

Columbia Law School

From the Selected Works of Hon. Gerald Lebovits

February, 2011

Drafting NY Civil-Litigation Documents: Part 5—Special Proceedings

Gerald Lebovits



Available at: https://works.bepress.com/gerald_lebovits/193/

FEBRUARY 2011

VOL. 83 | NO. 2

NEW YORK STATE BAR ASSOCIATION

Journal



Requiem for a GP

The End of an Era

by Gary Munneke

The solo/small firm issue



Drafting New York Civil-Litigation Documents: Part V — Pleadings in Special Proceedings

The *Legal Writer* continues with techniques on writing pleadings. In earlier issues, the *Legal Writer* discussed pleading techniques specific to plenary actions. The *Legal Writer* now discusses general requirements applicable to special proceedings.

Special Proceeding: Overview

Unlike a plenary action, a special proceeding is a relatively fast and inexpensive way to secure your client's rights. Like a plenary action, a special proceeding ends with a court's issuing a judgment. CPLR Article 4 and other statutes authorize special proceedings. As important as CPLR 3013 is to the complaint, so, too, is it applicable in special proceedings. If an authorizing statute provides a pleading instruction, follow it. Otherwise, comply with the CPLR's liberal pleading requirements.

Special proceedings include "the proceeding to settle an infant's claim, the proceeding by an attaching plaintiff against a garnishee to compel the garnishee to deliver property to the levying sheriff, and the several supplied for the enforcement of a money judgment."¹ Other special proceedings include Article 78 CPLR proceedings and proceedings to test the arbitrability of a dispute or the validity of an arbitration award.² Another special proceeding is a landlord-tenant dispute to recover rent or repossession or both;³ it's also known as a summary proceeding to recover possession of real property.⁴ An election dispute, especially a pre-election dispute that must be resolved quickly, may also be

commenced as a special proceeding.⁵ Special proceedings are further permitted when you're seeking to destroy or confine a dangerous dog or when you're seeking to declare a person an incapacitated person and appoint a guardian for that person.⁶

In a special proceeding, the moving party is known as the "petitioner,"⁷ the equivalent of a plaintiff in plenary actions. The proceeding is brought against the "respondent," the equivalent of a defendant in plenary actions.⁸ The petitioner initiates the proceeding by filing a petition, which serves the same function as a complaint. For drafting purposes, the petition must comply with the CPLR's complaint requirements.⁹ The petitioner must also attach and serve a notice of petition along with the petition.¹⁰ Like a defendant in a plenary action, the respondent either files a pre-answer motion or an answer.

A petition identifies the parties, sets out the factual basis of the claim, and prays for a legal remedy. In special proceedings, you may attach affidavits and exhibits to the petition. This is unlike the procedure in commencing an action, in which a complaint is all you need. Affidavits and exhibits close any gap that might exist in a petition; they provide more detail than the petition alone. A petitioner brings a special proceeding by filing a petition with the court clerk. The notice of petition states the basis for the special proceeding, the time and place of the hearing on the petition, and "enumerates the supporting affidavits that accompany the petition."¹¹ The notice of petition is the counterpart of a summons in a

plenary action.¹² The notice of petition must have a return date and a place for the proceeding. The return date may be changed after a judge has been assigned the case. But don't include a fictional return date and don't leave the date blank. Doing so might be a jurisdictional defect.¹³ Check with the clerk in your county about this procedure.

A respondent's response to the petition is the answer, as in an action. An answer is required only when an adverse party exists.¹⁴ Some special proceedings have no adverse party; this situation is similar to a party's making an *ex parte* motion in an action. An answer may contain counterclaims. If multiple respondents exist, your answer may contain cross-claims. A reply is required to a counterclaim, as it is in an action. Answer a cross-claim only if the pleading demands one.¹⁵ In an action, court leave is required if you're seeking to reply to an answer that contains no counterclaim. In a special proceeding, you may reply to new matter in an answer even though the answer contains no counterclaim.¹⁶

Special proceedings may also be brought by order to show cause.

Except by leave of court, joinder, interpleader, third-party practice, and intervention are forbidden in a special proceeding.¹⁷ Intervention is a procedure in which an outsider can become a party to a case on the outsider's own initiative;¹⁸ intervention is available in actions and in special proceedings. For more information on joinder, interpleader, and third-party practice, con-

CONTINUED ON PAGE 54

sult earlier *Legal Writer* columns in this multi-series article on pleadings.

