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CPLR 303: Commencement of federal action in New York does not result in designation of attorney as agent for service of process in state court action

Under CPLR 303,⁴⁰ “[t]he commencement of an action in the state by a person not subject to personal jurisdiction” creates an implied designation of the nondomiciliary’s attorney as agent for service of process.⁴¹ Available only to a party to the original action,⁴²

⁴⁰ CPLR 303 (Supp. 1978-1979) provides in part:

The commencement of an action in the state by a person not subject to personal jurisdiction is a designation by him of his attorney appearing in the action . . . as agent, during the pendency of the action, for service of a summons pursuant to section 308, in any separate action in which such a person is a defendant and another party to the action is a plaintiff if such separate action would have been permitted as a counterclaim had the action been brought in the supreme court.

CPLR 303 was amended in 1972 to allow service pursuant to CPLR 308. Ch. 487, [1972] N.Y. Laws 1819 (McKinney). See *The Quarterly Survey*, 47 St. JOHN’S L. REV. 148, 157 (1972). Thus, in addition to personal service within the state, the alternative methods of service under CPLR 308 are now available. See CPLR 308(2)-(5) (Supp. 1978-1979). Prior to this amendment, only personal service on the attorney was valid. See *Twentieth Century-Fox Film Corp. v. Dupper*, 33 App. Div. 2d 682, 305 N.Y.S.2d 918 (1st Dep’t 1969) (mem.), discussed in *The Quarterly Survey*, 44 St. JOHN’S L. REV. 758, 773 (1970). For a general discussion of CPLR 303, see 1 WK&M ¶¶ 303.01-.08.

⁴¹ CPLR 303 (Supp. 1978-1979). A nonresident who voluntarily attends judicial proceedings in the state as a party or a witness, and is not otherwise subject to in personam jurisdiction, is generally granted immunity from service of process. See *Thermoid Co. v. Fabel*, 4 N.Y.2d 494, 151 N.E.2d 883, 176 N.Y.S.2d 331 (1958); *Netograph Mfg. Co. v. Scrugham*, 197 N.Y. 377, 90 N.E. 962 (1910). If attendance is mandatory, however, and there would be a penalty for not appearing, no immunity is granted. See *New England Indus., Inc. v. Margiotti*, 270 App. Div. 488, 60 N.Y.S.2d 430 (1st Dep’t), *aff’d per curiam*, 296 N.Y. 722, 70 N.E.2d 540 (1946); *Barbella v. Yale*, 4 Misc. 2d 825, 152 N.Y.S.2d 695 (Sup. Ct. Bronx County 1956).

The immunity privilege is granted to suitors and witnesses by the court to promote an efficient judicial system through voluntary participation. See *Bunce v. Humphrey*, 214 N.Y. 21, 108 N.E. 95 (1915); *Parker v. Marco*, 136 N.Y. 585, 32 N.E. 989 (1893); *Chauvin v. Dayon*, 14 App. Div. 2d 146, 217 N.Y.S.2d 795 (3d Dep’t 1961); *Cake v. Haight*, 30 Misc. 386, 63 N.Y.S. 1043 (Sup. Ct. N.Y. County 1900). There is, however, no constitutional requirement that immunity be given. See *Zirinsky v. Zirinsky*, 77 Misc. 2d 954, 356 N.Y.S.2d 414 (Sup. Ct. N.Y. County 1974). In fact, some courts have denied immunity to a person voluntarily attending an action closely related to the action in which jurisdiction is sought to be acquired. See, e.g., *Lamb v. Schmitt*, 285 U.S. 222 (1932); *Roth v. W.T. Cowan, Inc.*, 103 F. Supp. 203 (E.D.N.Y. 1952); *Zirinsky v. Zirinsky*, 77 Misc. 2d 954, 356 N.Y.S.2d 414 (Sup. Ct. N.Y. County 1974). For an excellent critique of the immunity privilege, see *Keeffe & Roscia, Immunity and Sentimentality*, 32 CORNELL L.Q. 471 (1947).

