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CPLR 7503(c): Nonsignatory of Arbitration Agreement Is Not Precluded by the Failure To Apply for a Stay of Arbitration within Ten Days

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trator should not be allowed to decide it.[155] Third, the arbitrator's experience in a particular field makes him better able to rule on technical issues than the court. Finally, *City of Auburn* relieves the court of its duty to determine threshold questions and, as a calendar-clearing device, is much more palatable than an oppressive ten-day statute of limitations.[156] Nonetheless, the legislature has identified the time-limitations objection as a threshold one to be decided by the courts upon a timely application for a stay of arbitration. Particularly in view of the variance in scope of review between the court's decision and the abritrator's determination, CPLR 7502(b) should not be abrogated by judicial fiat.

CPLR 7503(c): Nonsignatory of arbitration agreement is not precluded by the failure to apply for a stay of arbitration within ten days.

The recipient of a properly drafted[157] notice of intention to arbitrate will be foreclosed from raising certain threshold questions[158] in court[159] unless he applies for a stay of arbitration within ten days.[160] This ten-day period has been construed as a statute of limitations.[161] Such an interpretation is onerous when applied to a signatory of an arbitration agreement; if applied to a nonsignatory it would be even more oppressive. This was the conclusion reached by the Appellate Division, Second Department, in *Glasser v. Price*.[162]

The petitioners entered into a leasing agreement with the individual respondents, Price, Kligher and Tobin. The contract contained a clause whereby the parties agreed to arbitrate any and all disputes arising thereunder. Respondent, Premier Estate Planners, Inc. (Premier), which was not a party to the leasing agreement, notified peti-

155 *Cf.* Aimcee Wholesale Corp. v. Tomar Prods., Inc., 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968); Agur v. Agur, 32 App. Div. 2d 16, 298 N.Y.S.2d 772 (2d Dep't 1969).

156 CPLR 7503(c), *as construed in* 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).

157 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).

158 Under CPLR 7503(c) the threshold questions are: (1) whether a valid agreement to arbitrate was made; (2) whether it was complied with; (3) whether the claim sought to be arbitrated is barred by a limitation of time.

159 The recipient may nonetheless present before the arbitrator the objection that the arbitration is barred by a limitation of time. However, the latter may refuse to consider it. CPLR 7502(b).

160 CPLR 7503(c).

161 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), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 758, 760 (1970).

162 35 App. Div. 2d 98, 313 N.Y.S.2d 1 (2d Dep't 1970).

tioners that their tenancy was being terminated. In response, petitioners served a demand for arbitration on both the individual and the corporate respondents. When neither recipient moved to stay arbitration within ten days, petitioner moved to compel arbitration. The lower court ordered the individual respondents to arbitrate but refused to rule similarly with respect to Premier inasmuch as it was not a party to the arbitration agreement.

On appeal the appellate division was confronted with a vital question: is a nonsignatory precluded from objecting to the arbitration by the failure to move within ten days? A similar question had arisen under the CPA.[163] However, the court recognized that the issue before it had not been decided previously inasmuch as the CPA cases focused entirely on the casual mode of notice contained in the demand for arbitration and the due process considerations that were inherent therein.[164] Such deficiencies, however, were rectified by the specific notice requirements contained in CPLR 7503(c).[165] Thus, it could be presumed that, having cited the ground for censure contained in earlier cases and having acknowledged that objections based on insufficient notice are no longer plausible, the appellate division would conclude that the nonsignatory was precluded by its failure to object promptly. Nonetheless, the court ruled that had such a result been intended by the legislature, it would have employed the broad term "person" rather than the more restrictive word "party" in the preclusionary caveat contained in CPLR 7503(c).

