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Article 13

CPLR 302(a)(1): Further Construction of the Words "In Person," Through an Agent," and "Transacts Business"

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Among the more significant cases discussed herein are two Court of Appeals decisions: *Parke-Bernet v. Franklyn* and *Granite Worsted Mills v. Aaronson Cowen, Ltd.* The former apparently marks the end of judicial entanglement with technical rules of agency when jurisdiction is predicated under the long-arm statute. The latter seemingly heralds the beginning of speculative scrutiny of an arbitrator's award.

Finally, special attention must be given to the arguments advanced in *Lawson v. Mantell,* which is reported under article 71. There, the replevin provision contained in CPLR 7102 withstood constitutional attack in the face of allegations that it violated the due process and equal protection clauses. Nevertheless, immediately prior to publication, a federal court held that the section is violative of due process requirements. Further analysis of this area can be expected in future issues of the *Survey.*

The *Survey* sets forth in each installment those cases which are deemed to make the most significant contribution to New York's procedural law. Due to limitations of space, however, many other less important, but, nevertheless, significant cases cannot be included. While few cases are exhaustively discussed, it is hoped that the *Survey* accomplishes its basic purpose, viz., to key the practitioner to significant developments in the procedural law of New York.

The Table of Contents is designed to direct the reader to those specific areas of procedural law which may be of importance to him. The various sections of the CPLR which are specifically treated in the cases are listed under their respective titles.

CPLR 302(a)(1): Further construction of the words "in person," "through an agent," and "transacts business."

Almost since its inception, the purpose of CPLR 302(a)(1)[1] has been, in the words of the Court of Appeals, "to take advantage of the 'new [jurisdictional] enclave' . . . opened up by *International Shoe* where the nonresident defendant has engaged in some purposeful activities in the state."[2] Nevertheless, in enacting this section, the legislature chose not to fix precise standards as to the minimal contacts required to sustain jurisdiction.[3] Two recent cases, in an attempt to clarify the factual prerequisites to the assertion of long-

[1] CPLR 302(a)(1) confers personal jurisdiction over any nondomiciliary who in person or through an agent "transacts any business within the state."

[2] Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 456-57, 209 N.E.2d 68, 75, 261 N.Y.S.2d 8, 18 (1964).

[3] *Id.* at 456, 209 N.E.2d at 75, 261 N.Y.S.2d at 18.

arm jurisdiction, have focused on three elements of CPLR 302(a)(1) which have created difficulties of interpretation in the past: the meaning of the words "in person,"[4] the character of the agency relationship,[5] and the nature of the business that must be transacted.[6]

Transaction of Business "in Person"

In *Parke-Bernet v. Franklyn*,[7] the defendant, a California resident, participated in an art auction held in New York via telephone from his home state. Pursuant to his request, the defendant was assigned an employee of the art gallery to relate the progress of the auction and enter bids on his behalf. As a result of this arrangement, the defendant successfully bid $96,000 for two paintings, but subsequently refused to pay for them. Thereupon, plaintiff commenced an action in New York by personally serving the defendant in California.

Under these facts, the Court of Appeals held that the telephone contact was enough to establish that defendant had personally transacted business in New York. For, these activities constituted more than the simple placing of an order by telephone;[8] "in a very real sense, [they] projected [the defendant] into the auction room to compete with the other purchasers . . . there."[9] And, through his active participation in the auction, defendant had purposefully availed himself of the benefits and protections of New York's laws relating to the conduct of auctions.[10]

Transaction of Business "Through an Agent"

Although other cases have held that a party need not be actually present in the state[11] and that a single act[12] may have jurisdictional consequences, the ruling that defendant had personally transacted

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4 *Compare* Singer v. Walker, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965) *with* Ferrante Equip. Co. v. Lasker-Goldman Corp., 31 App. Div. 2d 355, 297 N.Y.S.2d 985 (1st Dep't 1969), *aff'd*, 26 N.Y.2d 280, 258 N.E.2d 202, 309 N.Y.S.2d 913 (1970). *See generally* 7B McKINNEY'S CPLR 302, supp. commentary at 128-33 (1965).

5 *See, e.g.*, Elman v. Belson, 32 App. Div. 2d 422, 302 N.Y.S.2d 961 (2d Dep't 1969); A. Millner Co. v. Noudar LDA, 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966); Schneider v. J & C Carpet Co., 23 App. Div. 2d 103, 258 N.Y.S.2d 717 (1st Dep't 1965).

6 *See* Chunky v. Blumenthal Bros. Chocolate Co., 299 F. Supp. 110 (S.D.N.Y. 1969).

7 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970), *rev'g* 31 App. Div. 2d 276, 297 N.Y.S.2d 151 (1st Dep't 1969).

8 *See, e.g.*, Katz & Son Billiard Prods. v. Correale & Sons, 20 N.Y.2d 903, 232 N.E.2d 864, 285 N.Y.S.2d 871 (1967).

9 26 N.Y.2d at 18, 256 N.E.2d at 508, 308 N.Y.S.2d at 340-41.

10 *Cf.* Hanson v. Denckla, 357 U.S. 235 (1958).

