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Article 37

CPLR 305(b): Court Is Powerless To Enter Default Judgment Where Notice Served with Summons Fails To State Object of Action

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Sunrise Toyota court distinguished *Delagi v. Volkswagenwerk AG*,[35] wherein the Court of Appeals unanimously held that the German parent was not subject to New York jurisdiction on the basis of its subsidiary's activities on either an agency or department theory. In *Delagi*, the American Volkswagen distributor was a publicly-owned franchise whose only significant contact with the German manufacturer was through its purchase of cars at dockside from the American importer, a wholly-owned subsidiary of the manufacturer, which was not doing business here. In denying jurisdiction, the Court stated that "[w]here, as here, there exists [sic] truly separate corporate entities, not commonly owned, a valid inference of agency cannot be sustained."[36]

The instant court's characterization of the relationship between the Japanese parents and their American subsidiaries as one of agency is in accord with *Frummer* and *Delagi*. Moreover, it fairly places responsibility on the nondomiciliary parents to defend litigation stemming from the purposeful use of the state by their subsidiaries which they planned and at least partially controlled.

CPLR 305(b): Court is powerless to enter default judgment where notice served with summons fails to state object of action.

Although an action is commenced by the service of a summons,[37] a judgment may not be entered against a defaulting defendant unless service of either a complaint or a CPLR 305(b) or 316(a) notice is also proved.[38] In the absence of such proof, a court is without jurisdiction to enter a default judgment.[39] When a plaintiff attempts to serve a summons and notice pursuant to CPLR 305(b), but his notice fails to meet the statutory requirements, what are the jurisdictional consequences?

In *Arden v. Loew's Hotels, Inc.*,[40] the plaintiff commenced a personal injury action by service of a summons containing a notice stating the amount of damages sought, but not the nature of the claim. The notice was, therefore, defective in that, while it set forth the relief sought, it failed to state the object of the action as required by CPLR 305(b).[41] Finding that the defendant was aware of the nature and the

35 29 N.Y.2d 426, 278 N.E.2d 895, 328 N.Y.S.2d 653 (1972).

36 *Id.* at 431, 278 N.E.2d at 897, 328 N.Y.S.2d at 656.

37 CPLR 304.

38 CPLR 3215(e).

39 *See* McDermott v. Hoenig, 32 App. Div. 2d 838, 302 N.Y.S.2d 280 (2d Dep't 1968) (mem.); Malone v. Citarella, 7 App. Div. 2d 871, 182 N.Y.S.2d 200 (2d Dep't 1959) (mem.).

40 40 App. Div. 2d 894, 337 N.Y.S.2d 669 (3d Dep't 1972) (mem.).

41 CPLR 305(b) provides in pertinent part:

object of the action when the summons was served, the Supreme Court, Tompkins County, entered a default judgment after an inquest, the defendant having failed to appear.[42] On appeal, the Appellate Division, Second Department, reversed the lower court's order and vacated the judgment, holding that the defect in the notice was jurisdictional.[43] The dissent reasoned that since a notice was given pursuant to CPLR 305(b) and the defendant was advised of the assertion of a serious claim, the court had power to enter the default judgment.[44]

The *Arden* holding implies that a defective CPLR 305(b) notice is equivalent to no notice at all, the defect rendering a court powerless to enter a default judgment. This decision requires one who seeks the benefits of CPLR 305(b) to comply fully with its provisions, thereby affording the fullest protection to the absent party. The practitioner can avoid this jurisdictional pitfall by including a statement of the object of the action when serving a 305(b) notice.

CPLR 308(5): Defendant's attempt to evade service of process by deception held ineffective.

CPLR 308(5) empowers a court to devise extraordinary methods of service of process when the regular methods are impracticable.[45] Such impracticability may result when a defendant intentionally evades the process server. In *Kenworthy v. Van Zandt*,[46] the defendant, by false assurances of his availability, induced the plaintiff's attorney to delay service of process for three days. In the interim, the defendant vacated his New York apartment and established a new domicile in Tennessee. Upon discovering the ruse, the plaintiff's attorney effected service by delivering the summons and complaint to the superintendent of the apartment building where the defendant had resided and by mailing a

> [T]he summons may contain or have attached thereto a notice stating the object of the action and the relief sought, and, in an action for a sum certain or for a sum which can by computation be made certain, the sum of money for which judgment will be taken in case of default.

Note that the statute appears to require a statement of the object of the action in cases involving liquidated damages as well as in other actions.

[42] The clerk may enter a default judgment under CPLR 3215 only when the summons and notice were for a liquidated claim. When unliquidated damages are sought, a plaintiff who has served an object notice may obtain a default judgment by applying to the court and obtaining an inquest. *See* 1 WK&M ¶ 305.12.

[43] 40 App. Div. 2d at 895, 337 N.Y.S.2d at 671, *citing* McDermott v. Hoenig, 32 App. Div. 2d 838, 302 N.Y.S.2d 280 (2d Dep't 1968) (mem.).

[44] 40 App. Div. 2d at 895, 337 N.Y.S.2d at 671.

[45] The court's discretion under CPLR 308(5) is limited only by the requirements of due process. The method of service devised must be reasonably calculated to give the defendant notice of the action and an opportunity to be heard. Milliken v. Meyer, 311 U.S. 457 (1940).

[46] 71 Misc. 2d 950, 337 N.Y.S.2d 481 (N.Y.C. Civ. Ct. N.Y. County 1972).