

## CPLR 1021: Motion To Dismiss for Failure To Substitute Denied Pending the Appearance of the Adversary

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more detailed pleading is required. Notwithstanding Judge Shapiro's praise, the practitioner is well advised to continue to heed the issuer's caveats.

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE  
AND CHOICE OF COURT

*CPLR 302: Jurisdiction not obtained in defamation action because defamation did not arise from transaction of business.*

CPLR 302(a)(1) enables a plaintiff to obtain jurisdiction over a non-domiciliary defendant where the cause of action arises out of the "transaction of business" by the defendant within the state. While the "long-arm" statute may not be used to obtain jurisdiction in defamation actions based on tortious acts committed within or without the state and resulting in injury within the state,<sup>7</sup> no such limitation exists where such a cause of action arises from the *transaction of business* within the state.<sup>8</sup>

In a recent libel action,<sup>9</sup> defendants moved to dismiss the complaint for lack of jurisdiction. In granting the motion, the Supreme Court, New York County, indicated that while the defendant had transacted business within the state, the claim did not arise from such transaction of business. The defendant's contacts with the state included the direct solicitation of advertising amounting to only slightly more than three percent of its advertising revenue. Furthermore, the average daily circulation in New York of defendant's newspaper, the Baltimore Sun, was less than three percent of its total average daily circulation. The court decided that the acts of publication and circulation which gave rise to plaintiff's complaint occurred in Baltimore.

If the cause of action had been brought by a New York subscriber for failure to deliver the paper, jurisdiction would obviously have been acquired by service under CPLR 302(a)(1), since the cause of action would then have arisen out of the transaction of business by the defendant within the state.

ARTICLE 10 — PARTIES GENERALLY

*CPLR 1021: Motion to dismiss for failure to substitute denied pending the appearance of the adversary.*

CPLR 1021 provides that "[i]f the event requiring substitution occurs before judgment and substitution is not made within a reason-

<sup>7</sup> CPLR 302(a)(2) & (3).

<sup>8</sup> CPLR 302(a)(1).

<sup>9</sup> *American Radio Ass'n v. A.S. Abell Co.*, 58 Misc. 2d 483, 296 N.Y.S.2d 21 (Sup. Ct. N.Y. County 1968).

able time, the action may be dismissed as to the party for whom substitution should have been made."

In *De Rijdt v. Robert Straile Co.*,<sup>10</sup> the defendant moved for dismissal for failure to substitute the plaintiff's executor or administrator in his stead, contending that the two years which had elapsed since the plaintiff's death was an unreasonable length of time. The court, in concluding that the determination of "reasonable time" is a matter properly left to its discretion,<sup>11</sup> held:

A dismissal against a deceased plaintiff under CPLR 1021, *if at all permissible*, should be saved for a situation in which the court has before it the decedent's side as well as his adversary's and where the court can factually determine that the delay in substitution has indeed been unreasonable.<sup>12</sup>

In so holding, the court dismissed the defendant's motion without prejudice to reintroduce it upon the appearance of the decedent's representative to provide the factual setting.

The court, in delineating the sinews of discretion in *De Rijdt*, avoided the jurisdictional problem in a situation where there exists no one upon whom to serve notice of the motion. Furthermore, the court avoided the necessity of declaring an exception under CPLR 5016(d), viz., "no verdict or decision shall be rendered against a deceased party."

#### ARTICLE 11 — POOR PERSONS

*CPLR 1102(d): Payment of publication expenses arising from indigent's divorce action required by equal protection clause.*

In *Jeffreys v. Jeffreys*,<sup>13</sup> the court held that CPLR 1102(d), which provides in part that "a poor person shall not be liable for the payment of any costs and fees," does not afford relief from the expense of service of summons by publication, but that the plaintiff had been denied the equal protection of the law guaranteed by the state and Federal Constitutions.

The conclusion reached by the court in *Jeffreys* resulted from a reappraisal of an earlier determination, wherein the court, upon consent of the City, entered an order directing that the expense of publication be paid by the City.<sup>14</sup> On relitigation, however, the court decided

<sup>10</sup> 58 Misc. 2d 543, 296 N.Y.S.2d 601 (Sup. Ct. Queens County 1968).

<sup>11</sup> See generally 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 1021.09-10 (1968).

<sup>12</sup> 58 Misc. 2d at 547, 296 N.Y.S.2d at 605.

<sup>13</sup> 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. Kings County 1968).

<sup>14</sup> 57 Misc. 2d 416, 292 N.Y.S.2d 767 (Sup. Ct. Kings County 1968). See also *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 498, 510 (1969).