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# RPAPL 735: Substituted Service Insufficient To Allow Judgment for Rent Against Defaulting Tenant

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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."[205]

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.[206] Due diligence need not be exercised before resort to this method of service.[207]

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."[208] 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). . . ."[209]

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[205] *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).

[206] 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.
14 CARMODY-WAIT 2d 90:225, at 181 (1967).

[207] 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).

[208] CPLR 308(4).

[209] 7B MCKINNEY'S CPLR 308, commentary at 208 (1972). *See* 1 WK&M ¶ 308.14 (1971).

In *1405 Realty Corp. v. Napier*,[210] a process server visited the defendants' apartment twice, but failed to personally serve them. He then resorted to RPAPL 735's alternative method of service. Since the requirements of this section had been complied with, a judgment for possession was granted. However, the judgment did not include accrued rent, since the place of service requirements of CPLR 308(4) had not been met.[211] The court emphasized that, as to the places where service is to be made under CPLR 308(4) and RPAPL 735, there is "a difference of substance, not a mere semantical distinction."[212] It noted: "The former requirement is calculated to acquire jurisdiction of the person; the latter seeks only jurisdiction of the res."[213]

## Developments in New York Practice

### Dole v. Dow Chemical Co.: *A Revolution in New York Law*

*Introduction*

In *Dole v. Dow Chemical Co.*,[1] the New York Court of Appeals recently recognized the right of one charged solely with active negligence to obtain indemnification from other persons sharing responsibility for the plaintiff's damages. Liability is now to be apportioned among the several tortfeasors, on the basis of the "relative responsibility" of each.[2] Prior to *Dole*, the right to indemnification was limited to situations where a passive tortfeasor sought recovery over from an active tortfeasor. Additionally, CPLR 1401 allowed contribution where a joint tortfeasor paid more than his pro rata share of a joint judgment.

The following example illustrates the operation of this rule of apportionment. *X*, while on the premises of *Y*, was injured due to a dangerous condition created by the negligence of *Z*. *Y*, who was aware of the danger, permitted *X* to enter the premises anyway. Prior to *Dole*, if *Y* were sued individually, he would bear the entire loss, with no recourse against *Z* for *X*'s injuries.[3] However, *Dole* vests in *Y* the right either to implead *Z* or to institute a separate action against *Z*, and thus be indemnified for that portion of the plaintiff's recovery attributable to *Z*'s negligence.

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210 68 Misc. 2d 793, 328 N.Y.S.2d 44 (N.Y.C. Civ. Ct. Bronx County 1971).

211 *Id.* at 795, 328 N.Y.S.2d at 46.

212 *Id.*

213 *Id.*

1 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

2 *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 392.

3 "[F]ailure to act after actual knowledge of the existence of the dangerous condition . . . spells out active negligence." Central Hudson Gas & Elec. Corp. v. Costanzi, 140 N.Y.S.2d 185, 188 (Sup. Ct. Westchester County 1955).