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CPLR 2001: Failure To State Court and County Summons Is a Jurisdictional Defect

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fact that by granting petitioner's motion to add LoPinto as a judgment debtor it denies the latter's right to argue the merits, as provided for by 1502.[103]

ARTICLE 20 — MISTAKES, DEFECTS, IRREGULARITIES AND EXTENSIONS OF TIME

CPLR 2001: Failure to state court and county in summons is a jurisdictional defect.

Despite the legislative mandate that ". . . [a] defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given,"[104] the courts have not allowed all defects to be so corrected. They have drawn a distinction between summonses with mistakes in form and those with jurisdictional defects. The former may be corrected or disregarded;[105] the latter may not.[106]

In *Tamburo v. P. & C. Food Markets, Inc.*,[107] the Appellate Division, Fourth Department, decided that a summons which fails to specify the court and county in which it is returnable is jurisdictionally defective. Thus, the summons could not be amended *nunc pro tunc* and failure to return it was not a waiver of the omission.[108] A supplementary summons would be futile, for the statute of limitations had run.[109]

That the summons was void and not merely irregular is technically correct insofar as there is case law to support it. But it should be noted that the two cases providing this support were decided in 1851.[110] The

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103 CPLR 1502: "The defendant in the subsequent action may raise any defenses or counterclaims that he might have raised in the original action if the summons had been served on him when it was first served on a co-obligor, and may raise objections to the original judgments, and defenses or counterclaims that have arisen since it was entered."

104 CPLR 2101(f).

105 CPLR 2001 states:

> At any stage of an action, the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded.

See, eg., Barron v. Hadcox, 47 Misc. 2d 435, 262 N.Y.S.2d 758 (Sup. Ct. Oneida County 1965); D'Alessandra v. Manufacturers Cas. Ins. Co., 106 N.Y.S.2d 561 (Sup. Ct. Kings County 1951).

106 *E.g.*, Rockefeller v. Hein, 176 Misc. 659, 28 N.Y.S.2d 266 (Sup. Ct. Queens County 1941) stated that CPA 105, predecessor of CPLR 2001, could not be utilized where there was a jurisdictional error.

107 36 App. Div. 2d 1017, 321 N.Y.S.2d 487 (4th Dep't 1970).

108 CPLR 2101(f).

109 36 App. Div. 2d at 1017, 321 N.Y.S.2d at 488.

110 Dix v. Palmer & Schoolcraft, 5 How. Pr. 233 (N.Y. Sup. Ct. Oneida County 1851) (dictum); James v. Kirkpatrick, 5 How. Pr. 241 (N.Y. Sup. Ct. Albany County 1851).

more current view is to treat such mistakes as "formal" rather than jurisdictional.[111]

The purpose of a summons is to give a defendant notice that an action is being brought against him.[112] In the instant case the defendant *had* notice of the commencement of the action. Since the name, address and telephone number of the plaintiff's attorney were included in the summons,[113] the defendant could have obtained the necessary information by merely telephoning the plaintiff's attorney. In fact, communicational developments such as the telephone would appear to have conclusively vitiated the rationale of the nineteenth century cases. Failure to telephone could have been deemed a waiver of defect pursuant to CPLR 2101(f). In effect, by holding the summons jurisdictionally defective, the court has reversed the warning of an old adage and "painted the client with the sins of his attorney."

ARTICLE 22 — STAYS, MOTIONS, ORDERS AND MANDATES

CPLR 2201: Court stays action under comity to avoid multiple suits.

CPLR 2201 is substantially the same as its parent provision governing the granting of a stay under the CPA.[114] It therefore should delineate clear guidelines of precedent. Nevertheless, the verbal mainsprings of CPLR 2201 — "a proper case" and "terms that may be just" — can at times disarrange the orderly pattern of case law.[115]

The recent case of *Research Corp. v. Singer General Precision, Inc.*[116] illustrates how the court's discretion[117] is influenced by the division of power inherent in federalism. By granting a patent the federal government creates a "statutory monopoly."[118] Policing patent claims is a peculiarly federal activity.[119] Yet a breach of contract action typically requires invocation of state jurisdiction, absent a diversity of

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111 *See generally* 2A WK&M ¶ 2001.01-.03; *id.* ¶ 2101.06.

112 Stuyvesant v. Weil, 167 N.Y. 421, 60 N.E. 738 (1901).

113 *See* CPLR 2101(d).

114 *Compare* CPA 167 *with* CPLR 2201.

115 Bucky v. Sebo, 276 App. Div. 545, 95 N.Y.S.2d 769, *appeal denied and reargument denied*, 277 App. Div. 757, 97 N.Y.S.2d 369 (1st Dep't 1950). On facts remarkably similar to the instant case the court held that "the licensee is estopped from challenging the validity of a patent, until he has completely repudiated and renounced the licensing agreement." 276 App. Div. at 546, 95 N.Y.S.2d at 771.

116 36 App. Div. 2d 987, 320 N.Y.S.2d 818 (3d Dep't 1971).

117 *Id.* at 988, 320 N.Y.S.2d at 820. *Cf.* Trieber v. Hopson, 27 App. Div. 2d 151, 152, 277 N.Y.S.2d 241, 242 (3d Dep't 1967), *discussed in The Quarterly Survey*, 42 ST. JOHN'S L. REV. 283, 294 (1967) (CPLR 2201 grants the trial court discretionary power to issue a stay); O'Connor v. Papersian, 309 N.Y. 465, 471-72, 131 N.E.2d 883, 886-87 (1956) (appellate division may review a stay).

118 Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964).

119 *Id.* at 230-31.