

December 2012

CPLR 302(a)(1): Further Examination of "Transaction of Business" Concept

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 203(b): Employer and employee are "united in interest."

CPLR 203(b) provides, in part, that "a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with him when: 1. the summons is served upon the defendant." While the term united in interest has proven difficult to apply,¹ *Prudential Insurance Co. v. Stone*² offers the most often relied upon definition: "if the interest of the parties in the subject matter is such that they stand or fall together and that judgment against one will similarly affect the other then they are 'otherwise united in interest.'" ³

In *Modica v. Westchester Rockland Newspapers, Inc.*,⁴ a libel action was commenced against both the newspaper and writer of an allegedly libelous article by service of summons and complaint on the defendant newspaper.⁵ Regarding the defendants' relationship as one of employer-employee, the court held the service sufficient to toll the running of the statute against the defendant writer.

On several occasions an employer-employee relationship has been held to evidence unity of interest.⁶ *Modica*, therefore, indicates another example for the application of this principle.

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

CPLR 302(a)(1): Further examination of "transaction of business" concept.

CPLR 302(a)(1) provides that personal jurisdiction may be had of a non-domiciliary defendant where the cause of action arises out of the "transaction of business" by the defendant within the

¹ WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶203.06 (1967).

² 270 N.Y. 154, 200 N.E. 679 (1936).

³ *Id.* at 159, 200 N.E. at 680.

⁴ 54 Misc. 2d 1086, 283 N.Y.S.2d 939 (Sup. Ct. Westchester County 1967).

⁵ In *Shaw v. Cock*, 78 N.Y. 184 (1879), the Court held that for service to be valid as to other defendants united in interest, all defendants must be named in the summons as parties. However, as in the instant case, a person can be named fictitiously if his true identity cannot be determined. *Plumitallo v. 1407 Broadway Realty Corp.*, 279 App. Div. 1019, 111 N.Y.S.2d 720 (2d Dep't 1952) (mem.); *Halucha v. Jockey Club*, 31 Misc. 2d 186, 220 N.Y.S.2d 567 (Sup. Ct. N.Y. County 1961) (dictum).

⁶ *E.g.*, *Plumitallo v. 1407 Broadway Realty Corp.*, 279 App. Div. 1019, 111 N.Y.S.2d 720 (2d Dep't 1952) (mem.) (service on corporation for which the defendant was employed); *Diver v. Jewish Hospital of Brooklyn*, 18 Misc. 2d 231, 188 N.Y.S.2d 1003 (Sup. Ct. Kings County 1959) (service on hospital in which defendant was doctor).

state. The somewhat elusive concept of "transaction of business" has given rise to much litigation.

In determining whether or not there is a transaction of business, the New York Court of Appeals has laid down certain guidelines, which, while helpful, by no means conclusively resolve any particular case. The Court, in *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*,⁷ has adopted the language of *International Shoe Co. v. Washington*⁸ so that, in order to obtain in personam jurisdiction over a non-resident defendant, it must be shown that there were

certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'⁹

However, in *McKee Electric Co. v. Rauland Borg Corp.*,¹⁰ the Court stated that "[t]here is no fixed standard by which to measure the minimum contacts required to sustain jurisdiction. . . ."¹¹

The following three cases illustrate separate attempts by lower courts to determine what purposeful acts¹² will be construed as amounting to a transaction of business.

In *Hubbard, Westervelt & Mottelay, Inc. v. Harsh Building Co.*,¹³ the non-resident defendant executed and delivered, in Arizona, a note payable to plaintiff in seven installments in New York. The note was given for services rendered by the plaintiff in obtaining a mortgage commitment from a New York bank to finance the purchase and development of land in Arizona. The court held that there was no transaction of business to satisfy in personam jurisdiction based upon service of process on the defendant outside of New York.

The court found *G. Benedict Corp. v. Epstein*¹⁴ to be against the weight of authority and distinguished *Banco Espanol de Credito v. Pierre S. DuPont*,¹⁵ cases which were relied upon by the dissent

⁷ 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

⁸ 326 U.S. 310 (1945).

⁹ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 451, 209 N.E.2d 68, 71-72, 261 N.Y.S.2d 8, 13 (1965).

¹⁰ 20 N.Y.2d 377, 229 N.E.2d 604, 283 N.Y.S.2d 34 (1967).

¹¹ *Id.* at 381, 229 N.E.2d at 607, 283 N.Y.S.2d at 37.

¹² "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Longines-Wittnauer v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 451-52, 209 N.E.2d 68, 72, 261 N.Y.S.2d 8, 14 (1965), quoting from *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

¹³ 28 App. Div. 2d 295, 284 N.Y.S.2d 879 (1st Dep't 1967).

¹⁴ 47 Misc. 2d 316, 262 N.Y.S.2d 726 (Sup. Ct. Albany County 1965).

