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Article 39

CPLR 327: Denial of Permission To Arbitrate on the Ground of Forum Non Conveniens

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copy to the defendant at that address. The defendant's attorney moved to dismiss the complaint on the ground of improper service. The New York City Civil Court, New York County, denied the motion and expressed its abhorrence for the artful devices employed to frustrate service of process. Relying on *Dobkin v. Chapman*,[47] the court concluded that the plaintiff's method of service complied with due process, but ordered additional service upon the defendant's attorneys, service to be valid *nunc pro tunc* from the date of the initial service.[48]

Clearly, a defendant should not be allowed to evade service of process by the deceptive means employed in *Kenworthy*. The court's holding comports with New York decisions denying effectiveness to deceptive avoidance of process.[49]

CPLR 327: Denial of permission to arbitrate on the ground of forum non conveniens.

In *Hubbell v. Insurance Co. of North America*,[50] the petitioner commenced a proceeding under CPLR 7502(a) for permission to submit to arbitration a controversy between his four infant children and the respondent insurance company, which was doing business in Nassau County.[51] The dispute arose out of an automobile collision with an uninsured Pennsylvania motorist in Pennsylvania. Previously New York residents, the petitioner and his family had moved to Pennsylvania prior to the accident.

The Supreme Court, Nassau County, denied the petitioner's application under the doctrine of *forum non conveniens*, and the Appellate Division, Second Department, unanimously affirmed. Invoking *Silver v. Great American Insurance Co.*,[52] the Second Department

47 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968). The Court of Appeals in *Dobkin* established a flexible due process requirement. Due process, the Court stated, may, in certain circumstances, be satisfied even where there is little probability that the method of service will give the defendant actual notice of the litigation. "Due process does not require that defendants derive any advantage from the sedulous avoidance of . . . measures [intended to inform them of litigation]." *Id.* at 504, 236 N.E.2d at 459, 289 N.Y.S.2d at 173.

48 71 Misc. 2d at 954, 337 N.Y.S.2d at 484-85. Service which does not comply with CPLR 308(1), (2), or (4) may be validated by a *nunc pro tunc* order under CPLR 308(5). *See* Totero v. World Tel. Corp., 41 Misc. 2d 594, 245 N.Y.S.2d 870 (Sup. Ct. N.Y. County 1963); 7B McKINNEY'S CPLR 308, commentary at 215 (1972).

49 *See* Cohen v. Arista Truck Renting Corp., 70 Misc. 2d 729, 335 N.Y.S.2d 30 (Sup. Ct. Nassau County 1972) (defendant in automobile accident case voluntarily gave plaintiff wrong address); Schenkman v. Schenkman, 206 Misc. 660, 136 N.Y.S.2d 405 (Sup. Ct. Kings County), *aff'd mem.*, 284 App. Div. 1068, 137 N.Y.S.2d 628 (2d Dep't 1954) (defendant in divorce action misrepresented his identity and returned process papers).

50 40 App. Div. 2d 696, 336 N.Y.S.2d 310 (2d Dep't 1972) (mem.).

51 Since the respondent was doing business in Nassau County, an application was properly brought there under CPLR 7502(e).

52 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972), *noted in* 46 ST. JOHN'S L. REV. 588 (1972).

succinctly applied its new discretion to decline to exercise its jurisdiction. On the facts, New York was an inconvenient forum, and another forum was available where "the ends of justice and the convenience of the parties"[53] could better be served.

The *Hubbell* decision epitomizes the flexibility and simplicity of the *Silver* doctrine and its codification, CPLR 327.

ARTICLE 30 — REMEDIES AND PLEADING

CPLR 3025(b): Second Department reverses order denying leave to amend answer where no prejudice was shown.

CPLR 3025(b) provides that "[l]eave [to amend pleadings] shall be freely given upon such terms as may be just. . . ." Accordingly, amendments are freely allowed in the absence of prejudice to the opposing party.[54] This permits "the full litigation of a controversy."[55]

In *Lermit Plastics Co. v. C. W. Lauman & Co.*,[56] the Appellate Division, Second Department, held that the denial of a co-defendant's motion for leave to serve an amended answer raising certain affirmative defenses, including the statute of limitations, was "an improvident exercise of discretion absent a showing of prejudice to plaintiffs."[57] Therefore, the order was unanimously reversed, and the motion was granted.

If the plaintiff's attorney proceeds to prepare for trial when the defendant's answer contains no statute of limitations defense, the plaintiff will be in a position to show prejudice should the defendant seek to amend his answer.

CPLR 3041: Bill of particulars may not contain reservation of right to file supplemental bill.

The bill of particulars serves to amplify the pleadings, limit the proof, and prevent surprise at trial, "by enabling the adverse party to know definitely the claim which he is called upon to meet."[58] When one party is unable to furnish all the information demanded by the adverse party, he cannot serve a bill of particulars and reserve the right

53 40 App. Div. 2d at 696, 336 N.Y.S.2d at 312.

54 *See, e.g.*, Petrozzi v. Passamonte, 32 App. Div. 2d 716, 300 N.Y.S.2d 183 (3d Dep't 1969) (mem.); Stillwell v. Giant Supply Corp., 47 Misc. 2d 568, 262 N.Y.S.2d 833 (Sup. Ct. Nassau County 1965); Leutloff v. Leutloff, 47 Misc. 2d 458, 262 N.Y.S.2d 736 (Sup. Ct. Onondaga County 1965) (amendment of pleadings freely allowed in absence of laches, undue prejudice, and unfair advantage). *See also* 3 WK&M ¶ 3025.11.

55 3 WK&M ¶ 3025.11.

56 40 App. Div. 2d 680, 336 N.Y.S.2d 187 (2d Dep't 1972) (mem.).

57 *Id.*, 336 N.Y.S.2d at 188.

58 Elman v. Ziegfeld, 200 App. Div. 494, 497, 193 N.Y.S. 133, 136 (1st Dep't 1922).