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CPLR 301: Application of the "Doing Business" Predicate to Acquire In Personam Jurisdiction Over Nonresident Individual

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struction of CPLR 203(c) should not, however, go unheeded; nor, it is submitted, should the majority's approach be interpreted as indicative of a judicial narrowing of the equitable recoupment doctrine. The significance of the *SCM* decision lies in the method of analysis utilized by the Court in determining the applicability of section 203(c): careful scrutiny of all facets of the claims, defenses, and counterclaims asserted by the opposing litigants.

ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 301: Application of the "doing business" predicate to acquire in personam jurisdiction over nonresident individuals.

CPLR 301 preserves the predicates for the exercise of in personam jurisdiction that were recognized under pre-CPLR law.[17] One such predicate, the "doing business" test, permits the exercise of jurisdiction over nondomiciliaries engaged in a continuous and systematic course of business within the state in actions not associated with that party's New York operations.[18] Previously, this jurisdictional predicate had been applied only to foreign corporations.[19]

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of the original pleading, also contains the "transaction or occurrence" language found in § 203(c). *See* 1 WK&M ¶ 203.25, at 2-86. In determining the applicability of 203(e), courts appear to focus on the facts underlying the claims rather than the legal theories upon which the causes of action are founded. *See, e.g.*, Town Bd. v. National Sur. Corp., 53 Misc. 2d 23, 277 N.Y.S.2d 872 (Sup. Ct. Sullivan County 1967), *aff'd mem.*, 29 App. Div. 2d 726, 286 N.Y.S.2d 122 (3d Dep't 1968). The *SCM* Court, in reasoning that the facts underlying the landlord's claim related to mutual mistake while the facts inherent in the tenant's claim pertained to improper mathematical assessments, *see* text accompanying note 10 *supra*, seemingly employed an "emphasis of the facts" mode of analysis similar to the test employed under § 203(e).

[17] CPLR 301 provides: "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."

[18] *See The Biannual Survey*, 39 ST. JOHN'S L. REV. 406, 413 (1965). The doing business predicate evolved out of decisional law. It first surfaced in New York in Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917) (Cardozo, J.), wherein the Court held that a corporation which does business in New York "with a fair measure of permanence and continuity . . . is within the jurisdiction of our courts" regardless of the origin of the cause of action. *Id.* at 267, 115 N.E. at 917. *See generally* Prashker, *Service of Summons on Non-Resident Natural Persons Doing Business in New York*, 15 ST. JOHN'S L. REV. 1, 18-19 (1940)[hereinafter cited as Prashker].

[19] *See, e.g.*, Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317 (2d Cir. 1964); Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965); Curran v. Rouse Transp. Corp., 42 Misc. 2d 1055, 249 N.Y.S.2d 718 (Sup. Ct. Queens County 1964). In *Curran* the court refused to extend the doing business test to nonresident individuals. *Id.* at 1058, 249 N.Y.S.2d at 721. A federal tribunal, however, in Erving v. Virginia Squires Basketball Club, 349 F. Supp. 709 (E.D.N.Y. 1972), applied the test to a partnership without discussing the fact that it previously had been applied only to corporations. *Id.* at 712-15.

Recently, however, the Appellate Division, First Department, in *ABKCO Industries, Inc. v. Lennon,*[20] extended the doing business jurisdictional nexus to encompass an exercise of jurisdiction over a nonresident individual.

ABKCO Industries, a former theatrical manager of the Beatles, instituted an action against the individual members of that well-known singing group.[21] Plaintiff sought to recover money allegedly due for services performed and funds advanced during the period that it managed the group under a contract entered into in London.[22] Richard Starkey, one of the named defendants, was served in England pursuant to CPLR 301 on the theory that he was doing business in New York.[23] Dean Joseph McLaughlin, serving as referee, initially determined that Starkey could not be served under CPLR 301 since " 'jurisdiction over an individual cannot rest on a finding that he is doing business in this State unless the cause of action arises out of that business.' "[24] While the supreme court conceded that this was probably an "accurate exposition of case law,"[25] it construed CPLR 301 broadly, subjecting Starkey to the same jurisdictional standards that are applied to foreign corporations.[26] The trial court held, therefore, that the doing business nexus could be utilized to acquire personal jurisdiction over defendant Starkey.[27]

The Appellate Division, First Department, in affirming the trial court's disposition of the jurisdictional issue, maintained that CPLR 301 was limited neither by CPLR 302(a)(1), which subjects nonresidents transacting business in New York to jurisdiction in actions arising from that business,[28] nor by prior statutory provisions.[29] Thus, because Starkey " 'pervasively, unmistakably, unde-

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[20] *Id.* at 712-15, 52 App. Div. 2d 435, 384 N.Y.S.2d 781 (1st Dep't 1976), *modifying* 85 Misc. 2d 465, 377 N.Y.S.2d 362 (Sup. Ct. N.Y. County 1975).

[21] In addition to the individual Beatles, the defendants in *ABKCO* included the wife of one of the group members, the group's English solicitor, and nine of their affiliated companies in the United States. 52 App. Div. 2d at 438, 384 N.Y.S.2d at 782-83.