The designation of the nonresident’s attorney as agent for service of process under CPLR 303 does not act to remove the personal immunity granted to the nonresident plaintiff. See *Landsman v. Rabinowitz*, 208 Misc. 126, 144 N.Y.S.2d 241 (Sup. Ct. N.Y. County 1955). *But see* *Resort Airlines, Inc. v. Sternberg*, 208 Misc. 383, 144 N.Y.S.2d 70 (Sup. Ct. N.Y. County 1955). Nevertheless, since valid service may be made on the attorney, CPLR 303 operates to curtail the immunity privilege. The agency designation of the attorney exists during the pendency of the nonresident’s action. Service may be made only from the time that the action is commenced to the moment a final judgment is entered. See *Banco de Brasil v. Madison*

this procedure is limited to a separate action that "would have been permitted as a counterclaim had the [first] action been brought in the supreme court."⁴³ Recently, in *Rockwood National Corp. v. Peat, Marwick, Mitchell & Co.*,⁴⁴ the Appellate Division, Second Department, construed CPLR 303 to extend only to actions instituted in state court and thus found it inapplicable when the nonresident's original action was commenced in federal court.⁴⁵

In *Rockwood*, shareholders of Rockwood National Corp. (Rockwood) brought an action in the District Court for the Southern District of New York alleging violations of federal securities laws by Durick and Siegel, two of its corporate officers, and its auditor, Peat, Marwick, Mitchell & Co. (PMM).⁴⁶ In this action, Durick and Siegel cross-claimed against PMM, disclaiming all liability.⁴⁷ In a

S.S. Corp., 61 Misc. 2d 1028, 307 N.Y.S.2d 341 (Sup. Ct. N.Y. County 1970); *Concourse Super Serv. Station, Inc. v. Price*, 33 Misc. 2d 503, 226 N.Y.S.2d 651 (Sup. Ct. Bronx County 1962).

⁴² In accord with CPLR 105(b) (1972), courts have construed actions under CPLR 303 to include special proceedings. See *Hurwitz v. Bernard Assocs. Number Three, Inc.*, 30 Misc. 2d 512, 219 N.Y.S.2d 531 (Sup. Ct. Queens County 1961). The commencement of criminal proceedings are not included within the scope of CPLR 303. See *Mount Everest Strawberry Co. v. Chapron*, 29 Misc. 2d 390, 218 N.Y.S.2d 30 (Sup. Ct. Kings County 1961); *Krooks v. Krooks*, 2 Misc. 2d 890, 150 N.Y.S.2d 268 (Sup. Ct. Westchester County 1956). Similarly, CPLR 303 does not extend to arbitration proceedings, see *Knickerbocker Ins. Co. v. Gilbert*, 28 N.Y.2d 57, 268 N.E.2d 758, 320 N.Y.S.2d 12 (1971); *Titan Research & Dev. Corp. v. Doeller*, 30 Misc. 2d 835, 217 N.Y.S.2d 726 (Sup. Ct. N.Y. County 1961), unless leave of the court is required to compel or stay arbitration. See *Gillespie & Co. v. Coleport Fabrics, Inc.*, 48 Misc. 2d 333, 264 N.Y.S.2d 653 (Sup. Ct. N.Y. County 1965). Commencement of an action by an assignee will not permit service upon the assignor of a claim unless the former is acting solely as an agent for the latter. *Segal Lock & Hardware Co. v. Markey*, 124 N.Y.S.2d 181 (Sup. Ct. N.Y. County 1953).

⁴³ CPLR 303 (Supp. 1978-1979). CPLR 303 extends to any claim that could have been brought as a counterclaim in New York supreme court. *Id.* CPLR 3019, which governs counterclaims, states that a counterclaim "may be any cause of action in favor of" a defendant against a plaintiff. CPLR 3019(a) (1974). Thus, the separate CPLR 303 cause of action need not be related to the subject matter of the original suit. *Norry v. Land*, 44 Misc. 2d 556, 254 N.Y.S.2d 176 (Sup. Ct. Monroe County 1964).

⁴⁴ 63 App. Div. 2d 978, 406 N.Y.S.2d 106 (2d Dep't 1978) (per curiam).

