

CPLR 7503(c): Fourth Department Upholds Effectiveness of Service upon a Party's Attorney for a Stay of Arbitration

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order to show cause does not institute a special proceeding."¹⁰⁷ For a special proceeding to be commenced, the petitioner should have served the order within the ten day period.

CPLR 201 commands that "[n]o court shall extend the time limited by law for the commencement of an action." The first department construed this section as mandating the dismissal of petitioner's application. However, CPLR 2004, which was not noted in the opinion, allows a court to grant an extension of time for good cause unless otherwise expressly prescribed by law.¹⁰⁸ By refusing to allow an extension of time by an order to show cause, without considering the circumstances, the court has construed this ten day period as a statute of limitations, though it has not heretofore been considered as such.¹⁰⁹ The first department's holding restricts the discretion given to the courts under CPLR 2004, and thereby precludes any extension for whatever good and meritorious cause a petitioner might have. Since the decision was rendered by a closely divided court, and because of the potential harshness which would result from such an interpretation of the section, one might think that the other courts would be less prone to adopt the court's ruling. However, the Court of Appeals, adopting the first department's opinion, has surprisingly affirmed the *Jonathan Logan* holding in a recent, still unreported decision, from which Chief Judge Fuld and Judge Burke dissented. It is unfortunate that the Court has sanctioned such a harsh rule without fully explicating its own reasons for doing so.

CPLR 7503(c): Fourth department upholds effectiveness of service upon a party's attorney for a stay of arbitration.

In re Bauer,¹¹⁰ a fourth department case, permits the notice for a stay of arbitration under CPLR 7503(c) to be served upon the attorney for the party seeking the arbitration. This decision is diametrically opposed to the second department's holding in *Statewide Insurance Co. v. Lopez*¹¹¹ that such service does not confer jurisdiction for a special proceeding.

¹⁰⁷ 31 App. Div. 2d at 210, 295 N.Y.S.2d at 856.

¹⁰⁸ "It should also be observed that CPLR 2004, which confers general power on the court to 'extend the time fixed by any statute,' does not apply to statutes of limitations . . ." 7B MCKINNEY'S CPLR 201, commentary 40 (1963).

¹⁰⁹ Had the delay been due to a misinterpretation, the court would have had power to extend this time under CPLR 2004. 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 7502.04 (1968).

¹¹⁰ 31 App. Div. 2d 239, 296 N.Y.S.2d 675 (4th Dep't 1969). See also *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 344-45 (1968).

¹¹¹ 30 App. Div. 2d 694, 291 N.Y.S.2d 928 (2nd Dep't 1968). See also *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 500, 532 (1969).

In *Statewide*, the second department construed the statute strictly in holding that the application for a stay of arbitration must be commenced by a special proceeding requiring service of notice of the application for a stay upon the party and not his attorney since CPLR 7503(c) states that the notice "shall be served in the same manner as a summons or by registered or certified mail, return receipt requested." The court required service on the *party*, even if made by mail, since the manner was to be that of service of a summons.

However, in *Bauer*, the attorney for the claimants sent a demand to arbitrate to MVAIC which, in turn, sent a notice of a stay of arbitration in the prescribed manner to the claimants' attorney within the ten day period of limitation. In reversing the lower court, the fourth department based its decision upon practicality. The court, while admitting that a stay of arbitration calls for a special proceeding, determined that by making the demand for arbitration by means of an attorney, the claimants authorized and in fact designated their attorney to receive process. The court found additional support for its view in CPLR 7506(d) which provides in part that "[i]f a party is represented by an attorney, papers to be served on the party shall be served upon his attorney." Therefore, once a party demands arbitration through an attorney, the attorney becomes the agent to receive process to confer jurisdiction upon the court in a special proceeding.

The court also commented upon the fairness and practicality of this interpretation. The attorney must be notified by the party served with notice anyway, so as to enable him to act quickly and expeditiously, and such prompt action would be further assured by this ruling.

Until the Court of Appeals has resolved the conflict between departments, the cautious practitioner should serve both the party and his attorney or, at least, the adverse party.

ARTICLE 78—PROCEEDING AGAINST BODY OR OFFICER

CPLR 7804(g): First department affirms findings in an Article 78 proceeding but substitutes a "more appropriate" penalty.

*Ancis v. Lomenzo*¹¹² was an Article 78 proceeding under CPLR 7804(g), which permits appeals from administrative determinations to the appellate division where the appellant raises a question under CPLR 7803.¹¹³

¹¹² 31 App. Div. 2d 615, 295 N.Y.S.2d 784 (1st Dep't 1969).

¹¹³ The questions which may be raised in an Article 78 proceeding under CPLR 7803 are:

1. whether the body . . . failed to perform a duty enjoined upon it by law; or
2. whether the body . . . proceeded, is proceeding or is about to proceed without or