St. John's Law Review

Volume 47, October 1972, Number 1 Article 14

CPLR 327: Recent Developments in the Area of Forum Non Conveniens

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scribed means have failed. Under this statute, virtually any method[37] that meets the due process standard, *i.e.*, which is reasonably calculated to apprise the defendant of the action pending against him, may be employed.[38] However, in divorce actions alone, DRL 232 mandates service by publication if personal service within or without the state can not be effected.[39]

In *Prince v. Prince*,[40] the petitioner, a New York City welfare recipient, sought to compel the state or the city to pay the cost of publication of a divorce summons. The United States Supreme Court, in *Boddie v. Connecticut*,[41] had stated that publication is the weakest method of service for giving notice and that due process may be better satisfied by "service at defendant's last known address by mail and posted notice."[42] The Supreme Court, Richmond County, thus found CPLR 308(5) a viable alternative to the "no substituted service rule" of DRL 232.[43] Finding that it had jurisdiction over the defendant, the court, in the exercise of its discretion, utilized CPLR 308(5) to prescribe a means for giving notice of the pending action.[44] In lieu of publication of the summons, the court ordered the petitioner to mail copies of the summons to the defendant's last known address, his last known employer, and his sister.[45]

Prince is laudable. It pragmatically implements the philosophy of *Boddie* by reducing the cost of service in a divorce action to the expense of mailing, thereby avoiding the problem of who should bear the onerous publication costs of the indigent. In addition, *Prince*, by refusing to restrict non-personal service in a divorce action to publication, avoids the constitutional issue latent in the unique mandate of DRL 232.[46]

CPLR 327: Recent developments in the area of forum non conveniens.

Case law[47] and CPLR 302 have offered litigants greater access to New York courts. This has necessitated the liberalization of the doctrine

37 *See* 7B McKinney's CPLR 308, commentary at 212 (1972).

38 *Id.*

39 Note, however, that CPLR 316(b) states that mailing of the summons should accompany an order for service by publication "unless a place where such person probably would receive mail cannot with due diligence be ascertained. . . ."

40 69 Misc. 2d 410, 329 N.Y.S.2d 963 (Sup. Ct. Richmond County 1972).

41 401 U.S. 371 (1971).

42 *Id.* at 382.

43 69 Misc. 2d at 411, 329 N.Y.S.2d at 965.

44 *Id.*

45 *Id.* at 412, 329 N.Y.S.2d at 965.

46 *See The Quarterly Survey*, 46 St. John's L. Rev. 768, 781 (1972).

47 *See, e.g.*, Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), *reargument denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968); Seider

of *forum non conveniens*[48] to allow our courts broader discretion to decline litigation which would be more appropriately adjudicated in other forums. Until recently, our courts were automatically precluded from employing the *forum non conveniens* doctrine whenever either party to the suit was a New York resident or corporation.[49] This rule was abrogated by the Court of Appeals in *Silver v. Great American Insurance Co.*,[50] in which the Court replaced the rigid rule with a flexible one based on "considerations of justice, fairness and convenience"[51] to the parties, witnesses, and courts.

On remand to determine whether "in the exercise of its sound discretion" New York should entertain the *Silver* case, the Appellate Division, First Department, answered in the negative.[52] Previously, the First Department had been constrained by existing decisional law to deny the motion to dismiss,[53] but had called for reconsideration of this constraint by the Court of Appeals.[54] Upon the reversal of that confining precedent, the First Department predictably held that the facts militated against the choice of New York as a proper forum.[55]

Silver is the first of many cases to be dismissed under this expanded discretionary power. In *Taurus, Inc. v. Boeck Fuel Co.*,[56] the plaintiff-assignee, a New York corporation, brought an action for property damages which had occurred in Wisconsin. The plaintiff's assignor and the defendants were domiciliaries of Wisconsin. The Appellate Division, First Department, applying the discretion conferred in *Silver*, dismissed the complaint on the ground of *forum non conveniens*. Finding that the plaintiff-assignee's residence was the only jurisdictional predicate for the action and noting that this factor alone is no longer controlling, it concluded that "no reason appears here why our courts should be burdened with this piece of imported litigation."[57]

Taurus illustrates the change brought about by the *Silver* formula. Under the prior law, nonresident plaintiffs could circumvent the application of the *forum non conveniens* doctrine and indirectly gain

v. Roth, 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).

48 *See The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 588 (1972).

49 *See* De La Bouillerie v. De Vienne, 300 N.Y. 60, 89 N.E.2d 15 (1949), *reargument denied*, 300 N.Y. 644, 90 N.E.2d 496, (1950), *overruled*, Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).

50 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).

51 *Id.* at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402.

52 38 App. Div. 2d 932, 330 N.Y.S.2d 156 (1st Dep't 1972) (mem.).

53 35 App. Div. 2d 317, 316 N.Y.S.2d 186 (1st Dep't 1970) (per curiam).

54 *Id.* at 318, 316 N.Y.S.2d at 187.

55 38 App. Div. 2d at 932, 330 N.Y.S.2d at 157.

56 *Id.* 702, 328 N.Y.S.2d 366 (1st Dep't 1972) (mem.).

57 *Id.*

access to our courts merely by assigning their causes of action to New York domiciliaries, who had an absolute right to resort to New York courts.[58] This practice, which had sanctioned forum shopping and frustrated our courts with unwanted and burdensome foreign litigation, was terminated by *Silver*.

