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CPLR 320(b): Conduct Inconsistent with a Desire To Raise Jurisdictional Objection Deemed an Appearance

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in addition to the process server's due diligence, the court was satisfied that the defendants were a party to the deception. Special cognizance was taken of the receptionist's role: "[A process server] has the right to assume that corporate employees whose duties include meeting and guiding visitors will act honestly and cooperatively."[30]

It is difficult to disagree with a decision that places ultimate responsibility on a corporation for the misconduct of its employees. It should be noted, however, that a decision such as *Belofatto* must achieve a delicate balance between countervailing equities. On one hand, there is the danger that sustaining improper service will lead to carelessness and increase the risk of default by the purported recipient.[31] On the other hand, exacting compliance with CPLR 311 might invite corporate defendants "to engage in deceptive maneuvers designed to mislead the process server and to defeat justice."[32] Hence, of necessity, general rules cannot be propounded; exceptions must be carefully carved out in special situations.[33] Nonetheless, it is hoped that in the future more decisions will be tempered by the sense of fairness pervading the *Belofatto* outcome.

CPLR 320(b): Conduct inconsistent with a desire to raise jurisdictional objection deemed an appearance.

If process or its service is insufficient to provide the court with personal jurisdiction, such jurisdiction will nonetheless be secured if the defendant makes an appearance.[34] Under CPLR 320(a), defendant appears "by serving an answer, or a notice of appearance, or by making a motion which has the effect of extending the time to answer." In *Rizika v. Board of Assessors*,[35] it was conceded that service of a petition to review a tax assessment by mail, instead of by personal delivery as required by statute,[36] was improper.[37] And, the recipient had not taken any action which would constitute an appearance under CPLR 320(a).[38]

30 *Id.* at 924, 310 N.Y.S.2d at 193.

31 McDonald v. Ames Supply Co., 22 N.Y.2d 111, 116, 238 N.E.2d 726, 728, 291 N.Y.S.2d 328, 332 (1968).

32 Belofatto v. Marsen Realty Corp., 62 Misc. 2d 922, 924, 310 N.Y.S.2d 191, 193 (N.Y.C. Civ. Ct. N.Y. County 1970).

33 One important factor in *Belofatto* was that the statute of limitations was about to expire when service was effected, and the court was of the opinion that a dismissal of the complaint would deprive plaintiff of his day in court. *Id. Accord*, 7B McKINNEY'S CPLR 205, supp. commentary at 49 (1964).

34 CPLR 320(b): ". . . unless an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in an answer as provided in rule 3211."

35 62 Misc. 2d 774, 310 N.Y.S.2d 43 (Sup. Ct. Herkimer County 1970).

36 REAL PROP. TAX LAW § 708 (McKinney 1960).

37 *See* Pennington v. Board of Assessors, 34 Misc. 2d 336, 227 N.Y.S.2d 964 (Sup. Ct. Jefferson County 1962).

38 Usually, a defendant must make an appearance in order to avoid a default judg-

Nevertheless, a motion to dismiss for lack of jurisdiction was denied on the ground that respondent had already appeared in the action.

In reaching this conclusion, the court examined respondent's conduct from the time it received the petition until the trial was ordered and found, essentially, that it was inconsistent with any desire to object to jurisdiction.[39] Mindful, perhaps, that whether or not respondent had in fact appeared was at least arguable,[40] the court solidified its position by adding that "any court appearance without a motion . . . is a waiver of any objection to jurisdiction of the person."[41]

In view of the peculiar facts presented in *Rizika*, the court was justified in holding that respondent had waived its jurisdictional objection. Nevertheless, the language in the opinion to the effect that any appearance constitutes a waiver should not be read as illustrative of a universal truism; by statute, certain courses of action which will not constitute an appearance conferring personal jurisdiction are prescribed. Specifically, a "restrictive" appearance is provided in CPLR 302(b)[42]; a "limited" appearance is found in CPLR 320(c)[43]; and, no appearance is made when a defendant moves under sections 3012(b), 6222 or 6223 of the CPLR. It should be noted, however, that earlier cases recognized what is known as an informal appearance,[44] and there is no indication that these holdings have been abrogated by the CPLR.[45] Thus, while *Rizika* serves to remind the practitioner that an objection to jurisdiction should be raised as soon as possible, its overly broad language must be read in the light of the above considerations.

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ment. H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 48 (3d ed. 1970). However, the peculiar facts in *Rizika* arose because the Real Property Tax Law § 712(ii) does not require an answer, *i.e.*, a responsive pleading under 3211(e).

39 The petition was mailed on August 22, 1968. On the return date, special term transferred the proceedings to the general calendar at respondent's request. In March 1969, the proceeding was reached for trial, respondent objecting to an erroneous note of issue, but not to the insufficiency of original service. Subsequent attempts to adjust the assessment proved futile, and when trial was ordered in January 1970, respondent, for the first time, asserted that the original service was improper.

40 The Real Property Tax Law makes no provision as to what acts constitute an appearance. Hence, this determination was governed by the CPLR, see CPLR 103(b), and respondent had not done anything which would constitute an appearance under CPLR 320(a).

41 62 Misc. 2d at 777, 310 N.Y.S.2d at 46.

42 Although the defendant appears and defends an action where jurisdiction is predicated on the long-arm statute, he does not subject himself to personal jurisdiction as to any cause of action not arising from one of the acts enumerated in CPLR 302. H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 32 (3d ed. 1970).

43 This subdivision, as amended, restores the limited appearance to New York practice where the sole basis of jurisdiction is an attachment levy upon the defendant's property. It is written to codify the holding of Simpson v. Loehmann, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968). *See generally* 7B MCKINNEY'S CPLR 320, supp. commentary at 228-34 (1969).

44 *See, e.g.*, Henderson v. Henderson, 247 N.Y. 428, 160 N.E. 775 (1928).

45 *See* H. PETERFREUND & J. MCLAUGHLIN, NEW YORK PRACTICE 377 (2d ed. 1968).