

August 2012

# CPLR 327: Doctrine of Forum Non Conveniens Held Inapplicable Although the Plaintiff's Only Apparent Connection with New York Was His Residence

St. John's Law Review

Follow this and additional works at: <http://scholarship.law.stjohns.edu/lawreview>

---

### Recommended Citation

St. John's Law Review (2012) "CPLR 327: Doctrine of Forum Non Conveniens Held Inapplicable Although the Plaintiff's Only Apparent Connection with New York Was His Residence," *St. John's Law Review*: Vol. 48: Iss. 1, Article 10.

Available at: <http://scholarship.law.stjohns.edu/lawreview/vol48/iss1/10>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact [cerjanm@stjohns.edu](mailto:cerjanm@stjohns.edu).

to recommend consideration of judicially devised service by the lower court.

Following the Court of Appeals' suggestion, the Supreme Court, Albany County, on the remand of the *Deason* case,<sup>51</sup> granted an indigent plaintiff's request to serve the defendant pursuant to CPLR 308(5) by mailing him the summons in care of his mother. The court reasoned that the primary purpose of DRL 232 is to prevent fraud by requiring notice of the nature of the action.<sup>52</sup> This provision, the court stated, "should not be allowed to eclipse the primary provisions of law governing permissible *methods* of service."<sup>53</sup> The court noted that CPLR 308(5), unlike CPLR 308(2) through (4), does not expressly exclude matrimonial actions from its application. From this the court concluded that "there is no indication of legislative intent to extend the matrimonial exclusion to subsection 5."<sup>54</sup> The plaintiff would not be allowed to avail herself of judicially devised service, the court held, until she had met the heavy burden of showing that an exhaustive search had been made for the defendant, that other permissible methods of service were impracticable and that the proposed method of service complied with due process. Nonetheless, the plaintiff was held to have met this burden by submitting an affidavit stating that the defendant had not been seen in the area for the past three years. Mailing of the process to a relative was held to be compatible with due process.<sup>55</sup>

The *Deason* solution to the problem of service on absent defendants in indigents' matrimonial actions is clearly preferable to publicly financed publication. It is hoped that it will become the routine practice in these cases.

*CPLR 327: Doctrine of forum non conveniens held inapplicable although the plaintiff's only apparent connection with New York was his residence.*

The *Silver v. Great American Insurance Co.*<sup>56</sup> decision and its codification in CPLR 327 introduced a welcome change in the doctrine of *forum non conveniens*. Under the former rule, the doctrine was

---

<sup>51</sup> 73 Misc. 2d 964, 343 N.Y.S.2d 276 (Sup. Ct. Albany County 1973).

<sup>52</sup> The court cited *Apploff v. Apploff*, 55 Misc. 2d 781, 287 N.Y.S.2d 486 (Sup. Ct. Kings County 1968); *Martin v. Martin*, 38 Misc. 2d 836, 238 N.Y.S.2d 749 (Sup. Ct. Richmond County 1963); *Braham v. Braham*, 91 Misc. 151, 154 N.Y.S. 1044 (Sup. Ct. N.Y. County 1915); *Rudolph v. Rudolph*, 12 N.Y.S. 81 (Super. Ct. of Buffalo 1890).

<sup>53</sup> 73 Misc. 2d at 968, 343 N.Y.S.2d at 281 (emphasis in original).

<sup>54</sup> *Id.* at 967, 343 N.Y.S.2d at 280.

<sup>55</sup> *Id.* at 966, 343 N.Y.S.2d at 279, citing *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Dobkin v. Chapman*, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

<sup>56</sup> 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 158 (1972).

automatically inapplicable if either party was a resident of New York, regardless of the presence of any other relevant factors.<sup>57</sup> This rigid approach was abandoned by *Silver* in favor of a more flexible one based upon "considerations of justice, fairness and convenience and not solely on the residence of one of the parties."<sup>58</sup>

This policy seems to have been ignored by the Appellate Division, First Department, in a recent case, *Slaughter v. Waters*.<sup>59</sup> The lower court had dismissed the action on the ground of *forum non conveniens*, and the 3-2 majority, purporting to apply *Silver*, reversed, despite the fact that the plaintiff's only apparent connection with New York was his residence here. The suit grew out of an accident in North Carolina and the court acquired jurisdiction by attachment of the defendant's automobile insurance policy under the *Seider v. Roth*<sup>60</sup> doctrine. Cases such as *Seider* and *Babcock v. Jackson*,<sup>61</sup> as well as the enactment of the long-arm statutes, were partly responsible for the *Silver* holding, because they brought increasing numbers of suits of foreign origin into the New York courts. One aim of *Silver* was to give the courts some control over their burgeoning dockets by conferring upon them the right to refuse to hear a case which clearly did not belong in a court of this state. As Chief Judge Fuld stated in *Silver*, "[i]t has become increasingly apparent that a greater flexibility in applying the doctrine is not only wise but, perhaps, necessary."<sup>62</sup>

