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CPLR 506(b)(2): Express Venue Provision for Comptroller Held Controlling in Action with Multiple Defendants

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scheme which requires notice but which fails to designate the method of service to be employed.[93]

As indicated previously, however, the plaintiff in *Twentieth Century-Fox* would not have fared any better under this construction of the statute since he had not complied with CPLR 308 to any degree. And, the courts have repeatedly held that substituted service cannot be utilized without express statutory authority or court permission.[94] Nevertheless, a valid argument can be made that the rules for service upon a 303 agent should be more relaxed than the other rules governing service of initiatory process, and that service upon such an agent should be valid if the summons and complaint are mailed to, or left at, his office. This follows from the very character of CPLR 303: the section can only be utilized when a defendant in the first action wishes to bring a cause of action in the nature of a counterclaim against the party who commenced that action.[95] Counterclaims are interposed by an answer,[96] and it is always permissible to serve answers upon the plaintiff's attorney by personal delivery, mail, or by leaving it at his office.[97] Thus, the requirement for personal service of process upon a 303 agent could be viewed as comparatively restrictive. Justification for this distinction might lie in the fact that after service is made in an action an attorney anticipates receipt of certain papers relating thereto, and this would not be true of a summons commencing an independent action against his client. However, motions papers are not always anticipated, and they may be served by mail.[98] Therefore, perhaps the solution in such a case is to permit a more liberal method of service while also liberalizing the ability to vacate a default judgment if the defendant can make a satisfactory showing that he has not received the summons and had no notice of the action.

In any event, the courts and practitioners should realize the utility of CPLR 308 in cases where personal delivery cannot be effected upon the person to be served pursuant to a statute which is silent on the method of service required.

ARTICLE 5 — VENUE

CPLR 506(b)(2): Express venue provision for comptroller held controlling in action with multiple defendants.

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93 *See* CPLR 101.
94 *See* notes 85 and 86 *supra* and accompanying text.
95 *See* 7B McKinney's CPLR 303, commentary 440-41 (1963).
96 CPLR 3011.
97 CPLR 2103(b).
98 *Id.*

CPLR 506(b)(2) is substantially a restatement of CPA 1287.[99] However, under the CPLR an article 78 proceeding against certain bodies or officers must be brought in Albany County,[100] whereas the CPA laid venue in any county within the third judicial district. This statutory innovation is applicable only to article 78 proceedings;[101] other causes of action against those designated in 506(b)(2) have different venue requirements.[102]

In *Posner v. Rockefeller*,[103] the appellate division, characterizing the lower court's order as one flying in the face of the statute, reasoned that CPLR 506(b)(2) was the controlling venue provision despite the fact that only one of the respondents, the Comptroller, was within its ambit, and therefore held that the motion for a change of venue to Albany County should have been granted.

It should be remembered that the motion for a change of venue cannot be made by a court sua sponte; hence, there is danger of an inadvertent waiver.[104] It should also be noted that where there are two or more express venue provisions which conflict,[105] CPLR 502 governs and the court "shall order as the place of trial one proper . . . as to at least one of the parties or claims."

ARTICLE 22 — STAY, MOTIONS, ORDERS AND MANDATES

CPLR 2212(a): "Adjoining county" theory not utilized by New York City Civil Court.

Motion practice in the New York City Civil Court is, for the most part, governed by the CPLR.[106] Nonetheless, CPLR 2212(a) which provides that a motion in an action in the supreme court may be heard "in the judicial district where the action is triable or in any county adjoining the county where the action is triable," has not been made applicable to the city court.[107] An examination of a recent case, *Fox v. Montenegro*,[108] raises the question whether the section should so apply.

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99 FIRST REP. 21.

100 The provision is made explicit in CPLR 7804(b).

101 It is not applicable, for example, to a declaratory judgment action, New York Central R.R. v. Lefkowitz, 12 N.Y.2d 305, 189 N.E.2d 695, 239 N.Y.S.2d 341 (1963); nor, a garnishment proceeding, Butler v. State, 47 Misc. 2d 365, 262 N.Y.S.2d 705 (Broome County Ct. 1965).

102 *See, e.g.*, CPLR 7002(b).

103 33 App. Div. 2d 683, 305 N.Y.S.2d 852 (1st Dep't 1969).

104 CPLR 511.

105 An action against the Public Service Commission triable in Albany County (CPLR 506) and the New York City Transit Authority triable in New York County (CPLR 505) would present such a conflict.

106 CCA 1001.

107 *See* 29A MCKINNEY'S CCA 1001, commentary 159 (1963). *See also* SECOND REP. 182.

108 61 Misc. 2d 1, 304 N.Y.S.2d 624 (N.Y.C. Civ. Ct. Kings County 1969).