St. John's Law Review

Volume 57, Spring 1983, Number 3 Article 8

CPLR 203(b)(5): Filing of Summons with County Clerk Is Effected Upon Mailing of Summons, Not Upon Actual Receipt by County Clerk

Steven J. Gartner

"public offering" as stated in the New York Real Estate Syndicate Act which requires the filing of detailed disclosure documents in real estate transactions. The author analyzes relevant case law and proposes a statutory scheme that would clarify the circumstances in which an offering would be deemed "private" within the meaning of the Act.

CIVIL PRACTICE LAW AND RULES

Article 2—Limitations of Time

CPLR 203(b)(5): Filing of summons with county clerk is effected upon mailing of summons, not upon actual receipt by county clerk

Section 203 of the CPLR sets forth the general method for computing the time period within which a claim must be interposed.[1] Subdivision (b)(5) of that section allows a plaintiff, by serving a summons on a designated county official, an additional 60 days after the expiration of the appropriate statutory period.[2] De-

---

[1] CPLR 203 (1972 & Supp. 1982-1983). Section 203(a) of the CPLR provides that a plaintiff must "interpose" his claim in order to toll the statute of limitations. *See* CPLR 203(a) (1972). Failure to do so within the prescribed statutory period suspends the plaintiff's remedy. Hulbert v. Clark, 128 N.Y. 295, 297-98, 28 N.E. 638, 638 (1891). Although the plaintiff's right is preserved, the practical effect of his neglect to interpose a timely claim is a permanent dismissal of the action. *See* SIEGEL § 34, at 35.

CPLR 203(b) provides six methods by which a plaintiff may interpose his claim. The most common way of interposing a claim is by serving a summons upon the defendant. CPLR 203(b)(1) (1972); *see id.*, commentary at 114. Alternatively, the statute permits a "publication of the summons against the defendant . . . pursuant to an order." CPLR 203(b)(2) (1972). Orders granted for a provisional remedy or attachment, under certain conditions, also will satisfy the interposition requirement. *Id.* 203(b)(3),(4). Service upon an appropriate public official will allow the plaintiff an additional 60 days beyond the prescribed statutory period to serve the defendant. *Id.* 203(b)(5) (McKinney 1972 & Supp. 1982-1983); *see infra* note 2. Finally, subdivision 6 of section 203(b) sets forth the procedure to interpose a claim "in an action to be commenced in a court not of record." CPLR 203(b)(6) (1972); *see* SIEGEL §§ 45-49, at 47-51; WK&M § 203.02, at 2-61 (1982 & Supp. 1982).

[2] CPLR 203(b)(5) (McKinney Supp. 1982-1983). Section 203(b)(5) provides in pertinent part:

> A claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with him when: . . .
>
> 5. The summons is delivered to the sheriff of that county outside the city of New York or is filed with the clerk of that county within the city of New York in which the defendant resides, is employed or is doing business, . . . provided that:
>
> (i) the summons is served upon the defendant within sixty days after the period of limitation would have expired but for this provision . . . .

Id. Section 203(b)(5) was designed to aid a plaintiff who is experiencing difficulty effecting

pending upon whether the defendant resides, is employed, or is doing business within or without New York City,[3] the summons must be "delivered to the sheriff" of a county outside the city, or "filed with the clerk" of a county within city limits.[4] While New York

---

service upon a defendant. *See, e.g.*, Clough v. Board of Educ., 56 App. Div. 2d 233, 235, 392 N.Y.S.2d 170, 172-73 (4th Dep't 1977); Rossi v. Oristian, 50 App. Div. 2d 44, 48-49, 376 N.Y.S.2d 295, 299 (4th Dep't 1975); Calabrese v. Coch, 44 App. Div. 2d 819, 819, 355 N.Y.S.2d 776, 777 (1st Dep't 1974); Cyens v. Town of Roxbury, 40 App. Div. 2d 915, 915, 337 N.Y.S.2d 732, 733 (3d Dep't 1972). As originally enacted, subsection (b)(5) permitted the plaintiff to gain an additional 60 days by serving a sheriff, and no distinction was made between counties within New York City and those without. *See infra* note 4. Service upon an out-of-state sheriff, however, was not sufficient to commence the action. Butler v. UBS Chem. Co., 32 App. Div. 2d 8, 9, 299 N.Y.S.2d 247, 248 (1st Dep't 1962). Currently, the appropriate official depends, in most instances, upon whether the defendant resides, is employed, or is doing business within or without the city of New York. *See* CPLR 203(b)(5) (McKinney Supp. 1982-1983). If the current residence, place of business, or place of employment cannot be ascertained, the statute permits delivery to the proper official in the county of the defendant's last known residence, place of business, or place of employment. *Id.*; *see* Mooney v. Fortuin, 49 Misc. 2d 85, 87, 266 N.Y.S.2d 676, 677-78 (Sup. Ct. N.Y. County 1966). Additionally, the section simply does not apply when the defendant has not been, and is not, in New York. *See* Parkhurst v. First & Merchants Corp., 100 Misc. 2d 69, 71, 418 N.Y.S.2d 260, 261 (Sup. Ct. N.Y. County 1979).