The old rule, under which the simple fact of residence automatically precluded the application of *forum non conveniens*, was susceptible to gross abuse. A party's choice of New York as a forum was often motivated by improper purposes, such as the hope of a higher verdict, the chance to harass one's adversary, or the belief that potentially damaging local prejudice existed in another jurisdiction. The opportunity for abuse under the pre-*Silver* rule was compounded by the fact that even residence acquired after the accrual of the cause of action,<sup>63</sup>

<sup>57</sup> See *De La Bouillerie v. De Vienne*, 300 N.Y. 60, 89 N.E.2d 15 (1949); 1 WK&M ¶ 327.01.

<sup>58</sup> 29 N.Y.2d at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402. Factors to be considered by the court include "the burden on the court, the burden on the parties, and any special or unusual circumstances." 1 WK&M ¶ 327.01. Special circumstances might include a situation where all other available forums had declined to accept jurisdiction. See 7B MCKINNEY'S CPLR 327, *supp. commentary* at 22 (1972).

<sup>59</sup> 41 App. Div. 2d 810, 342 N.Y.S.2d 180 (1st Dep't 1973) (mem.).

<sup>60</sup> 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), *discussed in The Quarterly Survey*, 41 ST. JOHN'S L. REV. 463, 490 (1967). See also Note, *Seider v. Roth: The Constitutional Phase*, 43 ST. JOHN'S L. REV. 58 (1968).

<sup>61</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (wherein the Court of Appeals endorsed the center of gravity theory in conflicts of law cases).

<sup>62</sup> 29 N.Y.2d at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 403.

<sup>63</sup> See, e.g., *De La Bouillerie v. De Vienne*, 300 N.Y. 60, 89 N.E.2d 15 (1949).

or an assignment of the cause of action by a non-resident to a resident,<sup>64</sup> were sufficient to ensure that the doctrine would be no bar.

In *Slaughter*, dissenting Justice McGivern implied that the majority's true motivation in opening up the New York courts to this plaintiff was its belief that he would not get a fair trial in North Carolina.<sup>65</sup> Such a position is contrary to the policy embodied in *Silver*, and encourages forum shopping and all the injustice growing out of that practice. Underlying a decision of whether or not to apply the doctrine of *forum non conveniens* must be the assumption that the quality of justice in all jurisdictions is equal. The refusal to apply it on the basis of a skepticism about that assumption is contrary to the *Silver* mandate that "justice, fairness and convenience" be the controlling considerations.

*CPLR 328: New rule allows New York courts to assist in serving out-of-state judicial documents.*

The Judicial Conference has added Rule 328 to the CPLR.<sup>66</sup> The new rule is an adoption of section 2.04 of the Uniform Interstate and International Procedure Act, and is designed to provide assistance to out-of-state courts and litigants in serving documents on persons domiciled or found within the state. It provides that the Supreme Court or the County Courts may order such service upon application by an "interested person"<sup>67</sup> or when presented with letters rogatory issued by an out-of-state court. The rule specifically states that service of out-of-state papers may be made without court order. It further provides that service pursuant to court order under the new rule will not automatically make a judgment rendered in a foreign judicial proceeding valid and enforceable in New York. The Judicial Conference recommended this change in recognition of the increasing need for interstate and international cooperation in the growing number of cases having "cosmopolitan aspects."<sup>68</sup>

#### ARTICLE 5 — VENUE

*CPLR 503(f): New venue requirements in "consumer credit transactions."*

To combat abuses of venue provisions heretofore prevalent in actions based on consumer credit sales, the Legislature has enacted a

---

<sup>64</sup> See, e.g., *Wagner v. Braunsberg*, 5 App. Div. 2d 564, 173 N.Y.S.2d 525 (1st Dep't 1958).

<sup>65</sup> 41 App. Div. 2d at 811, 342 N.Y.S.2d at 182.

<sup>66</sup> JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, REPORT TO THE 1973 LEGISLATURE IN RELATION TO THE CIVIL PRACTICE LAW AND RULES AND PROPOSED AMENDMENTS ADOPTED PURSUANT TO SECTION 229 OF THE JUDICIARY LAW 76 (1973).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 77.