⁴⁵ *Id.* at 978, 406 N.Y.S.2d at 107.

⁴⁶ *Id.* at 978, 406 N.Y.S.2d at 106. The federal action was brought under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976). The plaintiffs alleged that the financial statements of Rockwood National Corp. (Rockwood), prepared by Peat, Marwick, Mitchell & Co. (PMM), contained misrepresentations. Durick and Siegel were charged with "aiding and abetting" the issuance of the false statements. Brief for Respondent at 3-4, *Rockwood Nat'l Corp. v. Peat, Marwick, Mitchell & Co.*, 63 App. Div. 2d 978, 406 N.Y.S.2d 106 (2d Dep't 1978) (per curiam). The Securities Exchange Act of 1934 specifies that the federal district courts have exclusive jurisdiction in this type of action. 15 U.S.C. § 78aa (1976).

⁴⁷ 63 App. Div. 2d at 978, 406 N.Y.S.2d at 106. Durick and Siegel's cross-claim alleged that PMM was solely responsible for any misrepresentations and any judgment for the plaintiffs should be fully borne by PMM. Brief for Respondent at 4, *Rockwood Nat'l Corp. v. Peat Marwick, Mitchell & Co.*, 63 App. Div. 2d 978, 406 N.Y.S.2d 106 (2d Dep't 1978) (per curiam).

related action brought by Rockwood against PMM in the Supreme Court, Westchester County, PMM counterclaimed against nonresidents Durick and Siegel and served their attorney with process.⁴⁸ PMM contended that the interposition of the cross-claim in the federal suit subjected Durick and Siegel to in personam jurisdiction pursuant to CPLR 303.⁴⁹ Rejecting this argument, the lower court dismissed the counterclaim for lack of personal jurisdiction.⁵⁰

In a unanimous, per curiam decision, the appellate division affirmed.⁵¹ The court interpreted CPA 227-a, the predecessor of CPLR 303, to be inapplicable to an action commenced in a federal court located within New York.⁵² Although the court found the language of CPLR 303 to be unclear, it believed that the legislature did not intend to change prior law when it enacted the statute.⁵³ Concluding that the commencement of an action in federal court does not provide a basis upon which to serve a nondomiciliary's attorney under CPLR 303, the *Rockwood* court declined to rule on whether a broader reading of the statute would have been constitutionally permissible.⁵⁴ In addition, the court did not indicate whether the provisions of the statute would have applied if the original action had been brought in state court.⁵⁵

Although some courts have intimated that the commencement of a federal action is within the scope of CPLR 303,⁵⁶ the *Rockwood*

⁴⁸ 63 App. Div. 2d at 978, 406 N.Y.S.2d at 106. The state action was brought by Rockwood National Corp. and two subsidiary corporations. *Id.* Alleging PMM negligently audited their corporate records, the plaintiffs sought damages for accounting malpractice. Brief for Appellant at 7, *Rockwood Nat'l Corp. v. Peat, Marwick, Mitchell & Co.*, 63 App. Div. 2d 978, 406 N.Y.S.2d 106 (2d Dep't 1978) (per curiam). In its counterclaim, PMM alleged that Rockwood, Durick, and Siegel concealed information and otherwise made false representations as to the validity of the corporation's records. Brief for Appellant at 8-9.

⁴⁹ 63 App. Div. 2d at 978, 406 N.Y.S.2d at 106-07.

⁵⁰ *Id.*, 406 N.Y.S.2d at 106.

⁵¹ *Id.* The case was heard by Presiding Justice Gulotta and Justices Shapiro, Cohalan and O'Connor.

⁵² 63 App. Div. 2d at 978, 406 N.Y.S.2d at 107.

⁵³ *Id.* Under CPA 227-a, "[t]he commencement of any action or proceeding in any court of this state by any person not residing in this state shall be deemed a designation" of his attorney as agent for service of process. Ch. 161, [1949] N.Y. Laws 342 (emphasis added). In contrast, CPLR 303 provides that "[t]he commencement of an action in the state by a [nonresident] is a designation" of his attorney for service of process. CPLR 303 (Supp. 1978-1979) (emphasis added).

