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CPLR § 320: Unauthorized Appearance by an Attorney Does Not Confer Personal Jurisdiction upon a Defendant

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riety of issues of recent importance in New York law. Among the cases discussed is *People v. Magliato*. In *Magliato*, the New York Court of Appeals rejected a defendant's contention that the defense of justification is available to a person who threatens and actively prepares to use deadly physical force upon an attacker, without first attempting to retreat. The Court of Appeals held, in analyzing both the definition of "deadly physical force" in CPL 10.00(11) and the defense of justification under CPL 35.15(2), that the justification defense is not available when a defendant threatens the use of deadly physical force, despite a lack of intent to actually inflict bodily injury upon the victim.

The Survey also examines the Appellate Division, Second Department decision in *Skyline Agency v. Ambrose Coppotelli, Inc.*, in which CPLR 320 was interpreted. The *Skyline* court held that an unauthorized appearance of an attorney did not confer jurisdiction upon a resident-defendant. The previous New York rule had been that even such unauthorized appearance by counsel conferred jurisdiction upon a defendant, however such judgments in the Second Department now seem to be subject to collateral attack based upon the *Skyline* doctrine.

Finally, *The Survey* addresses the Court of Appeals' recent analysis of municipal corporation liability in tort in *Crosland v. New York City Transit Authority*. The *Crosland* court held that a municipally owned carrier was not immune from liability when its employees failed to summon aid when witnessing an attack upon a passenger.

The members of Volume 60 hope that the analysis of the cases contained in *The Survey* will be of interest to the New York bench and bar.

CIVIL PRACTICE LAW AND RULES

CPLR § 320: Unauthorized appearance by an attorney does not

1957 N.Y. Leg. Doc. No. 6(b) ..... FIRST REP.
1958 N.Y. Leg. Doc. No. 13 ..... SECOND REP.
1959 N.Y. Leg. Doc. No. 17 ..... THIRD REP.
1960 N.Y. Leg. Doc. No. 120 ..... FOURTH REP.
1961 Final Report of the Advisory Committee on Practice and Procedure ..... FINAL REP.

Also valuable are the two joint reports of the Senate Finance Assembly Ways and Means Committee:

1961 N.Y. Leg. Doc. No. 15 ..... FIFTH REP.
1962 N.Y. Leg. Doc. No. 8 ..... SIXTH REP.

confer personal jurisdiction upon a defendant

CPLR 320(b)[1] provides that "an appearance[2] of the defendant is equivalent to personal service of the summons upon him."[3] This provision allows a defendant to waive the requirement of personal service and submit to the court's jurisdiction by voluntarily appearing in the action.[4] The defendant may appear either in person or by counsel.[5] The ancient New York rule has been that even an unauthorized appearance by an attorney made on behalf of a resident-defendant confers personal jurisdiction upon that defendant.[6]

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[1] CPLR 320(b) (McKinney 1976); *see* WK&M § 320.09, at 3-365 (1986). The theory behind this rule is that if a defendant voluntarily participates in an action brought against him, it is not unfair to overlook deficiencies in the court's jurisdiction over him. *See* Gager v. White, 53 N.Y.2d 475, 488, 425 N.E.2d 851 442 N.Y.S.2d 463, 468, *cert. denied*, 454 U.S. 1086 (1981). CPLR 320(b) arose from CPA 237, which provided that "a voluntary general appearance of the defendant is equivalent to personal service upon him."

[2] *See* CPLR 320(a) (McKinney 1976). CPLR 320(a) provides in part: "[t]he defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer." *Id.* Prior to the passage of the CPLR, appearances were differentiated into two categories: special and general. SIEGEL § 109, at 136. The sole purpose of making a special appearance was to object to personal jurisdiction, *see id.*, while a general appearance was a "voluntary submission to the court when the litigation has begun." F. JAMES & G. HAZARD, CIVIL PROCEDURE § 2.24 (3d ed. 1985). The CPLR has abolished this distinction. See CPLR 320, commentary at 292 (McKinney Supp. 1987).

[3] CPLR 320(b) (McKinney 1976).

[4] *Id.* By appearing, the defendant submits himself to the jurisdiction of the court "unless an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer as provided in rule 3211." CPLR 320(b) (McKinney 1976). Rule 3211 is the modern equivalent to a special appearance, governing jurisdictional challenges. *See* CPLR 320, commentary at 292 (McKinney 1987); CPLR 3211(a)(8) (McKinney 1976).