11 *See, e.g.*, Singer v. Walker, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

12 *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

business in the state is indeed a novel determination. Yet, the Court's alternate holding that the defendant had also acted through an agent in this state will probably become more renowned since it repudiates those lower-court cases which have insisted upon a technically perfect agency,[13] before permitting the assertion of long-arm jurisdiction. Indeed, the appellate division's holding in *Parke-Bernet* that there must be proof that the agent was "acting for the defendant alone, solely in his interest and subservient to his wishes"[14] is indicative of this trend. To the contrary, the Court of Appeals established that a technically perfect agency is not required, at least in that instance where a third person, rather than the agent himself, is suing the principal.[15] Moreover, in the Court's opinion, to say that plaintiff's employee acted solely as its agent "ignores the realities of what he actually did."[16]

The Nature of the "Business"

In evaluating cases involving separation agreements, the courts have posited that "business" means commercial business.[17] Although there have been many deviations from this approach,[18] they have been based on the commercial aspects of a separation agreement, rather than the validity of the principle itself. It remains to be determined what effect the holding in *Parker v. Rogerson*[19] will have on this commercial-noncommercial business dichotomy. In *Parker*, the Appellate Division, Fourth Department, upheld jurisdiction over the donees of a gift in an action for the settlement of an estate with the following statement: "It is undisputed that these defendants . . . met with [Rogerson] in New York City for the purpose of arranging a gift to them of some of the shares . . . the shares were . . . held [in New York] for the benefit of these defendants."[20]

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13 *See, e.g.*, Glassman v. Hyder, 23 N.Y.2d 354, 244 N.E.2d 259, 296 N.Y.S.2d 783 (1968); A. Millner Co. v. Noudar LDA, 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966).

14 31 App. Div. 2d 276, 278, 297 N.Y.S.2d 151, 153 (1st Dep't 1969).

15 *Compare* Elman v. Belson, 32 App. Div. 2d 422, 302 N.Y.S.2d 961 (2d Dep't 1969) *with* Glassman v. Hyder, 23 N.Y.2d 354, 244 N.E.2d 259, 296 N.Y.S.2d 783 (1968).

16 26 N.Y.2d at 19, 256 N.E.2d at 509, 308 N.Y.S.2d at 341.

17 *See, e.g.*, Whitaker v. Whitaker, 56 Misc. 2d 625, 289 N.Y.S.2d 465 (Sup. Ct. Ulster County 1968) (dictum); Willis v. Willis, 42 Misc. 2d 473, 248 N.Y.S.2d 260 (Sup. Ct. New York County 1964).

18 *See, e.g.*, Kochenthal v. Kochenthal, 52 Misc. 2d 437, 275 N.Y.S.2d 951 (Sup. Ct. Nassau County 1966); Raschitore v. Fountain, 52 Misc. 2d 402, 275 N.Y.S.2d 455 (Sup. Ct. Monroe County 1966) (dictum); Todd v. Todd, 51 Misc. 2d 94, 272 N.Y.S.2d 455 (Sup. Ct. Nassau County 1966) (dictum).

19 33 App. Div. 2d 284, 307 N.Y.S.2d 986 (4th Dep't 1970).

20 *Id.* at 292, 307 N.Y.S.2d 994-95.

The decision in *Parker* is not beyond criticism. In New York, the Surrogate's Court Procedure Act (SCPA) confers jurisdiction over the recipient of a bequest from an estate[21] and was intended to fill in specific gaps left by CPLR 302.[22] If, as the Fourth Department has held, 302 is broad enough to encompass gifts, why was the SCPA provision needed?[23]

In any event, before the requirement of commerciality can be disposed of, further analysis is needed.

CPLR 302(a)(4): Jurisdiction predicated upon ownership of property before cause of action accrued.

Under CPLR 302(a)(4), a nondomiciliary may be subjected to personal jurisdiction in New York if he owns, uses or possesses any real property in the state. Although the jurisdictional possibilities under this subsection are potentially broad,[24] there have been only a few cases to base jurisdiction under it.[25] Nevertheless, it has been held that at the time of service the defendant need not have any interest in the realty; it is sufficient if jurisdiction is grounded in "the relationship existing between the defendant and the realty . . . at the time the cause of action accrues."[26]

In *Karrat v. Merhib*,[27] the plaintiff sued to recover brokerage commissions due under a contract for the sale of property in New York. In opposition, the defendants asserted that the cause of action accrued subsequent to the disposition of the property and, therefore, jurisdiction could not be predicated upon CPLR 302(a)(4). Nonetheless, the court ruled that by their ownership and sale of the land, the defendants had transacted business in the state.[28]

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21 SURR. CT. PROC. ACT § 210(2)(b) (McKinney 1967).

22 58A MCKINNEY'S SURR. CT. PROC. ACT 210, commentary at 290 (1967).

23 The SCPA provision has been said to include gifts *causa mortis* if the disposition of decedent's property came under the surrogate court's jurisdiction. *Id.*, commentary at 296. Thus, in *Parker*, this line of reasoning might have been followed to secure jurisdiction over the donees for the Chautauqua County Surrogate's Court.

24 CPLR 302(a)(4) covers any interest in real property: fee, leasehold or easement. 1 WK&M ¶ 302.12. The only limitation appears to be that the cause of action must be reasonably related to the property. 7B MCKINNEY'S CPLR 302, commentary at 433-34 (1963).

25 *See* Tebedo v. Nye, 45 Misc. 2d 222, 256 N.Y.S.2d 235 (Sup. Ct. Onondaga County 1965); Hempstead Medical Arts Co. v. Mille, 150 N.Y.L.J. 111, Dec. 9, 1963, at 18, col. 6 (Sup. Ct. Nassau County).

26 Tebedo v. Nye, 45 Misc. 2d 222, 223, 256 N.Y.S.2d 235, 236 (Sup. Ct. Onondaga County 1965).

27 62 Misc. 2d 72, 307 N.Y.S.2d 915 (Sup. Ct. Oneida County 1970).

28 *But see* Glassman v. Hyder, 23 N.Y.2d 354, 244 N.E.2d 259, 296 N.Y.S.2d 783 (1969).