It should be noted that this service, in and of itself, does not toll the statute of limitations. A plaintiff may not obtain the benefit of the 203(b)(5) toll unless, after having served the designated county official, the summons is then served upon the defendant within 60 days. Oliver v. Basle, 55 App. Div. 2d 975, 976, 390 N.Y.S.2d 466, 466 (3d Dep't 1977). Technically therefore, section 203(b)(5) does not operate as a tolling provision. The additional 60 days are not an extension or a stay, but rather, "a condition subsequent which must be satisfied." Maurer v. County of Putnam, 89 Misc. 2d 302, 304, 391 N.Y.S.2d 801, 802-03 (Sup. Ct. Putnam County 1977).

[3] *See supra* note 2. Prior to 1979, the question whether service should be made upon the sheriff or the county clerk was dependent upon whether the action was to be tried within or without the city of New York. *See id.* It is not always possible, however, to determine where the action will be tried. *See* CPLR 203, commentary at 53 (McKinney Supp. 1982-1983). For an example of the confusion caused by the language of the former statute, see Filardi v. Bronxville Obstetrical & Gynecological Group, P.C., 67 App. Div. 2d 997, 998, 413 N.Y.S.2d 729, 730-31 (2d Dep't 1979). The 1979 amendment to section 203(b)(5) avoids most of this confusion by focusing upon the identity and location of the defendants, rather than upon the particular venue of the action. *See* CPLR 203, commentary at 51 (McKinney Supp. 1982-1983); SIEGEL § 47, at 11-13. *See generally* Farrell, *Civil Practice, 1979 Survey of N.Y. Law*, 31 SYRACUSE L. REV. 15, 15-17 (1980).

[4] CPLR 203(b)(5) (McKinney Supp. 1982-1983); *see supra* note 2. Prior to a 1976 amendment of section 203(b)(5), the 60-day toll could be obtained by delivering the summons to a sheriff of the proper county. *See* CPLR 203, commentary at 117 (1972); *supra* note 2. The 1976 amendment, however, required that, for actions within New York City, delivery be made to the clerk of the county in which the action was commenced, rather than to the sheriff. Ch. 722, § 1, [1976] N.Y. Laws 2. Outside the city of New York, the sheriff remained the proper official to whom the summons should be delivered. *Id.* This amendment was intended to be "beneficial to both the courts and the bar." Memorandum of Sen. Halperin, *reprinted in* [1976] N.Y. LEGIS. ANN. 20 [hereinafter cited as 1976 Memorandum]. As Senator Halperin stated, greater revenue for the court would be generated since "an

courts have held that a "delivery" is complete upon mailing,[5] neither the legislature nor the judiciary has indicated whether a