[22] *Id.*

[23] 85 Misc. 2d at 467, 377 N.Y.S.2d at 364. Seven of the affiliated companies, *see* note 21 *supra,* were also served under CPLR 301. 85 Misc. 2d at 467, 377 N.Y.S.2d at 364.

[24] 85 Misc. 2d at 469, 377 N.Y.S.2d at 366.

[25] *Id.*

[26] *Id.* at 469-70, 377 N.Y.S.2d at 366-67.

[27] *Id.* at 470, 377 N.Y.S.2d at 367.

[28] CPLR 302(a)(1) provides in pertinent part:

> As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary . . . who in person or through an agent:
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> 1. transacts any business within the state . . . .

[29] 52 App. Div. 2d at 440, 384 N.Y.S.2d at 784. The language of § 301 plainly states that

niably, continuously and substantially'" did business in New York,[30] the first department declared, he was subject to personal jurisdiction even "with respect to causes of action which did not arise in New York."[31]

Since the doing business jurisdictional predicate apparently has never before been applied to individual defendants in New York,[32] a question arises as to whether such an expansion of in personam jurisdiction is permissible under the federal constitution. Due to the fact that defendant Starkey retained attorneys and accountants in New York on a continuing basis to exploit his composing activities in the United States,[33] this extension of the doing business predicate seems to be constitutionally permissible. By purposefully availing himself "of the privilege of conducting activities within the forum state, [and] thus invoking the benefits and pro-

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a "court may exercise such jurisdiction . . . as might have been exercised heretofore." This was intended to assure that previously permitted jurisdiction was not to be superseded or limited by any other CPLR provisions. *See* SECOND REP. 38. Some commentators, however, have suggested that § 301 is merely a codification of previously existing bases of jurisdiction. *See* CPLR 301, commentary at 7 (McKinney Supp. 1977). Under this view, prior limitations on the exercise of in personam jurisdiction are also deemed codified in CPLR 301, *viz*, CPA 229-b which authorized service of summons upon a nonresident individual doing business in New York *only in actions arising out of such business.* The *ABKCO* court, however, chose to give § 301 a more expansive interpretation by construing it to preserve the exercise of prior jurisdiction without preserving such limitations. It is submitted that this is the better view and more in keeping with the objective of the draftsmen of article 3 of the CPLR "[t]o make it possible, with very limited exceptions, for a litigant in the New York courts to take full advantage of the state's constitutional power over persons and things." SECOND REP. 37.

[30] 52 App. Div. 2d at 439, 384 N.Y.S.2d at 783, *quoting* 85 Misc. 2d at 469, 377 N.Y.S.2d at 366. There are no precise criteria for determining what constitutes doing business. Courts have indicated that the test necessarily must be a pragmatic one. *See* Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 432, 208 N.E.2d 439, 441, 260 N.Y.S.2d 625, 628-29 (1965). The in-state activities must have a "fair measure of permanence and continuity" in order to establish the nonresident's presence. *See* Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 267, 115 N.E. 915, 917 (1917). The test does not require, however, that the primary activities of the defendant be carried on in the state; rather, the fact that an agent or employee devotes a portion of his time to promoting the business interests of the individual in New York is sufficient. *See* Frummer v. Hilton Hotels Int'l Inc., 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, *cert. denied*, 389 U.S. 923 (1967).

It is important to note the distinction between "doing business" and "transacting business" as the latter term is used in the CPLR. The contacts required under the doing business test are more substantial than those necessary to constitute transacting business under CPLR 302. *See* Simonson v. International Bank, 14 N.Y.2d 281, 288, 200 N.E.2d 427, 431, 251 N.Y.S.2d 433, 438 (1964).

[31] 52 App. Div. 2d at 440, 384 N.Y.S.2d at 784.

[32] *See* note 19 and accompanying text *supra.* Dean McLaughlin has stated that, until *ABKCO*, "all the New York cases involving 'doing business' have dealt with corporate defendants." CPLR 301, commentary at 7 (McKinney Supp. 1977).

[33] 52 App. Div. 2d at 440, 384 N.Y.S.2d at 784.

tections of its law,"[34] it is submitted that Starkey fell within the constitutional limits for the exercise of a state's jurisdiction over persons.[35]

Aside from the constitutional issue,[36] the *ABKCO* decision raises a serious question concerning the extent to which New York courts should exercise their far-reaching jurisdiction. In resolving this issue, several important equitable considerations must be weighed. The crucial judicial task would seem to entail balancing the need to protect state interests against the desire to avoid imposition of undue hardships upon nondomiciliaries.[37] In the case of many individual defendants, the scales will often indicate that jurisdiction should not be asserted.[38] While application of the balancing process by the trial court in *ABKCO* led it to conclude that jurisdiction over Starkey should be exercised,[39] it is noteworthy that the appellate division, unlike the trial court, did not explicitly utilize a

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[34] Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[35] *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945); Hanson v. Denckla, 357 U.S. 235 (1958). In *Hanson,* the most recent Supreme Court opinion on the subject, it was implied that when the cause of action was unrelated to the defendant's activities in the forum state, something more than the minimum contacts test of *International Shoe* would be applied. *Id.* at 253. Since Starkey's business activities were found by the court to be continuous and substantial, *see* 52 App. Div. 2d at 439, 384 N.Y.S.2d at 783, it is submitted that they constituted more than minimum contacts with New York.

