St. John's Law Review

Volume 45
Number 1 *Volume 45, October 1970, Number 1*

Article 35

CPLR 7503(c): Ten-Day Statute of Limitations Is Satisfied by Posting Papers by Certified Mail on Tenth Day after Receipt of a Notice of Intention To Arbitrate

St. John's Law Review

CPLR 7503(a): Service of an application to compel arbitration upon an attorney by mail is proper if an action is already pending.

In *Olsen & Chapman Construction Co. v. Village of Cazenovia*,[200] a contractor sought a declaratory judgment as to whether certain items constituted additional work under the terms of his contract. The defendant thereupon moved to compel arbitration by mailing an order to show cause to the plaintiff's attorney. Since the application to compel arbitration was made within a pending action, the court ruled that this mode of service[201] was proper.

Inasmuch as arbitration is no longer deemed a special proceeding,[202] a great deal of confusion surrounds the service of the first application arising out of the arbitrable controversy.[203] Indeed, this initiatory-interlocutory papers distinction has received continuous attention in the *Survey*.[204] If an action is not pending when the first application is made, jurisdiction over the defendant must be acquired. Hence, exacting compliance with the service requirements of the CPLR[205] is mandated.[206] However, when an action has already been commenced, the first application is classified a motion.[207] Therefore, as illustrated by *Olsen*, resort to the rules governing the service of motion papers is undoubtedly proper.[208]

CPLR 7503(c): Ten-day statute of limitations is satisfied by posting papers by certified mail on tenth day after receipt of a notice of intention to arbitrate.

Under CPLR 7503(c), the recipient of a properly drafted notice of intention to arbitrate[209] must apply to stay arbitration within ten

200 33 App. Div. 2d 929, 306 N.Y.S.2d 560 (3d Dep't 1970).

201 Service of an order to show cause in lieu of a notice of motion is authorized by CPLR 2214. Service by mail upon an attorney is authorized by CPLR 2103.

202 *Compare* CPA 1458 *with* CPLR 7502(a).

203 CPLR 7502(a) provides: "A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action."

204 *See, e.g., The Quarterly Survey*, 44 ST. JOHN'S L. REV. 760, 158, 157 (1969); *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 532, 344, 70 (1968).

205 CPLR 304

206 *See, e.g.*, Graffagnino v. MVAIC, 48 Misc. 2d 441, 264 N.Y.S.2d 483 (Sup. Ct. N.Y. County 1963).

207 CPLR 7502(a).

208 In addition to service by mail upon an attorney, the three-day extension authorized by CPLR 2103(b) would be available.

209 The notice of intention to arbitrate must contain the name and address of the claimant and must specify the agreement pursuant to which arbitration is sought. Also, notice must be given the recipient that unless an application is made within ten days after such service, he will be precluded from raising the "threshold" questions. CPLR 7503(c).

days. Otherwise, he is thereafter precluded from asserting that a valid agreement had not been made or complied with.[210] This ten-day caveat is not mere precatory language.[211] In effect, it constitutes a very short statute of limitations[212] in that instance wherein it is necessary to commence a special proceeding, *i.e.*, if an action is not already pending.[213]

To date, a frequent question surrounding the interpretation of CPLR 7503(c) has been when the ten-day period begins to run.[214] Recently, however, in *Glens Falls Insurance Co. v. Anness*,[215] the Supreme Court, New York County, was confronted with the problem of determining the final date on which a "timely" application for a stay of arbitration could be received.

In *Glens Falls*, the moving papers for a stay of arbitration were posted by certified mail, return receipt requested, on the tenth day following the receipt of a notice of intention to arbitrate, but were not delivered until several days later. In response to the contention that service was untimely, the court held that service was effected on the date of posting — not the date of actual receipt.

The decision in *Glens Falls* was motivated by a number of practical considerations as well as the logical discernment of legislative intent. As recognized by the court, the party demanding arbitration may have several months to prepare and serve his papers. In addition, an objection to his opponent's subsequent application for a stay of arbitration is styled a motion; hence, the period of time in which to respond can be enlarged.[216] On the other hand, the recipient of a notice of intention to arbitrate is denied the time extensions afforded by CPLR 2004[217] and 2103(b).[218] Thus, in accord with previous decisions,[219]

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210 The third "threshold question," whether the arbitration is barred by a limitation of time may be presented to the arbitrator, but he may refuse to consider it. CPLR 7502(b).

211 7B McKINNEY'S CPLR 7503(c), supp. commentary at 123 (1967).