⁵⁴ 63 App. Div. 2d at 978, 406 N.Y.S.2d at 107; see notes 64-66 and accompanying text *infra*.

⁵⁵ *Id.*; see notes 64-66 and accompanying text *infra*.

⁵⁶ See, e.g., *Kamhi v. Cohen*, 512 F.2d 1051 (2d Cir. 1975); *Banco de Brasil v. Madison S.S. Corp.*, 61 Misc. 2d 1028, 307 N.Y.S.2d 341 (Sup. Ct. N.Y. County 1970). See generally WK&M ¶ 303.01.

court appears correct in its assessment of the statute's legislative history. CPA 227-a was directed to instances where a counterclaim was stricken by the court,⁵⁷ or where a counterclaim could not be interposed in a court of limited jurisdiction.⁵⁸ Thus, the legislature provided a means by which personal jurisdiction could be obtained over a nondomiciliary who was immune from service of process, thereby permitting defendants to adjudicate these claims in a separate action. In enacting CPA 227-a to deal with situations where counterclaims could not be interposed,⁵⁹ it does not appear that the legislature otherwise intended to abrogate the immunity generally given to nonresidents who are parties to judicial proceedings in the state. Furthermore, the *Rockwood* court correctly recognized that a

⁵⁷ Recommendation of the Law Revision Commission to the Legislature Relating to Designation by a Non-Resident Plaintiff of Attorney as Agent to Receive Service of Process in Separate Action or Proceeding, [1949] N.Y. LAW REV. COMM'N REP. 169 [hereinafter cited as 1949 REPORT]; see CPA 262, ch. 324, [1936] N.Y. Laws 675.

⁵⁸ 1949 REPORT, *supra* note 57, at 200-01. The Report referred to the Municipal Court of the City of New York which had no power to grant affirmative equitable relief as an example of when a counterclaim could not be interposed in a court of limited jurisdiction. Thus, in an action for breach of contract, the defendant could not counterclaim for reformation or cancellation of the contract. Instead, he would have to commence a separate action in another court. *Id.* at 173 n.1.

⁵⁹ New York courts previously had refused to alter the general immunity rule which applied to nonresident plaintiffs, see note 42 *supra*, notwithstanding its harsh effect on local defendants. See *Petrova v. Roberts*, 216 App. Div. 814, 216 N.Y.S. 897 (2d Dep't 1926), *aff'd mem.*, 245 N.Y. 518, 157 N.E. 841 (1927); *Roberts v. Thompson*, 149 App. Div. 437, 134 N.Y.S. 363 (4th Dep't 1912).

The constitutionality of a California statute identical in purpose to CPA 227(a) was sustained by the United States Supreme Court in *Adam v. Saenger*, 303 U.S. 59 (1938). In so holding, the Court stated:

There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff *in its courts* The plaintiff having, by his voluntary act . . . submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff.

Id. at 67-68 (emphasis added); see *Frank L. Young Co. v. McNeal-Edwards Co.*, 283 U.S. 398 (1931); See generally RESTATEMENT (SECOND) OF CONFLICT OF LAW § 83 (1969); RESTATEMENT (SECOND) OF JUDGMENTS § 21, comment a (1942).

Conditions on the use of a state's facilities are not limited to its court system. The state, for example, may stipulate that before a foreign corporation may do business in the state, it must meet certain registration requirements and designate the Secretary of State as the corporation's agent for service of process. See, e.g., N.Y. BUS. CORP. LAW § 1304 (1972). Similarly, a condition attached to a nonresident's use of state roadways is the designation of the Secretary of State for service of process. See VEH. & TRAF. LAW § 253 (1970 & Supp. 1978-1979). The United States Supreme Court has upheld the constitutionality of such statutes, declaring that, where the state has a "special interest" in protecting its citizens, regulations on nonresidents are permissible. See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Hess v. Palowski*, 274 U.S. 352 (1927).

constitutional issue would be presented if CPLR 303 were interpreted to apply to actions commenced in federal court.⁶⁰ Since the right to utilize the federal courts is protected by the Constitution,⁶¹ and federal courts confer immunity upon parties to their proceedings,⁶² it is unclear whether New York could base jurisdiction on the institution of a suit in a federal court located in New York.⁶³