---

index number would have to be obtained to gain the benefit of the statute," and the city sheriff's office would be relieved of a financial burden because its permissible fee rarely met the expense incurred. *Id.*; *see* Farrell, *Civil Practice, 1976 Survey of N.Y. Law*, 28 SYRACUSE L. REV. 379, 392-94 (1977). It was discovered, however, that " '[d]elivery' to a clerk did not require 'filing' and the projected revenues were not realized." Memorandum of Legis. Rep. of City of N.Y., *reprinted in* [1977] N.Y. Laws 2354 (McKinney) [hereinafter cited as 1977 Memorandum]. Thus, according to the 1977 amendment to section 203(b)(5), for actions to be tried within the city of New York, a summons had to have been "filed" with the appropriate county clerk within the city, and not simply "delivered." Ch. 494, § 1, [1977] N.Y. Laws 2. The amendment continued to provide for "delivery" to the sheriffs of counties outside the city of New York. *Id.* Finally, in 1979, section 203(b)(5) was amended to clarify when service was to be made upon a sheriff outside New York City, and upon a county clerk within city limits. *See* Ch. 404, § 1, [1979] N.Y. Laws 1; *see also* CPLR 203, commentary at 53 (McKinney Supp. 1982-1983); Farrell, *Civil Practice, 1977 Survey of N.Y. Law*, 29 SYRACUSE L. REV. 449, 477-80 (1978); *supra* note 2.

[5] Early New York cases dealing with the applicability of the 203(b)(5) toll were in conflict as to whether a summons is delivered when the plaintiff mails the summons, or when the sheriff actually receives it. *Compare* Palm v. Jones, 74 Misc. 2d 580, 581, 345 N.Y.S.2d 428, 429 (Sup. Ct. Montgomery County 1973) (summons is delivered when plaintiff mails it) *with* Interstate System, Inc. v. Bev Pac, Inc., 77 Misc. 2d 129, 130, 353 N.Y.S.2d 346, 347 (Sup. Ct. Herkimer County 1974) (summons is not delivered until sheriff receives it). In Schneider v. Hahn, 79 Misc. 2d 411, 359 N.Y.S.2d 988 (Sup. Ct. Monroe County 1974), a summons was mailed within the prescribed limitations period, but was not received by the sheriff until after the statute of limitations had expired. 79 Misc. 2d at 411, 359 N.Y.S.2d at 989. The court rejected the plaintiff's contention that delivery was accomplished when the summons was mailed, reasoning that express statutory authorization is necessary to deem service complete upon mailing. *Id.* at 411-12, 359 N.Y.S.2d at 989; *see, e.g.*, CPLR 2103(b)(2) (1975 & McKinney Supp. 1982-1983). Indeed, the court stated: "Had the drafters of the CPLR meant to toll the Statue of Limitations upon mailing of the summons to the Sheriff, they could have clearly said so." 79 Misc. 2d at 412, 359 N.Y.S.2d at 989.

In 1975, however, the appellate division affirmed a lower court holding that delivery is complete upon mailing. Tracy v. New York Magazine Co., N.Y.L.J., June 13, 1975, at 16, col. 7 (Sup. Ct. Bronx County), *aff'd*, 50 App. Div. 2d 775, 376 N.Y.S.2d 1015 (1st Dep't 1975). In *Tracy*, special term, adhering to the liberal interpretation that both the legislature and the courts have accorded the CPLR with regard to mailings, concluded that delivery of the summons to the sheriff "ought not to require stricter observance than delivery of process to a defendant." N.Y.L.J., June 13, 1975, at 17, col. 1. Furthermore, the court stated:

> "[D]elivery" [should not] be subjected to the occasional delays, inefficiencies or accidents which may arise, through no fault of the sender, in the administrative processes of either the U.S. Post Office or the sheriff's office before actual receipt is officially recorded. At the very least, it would not be unreasonable to presume that the sheriff is in constructive possession of the summons and complaints at the time they are deposited in a mail box and properly addressed to him.

Id. Subsequently, the second and fourth departments adopted the view that delivery of a summons is complete upon mailing. Sanford v. Garvey, 81 App. Div. 2d 748, 749, 438 N.Y.S.2d 410, 412-13 (4th Dep't 1981); Kearns v. Moyer, 78 App. Div. 2d 979, 980, 435 N.Y.S.2d 553, 554 (4th Dep't 1980); Filardi v. Bronxville Obstetrical & Gynecological Group, P.C., 67 App. Div. 2d 997, 998, 413 N.Y.S.2d 729, 730-31 (2d Dep't 1979); Williams v. Interboro Gen. Hosp., 59 App. Div. 2d 738, 739, 398 N.Y.S.2d 568, 569 (2d Dep't 1977).

mailing similarly satisfies the filing requirement. Recently, in *Dowling v. Hillcrest General Hospital*,[6] the Appellate Division, First Department, ruled that for purposes of section 203(b)(5), filing of a summons with a county clerk inside the city of New York is effected upon mailing, and not upon actual receipt of the summons by the county clerk.[7]