[36] It also conceivably could be argued that subjecting a nonresident to the jurisdiction of the state merely because he does business in that state violates the privileges and immunities clause. The purpose of that clause, however, is to prevent unjust discrimination by a state against citizens of other states. *See* Prashker, *supra* note 18, at 11. The Supreme Court has never held that this clause demands exact equality between nonresidents and residents; instead the provision requires only that there be valid and substantial reasons for discriminating. *See* Toomer v. Witsell, 334 U.S. 385 (1948); Canadian-Northern Ry. v. Eggen, 252 U.S. 553, 562 (1920). *See generally* Note, *Service of Summons on Non-Resident Natural Person Doing Business in the State,* 10 FORDHAM L. REV. 126, 128 (1941). There appears to be no inequality in acquiring jurisdiction over a nonresident individual because he does business in the state, as this merely subjects him to the same power which a state exercises over its own citizens.

[37] *See* note 38 *infra.*

[38] Individuals are likely to be more inconvenienced than corporations in defending an action in a foreign jurisdiction. Therefore, the doctrine of forum non conveniens may present a frequent bar to the extension of jurisdiction endorsed in *ABKCO.* "The principle of *forum non conveniens* . . . [allows] a court [to] resist imposition upon its jurisdiction even when jurisdiction is authorized . . . ." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). When a suit is based on a foreign cause of action and one or both of the parties are nonresidents, forum non conveniens becomes an important consideration. *See* Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972). In such a case the court, in its discretion, may decide that the forum is not an appropriate place for the trial and dismiss the action. *See id.* at 363, 278 N.E.2d at 623, 328 N.Y.S.2d at 404. *See generally Developments in the Law— State-Court Jurisdiction,* 73 HARV. L. REV. 909, 1010-11 (1960) (discussing the factors considered by a court in invoking the doctrine of forum non conveniens).

[39] *See* 85 Misc. 2d at 470, 377 N.Y.S.2d at 366-67.

balancing approach, and did not expressly limit its holding to the specific context of the case.[40] Rather, the appellate division merely set forth the general rule that an individual who conducts continuous business activity within the state is subject to in personam jurisdiction with respect to causes of action not related to that activity.[41] It is hoped that this holding does not signal an unrestricted extension of the doing business jurisdictional predicate. New York has in the past adhered to a "wise policy . . . [of refraining] from imposing its jurisdiction too easily and unjustly upon nonresident individuals . . . ."[42] It would be unfortunate if the New York courts retreated from this position.

ARTICLE 32—ACCELERATED JUDGMENT

CPLR 3211: Court of Appeals limits use of affidavits where motion to dismiss is not converted into motion for summary judgment.

CPLR 3211(a)(7) permits a party to move for judgment dismissing a complaint if "the pleading fails to state a cause of action."[43] Subdivision (c) of CPLR 3211 further provides that upon the hearing of this motion, the parties may submit any evidence that a court could consider on a motion for summary judgment.[44] Since the submission of an affidavit in support of a motion for summary judgment is mandatory,[45] the courts have permitted the use of affidavits on a motion to dismiss made pursuant to CPLR 3211(a)(7).[46] Recently, however, in *Rovello v. Orofino Realty Co.*,[47] a divided Court

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[40] 52 App. Div. 2d at 440, 384 N.Y.S.2d at 784.

[41] *Id.*

[42] 85 Misc. 2d at 470, 377 N.Y.S.2d at 367.

[43] CPLR 3211(a)(7) provides: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: . . . the pleading fails to state a cause of action . . . ."

[44] CPLR 3211(c) provides: "Upon the hearing of a motion made under subdivision (a) . . . either party may submit any evidence that could properly be considered on a motion for summary judgment . . . ."

[45] CPLR 3212(b) provides in pertinent part: "A motion for summary judgment shall be supported by affidavit . . . ."

[46] In Rapoport v. Schneider, 29 N.Y.2d 396, 401, 278 N.E.2d 642, 645, 328 N.Y.S.2d 431, 436 (1972), the Court of Appeals utilized the facts contained in defendant's affidavit in considering a motion to dismiss. For some of the lower court cases in which the court allowed submission of affidavits to support a motion to dismiss, see Rappaport v. International Playtex Corp., 43 App. Div. 2d 393, 352 N.Y.S.2d 241 (3d Dep't 1974); Hamilton Printing Co. v. Ernest Payne Corp., 26 App. Div. 2d 876, 273 N.Y.S.2d 929 (3d Dep't 1966) (mem.); Epps v. Yonkers Raceway, Inc., 21 App. Div. 2d 798, 250 N.Y.S.2d 751 (2d Dep't 1964) (mem.).

[47] 40 N.Y.2d 633, 357 N.E.2d 970, 389 N.Y.S.2d 314 (per curiam), *rev'g* 51 App. Div. 2d 562, 378 N.Y.S.2d 740 (2d Dep't 1976) (mem.).