

RPAPL 735: Service on Corporation by Delivery of Process to Secretary of State, As Its Agent, Supports Judgment for Rent and Possession

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the contract contains a lien waiver provision would defeat the clear purpose of the statute."¹⁵⁹ It also advised that the filing of the lien as a breach of the contract would be a matter for the arbitrator to consider.¹⁶⁰

The possibility that one party will breach a contract condition is often the very reason for including an arbitration provision. To allow a breach to take the contract out of arbitration would negate the parties' original intent.

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

RPAPL 735: Service on corporation by delivery of process to Secretary of State, as its agent, supports judgment for rent and possession.

Rent arrears can be recovered in a summary possession proceeding under article 7 of the Real Property Actions and Proceedings Law. Under RPAPL 735, the court acquires in personam jurisdiction to grant a money judgment if service of the notice and petition is made by personal delivery to the respondent.¹⁶¹

In *Leven v. Browne's Business School, Inc.*,¹⁶² a landlord sought a default judgment against a corporate tenant in a summary proceeding for nonpayment of rent. The notice and petition were served by delivery to the Secretary of State pursuant to BCL 306¹⁶³ and in satisfaction of the requirements of CPLR 311 for personal service on a corporation.¹⁶⁴ While noting that, in the case of an individual, nothing but delivery to the person himself will suffice,¹⁶⁵ the Nassau County District Court held that, in the case of a corporation, delivery to its agent, including an agent appointed by law, is delivery to the respondent-corporation, authorizing an in personam judgment on de-

¹⁵⁹ 40 App. Div. 2d at 97, 337 N.Y.S.2d at 959.

¹⁶⁰ *Id.*

¹⁶¹ Originally RPAPL 735 provided that service "shall be made in the same manner as personal service of a summons in an action." Thus, substituted service under the CPLR clearly supported the in personam jurisdiction required for a money judgment in a summary proceeding. See *Callen v. De Koninck*, 23 App. Div. 2d 757, 258 N.Y.S.2d 627 (2d Dep't 1965) (mem.); *Wayside Homes, Inc. v. Upton*, 40 Misc. 2d 1087, 244 N.Y.S.2d 624 (Dist. Ct. Nassau County 1963), discussed in *The Biannual Survey*, 38 ST. JOHN'S L. REV. 406, 453 (1964).

¹⁶² 71 Misc. 2d 842, 337 N.Y.S.2d 307 (Dist. Ct. Nassau County 1972).

¹⁶³ Under BCL 306, service of process on the Secretary of State as agent of a domestic or authorized foreign corporation is complete upon delivering two copies of such process to him in Albany. The Secretary of State is required to forward one copy by registered mail to the corporation.

¹⁶⁴ CPLR 311(1) provides that personal service on a corporation shall be made by delivering the summons to an officer, director, managing or general agent, cashier, assistant cashier, or "any other agent authorized by appointment or by law to receive service."

¹⁶⁵ 71 Misc. 2d at 843, 339 N.Y.S.2d at 309. But see *1405 Realty Corp. v. Napier*, 68 Misc. 2d 793, 328 N.Y.S.2d 44 (N.Y.C. Civ. Ct. Bronx County 1971), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 184 (1972).

fault.¹⁶⁶ The court concluded that problems as to the receipt of the copy of the notice and petition which the Secretary of State is required to mail the respondent do not affect the court's jurisdiction, but may be grounds for opening a default judgment.¹⁶⁷

DAMAGES

Damages: Where survival and wrongful death actions are combined, medical and funeral expenses are allocated to former when estate is responsible and to latter when distributees are responsible.

Where a decedent's personal injury action¹⁶⁸ has been combined¹⁶⁹ with a wrongful death action, separate verdicts are required,¹⁷⁰ and medical and funeral expenses must be allocated to one of the causes of action. These expenses are allocated to the survival cause and thus to the decedent's estate when "paid by the estate or for the payment of which the estate is responsible. . . ;"¹⁷¹ they are allocated to the wrongful death action and thus to the decedent's distributees when "paid by the distributees, or for the payment of which any distributee is responsible. . . ."¹⁷² When such expenses have not been paid prior to trial or settlement, the court must determine who is responsible for payment.

The Surrogate's Court, Kings County, was faced with this problem in *In re Estate of Jackson*.¹⁷³ At the time of trial, medical and funeral bills exceeding \$5000 remained unpaid. After the jury awarded recovery in each cause, allocation was essential because a lien in excess of the total assets of the estate existed.¹⁷⁴ Correct procedure would be for the personal representative to advise in his account to the court

¹⁶⁶ 71 Misc. 2d at 843-44, 337 N.Y.S.2d at 309.

¹⁶⁷ *Id.* at 844, 337 N.Y.S.2d at 309. See *Cascione v. Acme Equip. Corp.*, 23 App. Div. 2d 49, 258 N.Y.S.2d 234 (1st Dep't 1965) (per curiam); *Montulli v. Sherlo Realty, Inc.*, 37 Misc. 2d 655, 234 N.Y.S.2d 754 (Sup. Ct. Monroe County 1962), *aff'd mem.*, 18 App. Div. 2d 1139, 239 N.Y.S.2d 864 (4th Dep't 1963).

¹⁶⁸ EPTL 11-3.3(a) limits the damages recoverable in such an action to those accruing before death plus reasonable funeral expenses in appropriate cases. N.Y. Est., POWERS & TRUSTS LAW § 11-3.3(a) (McKinney 1967).

¹⁶⁹ *Id.* § 11-3.3(b)(1). The decedent's estate gets the benefit of the wrongful death rule which makes contributory negligence a defense to be pleaded and proved by the defendant. *Id.* § 11-3.2(b).

¹⁷⁰ *Id.* § 11-3.3(b)(1).

¹⁷¹ *Id.* § 11-3.3(a).

¹⁷² *Id.* § 5-4.3. See *Murphy v. New York C. & H.R.R.*, 88 N.Y. 445 (1882); *Loeb v. Sheldon Foster Supply Co.*, 243 App. Div. 740, 277 N.Y.S. 439 (2d Dep't 1935).

¹⁷³ 71 Misc. 2d 133, 335 N.Y.S.2d 587 (Sur. Ct. Kings County 1972).

¹⁷⁴ There are two basic reasons for allocation. First, the decedent's debts are payable only out of estate funds. Second, even if there are no estate debts, "[t]he same persons do not necessarily share in the survival (pain and suffering) recovery and the wrongful death recovery. . . . Even when the same persons do share in each recovery, they do not share in the same proportion." *Id.* at 134-35, 335 N.Y.S.2d at 590.