In *Dowling*, the plaintiff's attorney mailed a supplemental summons and complaint, along with a check for the purchase of an index number,[8] to the Queens County Clerk,[9] naming additional defendants in a medical malpractice suit.[10] The supplemental summons was mailed to the county clerk's office on November 14, 1980, 3 days prior to the expiration of the applicable limitations period.[11] After having mailed the summons, the plaintiff moved for leave of court to serve a supplemental summons and amended complaint upon the defendant.[12] While the plaintiff's motion was pending, the county clerk received the summons on November 26, 1980, 9 days after the statute of limitations had expired.[13] Service upon the defendant subsequently was effected on January 12, 1981, after the plaintiff's motion had been granted.[14] The defendant moved to dismiss on the ground that the action was time barred, but special term denied the motion, stating that the plain-

---

[6] 89 App. Div. 2d 435, 455 N.Y.S.2d 628 (1st Dep't 1982).

[7] *Id.* at 440, 455 N.Y.S.2d at 631.

[8] Section 8018 of the CPLR states that a county clerk is entitled to payment in advance for the assignment of an index number. CPLR 8018(a) (1981). Since a plaintiff must obtain an index number pursuant to section 203(b)(5), it follows that a check or other payment must accompany the summons in order to obtain the benefit of this section. *See* 89 App. Div. 2d at 440, 455 N.Y.S.2d at 631.

[9] One of the named defendants, Hillcrest General Hospital, is located in Queens County. Drs. Van Gessel and Goldberg, who were associated with Hillcrest, resided in Queens. 89 App. Div. 2d at 436, 455 N.Y.S.2d at 629. Accordingly, the plaintiff mailed the summons to the Queens County Clerk. *Id.*

[10] *Id.* Three of the defendants, Hillcrest General Hospital, Group Health, Inc., and the Osteopathic Hospital and Clinic of New York, were served nearly 2 months before the statute of limitations was to expire. *Id.* at 435-36, 455 N.Y.S.2d at 628. Initially, the plaintiff erroneously believed that Drs. Van Gessel and Goldberg, the treating physicians, were employed by Hillcrest General Hospital. *Id.* at 436, 455 N.Y.S.2d at 629. After discovering that they simply were associated with the hospital, the plaintiff was required to serve a supplemental summons in order to add them as defendants. *See id.* The plaintiff also desired to include Planned Parenthood of New York City as an additional defendant, since that organization referred the plaintiff to Hillcrest General Hospital for treatment. *Id.*

[11] *Id.*

[12] *Id.*

[13] *See id.* at 435-36, 455 N.Y.S.2d at 628-29.

[14] *Id.* at 436, 455 N.Y.S.2d at 629.

tiff was entitled to the benefit of the presumption that " 'mail sent within the same city is delivered the next day.' "[15]

On appeal, the Appellate Division, First Department, affirmed special term's denial of the defendant's motion.[16] Writing for a unanimous court,[17] Justice Sullivan held that for purposes of the section 203(b)(5) toll, filing with a county clerk within the city of New York takes place when a properly addressed summons is mailed with the appropriate fee enclosed.[18] The court reasoned that any variation in the language of section 203(b)(5) "was motivated by purely fiscal considerations and not [by] any [legislative] desire to effect a substantive change" in the Civil Practice Law and Rules.[19] Indeed, Justice Sullivan stated, the 1976 amendment to section 203(b)(5) requiring delivery to the county clerks, and the 1977 change requiring a filing with the appropriate county clerks, respectively were designed to relieve the New York City sheriff from the economic burden of receiving summonses, while at the same time generating greater revenue.[20] Moreover, the court declared that no "rational basis" exists for imposing an "unnecessarily greater burden" upon plaintiffs who attempt to utilize the 203(b)(5) toll within New York City, than upon those who wish to obtain its benefit in the remainder of the state's counties.[21]

A general principle of statutory construction requires that, absent a statutory definition, a public law should be interpreted in accordance with the popular or perceived import of its words.[22] A

---

[15] *Id.* at 437, 455 N.Y.S.2d at 629.