[5] *See* CPLR §321(a) (McKinney 1987).

[6] *See* Ingalls v. Sprague, 10 Wend. 672, 674 (N.Y. 1833); *In Re* Hamilton, 81 Misc. 2d 40, 52, 364 N.Y.S.2d 950, 962 (Sup. Ct. Cattaraugus County 1974); Petker v. Rudolph, 168 Misc. 909, 911, 6 N.Y.S.2d 296, 298 (Sup. Ct. Bronx County 1938), *aff'd*, 258 App. Div. 1040, 17 N.Y.S.2d 1020 (1st Dep't 1940); *see also* Hamilton v. Wright, 37 N.Y. 502, 503 (1868) (appearance by attorney, for either party, may be recognized as valid by adverse party). *But see* Wickham v. Liberty Mut. Ins. Co., 73 App. Div. 2d 742, 743, 423 N.Y.S.2d 273, 274 (3d Dep't 1979) (mem.) (no modern day validity to ancient cases holding unauthorized appearance of attorney conferred personal jurisdiction); *cf.* Murphy v. Ferris, 143 Misc. 297, 298, 256 N.Y.S. 457, 458 (Sup. Ct. N.Y. County 1932) (plaintiff's motion to vacate judgment based on unauthorized appearance of defendant's attorney granted). This rule was first enunciated in Denton v. Noyes, 6 Johns. 296, 300-01 (Sup. Ct. 1810). In *Denton*, an attorney for one of three defendants entered into a stipulation on behalf of all. *Id.* at 297-98. The attorney acted with the knowledge and approval of two of the three defendants. *See id.* The third defendant subsequently moved to vacate the adverse judgment on the ground that he neither knew of, nor authorized, the attorney's action. *See id.* The court denied the motion. It held that the plaintiff and the court are entitled to rely upon the appearance of an attorney, although unauthorized. *See id.* The court, recognizing that its holding might cause in-

Recently, however, in *Skyline Agency v. Ambrose Coppotelli, Inc.*,[7] the Appellate Division, Second Department, held that an unauthorized appearance of an attorney does not submit a resident-defendant to the jurisdiction of the court, thus rendering any judgment based thereon void and subject to collateral attack.[8]

In *Skyline*, a real estate broker sued three defendants to recover a balance allegedly owed under a brokerage agreement.[9] One defendant, Dominic Coppotelli, retained counsel who appeared on behalf of all three defendants,[10] and entered into a stipulation on their behalf that provided for a settlement of $17,000.[11] It further provided that if payment was not made within thirty days, the plaintiff could enter a default judgment against the defendants for $39,000.[12] When payment was not timely made,[13] a default judgment was rendered against all three defendants, and notices to garnishee were issued to debtors of one defendant, Frank Coppotelli.[14] Frank Coppotelli moved to vacate the judgment rendered against him[15] alleging that he had not been served process and that Dominic Coppotelli retained counsel who appeared on Frank's behalf without his knowledge or authorization.[16] Special Term vacated the judgment,[17] holding that since Frank Coppotelli had not been served process, the court lacked jurisdiction over him.[18] Special

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justice to the defendant, held that the defendant may enter the action and defend on the merits or take recourse against the attorney. *See id.* Thus, although the judgment could not be collaterally attacked, it was subject to direct attack. *See id.* Subsequent courts have followed *Denton*, giving a defendant the opportunity to defend on the merits. *See* Brown v. Nichols, 42 N.Y. 26, 31 (1870); General Elec. Credit Corp. v. Salamone, 42 App. Div. 2d 506, 508, 349 N.Y.S.2d 446, 448 (3d Dep't 1973).

Among the reasons advanced for adhering to the *Denton* rule have been: the doctrine of stare decisis, *see* Ingalls v. Sprague, 10 Wend. 672, 674 (N.Y. 1833); the faith a party should be able to bestow in the appearance of an officer of the court, *see* Hamilton v. Wright, 37 N.Y. 502, 504 (1868); the rarity of such an occurrence and the lack of harm that would result from such a decision, *see* Denton v. Noyes, 6 Johns. 296, 304 (Sup. Ct. 1810). *But see* Note, *Unauthorized Appearance*, 25 ST. JOHN'S L. REV. 325, 330 (1950).

