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RPAPL 735: Court Lacks Jurisdiction To Render Judgment for Rent Where Tenant Was Not in Default Under CPLR 308(2)

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REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

RPAPL 735: Court lacks jurisdiction to render judgment for rent where tenant was not in default under CPLR 308(2).

The Real Property Actions and Proceedings Law provides for recovery of a judgment for both rent and possession in a summary proceeding.[204] While a proceeding to recover possession is essentially in rem, a court requires in personam jurisdiction to render a money judgment for rent arrears.[205] When substituted service is effected under RPAPL 735 by delivery to a person of suitable age and discretion living or employed at the property to be recovered,[206] in personam jurisdiction may be lacking if the respondent defaults.[207] This situation arose in *Fairhaven Apts. No. 6, Inc. v. Dolan*.[208]

In *Fairhaven*, a landlord seeking possession and a judgment for rent arrears commenced a summary proceeding by serving a petition and notice of petition on a person of suitable age and discretion at the property to be recovered. The respondent defaulted on the return date of the petition, which was set at nine days after its filing. In concluding that there was a "basic lack of jurisdiction" to obtain a money judgment, the Suffolk County District Court looked to CPLR 308(2), which permits such substituted service on a person of suitable age and discretion, but provides that service is not complete until ten days after filing.[209] The court held that while service on the respondent complied with CPLR 308(2), she was not in default thereunder because the petition was made returnable in only nine days. The court also held that recovery of a judgment for rent was barred by the petitioner's failure to include in the notice of petition a statement, required by court rule in cases of substituted service,[210] that the respondent would have 30 days after proof of service in which to answer.[211]

The rationale of the *Fairhaven* holding is that in personam juris-

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204 RPAPL 747(4).

205 *See, e.g.*, 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).

206 RPAPL 735 also permits substituted service by affixing a copy of the notice and petition on the property sought to be recovered. It imposes the additional requirement in such cases of mailing the notice of petition and petition to the respondent within one day of the delivery or affixation. Service is complete upon filing proof of service with the court within three days of the mailing.

207 *See* Wayside Homes, Inc. v. Upton, 40 Misc. 2d 1087, 244 N.Y.S.2d 624 (Dist. Ct. Nassau County 1963).

208 72 Misc. 2d 590, 339 N.Y.S.2d 787 (Dist. Ct. Suffolk County 1972).

209 *Id.* at 592, 339 N.Y.S.2d at 789. Proof of service must be filed within 20 days.

210 22 NYCRR 3935.3.

211 72 Misc. 2d at 592, 339 N.Y.S.2d at 789.

diction should be no easier to acquire under the RPAPL than under the CPLR. The court's opinion suggests, however, that where substituted service under RPAPL 735 conforms with CPLR 308(2), a money judgment may be recovered despite the absence of personal delivery of process to the respondent.[212]

DOLE v. DOW CHEMICAL CO.

Dole v. Dow Chemical Co.: *Recent developments.*

On March 22, 1972, the Court of Appeals decided *Dole v. Dow Chemical Co.*,[213] thereby abolishing the active-passive test for indemnification and establishing a system of equitable apportionment of damages among joint tortfeasors. The question of its retroactivity was presented in two recent cases.

In *Hain v. Hewlett Arcade, Inc.*,[214] a property owner impleaded the contractor which allegedly created the negligent condition that injured the plaintiff. On March 21, 1972, the Supreme Court, Nassau County, directed a verdict against the third-party defendant after the primary action had been settled. The Appellate Division, Second Department, upheld this procedure subject to proof by a third-party plaintiff of the reasonableness of the settlement and liability to the plaintiff permitting recovery over.[215] The court, however, remanded the case for a determination of the relative responsibilities of the tort-

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[212] *Cf.* 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) (implying that rent may be recovered in a summary proceeding if service fulfills the requirements of CPLR 308(4)). *But see* Leven v. Browne's Business School, Inc., 71 Misc. 2d 842, 843, 337 N.Y.S.2d 307, 309 (Dist. Ct. Nassau County 1972) (dictum), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 580, 606 (1973) (rent is recoverable only where process is personally delivered to respondent).

[213] 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), *noted in* 37 ALBANY L. REV. 154 (1972); 47 N.Y.U.L. REV. 815 (1972); 47 ST. JOHN'S L. REV. 185 (1972). For an extended discussion of *Dole* by Professor David D. Siegel, see 7B MCKINNEY'S CPLR 3019, supp. commentary at 205-38 (1972).

[214] 40 App. Div. 2d 991, 338 N.Y.S.2d 791 (2d Dep't 1972) (mem.).

[215] *Id.*, 338 N.Y.S.2d at 793, *citing* Colonial Motor Coach Corp. v. New York Cent. R.R., 131 Misc. 891, 228 N.Y.S. 508 (Sup. Ct. Jefferson County 1928). The third-party defendant in *Hain* did not challenge the reasonableness of the settlement.

In Michelucci v. Bennett, 71 Misc. 2d 347, 335 N.Y.S.2d 967 (Sup. Ct. Washington County 1972), the court allowed the defendant to implead two former co-defendants with whom the plaintiff had settled, since the defendant had not been a party to the release. The question of credit for the settlement payment was not reached. *Accord*, Williams v. Town of Niskayuna, 72 Misc. 2d 441, 339 N.Y.S.2d 888 (Sup. Ct. Schenectady County 1972) (also rejecting argument that plaintiff was entitled to recover only for defendant's proportionate liability after settling with third-party defendant). *Cf.* Vassar v. Jackson, 72 Misc. 2d 652, 340 N.Y.S.2d 151 (Sup. Ct. Dutchess County 1973) (1970 general release executed by defendant in favor of plaintiff-driver barred counterclaim for indemnity as to co-plaintiff-passenger's cause of action).