The result in *Rockwood* can also be justified on the ground that CPLR 303 was intended to enable a resident defendant to obtain jurisdiction over a nonresident plaintiff who purposefully and voluntarily entered the state to institute an action for his own benefit.⁶⁴ The assertion of a cross-claim that is essentially defensive in nature, as was done in *Rockwood*, should not be considered within the scope of CPLR 303.⁶⁵ It is submitted that only cross-claims that are unrelated to the main cause of action are sufficiently similar to the "commencement of an action" to justify application of CPLR 303.⁶⁶

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⁶⁰ 63 App. Div. 2d at 978, 406 N.Y.S.2d at 107.

⁶¹ See *Donovan v. City of Dallas*, 377 U.S. 408 (1964); *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922); *Markham v. City of Newport News*, 292 F.2d 711 (4th Cir. 1961). In *Terral*, the Court stated that, "a State may not, in imposing conditions upon [a party], exact from it a waiver of the exercise of its constitutional right to resort to the federal courts." 257 U.S. at 532.

⁶² The federal courts grant immunity as a convenience of the court, based on "their own notions of fairness and expediency." 2 MOORE'S FEDERAL PRACTICE ¶ 4.20 (3d ed. 1978); see *Page Co. v. MacDonald*, 261 U.S. 446 (1923); *Stewart v. Ramsey*, 242 U.S. 128 (1916). The extension of immunity to a party attending federal proceedings is deemed a procedural regulation and thus it may be neither controlled nor limited by state law. See *Marlowe v. Baird*, 301 F.2d 169 (6th Cir. 1962); *Hardie v. Bryson*, 44 F. Supp. 67 (E.D. Mo. 1942).

⁶³ Referring to the problems raised by a state asserting jurisdiction over a party who is attending a federal action, Dean McLaughlin states that the decision reached by the *Rockwood* court, "avoided a serious constitutional difficulty." CPLR 303, commentary at 70 (Supp. 1978-1979).

⁶⁴ See 1949 REPORT, *supra* note 57, at 174, 193.

⁶⁵ Cf. *Green v. Bender*, N.Y.L.J., June 15, 1976 at 11, col. 5 (Sup. Ct. Westchester County), discussed in *The Quarterly Survey*, 51 ST. JOHN'S L. REV. 201, 212 (1976) (counter-claim for Dole apportionment by nonresident third-party defendant defensive in nature and thus not a predicate for the use of CPLR 303).

⁶⁶ CPLR 3019(b) (1972), provides that "[a] cross-claim may be any cause of action in favor of one or more defendants" against another defendant. See, e.g., *A & R Constr. Co. v. New York State Elec. & Gas Co.*, 27 App. Div. 2d 899, 278 N.Y.S.2d 165 (3d Dep't 1967) (mem.); *La France Carpets, Inc. v. United States Rubber Co.*, 19 App. Div. 2d 812, 243 N.Y.S.2d 540 (1st Dep't 1963) (mem).

In contrast, a cross-claim in a federal action must allege a claim that is related to the transaction that is the subject matter of the primary litigation. FED. R. CIV. P. 13(g). Thus, they are "ancillary" to the main claim and independent jurisdictional grounds need not be established. 2 H. KOOMAN, FEDERAL CIVIL PRACTICE § 13.16 at 202 (1969); see, e.g., *R.M. Smythe & Co. v. Chase Nat'l Bank*, 291 F.2d 721 (2d Cir. 1961); *Glens Falls Indem. Co. v. United States*, 229 F.2d 370 (9th Cir. 1955); *United States v. Manufacturers Hanover Trust*

ARTICLE 9 — CLASS ACTIONS

CPLR 901: Class action denied in products liability case where common questions of design defect and misleading advertising held not to predominate over individual questions of causation and reliance

Enacted in 1975, article 9 of the CPLR expanded the applicability of the class action device in New York and removed certain judicially imposed barriers to its use.⁶⁷ Under CPLR 901, a plenary

Co., 231 F. Supp. 160 (S.D.N.Y. 1964). The purpose of allowing ancillary cross-claims is to expedite the judicial process by determining the rights of all related parties in one action. See *Meisner v. Healey*, 18 App. Div. 2d 368, 239 N.Y.S.2d 352 (1st Dep't 1963).