[7] 117 App. Div. 2d 135, 502 N.Y.S.2d 479 (2d Dep't 1986).

[8] *Id.* at 150, 502 N.Y.S.2d at 490.

[9] *See id.* at 137, 502 N.Y.S.2d at 482.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 138, 502 N.Y.S.2d at 483.

[16] *Id.*

[17] *Id.* at 139, 502 N.Y.S.2d at 483.

[18] *Id.*

Term stated further that it need not address the issue of whether the attorney was authorized to appear for Frank Coppotelli.[19] The Appellate Division, Second Department, affirmed the judgment but held that the lack of personal service was not dispositive.[20] The court addressed the issue of whether the defendant voluntarily submitted to the court's jurisdiction by appearing in the action,[21] and held that the unauthorized appearance of counsel on behalf of Frank Coppotelli did not constitute an appearance within the meaning of rule 320(b).[22]

Writing for the court, Justice Brown stated that until the time Frank Coppotelli moved to vacate the judgment against him, he was a stranger to the action.[23] Therefore, Justice Brown concluded that the only basis upon which the court could confer personal jurisdiction over the defendant was to follow the ancient New York rule, established in the 1810 case of *Denton v. Noyes*,[24] which allowed a court to overlook jurisdictional defects when an attorney appeared without authorization on behalf of a defendant.[25] The court held that *Denton* was no longer valid under modern concepts of due process.[26]

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[19] *Id.*

[20] *See id.*

[21] *See id.*

[22] *See id.* at 140, 502 N.Y.S.2d at 484.

[23] *See id.* at 149, 502 N.Y.S.2d at 490. The court asserted that "[m]inimum standards of due process require that an assertion of personal jurisdiction over an individual must be predicated upon a proper jurisdictional basis, adequate notice and an opportunity to be heard." *Id.* at 146, 502 N.Y.S.2d at 488 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980); Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314-15 (1950)).

The court held that Special Term correctly found that the plaintiff failed to prove that the defendant was personally served with process. *See* 117 App. Div. 2d at 140, 502 N.Y.S.2d at 484. The Appellate Division noted that even if Frank Coppotelli learned of the action through his brother or obtained a copy of the summons in a way other than by service, the court would not have obtained jurisdiction over him. *Id.* In New York, notice must be given by those methods prescribed in the CPLR. *Id.*; *see* CPLR 308 (McKinney 1976). Therefore, the court concluded that the defendant did not receive notice of the action in a manner that would satisfy due process. *See* 117 App. Div. 2d at 140, 502 N.Y.S.2d at 484.

The court noted that the defendant never appeared in the original lawsuit on his own behalf. *See id.* at 149, 502 N.Y.S.2d at 490. He neither voluntarily chose to be a participant in the action, nor did he surrender his objections to jurisdiction. *See id.* Moreover, the court concluded that the defendant never elected an attorney to act as his agent and appear on his behalf. *See id.* If an agency relationship had been created, the defendant would have been bound to the plaintiff by the acts of the attorney. *See id.* at 148, 502 N.Y.S.2d 489.

[24] 6 Johns. 296 (Sup. Ct. 1810).

[25] *See* 117 App. Div. 2d at 149, 502 N.Y.S.2d at 490 (citing 6 Johns. at 301).

[26] *See id.* The court stated: "[d]ue process is founded upon considerations of fair play

Justice Brown determined that the inherent unfairness of the *Denton* rule could not be counteracted by the remedies which that rule provided.[27] He maintained that allowing a defendant to enter the action and defend on the merits is small consolation to a defendant without a meritorious defense.[28] Additionally, enabling a defendant to bring suit against the attorney merely burdens the defendant with the institution of a second proceeding.[29] Therefore, Justice Brown concluded that the judgment was void and subject to collateral as well as direct attack.[30]

It is submitted that *Skyline* correctly departed from a rule that allowed a party to be deprived of property without due process of law.[31] However, while the decision protects the defendant's right to due process, it leaves plaintiffs without a remedy, since in the instant case and most probably in future cases of this sort, the statute of limitations will have expired by the time the default

