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RPAPL § 755: "Abuse of Process" Recognized as an Actionable Tort

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the court concluded that, absent a clearer legislative pronouncement, it would not decide that the amendment to Vehicle & Traffic Law section 253 was intended to waive the residency requirements of the county courts with regard to non-resident motorists. Thus, although section 253 may be utilized to effect service upon a non-resident, the residential prerequisites of the court seeking jurisdiction must also be satisfied.

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

RPAPL 755: "Abuse of process" recognized as an actionable tort.

Delay in the final disposition of cases both criminal and civil has plagued the judicial process in New York. In civil actions, a party often delays in the hope that his adversary will concede out of despair. Illustrative of this is *500 West 174 Street v. Vasquez,*[237] where the Civil Court, New York County, condemned this tactic in no uncertain terms.

In *Vasquez,* the tenant requested in 1968 that certain repairs to his apartment be made, but the landlord ignored this request. In January 1970, the tenant stopped paying rent; in June 1970, the landlord commenced nonpayment proceedings. The tenant then sought relief under section 755 of the RPAPL.[238] Both the landlord and his attorney continually failed to appear in court, but recommenced proceedings five times.[239] On the various calendar dates, the tenant, who had to close his one-man grocery store to go to court, appeared at least nine of ten times; the landlord appeared only once.[240]

The court deemed the unconscionable conduct of the landlord a tort designated "abuse of process,"[241] fixing damages at $1,000. Additionally, the landlord's attorney's behavior was referred by the court to the Grievance Committee of the Association of the Bar.[242] Thus, landlords were warned that misuse of process may be costly, and lawyers who aid in such unethical practices were put on notice that they will be subject to disciplinary proceedings.

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[237] 67 Misc. 2d 993, 325 N.Y.S.2d 256 (N.Y.C. Civ. Ct. N.Y. County 1971).

[238] *Id.* at 994, 325 N.Y.S.2d at 257.

[239] The landlord commenced non-payment proceedings in June 1970, November 1970, December 1970, June 1971, and July 1971. *Id.* at 995-96, 325 N.Y.S.2d at 257-58.

[240] *Id.* at 996, 325 N.Y.S.2d at 258.

[241] *Id.* at 995, 325 N.Y.S.2d at 258. In discussing "abuse of process," Dean Prosser states:

> [T]he gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designated to accomplish.

W. PROSSER, LAW OF TORTS 856 (4th ed. 1971). *See also* Hauser v. Bartow, 273 N.Y. 370, 7 N.E.2d 268, *reargument denied,* 274 N.Y. 489, 8 N.E.2d 617 (1937).

[242] 67 Misc. 2d at 996, 325 N.Y.S.2d at 259. The landlord failed to appear in court

VEHICLE AND TRAFFIC LAW

Vehicle & Traffic § 388: Benefit of taxicab owner's policy does not inure to passenger who was user within meaning of statute but who was excluded from coverage by the terms of the policy.

Kernon v. Shamrock Casualty Co.[243] reaffirms the long standing rule permitting passenger carrier owners to limit their insurance coverage for liability to themselves and the operators of the vehicle. Section 388 imposes liability on the owner of a vehicle for negligence in the use or operation thereof and requires the owner's policy to provide indemnity against such liability.[244] In *Kernon,* however, the policy issued by the defendant to the taxicab owner was in accordance with the limiting language of section 370,[245] which only requires coverage for the operation and not the use of a passenger carrier.

The plaintiff, while a passenger in the taxicab, negligently opened the door into the path of another motorist. The latter sued passenger Kernon and she in turn lodged this third-party complaint against the insurer of the taxicab owner. The court had little difficulty establishing that Kernon was a user of the vehicle and thus within the statutory coverage of section 388.[246] It follows that a valid suit in negligence could have been brought against the taxicab owner's insurer by the motorist.

The peculiarity of this case is that the motorist chose to sue only Kernon. Since the owner's policy covered him and the operators of the vehicle, the court concluded that Kernon, as a user of the taxicab, was an uninsured and had to defend the suit herself.[247] The court rejected the contention that section 388 projected coverage for the user of the vehicle into the policy.[248]

Under a literal construction of section 370, the court's decision is correct. However, a liberal reading of that section to include a user of the vehicle as an operator would perhaps be more consistent with the policy of public protection which the statute seeks to engender. This is especially so in the present case where by mere matter of choice the burden falls on the party less able to afford it.

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and gave no explanation for this failure. The court stated that the attorney's behavior might well be tortious and violative of the canons of professional ethics.

[243] 68 Misc. 2d 29, 326 N.Y.S.2d 137 (N.Y.C. Civ. Ct. N.Y. County 1971).

[244] N.Y. VEH. & TRAF. LAW § 388 (McKinney 1970).

[245] *Id.* § 370(1)(b) (McKinney Supp. 1971).

[246] 68 Misc. 2d at 30, 326 N.Y.S.2d at 138 (N.Y.C. Civ. Ct. N.Y. County 1971).

[247] *Id.* at 31, 326 N.Y.S.2d at 139.

[248] *Id., citing* General Accident Fire & Life Assurance Corp. v. Piazza, 4 N.Y.2d 659, 152 N.E.2d 236, 176 N.Y.S.2d 976 (1958).