

## COMMERCIAL LITIGATION

# New Rule Commercial Division Rule 9-a

By Leo K. Barnes Jr.

A recent amendment to the Commercial Division rules, effective as of Oct. 1, 2018, provides judges, litigants and their counsel with additional fodder to quickly and efficiently resolve *disputed* issues of fact in an effort to circumvent an otherwise lengthy and costly discovery process.

New Commercial Division Rule 9-a entitled “Immediate Trial or Pre-Trial Evidentiary Hearing” provides:

Subject to meet the requirements of CPLR 2218, 3211(c) or 3212(c), parties are encouraged to demonstrate on a motion to the court when a pre-trial evidentiary hearing or immediate trial may be effective in resolving a factual issue sufficient to effect the disposition of a material part of the case. Motions where a hearing or trial on a material factual issue may be particularly useful in disposition of a material part of a case, include, but are not limited to:

- (a) Dispositive motions to dismiss or motions for summary judgment;
- (b) Preliminary injunction motions, including but not limited to those instances where the parties are

willing to consent to the hearing being on the merits;

- (c) Spoliation of evidence motions where the issue of spoliation impacts the ultimate outcome of the action;
- (d) Jurisdictional motions where issues, including application of long arm jurisdiction may be dispositive;
- (e) Statute of limitations motions; and
- (f) Class action certification motions.

In advance of an immediate trial or evidentiary hearing, the parties may request, if necessary, that the court direct limited expedited discovery targeting the factual issue to be tried.

As per the supporting memorandum, the new rule “simply encourages parties to ask the court to exercise its existing authority under the CPLR to conduct pre-trial evidentiary hearings in appropriate circumstances,” and “does not expand, modify, or otherwise affect the court’s existing authority to conduct such hearings.” Indeed, it serves as another avenue to promote the speed and efficiency that is the hallmark of Commercial Division



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practice because, as the supporting memorandum observes:

the failure to employ these provisions — particularly in cases where the disputed issue may be dispositive, such as a statute of limitations defense or a jurisdictional defect — can lead to delay and inefficiency in resolving Commercial Division disputes.

The supporting memorandum likewise highlights that the rule is geared toward early resolution of *disputed* issues of fact that may serve to resolve a significant issue earlier rather than later:

When a lawsuit is commenced in the New York State courts, a defendant may have a defense which could result in immediate resolution of the entire action. An example of such a defense might be the statute of limitations or a jurisdictional defect. *Nevertheless, the court may be unable to adjudicate the defense on the basis of motion papers*

*provided to the court because there is a material issue of fact connected with the defense.* For example, there may be a fact issue as to when the plaintiff discovered or should have discovered the factual basis for its cause of action. Under these circumstances, New York State courts often do not conduct an immediate trial of such fact issues and instead postpone their resolution until the plenary trial. *The result of the failure to resolve the fact issue by conducting an immediate trial sometimes is that a litigation continues for years through extensive discovery and other proceedings until trial where the fact issue is finally adjudicated, and the case is resolved in a way that it might have been years ago.* The new rule which the Advisory Council now proposes is designed to reduce the waste of time and money which such situations create.

The rule is founded upon existing the court’s existing authority to order an immediate hearing on dispositive

(Continued on page 24)

## *Commercial Division Rule 9-a* (Continued from page 5)

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motions pursuant to CPLR 3211(c) and 3212(c) and the less-often cited CPLR 2218:

The court may order that an issue of fact raised on a motion shall be separately tried by the court or a referee. If the issue is triable of right by jury, the court shall give the parties an opportunity to demand a jury trial of such issue. Failure to make such demand within the time limited by the court, or, if no such time is limited, before trial begins, shall be deemed a waiver of the right to trial by jury. An order under this rule shall specify the issue to be tried.

The supporting memorandum references the court's inherent authority to direct that an issue be determined by a court-appointed referee pursuant to CPLR 4001: "[w]hether

the court or a court-appointed referee should conduct an immediate trial depends in large part on the court's assessment of the proof presented by the motion papers." As the Practice Commentaries to CPLR 4001 note, the referee may be tasked to "hear and determine" an issue "that stands as the decision of the court itself;" or "hear and report" wherein the referee will "hear[] the evidence as a judge would but merely report[] the findings to the judge, usually with a recommendation, which the judge can adopt or reject: the report is advisory only, not binding on the court."

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