It could be argued that because of the notice requirements contained therein, CPLR 7503(c) was designed to encompass nonsignatories as well as signatories of a contract. Otherwise, a person would be permitted to proceed to arbitration with the defense that he was not a party to the contract available should the proceedings be going poorly for him. And, such an alternative is exactly what CPLR 7503(c) is supposed to prevent, namely, the disruptive effect on arbitration when a party is allowed to raise preliminary defenses at any time.[166] Nevertheless, in view of the restrictive interpretations of CPLR 7503(c) con-

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163 *See, e.g.*, Matter of Hesslein & Co. v. Greenfield, 281 N.Y. 26, 22 N.E.2d 149 (1939); Schafran & Frankel v. M. Lowenstein & Sons, 280 N.Y. 164, 19 N.E.2d 1005 (1939).

164 Witness the following statement:

> The notice should state where and at what time the party is to proceed and the consequences of his failure to act as the law specified. We do not say that all these things are necessary, but we do say that the proceedings for arbitration cannot be left so vague and uncertain that people may be mulcted in judgment without being sufficiently warned of their rights.

Schafran & Frankel v. M. Lowenstein & Sons, 280 N.Y. 164, 172, 19 N.E.2d 1005, 1008 (1939).

165 *See* note 157 *supra*.

166 *See* FOURTH REP. A-244.

tained in *Jonathan Logan Inc. v. Stillwater Worsted Mills, Inc.*[167] and its progeny,[168] judicial alternatives to automatic preclusion are indeed welcomed.

CPLR 7503(c): Application to stay arbitration must be received within ten days.

Inasmuch as the ten-day preclusionary caveat contained in CPLR 7503(c) has been construed as a statute of limitations,[169] there is a great danger that the right to assert threshold objections to arbitration[170] may be lost by the failure to act promptly. Hence, questions relating to when the ten-day period begins to run[171] and how the requisite special proceeding[172] is timely commenced[173] are of critical importance to the practitioner. Unfortunately, the amount of litigation generated by this section is disheartening.[174] The latest issue to become the focal point of judicial controversy concerns a determination of the last date on which a timely application for a stay of arbitration can be received by the party demanding arbitration.

In *Glens Falls Insurance Co. v. Anness*[175] the Supreme Court, New York County, ruled that service of a notice of petition for a stay of arbitration was effected on the date of mailing—not on the date of actual receipt. The court reasoned that a contrary holding would compel a party to post his moving papers at least three days before the ten-day period expired in order to insure timely receipt. And, the court rea-

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167 24 N.Y.2d 898, 249 N.E.2d 477, 301 N.Y.S.2d 636 (1969).

168 *See, e.g.*, Knickerbocker Ins. Co. v. Gilbert, 35 App. Div. 2d 21, 312 N.Y.S.2d 406 (1st Dep't 1970); General Accident Fire & Life Assurance Corp. v. Cerretto, 60 Misc. 2d 216, 303 N.Y.S.2d 223 (Sup. Ct. Monroe County 1969) (parties are not permitted to extend the ten-day period by written agreement).

169 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).

170 *See* note 158, *supra*.

171 *See* Monarch Ins. Co. v. Pollack, 32 App. Div. 2d 819, 302 N.Y.S.2d 432 (2d Dep't 1969); Cosmopolitan Mut. Ins. Co. v. Moliere, 31 App. Div. 2d 924, 298 N.Y.S.2d 561 (1st Dep't 1969) (ten-day period begins to run when the notice of intention to arbitrate is actually received).

172 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. . . ."

173 It has been held that the moving papers cannot be served on a party's attorney. State-Wide Ins. Co. v. Lopez, 30 App. Div. 2d 694, 291 N.Y.S.2d 928 (2d Dep't 1968). *But see* Bauer v. MVAIC, 31 App. Div. 2d 239, 296 N.Y.S.2d 675 (4th Dep't 1969). And, it is generally acknowledged that the three-day time extension under CPLR 2103(b) is inapposite. Monarch Ins. Co. v. Pollack, 32 App. Div. 2d 819, 302 N.Y.S.2d 432 (2d Dep't 1969).

174 7B McKINNEY'S CPLR 7503(c), supp. commentary at 132 (1970).

175 62 Misc. 2d 592, 308 N.Y.S.2d 893 (Sup. Ct. N.Y. County 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 145, 173 (1970).