

**CPLR 302(a)(1): Execution of Indemnity Agreement in New Jersey by Non-Domiciliary Not a "Transaction of Business" in New York Even Though Performance by Subcontractor Was To Take Place in New York**

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*CPLR 302(a)(1): Execution of indemnity agreement in New Jersey by non-domiciliary not a "transaction of business" in New York even though performance by subcontractor was to take place in New York.*

Although a non-domiciliary need not be physically present in New York in order to be subject to in personam jurisdiction under CPLR 302(a)(1),<sup>22</sup> the courts have traditionally attached great importance to such physical presence.<sup>23</sup> Furthermore, if the case involves a contract, strong emphasis will also be placed upon the importance of the place where the contract was executed.<sup>24</sup> Indeed, where the defendant has not entered the state *and* the contract was executed without the state, it may prove extremely difficult to secure jurisdiction over the defendant even though he derives a substantial benefit from a contract that is to be performed in New York.

As noted by one authority,<sup>25</sup> this restrictive approach may be attributable to the fear that foreign jurisdictions will otherwise retaliate by increasing their jurisdictional bases.<sup>26</sup> Whatever their motives, however, the lower courts continue to interpret CPLR 302(a)(1) in the conservative fashion evidenced by the holding of the Appellate Division, First Department, in *Ferrante Equipment Co. v. Lasker-Goldman Corp.*<sup>27</sup>

In *Ferrante*, the defendant's surety (the fourth-party plaintiff) sought indemnification on its performance bond pursuant to the indemnity agreement between it and the fourth-party individual defendant (hereinafter *Ferrante*) after the defendant had defaulted in its performance. The indemnification agreement had been executed in New Jersey, and *Ferrante* had apparently not entered New York for any purposes related to the agreement. However, the agreement covered work to be performed in New York, and *Ferrante* most likely derived "commercial benefits" from the contract. It should also be noted that

While CPLR 302 expanded the circumstances in which in personam jurisdiction might be obtained, its effect is limited only to the situations enumerated therein, and matrimonial actions are not included. It being conceded that the respondent has a bona fide domicile in the State of Florida, CPLR 302 is inapplicable to permit the court to exercise personal jurisdiction over the respondent.

<sup>22</sup> See *Singer v. Walker*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

<sup>23</sup> E.g., *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 21 App. Div. 2d 474, 251 N.Y.S.2d 740 (1st Dep't 1964), *aff'd*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965); *Greenberg v. R.S.P. Realty Corp.*, 43 Misc. 2d 182, 250 N.Y.S.2d 460 (Sup. Ct. Kings County), *rev'd*, 22 App. Div. 2d 690, 253 N.Y.S.2d 344 (2d Dep't 1964). See generally 7B MCKINNEY'S CPLR 302, *supp. commentary* 113, 115 (1965); 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 302.06a (1968).

<sup>24</sup> See 7B MCKINNEY'S CPLR 302, *supp. commentary* 113, 117 (1965).

<sup>25</sup> 7B MCKINNEY'S CPLR 302, *supp. commentary* 108 (1966).

<sup>26</sup> Cf. *A. Millner Co. v. Noudar LDA*, 24 App. Div. 2d 326, 329, 266 N.Y.S.2d 289, 294 (1st Dep't 1966).

<sup>27</sup> 31 App. Div. 2d 355, 297 N.Y.S.2d 985 (1st Dep't 1969).

the defendant never would have obtained the performance bond in the absence of Ferrante's assurances. Moreover, Ferrante insisted that partial payment checks were to be made payable to him and the defendant jointly. The court nevertheless held that these facts were insufficient to sustain jurisdiction over him.

Justice McNally, in a strong dissent,<sup>28</sup> argued for a more liberal construction of CPLR 302; one that would take full advantage of the Supreme Court's decisions in *International Shoe Co. v. Washington*<sup>29</sup> and *McGee v. International Life Insurance Co.*<sup>30</sup> without offending the fourteenth amendment's due process clause. The dissent believed that Ferrante's activities, including those prior to and those subsequent to the execution of the performance bond and indemnity agreement, "in their entirety and in combination more than meet the statutory test of his transaction of business in New York."<sup>31</sup>

Few transactions of business would seem more purposefully connected with New York than the execution of an indemnity agreement for work to be performed in New York.<sup>32</sup> However, it appears that the first department has chosen to cling to the relatively safe jurisdictional nexuses of physical presence and domestic execution of a contract rather than venture forth on a jurisdictional limb which is strong enough to bear the additional weight without breaking.

*CPLR 302(a)(1): Retention of New York attorney is "transaction of business" within the state if defendant authorized institution of New York action.*

Non-domiciliaries may subject themselves to the in personam jurisdiction of New York courts by transacting business in the state in person or through an agent.<sup>33</sup> Therefore, when the plaintiff in an action is employed by a non-domiciliary defendant, and the cause of action arises from the employment, the nature of the relationship may well prove determinative. Where the plaintiff is an agent, his acts in New

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<sup>28</sup> *Id.* at 356, 297 N.Y.S.2d at 987 (dissenting opinion).

<sup>29</sup> 326 U.S. 310 (1945).

<sup>30</sup> 355 U.S. 220 (1957).

<sup>31</sup> 31 App. Div. 2d at 358, 297 N.Y.S.2d at 989.

<sup>32</sup> *Cf.* MINN. STAT. ANN. § 303.13 (1969):

(3) If a foreign corporation makes a contract with a resident of Minnesota to be performed in whole or in part by either party in Minnesota, . . . such [act] shall be deemed to be doing business in Minnesota by the foreign corporation and shall be deemed equivalent to the appointment by the foreign corporation of the secretary of the State of Minnesota and his successors to be its true and lawful attorney upon whom may be served all lawful process in any actions or proceedings against the foreign corporation arising from or growing out of such contract. . . .

<sup>33</sup> CPLR 302(a)(1).