[16] *Id.*

[17] Justice Sullivan was joined in the unanimous opinion by Justices Carro, Silverman, and Milonas.

[18] 89 App. Div. 2d at 440, 455 N.Y.S.2d at 631.

[19] *Id.* at 439, 455 N.Y.S.2d at 630; *see supra* note 4; *infra* note 27.

[20] 89 App. Div. 2d at 439, 455 N.Y.S.2d at 630; *see* CPLR 203, commentary at 48, 51 (McKinney Supp. 1982-1983); 1976 Memorandum, *supra* note 4, at 20; 1976 Memorandum, *supra* note 4, at 2354.

[21] 89 App. Div. 2d at 440, 455 N.Y.S.2d at 631.

[22] Deputy v. du Pont, 308 U.S. 488, 493 (1940) (quoting Maillard v. Lawrence, 57 U.S. (16 How.) 251, 261 (1853)); Mercantile Bank & Trust Co. v. United States, 441 F.2d 364, 366 (8th Cir. 1971). Generally, a statute may be interpreted from either of two perspectives, namely, the intent or the meaning of the language. 2A C. SANDS, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 45.08, at 22 (4th ed. 1973); *see infra* note 23. When a court employs legislative intent as the criterion for interpretation, the focal point of its examination is the "sender's," or the legislator's, perspective. 2A C. SANDS, *supra*, § 45.08, at 22. In order to construe meaning, however, an analysis of how the statute is understood by its receivers, the members of the public to whom it is addressed, is required. *Id.* at 24. The "meaning" form of interpretation has received the growing support of the courts. *Id.* While this rule has been criticized as a potential threat to separation of powers, it nonetheless has

facial or plain reading[23] of section 203(b)(5) apparently lends support to the conclusion that the words "file" and "deliver" bear definite, intentional distinctions, distinctions that might justify criticism of the *Dowling* decision.[24] In New York, both the judiciary[25]

---

found strong constitutional support in the area of due process, *id.*, which requires that "laws be communicated with sufficient definiteness to enable them to be understood by those who are subject to them," *id.* (footnote omitted); *see* 1 *id.*, § 21.16, at 95-96.

[23] *See* 2A C. SANDS, *supra* note 22, §§ 46.01-.02, at 48-52. What has come to be known as the "plain meaning rule" is simply the rather obvious principle that the "meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." Caminetti v. United States, 242 U.S. 470, 485 (1917). In New York, it has been recognized that courts must attempt to "construe the statute according to the plain meaning of the language used." People v. Uncapher, 207 Misc. 960, 962, 141 N.Y.S.2d 377, 379 (Steuben County Ct. 1955). Words and phrases should be given their ordinary meaning, unless the legislature has indicated that a different meaning was intended. People v. Cruz, 48 N.Y.2d 419, 428, 399 N.E.2d 513, 517, 423 N.Y.S.2d 625, 629 (1979); *see* N.Y. STATUTES §§ 76, 232 (McKinney 1971). Indeed, "[t]o interpret a statute when there is no necessity for interpretation . . . constitutes judicial trespass upon the legislative domain." *In re* Kenneth D., 102 Misc. 2d 363, 365, 423 N.Y.S.2d 423, 424 (Family Ct. Kings County 1979).

Ambiguity often is present, however, thus requiring courts to resort to alternative means of interpreting statutory language. When the language is ambiguous, the court's primary focus should be upon legislative intent. Civil Serv. Employees Ass'n v. County of Oneida, 78 App. Div. 2d 1004, 1004, 433 N.Y.S.2d 907, 908 (4th Dep't 1980); N.Y. STATUTES § 92 (McKinney 1971). The construction should not "defeat the general purpose and manifest intent of the legislation," Seltzer v. City of Yonkers, 286 App. Div. 557, 560, 145 N.Y.S.2d 664, 667 (2d Dep't 1955), *aff'd*, 1 N.Y.2d 782, 135 N.E.2d 588, 153 N.Y.S.2d 51 (1956), or render an absurd result, but rather, should extend to the reasonable implications of the language, Drelich v. Kenlyn Homes, Inc., 86 App. Div. 2d 648, 649, 446 N.Y.S.2d 408, 410 (2d Dep't 1982); *see* People v. Cruz, 48 N.Y.2d 419, 428, 399 N.E.2d 513, 517, 423 N.Y.S.2d 625, 629 (1979); N.Y. STATUTES § 94 (McKinney 1971). Additionally, the words of a statute should be construed together, rather than individually. People v. Mobil Oil Corp., 48 N.Y.2d 192, 199, 397 N.E.2d 724, 728, 422 N.Y.S.2d 33, 38 (1979); N.Y. STATUTES §§ 97, 130 (McKinney 1971).

