

**CCA 404(a)(1): Successful Solicitation of Patronage Through Advertising in New York City Constitutes Transaction of Business in New York City**

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## NEW YORK CITY CIVIL COURT ACT

*CCA 401(c): Constructive notice given regarding use of standard notice of petition form.*

Under section 401(c) of the Civil Court Act, a notice of petition in a summary proceeding to regain possession of leased realty must be issued by a judge or a court clerk. The Civil Court rules include a suggested form for the notice of petition which has been adopted verbatim by most landlord-tenant lawyers.<sup>199</sup>

In *150 East 58th Street Associates v. Birnbaum*,<sup>200</sup> the landlord's counsel submitted such a notice of petition to the court clerk to commence a summary proceeding against the defendant for nonpayment of rent. The petition invited the tenant to assert whatever counterclaims he might have against the landlord in answering his petition.<sup>201</sup> The tenant then interposed counterclaims against the plaintiff although the parties' lease expressly precluded any counterclaims in such actions. At issue was whether the petitioner, through strict compliance with the Civil Court rules, had waived the "no counterclaim" clause of the lease.

In denying the tenant the right to assert counterclaims in the present action, the court found that the landlord's counsel had not knowingly and intentionally waived his client's rights under the clause by employing the suggested notice of petition form.<sup>202</sup> The court noted that use of this form is not mandatory in the Civil Court, and warned that conflicts between a lease and the form will be resolved in favor of the form.<sup>203</sup> Thus, the Civil Court notice of petition form should be amended to avoid the waiver issue and the resulting delay of summary proceedings when counterclaims are tried therein.

*CCA 404(a)(1): Successful solicitation of patronage through advertising in New York City constitutes transaction of business in New York City.*

CCA 404(a)(1) authorizes personal jurisdiction over any nonresident as to a cause of action arising out of his transaction of business within New York City. In *Reich v. Pines Hotel*,<sup>204</sup> the plaintiff com-

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<sup>199</sup> See *150 East 58th St. Assocs. v. Birnbaum*, 68 Misc. 2d 756, 757, 327 N.Y.S.2d 878, 880 (N.Y.C. Civ. Ct. N.Y. County 1972).

<sup>200</sup> *Id.* 756, 327 N.Y.S.2d 878.

<sup>201</sup> 22 NYCRR 2900.21(c) provides: "Your answer may set forth any defense or counterclaim you may have against the petitioner."

<sup>202</sup> 68 Misc. 2d at 757, 327 N.Y.S.2d at 880.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* 1001, 328 N.Y.S.2d 918 (N.Y.C. Civ. Ct. Queens County 1972).

menced an action in the Queens County Civil Court against a hotel located about one hundred miles from New York City. Predicating personal jurisdiction under CCA 404(a)(1), the plaintiff argued that since the hotel (1) advertised almost exclusively in New York City newspapers and in the yellow pages of the City's telephone directories, and (2) obtained a major portion of its revenue from patronage by City residents, the defendant transacted business within the City. The court agreed. It held that "the total activity of the defendant in New York City demonstrates an ' . . . extensive purposeful activity here without ever actually setting foot in the . . . ' City."<sup>205</sup>

#### REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

*RPAPL 735: Substituted service insufficient to allow judgment for rent against defaulting tenant.*

In a summary proceeding to regain possession of property, either in personam or in rem jurisdiction can be acquired. Under RPAPL 735, in rem jurisdiction can be obtained by conspicuous posting of a copy of a summons on the property which is sought to be recovered and by the mailing of a copy to the defendant at the address of that property.<sup>206</sup> Due diligence need not be exercised before resort to this method of service.<sup>207</sup>

Under CPLR 308(4), personal jurisdiction can be acquired by "affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by mailing the summons to such person at his last known residence."<sup>208</sup> This method of service may be used after due diligence has been exercised, *i.e.*, after "a reasonable number of attempts have been made at service under [CPLR 308] subdivisions (1) and (2). . . ."<sup>209</sup>

<sup>205</sup> *Id.* at 1002, 328 N.Y.S.2d at 919-20, quoting *Parke-Bernet Galleries v. Franklyn*, 26 N.Y.2d 13, 17, 256 N.E.2d 506, 508, 308 N.Y.S.2d 337, 340 (1970).

<sup>206</sup> Since substituted service in a summary proceeding is an alternative, and not an exception to personal service, it is not necessary to establish that personal service could not be effected before resorting to substituted service, unless a personal money judgment is sought.

<sup>14</sup> *CARMODY-WARR* 2d 90:225, at 181 (1967).

<sup>207</sup> RPAPL 735 lacks a "due diligence" requirement. *Joseph E. Seagram & Sons, Inc. v. Rossi*, 45 Misc. 2d 427, 428, 257 N.Y.S.2d 60, 61 (N.Y.C. Civ. Ct. N.Y. County 1965). "[T]he Legislature never intended the substituted service under section 735 of the Real Property Actions and Proceedings Law to be the equivalent of substituted service under CPLR 308(4)." *1405 Realty Corp. v. Napier*, 68 Misc. 2d 793, 794, 328 N.Y.S.2d 44, 45 (N.Y.C. Civ. Ct. Bronx County 1971).

<sup>208</sup> CPLR 308(4).

<sup>209</sup> 7B *McKINNEY'S* CPLR 308, commentary at 208 (1972). See 1 *WK&M* ¶ 308.14 (1971).