Expedition is the goal of special proceedings. Motion practice in special proceedings is rarer than in plenary actions. A respondent may move to dismiss, for example, on the basis of jurisdiction. In lieu of a motion, a respondent may assert lack of jurisdic-

Expedition is the goal of special proceedings.

tion as a defense in the answer and supply proof of it in a supporting affidavit.¹⁹ A motion may prove helpful when it would obviate the need for an answer, such as threshold defenses like jurisdiction, statute of limitations, and *res judicata*.²⁰

Disclosure in special proceedings is available only by leave of court. Notices to admit²¹ are available, however, without leave of court.

A bill of particulars, which is only an amplification of the pleadings and is not a form of disclosure, is less needed in a special proceeding than in a plenary action. The pleadings should already be amplified by the affidavits attached to the petition.

Article 78 Proceedings

CPLR 7803 provides the scope of Article 78 proceedings. Article 78 proceedings are used to review administrative decisions. The party bringing the Article 78 proceeding is called the petitioner; the petitioner is one who has been aggrieved by the administrative result. Under CPLR 7802(a), the respondent — the party against whom the proceeding has been brought — “includes every court, tribunal, board, [public or private] corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article.”

Article 78 proceedings are sometimes brought against justices, judges, referees, and judicial hearing officers. Unless a court orders it, a judicial

respondent need not appear in the Article 78 proceeding; the results of the Article 78 proceeding, however, bind the judicial respondent. A judicial respondent who appears may be represented by the attorney general under Public Officers Law § 17(2)(b).

The statute of limitations in Article 78 proceedings is four months. Consult CPLR 217(1) to determine when the four-month period runs.

Pleadings in Article 78 proceedings must be verified. Another pleading nuance is that a “reply is mandatory not only when the respondent’s answer contains a counterclaim, but also when there is ‘new matter in the answer or where the accuracy of proceedings annexed to the answer is disputed.’”²² Thus, submit a reply if you’re the petitioner and you’re disputing the “correctness of the administrative record.”²³

As in special proceedings, you may bring an Article 78 proceeding by order to show cause; the order to show cause is in lieu of a notice of petition.

The case gets assigned to a judge once you’ve made a request for judicial intervention (RJI).

A respondent must give the court the record if it doesn’t have it already. Usually the record is voluminous. The respondent must file a certified transcript of the record of the proceedings with the answer.

If a respondent has an objection in point of law to the petition, the respondent has the option to include it as a defense in the answer or to make a motion to dismiss²⁴ based on the objection.²⁵

Article 78 proceedings are brought in Supreme Court. The Supreme Court may transfer the proceedings to the Appellate Division if a “substantial evidence” question arises.²⁶

Article 78 proceedings are usually resolved on the papers. Rarely does an issue of fact warrant a trial. If triable issues are raised, a court will conduct a trial forthwith.²⁷

As in other special proceedings, Article 78 proceedings end in a judgment. The court may grant a judg-

ment to the petitioner for the relief sought. The court may also dismiss the proceeding. The court may further “annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent.”²⁸

Family Court Proceedings

Although the CPLR does not list them as special proceedings, cases started under the Family Court Act (FCA) are just that. Family Court proceedings include juvenile delinquency, custody and visitation, support, paternity, child-protective, adoption, foster-care, permanent termination of parental rights, guardianship, family offenses, and PINS (person in need of supervision) proceedings.

Each type of case under the FCA is different. Consult with the court clerk and the court rules to determine what you need to do before commencing these proceedings. The petition is the pleading that’s common to all Family Court cases.

Summary Proceedings

A summary proceeding is “a category of special proceeding.”²⁹ A summary proceeding refers to a landlord-tenant case in which the landlord seeks dis-possession because the tenant failed to pay rent or because the tenant is holding over after the lease has expired. Real Property Actions and Proceedings Law (RPAPL) Article 7-A and lock-out proceedings and, in New York City, repair (Housing Part, or HP) and harassment proceedings are also summary proceedings. Guidance for non-payment and holdover comes from RPAPL Article 7.

The notice of petition and petition are the two documents necessary to commencing a summary proceeding. The notice of petition must specify the time and place of the hearing; it requires the respondent to answer and assert defenses affirmative or be barred from asserting them later. Check the court rules and the clerk of the court before setting a hearing date.