[24] "Delivery" has been defined as the act by which property "is placed within the actual or constructive possession or control of another." BLACK'S LAW DICTIONARY 385 (rev. 5th ed. 1979); *see* Poor v. American Locomotive Co., 67 F.2d 626, 630 (7th Cir. 1933). "File" on the other hand, denotes an act by which property is placed in the official custody of the court. BLACK'S LAW DICTIONARY 566 (rev. 5th ed. 1979). The New York Court of Appeals had occasion to interpret the meaning of the word "file" in Gates v. State, 128 N.Y. 221, 28 N.E. 373 (1891). In that case, an injured employee, subject to a 3-year statute of limitations, was required to file his claim with an appraiser who would hear and determine claims against the state. *Id.* at 227, 28 N.E. at 374. The Court rejected the plaintiff's argument that a mailing satisfied the filing requirement, *id.* at 228, 28 N.E. at 373-74, stating that "[t]here must have been a delivery by or on behalf of the party of his claim *at the office itself* to constitute, and enable him to allege and to establish . . . a filing," *id.*, 28 N.E. at 374 (emphasis added). Confronted with facts similar to those in *Gates*, the United States Supreme Court, citing *Gates*, similarly rejected the argument that forwarding through the usual course of mail should be considered a filing. United States v. Lombardo, 241 U.S. 73, 76 (1916). The Court stated that "[f]iling . . . is not complete until the document is delivered and received. 'Shall file' means to deliver to the office and not send through the United

and the legislature[26] have, indeed, recognized such distinctions in other contexts. Nevertheless, it is submitted that *Dowling* was decided properly by the First Department. The court, in refusing to adopt a plain reading of the statute, acknowledged that such an interpretation would yield "inequitable distinctions" between counties within New York City and those without.[27] In so doing, the court acted consistently with previous decisions which have favored a generally liberal construction of the CPLR with respect to mailings.[28] Although support exists for the proposition that filing

---

States mails." *Id.* (citation omitted); *see also In re* Gubelman, 10 F.2d 926, 929 (2d Cir. 1925) (the term file "signified the delivery into the actual custody of the proper officer"), *rev'd in part on other grounds sub nom.* Latzko v. Equitable Trust Co., 275 U.S. 254 (1927); Laser Grain Co. v. United States, 250 F. 826, 831 (8th Cir. 1918) (satisfaction of filing requirement necessitates proof of delivery and receipt by officer authorized to receive and file claim); Emmons v. Marbellite Plaster Co., 193 F. 181, 183 (D. Nev. 1910) (complaint considered filed when placed in hands of clerk and fee paid); People v. Madigan, 223 Mich. 86, 89, 193 N.W. 806, 807 (1923) (document is filed when it is "delivered to and received by [the] proper officer"); King v. Calumet & Hecla Corp., 43 Mich. App. 319, 326, 204 N.W.2d 286, 290 (1972) (" 'mailing' does not constitute 'filing' "). For a discussion of the filing requirement of section 203(b)(5) of the CPLR, see 1 WK&M § 203.18, at 2-84 to -85 (1982 & Supp. 1982). Notably, it has been stated that, with respect to section 203(b)(5), "[f]iling with a county clerk would not appear to be possible prior to actual receipt of the summons by the clerk." *Id.* at 2-85; *see also* Comment, *Title VII—Timely Filing Requirement in Deferral States Is Satisfied When the Initial Complaint is Received by the EEOC Within the 300-day Limitation of* § 706(e), 55 NOTRE DAME LAW. 396, 398-404 (1980).