The assertion of an independent cross-claim under CPLR 3019(b) by a person not otherwise subject to personal jurisdiction has been held to constitute a waiver of jurisdictional defenses. See *Goodman v. Solow*, 27 App. Div. 2d 920, 279 N.Y.S.2d 377 (1st Dep't) (mem.), *leave to appeal denied*, 20 N.Y.2d 646, 231 N.E.2d 789, 285 N.Y.S.2d 1026 (1967). See also CPLR 320, commentary at 379 (1972 & Supp. 1978-1979). Support for the conclusion that the assertion of an ancillary cross-claim by a nonresident defendant is ineffective to invoke jurisdiction under CPLR 303 may be found in the analogous situation where a defendant asserts a counterclaim that is related to the subject matter of the complaint. The courts have held that this will not waive a defendant's jurisdictional defenses. See, e.g., *Italian Colony Restaurant, Inc. v. Werhshals*, 45 App. Div. 2d 841, 358 N.Y.S.2d 448 (2d Dep't 1974) (mem.) (dicta); *M. Katz & Son Billiard Prods., Inc. v. G. Correale & Sons, Inc.*, 26 App. Div. 2d 52, 270 N.Y.S.2d 672 (1st Dep't 1966), *aff'd mem.*, 20 N.Y.2d 903, 232 N.E.2d 864, 285 N.Y.S.2d 871 (1967).

⁶⁷ TENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1972), in EIGHTEENTH ANN. REP. N.Y. JUD. CONFERENCE A27, A35-36 (1973); see EIGHTEENTH ANN. REP. N.Y. JUD. COUNCIL 217, 229-34 (1952). See generally *The Survey*, 50 ST. JOHN'S L. REV. 179, 189 (1975). Article 9 of the CPLR replaced the former class action statute, ch. 308, § 1, [1962] N.Y. LAWS (McKinney) (repealed by ch. 207, § 2, [1975] N.Y. LAWS (McKinney)), which required that privity exist between class members as a condition for maintaining a class action. See D. SIEGEL, *NEW YORK PRACTICE* § 140, at 176-77 (1978); 2 WK&M ¶ 901.02, at 9-6 to 7; Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971), reprinted in TENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1972), in EIGHTEENTH ANN. REP. N.Y. JUD. CONFERENCE 242, 245-48 (1972). Under this provision, the proposed class action had to be based on a "legal relation or unity of interest among the individual members of the group in relation to the subject matter of the action or the right asserted, or, at least a community of interest in relation to the relief demanded." EIGHTEENTH ANN. REP. N.Y. JUD. COUNCIL 217, 229 (1952) (CIV. PRAC. ACT. § 195 (renumbered CPLR 1005)). The privity requirement was included to avoid situations in which non-participating class members would be bound by a judgment in the absence of a common tie. See *Brenner v. Title Guar. & Trust Co.*, 276 N.Y. 230, 236-37, 11 N.E.2d 890, 893 (1937); Homburger, *supra*, at 613-17. Thus, the courts frequently held that "[s]eparate wrongs to separate persons, though committed by similar means and even pursuant to a single plan, do not alone create a common or general interest in those who are wronged." *Hall v. Coburn Corp.*, 26 N.Y.2d 396, 400, 259 N.E.2d 720, 721, 311 N.Y.S.2d 281, 283 (1970) (quoting *Society Milion Athena, Inc. v. National Bank of Greece*, 281 N.Y. 282, 292, 22 N.E.2d 374, 377 (1939); see *Richards v. Kaskel*, 32 N.Y.2d 524, 300 N.E.2d 388, 347 N.Y.S.2d 1 (1973). The strict construction of the former class action statute limited its utility to situations involving a common fund or legal relationship arising from "trusts, partnership, or joint ventures, and ownership of corporate stock." TENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1972), in EIGHTEENTH ANN. REP.