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and substantial justice. [citing International Shoe Co. v. Washington, 326 U.S. 310, 316, (1945)]. It is clear to us that the *Denton* rule does not meet this standard." 117 App. Div. 2d at, 502 N.Y.S.2d at 490; *see also* SIEGEL § 115, at 144 (*Denton* is "broadly criticized . . . [and] of doubtful constitutional validity today"); Note, *Unauthorized Appearance*, 25 ST. JOHN'S L. REV. 325, 328-33 (1950) (*Denton* rule inconsistent with principles of jurisdiction and agency). *Skyline* is not the first case to reject *Denton*. In 1979, the Third Department refused to follow the *Denton* rule because it "fail[ed] to see how an attorney's solvency [could] validate an otherwise void judgment entered against a person over whom personal jurisdiction was not obtained." Wickham v. Liberty Mut. Ins. Co., 73 App. Div. 2d 742, 743, 423 N.Y.S.2d 273, 274 (3d Dep't 1979) (mem.)

[27] *See* 117 App. Div. 2d at 149, 502 N.Y.S.2d at 490. The court stated: "we find the alternative remedies available to [the defendant] to be far from adequate." *Id.* at 150, 502 N.Y.S.2d at 490. The stated purpose for the remedies provided in *Denton* was "to prevent possible injury to the defendant and at the same time to save the plaintiffs from harm." 6 Johns. at 302.

[28] *See* 117 App. Div. 2d at 149, 502 N.Y.S.2d at 490; *Denton*, 6 Johns. at 302. Such a remedy would, in effect, allow a plaintiff to obtain jurisdiction without adhering to the dictates of the CPLR.

[29] *See* 117 App. Div. 2d at 149, 502 N.Y.S.2d at 490; *Denton*, 6 Johns. at 301.

[30] *See* 117 App. Div. 2d at 150, 502 N.Y.S.2d at 490.

[31] *See* U.S. CONST. amend. XIV; U.S. CONST. amend. V. The Supreme Court has consistently held that due process requires that a defendant be apprised of the pendency of an action against him before he may be deprived of property. *See, e.g.*, Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) (due process requirements apply regardless of party's ability to protect own interest); Greene v. Lindsay, 456 U.S. 444, 449-51 (1982) (in *in rem* proceeding, parties must be informed of pendency of proceedings which affect their interests and given opportunity to present their objections); Sniadach v. Family Fin. Corp., 395 U.S. 337, 339-40 (1969) (Wisconsin statute allowing pre-judgment garnishment of wages held unconstitutional) Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950) (due process requires adequate notice and opportunity to be heard); *see generally* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 319 (1985) (obligation of notice and opportunity to be heard, due process limitation on court's ability to exercise jurisdiction).

judgment is vacated.[32] Although it is unfair to allow a judgment rendered on the basis of an unauthorized appearance to bind the innocent defendant, it is submitted that it is equally unfair to leave the plaintiff without redress.[33] It is suggested that a rule be formulated that protects the defendant's procedural due process rights but still allows the plaintiff to assert his claim. The plaintiff should be able to bring an action against the attorney who made the unauthorized appearance for breach of his implied warranty of authority. An agent who purports to act on behalf of a principal impliedly warrants that he has the authority to do so.[34] Therefore,

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[32] *See* Brief for Plaintiff-Appellant at 14-15, Skyline Agency, Inc. v. Ambrose Coppotelli, Inc., 117 App. Div. 2d 135, 502 N.Y.S.2d 479 (2d Dep't 1985). The brokerage agreement at issue was breached in 1974; in 1980 the statute of limitations had run. It is submitted that the judiciary is without the power to furnish a plaintiff with a remedy against a defendant when a default judgment has been vacated after the statute of limitations has run. However, it should be noted that if an action is brought within the statutory period but terminated by any basis other than: 1) voluntary discontinuance; 2) dismissal for neglect to prosecute; or 3) final judgment on the merits, CPLR 205(a) will operate to keep the claim alive, and give the plaintiff six months to sue again after the initial termination. *See* CPLR 205(a) (1976 & Supp. 1987); SIEGEL, § 52, at 53-54. However, caselaw clearly holds that this six month toll will not attach in a case such as *Skyline*, where the court found that the defendant was not served at all. *See* Erickson v. Macy, 236 N.Y. 412, 415, 140 N.E. 938, 939 (1923). Further, when an earlier action is dismissed for lack of personal jurisdiction due to a reason other than non-service, the CPLR 205(a) six month period will also not be available. *See* Markoff v. South Nassau Community Hosp., 61 N.Y.2d 283, 289, 461 N.E.2d 1253, 1255, 473 N.Y.S.2d 766, 768 (1984).