[25] *See, e.g.*, Sweeney v. City of New York, 225 N.Y. 271, 275, 122 N.E. 243, 244 (1919); Gates v. State, 128 N.Y. 221, 228, 28 N.E. 373, 374 (1891); Drake v. Comptroller, 278 App. Div. 317, 320, 104 N.Y.S.2d 774, 777 (1st Dep't 1951); Cohalan v. Olmo, 71 Misc. 2d 196, 197, 335 N.Y.S.2d 747, 749 (Sup. Ct. Suffolk County 1972), *aff'd*, 41 App. Div. 2d 840, 342 N.Y.S.2d 153 (2d Dep't 1973).

[26] *See, e.g.*, CPL § 725.05(8) (McKinney Supp. 1981-1982).

[27] 89 App. Div. 2d at 440, 455 N.Y.S.2d at 631. Senator Halperin's 1976 memorandum seemingly does not recognize a substantive distinction between the words "file" and "deliver." *See* 1976 Memorandum, *supra* note 4, at 20. Similarly, Professor Siegel in his discussion of section 203(b)(5) uses the terms interchangeably. *See* SIEGEL § 47, at 48-49.

As Professor Siegel posits, section 203(b)(5) was the product of hasty amendments enacted in 1976 and 1977. *Id.* at 49; *see supra* note 4. The section was plagued with such ambiguities that, under the 1977 amendment, certain situations could arise whereby the statute would not be able to work at all. *See* CPLR 203, commentary at 51-52 (McKinney Supp. 1982-1983). To the extent that inconsistencies in language are present, however, the court must deal with them. United States v. Turkette, 452 U.S. 576, 580 (1981). In *Dowling*, a plain reading of the statute apparently would result in inconsistent treatment between plaintiffs seeking to use 203(b)(5) in counties within the city of New York, and those attempting to use the statute outside the city. It is submitted that such a reading, absent legislative direction, would be improper. *See supra* note 23 and accompanying text. Indeed, a meaning that would lead to "abuse or [an] unjust result" should not be attributed to statutory language. Worthy v. United States, 328 F.2d 386, 391 (5th Cir. 1964).

[28] 89 App. Div. 2d at 437-38, 455 N.Y.S.2d at 630; *see, e.g.*, Tracy v. New York Magazine, N.Y.L.J., June 13, 1975, at 16, col. 7 (Sup. Ct. Bronx County), *aff'd*, 50 App. Div. 2d

imposes a more stringent burden upon parties than does delivery,[29] it is suggested that the legislative history[30] and the inequities that otherwise would result impel an interpretation which would not effect a substantive change in section 203(b)(5). It thus is apparent that the term "file," for purposes of the 203(b)(5) toll, requires nothing more than a delivery to a county clerk within the City of New York and the purchase of an index number.

Notwithstanding the *Dowling* court's proper analysis of the "filing" issue, it is suggested that a further aspect of the court's decision warrants criticism. Under the stated facts of the case, the plaintiff mailed the supplemental summons to the county clerk before moving for leave to serve the supplemental summons and amended complaint upon the additional defendants.[31] Leave of court, however, generally is required before a supplemental summons bringing a new party into the action can be served.[32] It is

---

775, 376 N.Y.S.2d 1015 (1st Dep't 1975); *see also supra* note 5.

[29] *See supra* note 24.

[30] The legislative history of section 203(b)(5) does not indicate that any substantive change was intended by the 1976 and 1977 amendments to the statute. *See supra* note 4. Indeed, the 1976 and 1977 memoranda suggest that these amendments were intended merely to shift the financial burden of receiving summonses, and to ensure that greater revenues were realized. *Id.*

[31] 89 App. Div. 2d at 436, 455 N.Y.S.2d at 629. A supplemental summons is used to bring in a new defendant, and is not intended to be served upon a party already involved in the action or upon one who appears voluntarily. Patrician Plastic Corp. v. Bernadel Realty Corp., 25 N.Y.2d 599, 606, 256 N.E.2d 180, 184, 307 N.Y.S.2d 868, 874 (1970). An additional defendant may not be brought into the action unless a supplemental summons is issued. Graf v. Weinstein, 161 N.Y.S. 337, 338 (Sup. Ct. App. T. 1st Dep't 1916).