A more controversial application of *Silver* is *Barry v. American Home Assurance Co.*,[59] an action for breach of an insurance contract which had been commenced after the insured died in an airplane crash in Delaware. The accidental death policy had been purchased through a Delaware broker and the owners of the plane and the witnesses to and the investigators of the crash were all residents of the Delaware-Pennsylvania area. The Appellate Division, First Department, dismissed the action on the ground of *forum non conveniens*. The court stated:

> The convenience of the witnesses . . . would best be served by a trial in the State of Delaware. . . . [W]e hold the interests of justice, fairness and convenience would best be served by granting the motion to dismiss.[60]

Two judges dissented. They favored entertaining the action, since the insurance policy had been issued in New York by a New York insurer and since the breach had occurred in New York where the plaintiff had filed her claim. Additionally, they reasoned that in light of the defendant's defense, *i.e.*, that the insured had by virtue of his own actions caused his own death, New York witnesses would have to testify as to the decedent's conduct prior to take-off from New York. They concluded that the action could have been brought in any of the several jurisdictions involved, but considered one factor as decisive in this case — "[t]he fact that plaintiff was not afforded the opportunity of suit in an alternative forum until jurisdiction was first here established."[61]

Perhaps the *Barry* decision may have been an overenthusiastic exercise of the new discretion conferred in *Silver*.

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[58] *See* Smit, *Report on Whether to Adopt in New York, in Whole or in Part, the Uniform Interstate and International Procedure Act*, in THIRTEENTH ANNUAL REPORT OF THE N.Y. JUDICIAL CONFERENCE 130 (1968), *citing* Wagner v. Braunsberg, 5 App. Div. 2d 564, 173 N.Y.S.2d 525 (1st Dep't 1958); Gross v. Cross, 28 Misc. 2d 375, 211 N.Y.S.2d 279 (Sup. Ct. N.Y. County 1961); Marx v. Katz, 20 Misc. 2d 1084, 195 N.Y.S.2d 867 (Sup. Ct. N.Y. County 1959).

[59] 38 App. Div. 2d 298, 329 N.Y.S.2d 911 (1st Dep't 1972) (mem.), *aff'd mem.*, — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1972).

[60] *Id.* at 928, 329 N.Y.S.2d at 912-13. The court also considered the fact that the plaintiff-beneficiaries were not New York residents. *Id.*

[61] *Id.* at 928, 329 N.Y.S.2d at 913 (Kupferman, J., dissenting). It was argued that where the defendant seeks to have the court transfer the action to another forum, "it should first be shown that the plaintiff was given the opportunity to avail herself of the alternative and refused." *Id.* at 929, 329 N.Y.S.2d at 913.

Upon the recommendation of the Judicial Conference,[62] the *Silver* decision has been codified and incorporated into the CPLR as Rule 327 by the Legislature. This provision reads:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

Interestingly, the *Silver* case has been applied on an intrastate basis in *Asaro v. Audio by Zimet, Inc.*,[63] where the Suffolk County District Court denied venue in an action arising out of a Nassau County automobile accident. All the parties involved in the action were Nassau County residents, except the individual defendant-driver, who had been served personally within that county. The court conditionally granted the defendant's motion to dismiss, stating that Suffolk County had "little if any interest in or relationship to the issues here involved."[64]

The impact of the *Silver* case upon bench and bar has been immediate. It is certain that there will be further applications and refinements of the *forum non conveniens* doctrine as the courts and practitioners alike adjust to this necessary conferral of broad discretion as to the exercise of jurisdiction.

ARTICLE 10 — PARTIES GENERALLY

CPLR 1009: Claim by plaintiff against third-party defendant.

This section has been changed to permit the plaintiff to amend his complaint to raise against a third-party defendant any claim he has against that party. Prior to this amendment, the plaintiff was restricted to any claim he might have raised if the third-party defendant had been joined originally as a defendant.

The purpose of the amendment was to harmonize CPLR 1009 with related provisions of the CPLR, specifically CPLR 1008, which allows the third-party defendant complete freedom to cross-claim and

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62 JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, REPORT TO THE LEGISLATURE IN RELATION TO THE CIVIL PRACTICE LAW AND RULES AND PROPOSED AMENDMENTS PURSUANT TO SECTION 229 OF THE JUDICIARY LAW 59 (1972).

63 69 Misc. 2d 316, 330 N.Y.S.2d 25 (Dist. Ct. Suffolk County 1972) (mem.). *Accord*, Suriano v. Hosie, 59 Misc. 2d 973, 302 N.Y.S.2d 215 (Dist. Ct. Nassau County 1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 532, 588 (1970).

64 69 Misc. 2d at 318, 330 N.Y.S.2d at 27-28, *quoting* Pharo v. Piedmont Aviation, 34 App. Div. 2d 752, 310 N.Y.S.2d 120, 121 (1st Dep't 1970), *aff'd*, 29 N.Y.2d 710, 275 N.E.2d 333, 325 N.Y.S.2d 750 (1971). Dismissal was on the condition that the defendant, within thirty days, file a consent in writing that he would appear, receive all papers, and subject himself to the Nassau County District Court's jurisdiction in the action.