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Article 15

CPLR 320: The Appearing Nonresident--Everitt Revisited

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compliance with the CPLR should yield to the court's fundamental sense of fairness.[55]

CPLR 320: The appearing nonresident — Everitt *revisited.*

In *Everitt v. Everitt*[56] an action was commenced against a nondomiciliary by serving her while she was temporarily within the state. The summons was accompanied by a notice stating that the action was being brought for breach of contract and that judgment would be taken in the amount of $46,900 in the event of default.[57] After defendant had entered an appearance in the action, she was served with a complaint containing an additional cause of action for libel demanding damages of $350,000. Reasoning that the default notice was rendered ineffective by the defendant's appearance, a majority of the Court of Appeals permitted the libel cause of action to stand despite defendant's assertion that the court lacked personal jurisdiction to adjudicate that claim.

An appearance without timely objection to jurisdiction confers full in personam jurisdiction over the defendant[58] in most instances.[59] Nonetheless, it has been maintained that fundamental due process objections are raised by *Everitt* inasmuch as the defendant had not appeared in the action to defend a $350,000 claim for libel and, conceivably, she would have elected to default had she been aware of the enormity of the plaintiff's additional claim.[60] Accordingly, it has been concluded that when a defendant does enter an appearance, it should not be viewed as a "submission to a free-wheeling form of in personam jurisdiction on any and all causes of action by any and all parties to the action."[61] Moreover, it could be posited that the plaintiff in *Everitt* employed the $46,000 contract action with the attendant risk to defendant of absolute liability via default as a lever for securing jurisdiction in the much larger libel action. Similar considerations were deemed to outweigh the interests of the plaintiff and the court in resolving all issues in one action where the plaintiff has secured jurisdiction by attaching property owned by a nonresident.[62] Possibly, an expansive reading of

55 *See* Belofatto v. Marsen Realty Corp., 62 Misc. 2d 922, 310 N.Y.S.2d 191 (N.Y.C. Civ. Ct. N.Y. County 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 342, 350 (1970).

56 4 N.Y.2d 13, 148 N.E.2d 891, 171 N.Y.S.2d 836 (1958).

57 *See* CPLR §§ 305 & 3215(e).

58 CPLR 320(b).

59 Two exceptions are the limited appearance under CPLR 320(c) and the restricted appearance under CPLR 320(b).

60 Everitt v. Everitt, 4 N.Y.2d 13, 18, 148 N.E.2d 891, 894, 171 N.Y.S.2d 836, 840 (1958) (dissenting opinion). *But see* 3 WK&M ¶ 3025.10.

61 7B MCKINNEY'S CPLR 320, supp. commentary at 244 (1970).

62 *See* FIFTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK A109-113 (1970).

recent cases will lead to a judicially created limited appearance in cases resembling *Everitt*.[63]

First National City Bank v. Elsky[64] pronounces a rule designed to protect the defaulting defendant. There, plaintiff moved to increase the amount demanded in his complaint against a defendant who failed to appear in the action. Notice of said motion was served by mail, *i.e.*, in a manner authorized for service of interlocutory papers under CPLR 2103. Plaintiff attempted to justify this mode of service by pointing to CPLR 2103(c) which permits service by mail upon a party who has not appeared by an attorney. Nonetheless, the court ruled that "a person who has not appeared at all is not synonymous with a person who has not appeared by an attorney."[65]

Essentially, the court distinguished the case at hand from one where the defendant has entered an appearance and then defaulted. So long as the amended complaint is served before the defendant in the latter situation defaults, plaintiff is entitled to avail himself of the provisions for service of interlocutory papers. Where, however, the defendant has not appeared in the action, the notice of motion for leave to amend the complaint must be served in the same manner as a summons.[66] Such method of service, noted the court, is necessary to insure that defendant is fully aware of the consequences of his default.

Of course, if the jurisdictional basis for the original cause of action was the service of a nonresident within the state, more would be required than compliance with the notice requirements found in CPLR 308. In order to add an unrelated cause of action against the defendant, plaintiff would also be required to demonstrate a separate jurisdictional predicate. This much was conceded by all of the members of the *Everitt* Court[67] although the question was not squarely before them. A further limitation on claims that may be asserted against a nonresident was pronounced in *In re Einstoss*.[68]

In an earlier action to foreclose a mortgage on land owned by defendant in the territory of Alaska, service was effected by delivering the summons personally to the defendant in the state of Washington. Inas-

63 It could be speculated further that an ad hoc approach to limited appearances would lead to legislative action. CPLR 320(c) which prescribes a limited appearance in attachment cases was enacted to terminate the judge-made law that was emerging in cases such as Tjepkema v. Kenney, 31 App. Div. 2d 908, 298 N.Y.S.2d 175 (1st Dep't 1969). 1 WK&M ¶ 320.18a.

64 62 Misc. 2d 880, 312 N.Y.S.2d 325 (N.Y.C. Civ. Ct. N.Y. County 1970).

65 *Id.* at 883, 312 N.Y.S.2d at 329.

66 *See* 7B McKINNEY'S CPLR 3215(b), commentary 10, at 869 (1970).

67 4 N.Y.2d at 16, 17, 148 N.E.2d at 893, 894, 171 N.Y.S.2d at 838, 839.