[32] *See* SIEGEL § 65, at 66. An early first department case indicates that "before additional parties could be brought in an amended or supplemental summons must be issued; *leave to do so having first been obtained.*" Robinson v. Thomas, 131 App. Div. 894, 895, 115 N.Y.S. 921, 922-23 (1st Dep't 1909) (emphasis added). More recently, the second department, in interpreting section 1003 of the CPLR, which states that "[p]arties may be added or dropped by the court, on motion of any party or on its own initiative," CPLR 1003 (1976), held that leave of court was required to "serve an amended or supplemental summons and complaint." Catanese v. Lipschitz, 44 App. Div. 2d 579, 580, 353 N.Y.S.2d 250, 252 (2d Dep't 1974). Recognizing the hardship that might result from court delay, the second department later held that a claim in an amended complaint is timely interposed if the motion for the amendment and service upon the defendant are made before the statute of limitations expires, even though the motion is not granted until after its expiration. Vastola v. Maer, 48 App. Div. 2d 561, 565, 370 N.Y.S.2d 955, 959 (2d Dep't 1975), *aff'd*, 39 N.Y.2d 1019, 355 N.E.2d 300, 387 N.Y.S.2d 246 (1976); *see* Rydeberg v. State, 108 Misc. 2d 362, 363-64, 437 N.Y.S.2d 891, 893 (Ct. Cl. 1981). *Dowling* raises the new issue of whether service of a supplemental summons upon an additional defendant after the statute of limitations expires is timely if the summons is filed with a county clerk prior to such expiration, but before the plaintiff's motion for leave to serve the additional defendant is granted. 89 App. Div. 2d at 436-37, 455 N.Y.S.2d at 629. As in *Vastola*, the motion for leave in *Dowling* was

submitted, therefore, that when a plaintiff attempts to include additional parties as defendants in his action, filing a supplemental summons with a county clerk before the motion for leave to serve the new defendants is made does not suffice to afford the plaintiff the benefit of the 203(b)(5) toll. Consequently, since satisfactory filing with the county clerk is a prerequiste to obtaining the additional time within which to serve the new defendants,[33] the service upon the defendants in *Dowling* after the limitations period had expired, even though the motion for leave eventually was granted, would appear untimely.[34]

Steven J. Gartner

DEVELOPMENTS IN NEW YORK LAW

Actions in breach of contract and fraudulent misrepresentation against private educational institution will not be entertained when allegations of complaint attack quality of education

It has been widely held that an educational malpractice claim asserted against a public school for failure adequately to educate its students is not actionable.[35] Notwithstanding the apparent con-

---

made before the limitations period expired, and was granted after the statute of limitations terminated. *Id.* at 436, 455 N.Y.S.2d at 629. In *Dowling*, however, the motion for leave to serve the new defendants was not made until after the supplemental summons had been filed with the county clerk, and the defendants were not served until after the prescribed statutory period had expired. *Id.* This was not the situation presented in *Vastola*, and thus, it is submitted that its reasoning is inapplicable to the circumstances of *Dowling*.

[33] CPLR 203(b)(5) (McKinney Supp. 1982-1983).

[34] *See* Arnold v. Mayal Realty Co., 299 N.Y. 57, 85 N.E.2d 616 (1949). In *Arnold*, the Court of Appeals considered whether the date of the commencement of the action, for purposes of determining the applicability of the statute of limitations, is the date on which the motion for leave to serve a supplemental summons is made, or the date on which the supplemental summons and amended complaint actually are served. *Id.* at 60, 85 N.E.2d at 617. The Court favored the latter date, stating that "a Statute of Limitations is not open to discretionary change by the courts, no matter how compelling the circumstances." *Id.* Moreover, timely service of a codefendant will not aid a plaintiff seeking to bring a new defendant into the action through service of a supplemental summons; the statute of limitations will expire if the additional defendant is not served within the prescribed period. Miller v. Farina, 58 App. Div. 2d 731, 732, 395 N.Y.S.2d 867, 869 (4th Dep't 1977); *see* WK&M § 203.05, at 2-67 (1982 & Supp. 1982).

[35] *See, e.g.*, Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 825-28, 131 Cal. Rptr. 854, 861-63 (1976); Hunter v. Board of Educ., 292 Md. 481, 484, 439 A.2d 582, 586 (1982); Hoffman v. Board of Educ., 49 N.Y.2d 121, 125-26, 400 N.E.2d 317, 319-20, 424 N.Y.S.2d 376, 378 (1979); Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 445, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 378 (1979). In *Donohue*, the plaintiff showed that,