212 *See* Jonathan Logan, Inc. v. Stillwater Worsted Mills, Inc., 24 N.Y.2d 898, 249 N.E.2d 477, 301 N.Y.S.2d 636 (1969).

213 CPLR 7502(a): "A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action."

214 *See, e.g.*, Finest Restaurant Corp. v. L&A Music Co., 52 Misc. 2d 87, 275 N.Y.S.2d 1 (Sup Ct. N.Y. County 1966); Beverly Cocktail Lounge, Inc. v. Emerald Vending Mach., Inc., 45 Misc. 2d 376, 256 N.Y.S.2d 812 (Sup. Ct. Kings County 1965).

215 62 Misc. 2d 592, 308 N.Y.S.2d 893 (Sup. Ct. N.Y. County 1970).

216 CPLR 2004.

217 Jonathan Logan, Inc. v. Stillwater Worsted Mills, Inc., 24 N.Y.2d 898, 249 N.E.2d 477, 301 N.Y.S.2d 636 (1969).

218 Beverly Cocktail Lounge, Inc. v. Emerald Vending Mach., Inc., 45 Misc. 2d 376, 256 N.Y.S.2d 812 (Sup. Ct. Kings County 1965).

219 *See* Finest Restaurant Corp. v. L&A Music Co., 52 Misc. 2d 87, 275 N.Y.S.2d 1 (Sup. Ct. N.Y. County 1966).

the court concluded that if the ten-day period is indeed a statute of limitations, a party must be given a *full* ten days in which to apply for a stay of arbitration.

A contrary decision would presumably frustrate the purpose of permitting service by certified mail. For, to insure timely receipt, a party would often be compelled to post his moving papers at least three days before the ten-day period expired. Or, service by mail would be abandoned in favor of personal delivery.

CPLR 7511(b)(1)(iii): Court of Appeals establishes criteria for determining whether arbitrator has exceeded his powers.

In marked contrast to earlier hostility,[220] courts have demonstrated an extreme reluctance to interfere with the arbitral process,[221] except to scrutinize the arbitration agreement itself.[222] Recognizing the contractual right of parties to choose arbitration as the proper forum in which to settle their disputes,[223] thereby waiving the substantive and procedural law of the state,[224] courts have been similarly hesitant in vacating an arbitrator's award.[225] Indeed, it is generally accepted that an award cannot be vacated for errors of law or fact.[226] The CPLR reflects this approach inasmuch as the grounds for vacating an award focus primarily on the integrity of the participants[227] and the arbitrator,[228] rather than on the wisdom of the award. Even CPLR 7511 (b)(1)(iii), which provides for vacation if the arbitrator has exceeded his power, has been emasculated by an earlier decision that to fall within the ambit of this subsection, a contract must be given an irrational construction by the arbitrator: one that, in effect, makes a new contract for the parties.[229] Quite surprising, therefore, is the Court of Appeals' decision vacating an arbitrator's award in *Granite Worsted Mills v. Aaronson Cowen, Ltd.*[230]

220 *See* 8 WK&M ¶ 7501.01.

221 *See, e.g.*, Astoria Medical Group v. Health Ins. Plan, 11 N.Y.2d 128, 182 N.E.2d 85, 227 N.Y.S.2d 401 (1962).

222 For a discussion of the "threshold questions," *i.e.*, those to be decided by the court, see 7B McKINNEY'S CPLR 7503, commentary at 488-89 (1963).

223 Astoria Medical Group v. Health Ins. Plan, 11 N.Y.2d 128, 182 N.E.2d 85, 227 N.Y.S.2d 401 (1962).

224 Spectrum Fabrics Corp. v. Main St. Fashions, 285 App. Div. 710, 139 N.Y.S.2d 612 (1st Dep't 1955).

225 *See, e.g.*, Torano v. MVAIC, 15 N.Y.2d 882, 206 N.E.2d 353, 258 N.Y.S.2d 418 (1965).

226 Wilkins v. Allen, 169 N.Y. 494, 62 N.E. 575 (1902).

227 CPLR 7511(b)(1)(i): "corruption, fraud or misconduct in procuring the award."

228 CPLR 7511(b)(1)(ii): "partiality of an arbitrator appointed as a neutral."

229 National Cash Register Co. v. Wilson, 8 N.Y.2d 377, 171 N.E.2d 302, 208 N.Y.S.2d 951 (1960).

230 25 N.Y.2d 451, 255 N.E.2d 168, 306 N.Y.S.2d 934 (1969), *rev'g* 29 App. Div. 2d 303, 287 N.Y.S.2d 765 (1st Dep't 1968).