her counsel. CPLR §321(b); *see also*, 22 NYCRR §1200.15. Remember, once you formally appear as the attorney of record, you are not free to drop the client. You must seek permission from the court. It is also a good idea in your retainer statement to use language to the effect that you are being retained, "subject to your investigation". This language will allow you to drop the case prior to any formal appearance without fear of being in breach of contract.