

Legislation Report

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

REPORT NO. 50

May 1, 2003

A. 7885

By: M. of A. Cohen
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to filing of papers to commence actions and proceedings.

LAW AND SECTION REFERRED TO: CPLR 105(e), 304, 305, 1007

**REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE
LAW AND RULES (#22)**

THIS BILL IS DISAPPROVED

This bill would replace the words “clerk” with “county clerk” in CPLR 304, 305(a) and 1007 so as to supposedly provide clarity that papers to commence an action or special proceeding must be filed with the county clerk, not the chief clerk of the supreme court. The bill is introduced at the request of the Office of Court Administration to address “current confusion” in CPLR 304 created by the Court of Appeals in *Mendon Ponds Neighborhood Association v. Dehm*, 98 N.Y.2d 819 (2002). Unfortunately, the bill would codify *Mendon Ponds*, create more, not less confusion, and give legislative imprimatur the very kind of pitfall that the commencement-by-filing system was supposed to eliminate.

In *Mendon Ponds*, a civic association sought to challenge a board of zoning appeals decision through an article 78 proceeding. They obtained an index number from the Monroe County Clerk and then brought their petition and notice of petition to the office of the chief clerk, where it was assigned to a justice and given a return date. These papers, however, were not filed with the County Clerk. When the petition came to be heard, the Court dismissed it finding it had never been properly commenced because the papers had not been lodged with the County Clerk. The decision was upheld by both the Appellate Division and the Court of Appeals. Since by that time the short statute of

limitations applicable to such proceedings had passed, the civic association found itself out of court on this technicality.

CPLR 304 is the cornerstone of the commencement-by-filing system. The essence of that system was to create a method of commencing lawsuits with the certainty that they would not be dismissed on a technicality, thus permitting parties to have their suits addressed on the merits. Prior to commencement by filing, suits were often dismissed because of a technical failure of service. Commencement by filing is designed to allow litigants to safely commence suits without fear that they will later be dismissed on a technicality. See generally, Blair & Aloe, *New Commencement by Filing Law: A Practitioner's Survival Guide*, N.Y.L.J., June 26, 1992, p. 1, col. 1.

Over the years, the commencement by filing system has been amended to underscore this policy. In 1996, the legislature amended CPLR 304 to provide that the initial papers could be delivered to the “clerk of the court” or to any other person designated by the clerk of the court for that purpose. L. 1996, ch. 606 (“Chapter 606”). The purpose of this amendment was to deal with the situation, apparently present in *Mendon Ponds*, where court personnel direct the papers be lodged in some office other than that of the county clerk.

The system was amended several other times. Chapter 476 of the Laws of 1997 overhauled the law to eliminate the requirement that an action not served within 120 days be automatically dismissed. This measure was introduced at the suggestion of OCA to eliminate a pitfall.¹ In 2001, the system was amended to eliminate the requirement that a notice of petition be filed in order to initiate a proceeding since, as was the situation in *Mendon Ponds*, the return date of the petition (an essential feature thereof) is often supplied after the proceeding is commenced. L. 2001, Ch. 473.

In *Mendon Ponds* the Court of Appeals held that because under County Law § 525 the clerk of the supreme court is the county clerk, it was only the county clerk who could receive such papers. In so ruling, however, the court did not give any consideration to the language of Chapter 606 permitting the papers to be delivered to a person designated by the clerk. Since the system in Monroe County at the time was to obtain a return date from the chief clerk, it appears that the petitioner followed the directives of the county clerk, only to find those directives fatally defective.

In view of *Mendon Ponds*, there is no confusion regarding who is the clerk in CPLR 304. The Court of Appeals has made it clear. An amendment to clarify what the Court of Appeals has already made clear is at best unnecessary.

¹See Spencer, Pataki Weighs Bill on CPLR Filing Change, N.Y.J.L.J. 8/25/97 (“We felt meritorious suits should not be dismissed due to glitches in service. . . . [T]he 1992 statute did not entirely accomplish the purpose. In fact, it created no pitfalls for the unwary.”) (quoting George F. Carpinello, Chair, OCA Advisory Committee on Civil Practice).

Mendon Ponds should not be codified; it should be legislatively overruled. First, the Court wholly disregarded the language of CPLR 304 that would permit the papers to be delivered to someone other than the county clerk. Second, the *Mendon Ponds* decision allows a proceeding to be dismissed on a hyper technicality. The civic association in *Mendon Ponds* never was able to have the merits of its dispute heard in court, and such results erode public confidence in the judicial system.

The proposed amendment would also create further problems. Not all proceedings are commenced in courts where the county clerk is the clerk of the court. Certain proceedings, for example, are commenced in the appellate divisions which has its own clerk. See Judiciary Law § 93. Rather than eliminate confusion, the bill, if enacted, would create an entirely new area of confusion.

The problem created by *Mendon Ponds* requires careful study and response. The NYSBA Committee on Civil Practice Law and Rules has appointed a subcommittee to undertake such a study and make appropriate recommendations for remedial legislation. For the reasons stated above, the current proposed measure is not the appropriate response to *Mendon Ponds*.

For the above reasons, this bill is **DISAPPROVED**

Person who prepared the report: Paul H. Aloe, Esq.

Chair of the Committee: Sharon Stern Gerstman, Esq.