

LAWYERS WEEKLY

Judge: Lawyers Confused About Business Court

Says Most Common Mistake Is Satisfying Venue

BY JASON M. SCALLY

Attorneys and judges remain somewhat confused over the procedure required to file or transfer cases into the Suffolk Superior Court's business litigation session, according to the presiding justice.

Judge Allan van Gestel told *Lawyers Weekly* that the most common mistake parties make is attempting to bring a case into the session without satisfying the venue requirements.

"I'll look at a complaint and both parties are in Middlesex County," he said. "That's common."

The business litigation session was created last October to provide a specialized court in Boston for the often complex business cases that arise in Suffolk County.

Currently only those cases that satisfy the venue requirements for Suffolk County are allowed in the session.

Although venue and jurisdictional problems arise most frequently, van Gestel said some attorneys and judges also "don't realize it's discretionary to decide whether it fits within the general criteria."

The judge added that some parties are attempting to take advantage of the Business Litigation Session even though they filed cases before the Oct. 2, 2000 starting



PHOTO BY MICHELLE SCHAE

JUDGE ALLEN VAN GESTEL
Hears Suffolk cases only

date for the session.

"I'll see a motion to transfer on a 1998 case," van Gestel noted, "and I suspect what the lawyers are thinking is how we can jump into this session and get a speedy trial."

Judges have also not always followed

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procedure, according to van Gestel.

Although judges must make independent rulings on a party's motion to transfer the case, apparently some judges are sending cases to the session without acting on the motions beforehand, according to van Gestel.

Blueprint For Business

van Gestel recently highlighted the apparent confusion over BLS procedure in a decision denying the transfer of a case.

A party attempted to appeal the decision of a presiding "P Session" judge, who had denied a motion to transfer to the business session.

In denying the transfer, van Gestel wrote, "This court is not an appellate court, nor should it properly reconsider the actions of another justice."

He added that if a judge in a party's original session denies a motion to transfer to the BLS, "then there is no appeal to or right to reconsideration by the presiding justice of the BLS Session."

The two-page decision in *Desolis, et al. v. Bennett-Pickard Co.*, *Lawyers Weekly* No. 12-225-01.

In *Desolis*, van Gestel detailed the proper procedure required for bringing a case into the Business Litigation Session.

The judge emphasized that "if the BLS is a session with venue limited to Suffolk County and, therefore, will only accept cases the venue of which is properly set in Suffolk County."

He also listed the five ways in which a case may be brought to the BLS:

- a plaintiff can file a request with the

Suffolk County Civil Clerk's office using the BLS Civil Action Cover Sheet;

- either party in another session can file a motion before that session's judge, who will make a preliminary ruling;

- a judge in another session by "his/her own determination" can send a case to the BLS for discretionary review by the BLS judge;

- a party in another session may file directly in the business session a motion to transfer, although notice to the presiding judge in the original session should be given the "courtesy of notice because the potential for transfer may affect scheduling and other issues"; and
- the presiding BLS justice can sua sponte order transfer — although "the need ... has since passed and, consequently, the presiding justice is no longer looking to other sessions for cases to fill the BLS docket."

Ultimately, as presiding justice van Gestel said he has the discretion to reject or admit any case into the session.

Procedure 'Evolving'

Some of the procedural errors are understandable, van Gestel acknowledged, since the business session is still less than a year old.

"We have no special set of rules," said van Gestel. "There is some procedure that is still evolving."

Mitchell S. Ross of Boston, who has practiced before the BLS, said he has seen "no more confusion than with any relatively new process."

He believed the standing order issued when the court began gave clear and com-

plete guidelines.

"I have not seen any appreciable confusion about the jurisdiction of the court — perhaps only the venue [issue]."

Ross noted that many attorneys want the business session to encompass "broader scope, at least geographically."

Four Thumbs Up

In the nine months since the inception of the BLS, it has received strong praise from practitioners who have appeared before it.

They point to the focused attention their complex commercial cases have received, and the speediness in which the cases have been processed.

van Gestel and Superior Court Judge Nominie S. Burns, who is also presiding over cases in the session, have been widely praised by business attorneys.

J. Owen Todd of Boston stated that the biggest attraction to the specialized session was that there is an "intellectual judge and experienced litigator — who is very open to discussions and full exploration of the issues — leading up to the session."

He observed that "in a business case, particularly one involving key employees that leave and appear to be violating a non-

complete, you need rapid action or it's gone. You get rapid action with [van Gestel]."

Todd also praised Burns as "very bright, very patient and very experienced."

Ross agreed that with the combination of a judge who has a business background, a fresh caseload without a heavy backlog, and the "federal method of an early case

conference ... means it's handled in as rational a manner as complex litigation can be handled anywhere."

He said the best aspect of the BLS was that van Gestel gives attorneys a solid court date early on without fear of rescheduling or delay.

Kenneth A. Swedor of Boston, Ross' partner, recalled that he recently initiated a declaratory judgment action in the business session because he knew that van Gestel had written a decision on the same subject matter.

"It was very helpful to know that the judge you're going before has issued an opinion on a particular subject and will be acting consistently with it, rather than coming up through a series of judges who might view the law differently," he said.

Joseph L. Kocubes of Boston said the BLS has solved one of the main problems of business litigation — predictability.

"One of the things that a lot of businesses have been clamoring for is predictability," he observed. "In my experience, the timing is absolutely predictable when [van Gestel] gives you a date."

Realizing that the predictability and lack of backlog is partly because the session is still relatively new, Kocubes said the real benefit of the session will

have to be seen in a couple of years. van Gestel has started to caution attorneys who expect to have a quick and painless trial at the BLS.

"It's like a big parking lot full of cars," said the judge about the increasing docket at the BLS. "You're not going to get a speedy trial necessarily."

"We have no special set of rules. There is some procedure that is still evolving."

— Business session presiding justice Allan van Gestel



MITCHELL S. ROSS
Trial attorney says session's guidelines are 'clear'