68 26 N.Y.2d 181, 257 N.E.2d 637, 309 N.Y.S.2d 184 (1970).

much as the defendant was not subject to personal jurisdiction in Alaska, plaintiff agreed to satisfy any judgment solely out of the mortgaged property if defendant appeared in the action. Nevertheless, the territory of Alaska, which had been joined as a defendant, asserted a cross-claim against defendant on an unrelated cause of action. Before the expiration of time in which to answer the cross-claim, defendant died. The action proceeded to judgment in favor of Alaska against defendant for $95,000. The instant proceeding was commenced against defendant's administrator to recover the unpaid portion of the judgment.

The Court of Appeals proffered two reasons for denying full faith and credit to the Alaskan judgment: the New York administrator had not been made a party to the proceedings after defendant's death and the Alaskan court never acquired personal jurisdiction over the decedent on the unrelated cross-claim.

With regard to the first ground, the Court noted that under the federal rules,[69] as under the CPLR,[70] an action must be dismissed when a defendant has died before a verdict or decision is rendered, unless the action is revived by substituting the personal representative. Plaintiff contended that the failure to substitute the administrator was merely a formal defect which did not divest the court of jurisdiction; the Court of Appeals replied that substitution was imperative inasmuch as jurisdiction over the decedent did not secure the requisite jurisdiction over his administrator.[71]

In any event, the Court did not believe that the Alaskan court ever acquired jurisdiction over the decedent with respect to the cross-claim. Apparently, the Court was addressing itself to a question which has received little attention heretofore: must a defendant demonstrate an independent jurisdictional basis for his cross-claim? The Court's answer in the affirmative will have a profound effect on the course of litigation where a defendant has made either a limited appearance or a restricted appearance in New York.

It would seem that the question has not generated much discus-

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69 FED. R. CIV. P. 25.

70 *See* CPLR 1015(a).

71 The Court stated that with the advent of the long-arm statute, jurisdiction over the decedent would provide jurisdiction over the administrator provided that the latter was afforded sufficient notice of the action. *In re* Einstoss, 26 N.Y.2d 181, 191, 257 N.E.2d 637, 642, 309 N.Y.S.2d 184, 191 (1970), *citing* Rosenfeld v. Hotel Corp. of America, 20 N.Y.2d 25, 228 N.E.2d 374, 281 N.Y.S.2d 308 (1967). Whether this statement is true regarding a nondomiciliary whose only contact with the state is the fact that he was served here, has been questioned by Professor McLaughlin. *See* 7B MCKINNEY'S CPLR 302, supp. commentary at 126 (1968).

sion because in the ordinary case the defendant confers the requisite jurisdiction on the court by appearing in the action. *Bides v. Abraham & Straus, Inc.*[72] illustrates the outer limits of this point. In *Bides* defendant moved successfully to dismiss the plaintiff's action on the ground that the court lacked personal jurisdiction. However, in its answer to a cross-claim asserted by a codefendant, defendant failed to reallege its jurisdictional objection. Hence, the curious result ensued whereby defendant was deemed no longer a party to the action by the plaintiff but very much a party to the defendant's cross-claim.

Will *Einstoss* lead to a judge-made limited appearance in the *Everitt* situation? An affirmative response is perhaps attributable to a strong opposition to the *Everitt* outcome. Or, perhaps it reflects an acquiescence in the observation that with the emergence of a minimum contacts theory of jurisdiction the wholly fortuitous act of catching a nonresident within the state should no longer serve as a jurisdictional predicate.[73] Nevertheless, it is possible that in the future *Einstoss* will be read conservatively and distinguished by focusing on the fact that the administrator was not made a party to the Alaskan action. It is submitted, however, that it is an excellent time for, at least, restricting the adversary's right to amend against unwary nonresidents to claims based on the same occurrence or transaction that underlies the initial cause of action.[74]

ARTICLE 10 — PARTIES GENERALLY

CPLR 1005: Use of class action continues to be restricted by the courts.

In this age of consumerism, there has been an increased awareness not only of the plight of the consumer but also of the availability of many legal devices to aid in the effort to remedy that plight. One such device is the class action prescribed in CPLR 1005.[75] While advantages to the plaintiff utilizing the class action include those of an economic and procedural nature, imagine the profound impact upon public opinion, the jury, and the opposing party when there exists a class of 1,000 plaintiffs suing for $500 each, instead of a single plaintiff prosecut-

[72] 33 App. Div. 2d 569, 305 N.Y.S.2d 336 (2d Dep't 1969); *see also* Wajtman v. Brooklyn E. Dist. Terminal, 276 App. Div. 853, 93 N.Y.S.2d 586 (2d Dep't 1949).

[73] *See* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

[74] *Cf.* Frumer & Graziano, *Jurisdictional Dilemma of the Nonresident Defendant in New York — A Proposed Solution*, 19 FORDHAM L. REV. 125, 142-43 (1950).

[75] For a comprehensive survey of the use of the class action in consumer suits, see Starrs, *The Consumer Class Action — Part I: Considerations of Equity*, 49 BOSTON L. REV. 211 (1969); Starrs, *The Consumer Class Action — Part II: Considerations of Procedure*, 49 BOSTON L. REV. 407 (1969).