St. John's Law Review

Volume 44
Number 2 *Volume 44, October 1969, Number 2*

Article 13

CPLR 217: Ambiguous "Final and Binding Determination" Resolved Against Administrative Body

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Practitioners are well advised to examine the exact nature of the defendant over whom jurisdiction is sought, since the result in *Butler* could easily have been avoided by employing an alternative means of service designed specifically for that type of situation.[9]

CPLR 217: Ambiguous "final and binding determination" resolved against administrative body.

CPLR 217 establishes a four month period within which a proceeding against a body or officer pursuant to CPLR article 78 must be commenced.[10] The period commences when the determination of the body or officer becomes final and binding upon a petitioner — a time which is not always easily ascertainable. In *Castaways Motel v. Schuyler*,[11] the question as to when one such determination became final and binding was presented to the New York Court of Appeals.

Petitioner therein had applied for a grant of land adjacent to its own property but located under the Niagara River. The consent of respondent, the Commissioner of General Services, to proceed with the contemplated work while the application was pending was subsequently sought, because although it was urgent that the project be completed immediately, the time necessary for processing the application was somewhat lengthy. Consent having been finally obtained, the petitioner expended a considerable sum in constructing a bulkhead around the land.

Meanwhile, the application proceeded "swiftly" through the administrative morass. Pursuant to the Public Lands Law,[12] the New York State Power Authority notified respondent that the grant would be permissible. However, he was further advised that a covenant of release from the petitioner would be required, and that such covenant would release the state and the authority from all past and future claims.

Petitioner was first informed of the covenant and its nature in a letter, dated October 20, 1966, which requested him to execute the release. Counsel was consulted, and the Chief of the Bureau of Surplus Real Property was informed of petitioner's willingness to sign a release for any past claims, but that it would not give a *carte blanche* release for all future claims. In response to its letter petitioner was informed,

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9 *See* N.Y. BUS. CORP. LAW §§ 304, 307 (McKinney 1963).

10 It should be noted, however, that shorter limitation periods provided elsewhere remain effective. CPLR 217. The court may extend the period of two years if petitioner is under a disability specified in CPLR 208. *Id. See also* 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 217.01 (1968).

11 24 N.Y.2d 120, 247 N.E.2d 124, 299 N.Y.S.2d 148 (1969).

12 N.Y. PUB. LANDS LAW § 75(13) (McKinney 1951).

in a second letter, that the grant was conditioned upon its execution of the release as drawn.

The instant proceeding, commenced within four months after receipt of the second letter but more than four months after receipt of the first, was brought to compel the respondent to deliver the grant without the covenant. However, the action was dismissed because it had not been timely brought pursuant to CPLR 217, and the appellate division unanimously affirmed.[13]

The Court of Appeals, reversing, held that the second letter, rather than the first, constituted the final and binding determination contemplated by CPLR 217 since its receipt was the first occasion upon which the conditional nature of the covenant was conveyed to petitioner. Moreover, the Court declared that in dealing with such a dilatory defense courts should resolve any ambiguity against the public body responsible for it. In this manner questionable cases may be determined on their merits and parties will not be denied a day in court. This conclusion is in accord with standards of fairness and due process. When a petitioner has only four months within which to act, he should not be required to guess as to when a determination of an administrative body may have become final and binding.

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

CPLR 302(a): Third department refuses to extend long-arm statute in matrimonial action.

It has been held that the execution of a separation agreement in New York is not a "transaction of business" for the jurisdictional purposes of CPLR 302(a)(1), since such an act is not "commercial" in nature.[14] This holding apparently enjoys continued vitality in New York[15] even though some decisions have seriously undermined it[16] and even though it has been criticized by notable authority.[17]

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[13] 29 App. Div. 2d 16, 284 N.Y.S.2d 900 (3d Dep't 1967).

[14] Willis v. Willis, 42 Misc. 2d 473, 248 N.Y.S.2d 260 (Sup. Ct. N.Y. County 1964). *See The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 642, 646 (1967).

[15] *See* Whitaker v. Whitaker, 56 Misc. 2d 625, 289 N.Y.S.2d 465 (Sup. Ct. Ulster County 1968) (dictum).

[16] *E.g.*, Van Wagenberg v. Van Wagenberg, 241 Md. 154, 215 A.2d 812, *cert. denied*, 385 U.S. 833 (1966) (New York judgment jurisdictionally based upon separation agreement given full faith and credit); Kochenthal v. Kochenthal, 52 Misc. 2d 437, 275 N.Y.S.2d 951 (Sup. Ct. Nassau County 1966); Raschitore v. Fountain, 52 Misc. 2d 402, 275 N.Y.S.2d 709 (Sup. Ct. Monroe County 1966) (dictum); Todd v. Todd, 51 Misc. 2d 94, 272 N.Y.S.2d 455 (Sup. Ct. Nassau County 1966) (dictum). *See The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 309 (1968); *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 128, 132 (1967).

[17] Professor McLaughlin sees no reason why the execution of a separation agreement