Additionally, a court may deny a defendant the right to assert the statute of limitations on the basis of estoppel when it would be inequitable for him to do so. *See* CPLR 201, commentary at 59 (McKinney 1976 & Supp. 1986). A defendant will only be estopped, however, when the plaintiff relied to his detriment on representations, conduct or fraudulent concealment by the defendant. *Id.* In *Skyline* there were no acts by the defendant, who was uninvolved in the original action. *See* 117 App. Div. 2d at 149, 502 N.Y.S.2d at 490. Therefore, it is suggested that estoppel is unavailable to the plaintiff and he must turn elsewhere for redress.

[33] It is suggested that the plaintiff was not negligent in presuming that the attorney was authorized to appear on behalf of the defendant; he was under no duty to request proof of such authority. Generally, the attorney's authority to appear is presumed from his appearance. *See* Acker v. Ledyard, 8 N.Y. 62, 64 (1853); Buxbaum v. Assicuraioni Generali, 34 N.Y.S.2d 480, 482 (Sup. Ct. N.Y. County), *aff'd*, 264 App. Div. 855, 36 N.Y.S.2d 191 (1st Dep't 1942); H. REUSHLEIN & W. GREGORY, HORNBOOK ON THE LAW OF AGENCY AND OTHER UNINCORPORATED BUSINESS ORGANIZATIONS § 21, at 53 (1979). In fact, there is only one CPLR provision requiring an attorney generally to furnish proof of authorization. CPLR 322(b) requires that an attorney who represents a non-resident defendant in a real property action serve and file formal authorization. *See* CPLR 322(b) (McKinney 1976) If the plaintiff is not served with such authorization, he may make a motion to compel the defendant's attorney to prove his authority to appear on the defendant's behalf in such an action. *See* CPLR 322(a) (1976 & Supp. 1986). Thus, New York law does not recognize a general duty to inquire into an attorney's authorization, except in this limited situation.

[34] *See, e.g.*, Christman v. Maristella Compania Naviera, 293 F. Supp. 442, 444 (S.D.N.Y.

when an attorney appears on behalf of a defendant, he impliedly warrants that he does so with the defendant's authorization.[35] When a third party relies to his detriment upon the agent's representation, he has a cause of action against the agent for breach of this implied warranty.[36]

In an action for breach of implied warranty of authority, the plaintiff need not establish that the representation was made with the intent to deceive;[37] however, he must show that had the agent been authorized, the agreement entered into would have been enforceable against the principal.[38] The agent will then be held liable

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1968) (agent gives implied warranty that he has authority to contract for principal); Harris v. Tams, 258 N.Y. 229, 234, 179 N.E. 476, 479 (1932) (same). This implied warranty that the agent has authorization exists in the absence of any express representation. *See* 3 H. REUSCHLEIN & W. GREGORY, AGENCY AND PARTNERSHIP § 119 (1979); RESTATEMENT (SECOND) OF AGENCY § 329 comment a (1958).

[35] *See* D. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 1.1, at 2 (1980); H. REUSCHLEIN & W. GREGORY, *supra* note 33, § 21, at 53. An agency relationship may be created by the following methods: express authorization, authorization implied from the facts and circumstances of the transaction, apparent authorization manifested by the principal to the third party, and ratification of previously unauthorized acts. *See id.* §§ 12-34 (1979).

Neither express nor implied authority was given by Frank Coppotelli to the attorney. *See* 117 App. Div. 2d at 149, 502 N.Y.S.2d at 489. The agent-attorney's appearance without some manifestation of acquiescence by the principal-defendant could not warrant a third party to believe that the attorney was authorized to act on the defendant's behalf. *Id.* Since Frank Coppotelli objected to personal jurisdiction, it could not be said that the defendant ratified the attorney's unauthorized acts. *See id.*

[36] *See* RESTATEMENT (SECOND) OF AGENCY § 329 (1958).

