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BCL § 304(a): Court Will Not Vacate Default Judgment Where Corporate Defendant Had Not Received Notice Due to Its Own Neglect

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deed, the language of the preamble would seem to indicate a means whereby those disbursements permitted under CCA 1908 can be restricted, not supplemented, if a specific law so provides. Rather, any expansion of the permissible disbursements should utilize as its sole basis the "omnibus" provisions of CCA 1908(f).¹⁸³ Caution, however, should be utilized when interpreting this subsection. Prior to *Santiago*, it had not been construed,¹⁸⁴ and earlier and more restrictive cases¹⁸⁵ were decided under previous statutes and theories. Thus, although substantial portions of the earlier laws were retained,¹⁸⁶ the precedential value of cases decided under the CPA as an aid in construing CCA 1908(f) is questionable in view of the liberal construction demanded of the CPLR provisions which this CCA subsection incorporates.

A second alternative suggested by the *Santiago* rationale would be to view CCA 1908(f) as adopting CPLR 8301(a)(12),¹⁸⁷ thereby avoiding the \$250 limitation contained in CPLR 8301(a)(9). This approach allows an attorney to "exercise his ingenuity in bringing items of cost within [CPLR 8301(a)(12)'s] scope in order to shift the financial burden of the lawsuit to his adversary."¹⁸⁸

In short, the logical interaction of CPLR 8301(a) and CCA 1908(f) provide an attorney with the vehicle by which he can secure payment of expenses justly incurred in the prosecution of his client's action.

BUSINESS CORPORATION LAW

BCL 304(a): Court will not vacate default judgment where corporate defendant had not received notice due to its own neglect.

An action against a corporation may be commenced by service of process upon an officer, director, managing agent or cashier of the corporation,¹⁸⁹ by service upon its registered agent,¹⁹⁰ or by service upon the Secretary of State.¹⁹¹ In the latter instance, service is completed

¹⁸³ CCA 1908(f) permits the taxation of disbursements for all "reasonable and necessary expenses as are prescribed by law or taxable by express provision of law."

¹⁸⁴ Affidavit in Opposition to Plaintiff's Motion at 1, *Santiago v. Johnson*, 61 Misc. 2d 746, 305 N.Y.S.2d 717 (N.Y.C. Civ. Ct. Kings County 1969).

¹⁸⁵ See, e.g., *Landstrom Realty Corp. v. Lamborn*, 144 Misc. 701, 259 N.Y.S. 495 (App. T. 2d Dep't 1932) (error to allow the cost of the minutes of an examination before trial as a taxable disbursement).

¹⁸⁶ See, e.g., FOURTH REP. 326. Compare CPLR 8301(a) with CPA 1518.

¹⁸⁷ CPLR 8301(a)(12) is another "omnibus clause," perhaps even broader than CCA 1908(f). It permits disbursements for "reasonable and necessary expenses as are taxable according to the course and practice of the court, by express provision of law or by order of the court." 8 W. K. & M. ¶ 8301.24, at 83-36.1.

¹⁸⁸ 8 W. K. & M. ¶ 8301.01, at 83-86.

¹⁸⁹ CPLR 311(1).

¹⁹⁰ N.Y. BUS. CORP. LAW § 305 (McKinney 1963) [hereinafter BCL].

¹⁹¹ BCL 304(a). This section, as well as the two previously cited, is applicable to both domestic and foreign corporations.

when the Secretary of State is served,¹⁹² as it is he who is charged with the duty of forwarding the summons to the defendant corporation.¹⁹³

In *Detelich v. Mayo's R & A Clothing, Inc.*,¹⁹⁴ the plaintiff served his summons and complaint upon the Secretary of State. However, because the corporation had failed to advise the latter of a change of address, it never received the forwarded complaint. Nonetheless, the court denied defendant's subsequent motion to vacate the default judgment obtained by the plaintiff.¹⁹⁵

In deciding motions to vacate a default judgment in instances where a defendant corporation was without notice of the action, the New York courts have been guided by a simple test: who is at fault, the corporation or the Secretary of State?¹⁹⁶ Consequently, in view of the *Detelich* court's finding that the corporation, and not the Secretary of State, was at fault, the result is in accord with prior cases and BCL 304(d).¹⁹⁷

The lesson for the practitioner is clear: courts will only require the Secretary to mail the process to the designated address currently on file with the department of state. It is therefore imperative that counsel promptly notify the Secretary of each change of address of his corporate clients.

¹⁹² BCL 306(b). Service upon the Secretary of State has been held to constitute proper personal service upon the defendant corporation. *See* National Mfg. Co. v. Buffalo Metal Container Corp., 204 Misc. 209, 126 N.Y.S.2d 755 (Sup. Ct. Erie County 1953). Thus, CPLR 317, which concerns judgments obtained where the service was other than personal, is not applicable if the Secretary has been properly served; rather, CPLR 5015 governs.

¹⁹³ BCL 306(b).

¹⁹⁴ 60 Misc. 2d 788, 304 N.Y.S.2d 67 (Sup. Ct. Suffolk County 1969).

¹⁹⁵ The court pointed out an attempted settlement by defendant's insurer. Although not controlling, it is speculated that knowledge of the injury was accorded some weight by the court. *See* Horn v. Interlectron Corp., 294 F.Supp. 1153 (S.D.N.Y. 1968).

¹⁹⁶ Satisfactory proof, however, that a defendant has never received copies of the . . . process from the Secretary of State's office—impliedly through mistake or inadvertance on the part of the latter—has been held a proper ground for reopening of a default judgment . . .

Montulli v. Sherlo Realty, Inc., 37 Misc. 2d 655, 656, 234 N.Y.S.2d 754, 755 (Sup. Ct. Monroe County 1962), *aff'd*, 18 App. Div.2d 1139, 239 N.Y.S.2d 864 (4th Dep't 1963). *Compare* Cascione v. Acme Equip. Corp., 23 App. Div. 2d 49, 258 N.Y.S.2d 234 (1st Dep't 1965) and National Mfg. Corp. v. Buffalo Metal Container Corp., 204 Misc. 269, 126 N.Y.S.2d 755 (Sup. Ct. Erie County 1953) (judgments vacated) *with* *Laurendi v. Cascade Dev. Co.*, 5 Misc. 2d 688, 165 N.Y.S.2d 832 (Niagara County Ct.), *aff'd*, 4 App. Div. 2d 852, 167 N.Y.S.2d 240 (4th Dep't 1957) and *General Crane Serv., Inc. v. Whiting-Turner Constr. Co.*, 27 Misc. 2d 403, 208 N.Y.S.2d 244 (Sup. Ct. Onondaga County 1960).

¹⁹⁷ BCL 304(d) provides that the designated address to which the Secretary shall forward the process continues as such "until the filing of a certificate under this chapter directing the mailing to a different post office address."