The essential parts of the notice of petition are (1) the caption; (2) the petitioner's name; (3) the date of verification; (4) the money and other relief sought; (5) the address of the premises sought to be recovered, including the apartment or room number and the county where it is located; (6) the court's address; (7) the date; and (8) the petitioner's (or attorney's) name, address, and telephone number.³⁰ The notice of petition should inform the respondent that an answer is required orally or in writing and must be served and filed with the clerk of the court. It should also provide that the answer may contain a defense or counterclaim. The notice of petition should additionally inform the respondent of the ramifications of not answering or appearing in court, namely, a default judgment followed by warrant to dispossess the respondent. The notice of petition should also inform the respondent that if the respondent fails to comply with an initial deposit or payment order, the court may enter a final judgment against the respondent without holding a trial. The notice should provide that if the respondent fails to make a deposit or payment, the court may conduct an immediate trial on the issues raised in the answer.

In special proceedings, unlike in other contexts, courts might "treat as jurisdictional defects things which in other contexts might prove innocent and ignorable irregularities."³¹ A court may find that a defect in the caption is fatal if the respondent is prejudiced.

RPAPL 741 provides what the petition must contain. Courts will dismiss summary proceedings for defective pleadings. Petitions must contain allegations of the petitioner's and the respondent's interest in the premises and their relationship to one another (a tenant, a sub-tenant, or someone in possession of the property for some other reason); a description of the premises; the facts on which the proceeding is based, including whether a written lease or a verbal agreement exists; and the relief sought, such as a judgment for rent or the fair value of

the use or occupation of the premises for that period.

If you had to provide notice to the respondent before commencing the proceeding, you must state that you fulfilled the notice requirement. In a nonpayment case, for example, the petitioner must allege that it demanded rent in writing or orally in a demand that you've annexed to the petition.

In New York City, the petition must also provide whether the premises are part of a multiple dwelling. If the premises are part of a multiple dwelling, the petition must provide that an "effective registration statement is on file with the office of code enforcement in which the owner has designated a managing agent, a natural person over 21 years of age, to be in control of and responsible for the maintenance

A petition identifies the parties, sets out the factual basis of the claim, and prays for a legal remedy.

and operation of the dwelling."³² The petition should also allege the multiple dwelling registration number, the registered managing agent's name, and either the residence or business address of the managing agent.

The petition must be verified.³³ Generally, the petitioner should verify the petition, unless an authorized representative, attorney, or agent brings the case on the petitioner's behalf.³⁴

The various parts of the notice of petition must identically match the corresponding parts of the petition. Any deviation might result in dismissal. If, for example, you've written "Apartment 2A" in the petition, but "Apartment 3A" in the notice of petition, that might result in dismissal.

Disclosure devices available to parties in an action are not as readily available in summary proceedings. Disclosure is discouraged in most cases. You'll need a court order for disclosure. Motion practice, such as a motion to dismiss or a motion for

summary judgment, is applicable in summary proceedings.

In next issue's column, the *Legal Writer* will continue with techniques on writing pleadings, such as the answer. ■

GERALD LEBOVITS is a New York City Criminal Court judge in New York County and an adjunct professor at St. John's University School of Law and Columbia Law School. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's e-mail address is GLebovits@aol.com.

1. David D. Siegel, *New York Practice* § 547, at 943 (4th ed. 2005).
2. *Id.*
3. RPAPL Article 7.
4. Siegel, *supra* note 1, at § 547, at 943.
5. *Id.*
6. *Id.* at § 547, at 944.
7. CPLR 105(b).
8. *Id.*
9. CPLR 402.
10. CPLR 403(a).
11. Siegel, *supra* note 1, at § 553, at 949.
12. *Id.*
13. *Id.* at § 553, at 952.
14. CPLR 402.
15. Siegel, *supra* note 1, at § 552, at 948–49.
16. *Id.* at § 552, at 949.
17. N.Y. St. B. Ass'n, Committee on Continuing Legal Education, *Practical Skills — How to Commence a Civil Law Suit* 3, 9 (2009).
18. Siegel, *supra* note 1, at § 178, at 307.
19. *Id.* at § 554, at 952.
20. *Id.* at § 554, at 953.
21. CPLR 3123.
22. Siegel, *supra* note 1, at § 567, at 979.
23. *Id.*
24. CPLR 3211(a).
25. CPLR 7804(f).
26. CPLR 7804(g).
27. CPLR 7804(h).
28. CPLR 7806.
29. Siegel, *supra* note 1, at § 571, at 986.
30. For a sample form, see the official notice of petition in the rules of the New York City Civil Court, Uniform Rule 208.42(b).
31. Siegel, *supra* note 1, at § 573, at 991.
32. N.Y. City Civ. Ct. R. 208.42(g)(2).
33. CPLR 3020–3023.
34. RPAPL § 721.