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CPLR 1005(a): New York Court Refuses To Extend Basis for Class Actions

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the apartment during the entire week prior to service of process.[54] The court cited *Pickford v. Kravetz*,[55] in which it had been held that a hotel where defendant was a guest for one week constituted his dwelling place. It noted that "Warren Avis' connection with the Park Avenue apartment is considerably greater than a transient's nexus to a hotel."[56]

The court's construction of "dwelling place" as being broader than "residence" is a most pragmatic one. For, "[i]n a highly mobile society it is unrealistic to interpret CPLR 308(2) as mandating service at only one location where, in fact, a defendant maintains several dwelling places."[57] Furthermore, such decision is in accord with the underlying purpose of CPLR 308(2), *i.e.*, to assure fair notice to the defendant.[58] It cannot be argued seriously that delivery of process to an individual of suitable age and discretion at an apartment such as the one discussed above, is not well calculated to give fair notice to the defendant.[59]

ARTICLE 10—PARTIES GENERALLY

CPLR 1005(a): New York court refuses to extend basis for class actions.

With the advent of the consumer protection movement, there has been an upsurge in interest in the class action.[60] In the recent case of *Zachary v. R. H. Macy & Co.*,[61] the Supreme Court, New York County, declined to liberalize the requirements for instituting such actions. While deploring the inadequacy of solutions, the court concluded that plaintiff Zachary could not institute a class action. Zachary alleged that Macy's bookkeeping system imposed interest upon previous financing charges, but was not a proper party because her account had not yet been charged such interest.[62]

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54 *Id.*

55 17 FED. RULES SERV. 4th 121, Case 1 (S.D.N.Y. 1952).

56 326 F. Supp. at 1329-30.

57 *Id.* at 1329. *See also* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1096, at 368 (1969), where Federal Rule 4(d)(1), the federal parallel to CPLR 308, is discussed.

> In a highly mobile society in which 'summer' and 'winter' homes are becoming more and more common, it is unrealistic to interpret Rule 4(d)(1) so that the person to be served only has one dwelling house or usual place of abode at which the process may be left. In the same vein, it makes little sense to construe Rule 4(d)(1) technically when actual notice has been received. . . ."

58 *See* 7B MCKINNEY'S CPLR 308, supp. commentary at 203 (1966).

59 326 F. Supp. at 1329.

60 For a comprehensive survey of the use of the class action in consumer suits, see Starrs, *The Consumer Class Action—Part I: Considerations of Equity*, 49 BOSTON L. REV. 211 (1969); Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, *id.* 407 (1969). *See also* Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433 (1960).

61 66 Misc. 2d 974, 323 N.Y.S.2d 757 (Sup. Ct. N.Y. County 1971).

62 *Id.* at 976-77, N.Y.S.2d at 760. The court also refused to allow Zachary to maintain an individual suit, since she had not been injured. *Id.*, 323 N.Y.S.2d at 762. Additionally, the

New York's concept of the class action has undergone only slight revision since its initial appearance in the Field Code in 1848.[63] Nevertheless, finding a representative to commence the action is no simple matter. Actions have been denied in cases where the question raised,[64] the remedy sought,[65] or the defenses available[66] differed with each party. Not only must a class representative show a cause of action, but he must also show "that he is bound by a 'unity of interest' with other members of the alleged class."[67]

In the instant case the court provided no guidance as to what actually constitutes the "unity of interest" demanded. Previously, an alleged class action based on similarity of contracts had been disallowed by the Court of Appeals.[68] Although recognizing that other jurisdictions, including the federal, are much more receptive to class actions,[69] the *Zachary* court refused, under stare decisis, to extend the New York rule.[70]

If higher courts are not willing to extend CPLR 1005(a) by overruling or limiting *Hall v. Coburn Corp. of America*,[71] which viewed the class action restrictively, legislative reevaluation is clearly necessary. The consumer must have a viable class action weapon.[72]

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court refused to allow Salacuse, a co-plaintiff, to bring an individual action, since Macy's charge policy, while open to criticism, was not illegal under New York Law. *Id.* at 979-80, 323 N.Y.S.2d at 762-63, *construing* N.Y. PERS. PROP. LAW § 413 (McKinney 1962).

63 7B McKINNEY'S CPLR 1005, supp. commentary at 62 (1970).

64 Gledhill v. Best & Co., 33 App. Div. 2d 541, 304 N.Y.S.2d 284 (1st Dep't 1969), *appeal dismissed*, 26 N.Y.2d 703, 257 N.E.2d 48, 308 N.Y.S.2d 868 (1970).

65 Gaynor v. Rockefeller, 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965).

66 *Id.*

67 66 Misc. 2d at 977, 323 N.Y.S.2d at 760. A class action requires both a common interest and common facts among all members. Such actions have been largely limited to cases involving "closely associated relationships growing out of trust, partnership or joint venture, and ownership of corporate stock." Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 402, 259 N.E.2d 720, 722, 311 N.Y.S.2d 281, 284 (1970).

Other types of class actions have been dismissed on the theory that "[s]eparate wrongs to separate persons, though committed by similar means and even pursuant to a single plan, do not create a common or general interest in those who are wronged." Society Milion Athena v. National of Greece, 281 N.Y. 282, 292, 22 N.E.2d 374, 377 (1959).

68 Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 201 (1970), *discussed in* 7B McKINNEY'S CPLR 1005, supp. commentary at 62 (1970) and *The Quarterly Survey*, 45 ST. JOHN'S LAW REV. 500, 515 (1971).

69 66 Misc. 2d at 978-79, 323 N.Y.S.2d at 762.

70 *Id.* at 981, 323 N.Y.S.2d at 764:

> The actions herein represent an idea whose time may have come, but perhaps unfortunately, not in the courts of the State of New York. No matter how one studies the applicable case and legislative history, the result is the same.

71 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 201 (1970).

72 While advantages to the plaintiff utilizing the class action include those of an economic and procedural nature, imagine the profound impact upon public opinion, the jury, and the opposing party when there exists a class of 1,000 plaintiffs suing for $500 each, instead of a single plaintiff prosecuting his action in the conventional manner.

The Quarterly Survey, 45 ST. JOHN'S L. REV. 500, 515-16 (1971).