> A person who purports to make a contract, conveyance or representation on behalf of another who has full capacity but whom he has no power to bind, thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, unless he has manifested that he does not make such warranty or the other party knows that the agent is not so authorized.

Id. See, e.g., Wittenberg v. Robinov, 9 N.Y.2d 261, 264, 173 N.E.2d 868, 869, 213 N.Y.S.2d 430, 431 (1961) (third party has recourse against agent for agent's unauthorized acts); Howels v. Albert, 37 Misc. 2d 856, 858, 236 N.Y.S.2d 654, 656 (Sup. Ct. Nassau County 1962) (party held liable on contract made in principal's name but without principal's authority); Goldfinger v. Doherty, 153 Misc. 826, 828, 276 N.Y.S. 289, 293 (Sup. Ct. App. T. 1st Dep't 1934), *aff'd*, 244 App. Div. 779, 280 N.Y.S. 778 (1st Dep't 1935) (when agent acts without authority he is liable to one who relied). *See* D. MEISELMAN, ATTORNEY MALPRACTICE: LAW & PROCEEDURE § 1.1 at 2 (1980); REUSCHLEIN & GREGORY, *supra* note 33, § 21, at 53.

[37] *See* Moore v. Madock, 251 N.Y. 420, 424-25, 167 N.E. 572, 573 (1929); *Goldfinger*, 153 Misc. at 828-29, 276 N.Y.S. at 293 (Sup. Ct. 1st Dep't 1934). *See also* 3 H. REUSCHLEIN & W. GREGORY, AGENCY AND PARTNERSHIP § 119 (1979): RESTATEMENT (SECOND) OF AGENCY § 329 comment b (1957).

[38] *See* Broughton v. Dona, 101 App. Div. 2d 897, 898, 475 N.Y.S.2d 595, 596-97 (3d Dep't 1984); DePersia v. Merchants Mut. Casualty Co., 268 App. Div. 176, 179, 49 N.Y.S.2d 324, 328 (2d Dep't 1944), *aff'd*, 294 N.Y. 708, 61 N.E.2d 449 (1945); Broughton v. Dona, 101 App. Div. 2d 897, 898, 475 N.Y.S.2d 595, 596-97 (3d Dep't 1984). If the agent establishes

for any benefit the plaintiff would have received but for the agent's lack of authority.[39] It is submitted that this remedy should have been be available to the plaintiff in *Skyline*. In reliance upon the attorney's representation of authority, the plaintiff entered into a settlement agreement that, but for the lack of authority, would have been enforceable against Frank Coppotelli.[40]

The *Skyline* court was correct in rejecting an anomalous rule that denied a defendant his procedural due process rights when an attorney appears for him without authorization. However, to protect the plaintiff against the expiration of the statute of limitations on his claim because the judgment was vacated, the plaintiff should be provided with a remedy against the offending attorney sounding in breach of implied warranty of authority. Until a remedy is provided, it is urged that the plaintiff's attorney verify the authority of counsel who enters an appearance on behalf of a defendant.

Sheila Corvino

PENAL LAW

Penal Law § 10.00(11): Conduct short of discharging firearm constitutes use of deadly physical force; Penal Law § 35.15(2): Defense of justification is applicable to unintentional as well as intentional crimes

Pursuant to section 35.15 of the Penal Law of New York,[1] a

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that a contract can not be enforced against the principal despite the agent's lack of authority, the agent will not be liable in breach of warranty. *See, e.g.*, Gracie Square Realty Corp. v. Choice Realty Corp., 305 N.Y. 271, 282, 113 N.E.2d 416, 421 (1953) (contract void under statute of frauds creates no liability for unauthorized agent).

[39] *See* Cargo Ships El Yam v. Stearns & Foster Co., 149 F. Supp. 754 (S.D.N.Y. 1955); Harris v. Tams, 258 N.Y. 229, 234, 179 N.E. 476, 478 (1932). *See also* 3 H. REUSCHLEIN & W. GREGORY, AGENCY AND PARTNERSHIP § 120 (1979) (discussion of damages to be awarded in warranty action).

[40] *See* 117 App. Div. 2d at 148, 502 N.Y.S.2d at 489.

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[1] N.Y. PENAL LAW § 35.15 (McKinney 1975) provides in pertinent part:

1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he reasonably believes such to be