

CPLR 2302, 2307: Latter Section Operates Only in Conjunction with Former Section

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constitutional mandates of due process and equal protection necessitate such. Relying upon these constitutional guarantees, *Dorsey* has harmonized the due process requirements of notice and free access to the courts.

ARTICLE 23 — SUBPOENAS, OATHS AND AFFIRMATIONS

CPLR 2302, 2307: Latter section operates only in conjunction with former section.

The issuance of subpoenas is governed generally by article 23 of the CPLR and specifically by various other statutes. CPLR 2302 authorizes issuance in general,⁶⁹ and CPLR 2307 provides that a subpoena duces tecum to be served upon a library or upon an agency or officer of the state or of a municipal corporation must be issued by a justice of the supreme court.⁷⁰ Understandably, the issue arose whether CPLR 2307 restricts the power to issue subpoenas granted to various administrative agencies in their enabling statutes.

This question has been answered by the Court of Appeals in *In re Irwin v. Board of Regents*.⁷¹ Petitioner Irwin, a certified public accountant, was convicted under federal law of furnishing a gratuity to a federal employee. The State Department of Education then charged him with conviction of a crime⁷² and unprofessional conduct.⁷³ After a hearing, a subcommittee of said department found him guilty of both charges. Ultimately, the Commissioner of Education revoked petitioner's license to practice as a certified public accountant.⁷⁴ Petitioner then brought a proceeding to reverse the order of revocation, contending that he had been denied a fair hearing because, *inter alia*, the subcommittee denied his request for the issuance of certain subpoena duces tecum.⁷⁵ The Supreme Court, Special Term, reversed the order⁷⁶ but was in turn reversed by the Appellate Division, Third Department.⁷⁷ The Court of Appeals affirmed, reasoning that the refusal to issue subpoenas duces tecum to several state officials was not an abuse of discretion because their issuance could not have strength-

⁶⁹ See 7B MCKINNEY'S CPLR 2302, supp. commentary at 28 (1965); 2A WK&M ¶ 2302.09 (1969).

⁷⁰ See 2A WK&M ¶ 2307.04 (1969).

⁷¹ 27 N.Y.2d 292, 265 N.E.2d 752, 317 N.Y.S.2d 332 (1970).

⁷² N.Y. EDUC. LAW § 7406(i)(c) (McKinney 1953).

⁷³ *Id.* § 7406(i)(b).

⁷⁴ 27 N.Y.2d at 295, 265 N.E.2d at 753, 317 N.Y.S.2d at 334.

⁷⁵ *Id.* at 295, 265 N.E.2d at 753, 317 N.Y.S.2d at 334-35.

⁷⁶ 53 Misc. 2d 430, 279 N.Y.S.2d 69 (Sup. Ct. Albany County 1967).

⁷⁷ 33 App. Div. 2d 581, 304 N.Y.S.2d 319 (3d Dep't 1969).

ened petitioner's claim that his conviction under the federal statute was not a crime within the meaning of the Education Law.⁷⁸

The Court of Appeals concurred in the judgment of the Third Department, except with regard to the latter's interpretation of CPLR 2307. The Third Department read CPLR 2307(a) as circumscribing petitioner's right to have subpoenas issued by the subcommittee,⁷⁹ but the Court of Appeals concluded that said provision applies only to those subpoenas issued pursuant to CPLR 2302(a), which grants subpoena powers to those administrative agencies not granted specific subpoena powers. In light of the legislative purpose of article 23 — uniform treatment of the law of subpoenas⁸⁰ — and the CPLR drafters' criticism of the confusion inherent in dual sources of subpoena power,⁸¹ the Court determined that CPLR 2302 governs where the agency is not otherwise granted subpoena power and does not govern where said authority is derived from a specific statutory provision, and that CPLR 2307 operates only in conjunction with CPLR 2302.⁸² Thus, the Court's decision in *In re Irwin* resolves the apparent conflict between CPLR 2307 and various other statutes by furnishing a simple and sensible rule consistent with the purposes of the CPLR.

CPLR 2303: Subpoena cannot be validly served outside the state.

CPLR 2303 states that "[a] subpoena shall be served in the same manner as a summons."⁸³ CPLR 313 authorizes service of a summons without the state to obtain personal jurisdiction under certain circumstances. Is service of a subpoena without the state therefore valid in some instances?

The Supreme Court, New York County, confronted this question in *Israel Discount Bank Ltd. v. P. S. Products Corp.*⁸⁴ It concluded that neither CPLR 2303 nor any other statute authorizes service of a subpoena without the state,⁸⁵ even upon a defendant-judgment debtor who was validly served with a summons under CPLR 302 and 313.⁸⁶ If the Legislature had decided to confer upon the courts "long-arm" jurisdiction in the issuance of subpoenas, the court reasoned, it would have done so expressly.⁸⁷

78 27 N.Y.2d at 298-99, 265 N.E.2d at 755, 317 N.Y.S.2d at 336-37.

79 33 App. Div. 2d at 582, 304 N.Y.S.2d at 321.

80 27 N.Y.2d at 296, 265 N.E.2d at 754, 317 N.Y.S.2d at 335.

81 FIRST REP. 360.

82 27 N.Y.2d at 297, 265 N.E.2d at 754, 317 N.Y.S.2d at 336.

83 See 2A WK&M ¶ 2303.03; 6 WK&M ¶ 5224.05.

84 65 Misc. 2d 1002, 319 N.Y.S.2d 554 (Sup. Ct. N.Y. County 1971).

85 *Id.* at 1003, 319 N.Y.S.2d at 555.

86 *Id.* at 1004, 319 N.Y.S.2d at 556. *But see* 2A WK&M ¶ 2303.06.

87 *Id.*, citing *Beach v. Lost Mountain Manor, Inc.*, 53 Misc. 2d 563, 279 N.Y.S.2d 93 (Sup. Ct. Monroe County 1967).