¹⁵ 24 App. Div. 2d 445, 261 N.Y.S.2d 233 (1st Dep't 1965) (per curiam).

to sustain jurisdiction. In *Benedict*, the court found that a default on a note executed in Massachusetts but payable in New York was a transaction of business on the theory that the performance (payment) was to take place in New York. In *Banco Espanol*, defendant executed notes as an accommodation endorser in Delaware in order to make credit available to two partnerships, of which defendant was a special partner, for the production of motion pictures in Spain. The partnerships existed under the laws of New York and were transacting business there. The court felt that the additional contacts of the partnerships with New York made *Banco Espanol* inapplicable to the instant case.

It would appear that the recent determination by the first department is sound in light of the New York Court of Appeals' treatment of CPLR 302(a)(1).

The second case, *Maggio v. Gym Master Co.*,¹⁶ involved a physical education teacher who was injured while using a set of "still rings." The rings had been ordered from a New York company which in turn had ordered them from Gym Master Company, a Colorado corporation, by catalog number. Gym Master in turn ordered the rings from another corporation which placed the order with the manufacturer, who actually "drop-shipped" the rings to the high school. Notwithstanding the fact that the New York corporation ordered the rings by catalog number and that the defendant Colorado corporation admitted such fact, the court held that the activities were insufficient to constitute a transaction of business. The court stated:

Plaintiff has not shown that the catalog used by School-Equipment, Inc. [New York corporation], was *circulated* in New York by defendant Gym Master. Neither has there been any showing that Gym Master circulated any other catalogs or promotional material within the State.¹⁷

The case appears to follow prior decisions with respect to transaction of business. While the Court of Appeals has held that "mere shipment" of goods into the state is not sufficient for jurisdiction over a non-resident defendant,¹⁸ such shipment coupled with the solicitation of business in New York by means of catalogs, advertisements or other promotional material will be a sufficient jurisdictional predicate.¹⁹ The instant case appears to fall into the "mere shipment" category.

¹⁶ 54 Misc. 2d 845, 283 N.Y.S.2d 436 (Sup. Ct. Monroe County 1967).

¹⁷ *Id.* at 847, 283 N.Y.S.2d at 438 (emphasis added).

¹⁸ *Kramer v. Vogl*, 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966).

¹⁹ *Singer v. Walker*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

The third case, *Bard v. Steele*,²⁰ involved a non-resident defendant who maintained a direct New York telephone line to its New Jersey office and had a great number of customers in New York. The telephone line was used in the transaction out of which the present suit arose.

The court reasoned that the mere fact of carrying on a great deal of business with New York residents was not a sufficient minimum contact, but when the factor of a New York line listed in a New York directory was added, a sufficient jurisdictional basis was established. That is, these elements taken together were considered by the court as amounting to a *purposeful act* which evidenced the defendant's intention to avail himself of the privilege of conducting activities within the state and to invoke the benefits and protections of its laws.

The case is questionable in the light of past decisions. While it is true that courts do consider a telephone listing in the state as a factor in determining whether or not a non-resident is transacting business within the state,²¹ it appears that in order to find a transaction of business, the listing must be coupled with other factors. As *Kramer v. Vogl*,²² held, CPLR 302(a)(1) will not apply to a non-resident who never comes into New York and who only sends goods into New York pursuant to orders from within the state. Therefore, the significant fact in the instant case seems to be that the defendant maintained a direct line and telephone listing in New York.

While this may be within the proper scope of due process requirements, it should be noted that the Court of Appeals has thus far refused to expand the scope of 302(a)(1) to its full constitutional limit.²³ It should be kept in mind what the Court said in *McKee Electric Co. v. Rauland Borg Corp.*²⁴

In our enthusiasm to implement the reach of the long-arm statute (CPLR 302), we should not forget that defendants, as a rule, should be subject to suit where they are normally found, that is at their pre-eminent headquarters, or where they conduct substantial general business activity. Only in a rare case should they be compelled to answer a suit in a jurisdiction with which they have the barest of contact.²⁵

²⁰ 28 App. Div. 2d 193, 283 N.Y.S.2d 930 (3d Dep't 1967).

²¹ *City of New York v. Continental Vitamin Corp.*, 254 F. Supp. 845 (S.D.N.Y. 1966); *Standard Wine & Liquor Co. v. Bombay Spirits Co.*, 20 N.Y.2d 13, 228 N.E.2d 367, 281 N.Y.S.2d 299 (1967).

²² 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966).

²³ See *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 292 (1966).

²⁴ 20 N.Y.2d 377, 229 N.E.2d 604, 283 N.Y.S.2d 34 (1967).

²⁵ *Id.* at 383, 229 N.E.2d at 607-08, 283 N.Y.S.2d at 38.

Moreover, it should be expected that any jurisdiction exercised by New York courts over non-domiciliaries will be reciprocally exercised by foreign courts over New York domiciliaries.²⁶

CPLR 302(a)(3): Held non-applicable if original injury occurs without the state.

In order to obtain personal jurisdiction over a non-domiciliary under CPLR 302(a)(3), defendant must:

- (1) regularly do or solicit business in New York, or
- (2) engage in a persistent course of conduct within the State, or derive substantial revenue from goods used or consumed or services rendered in New York.

Or, the defendant must:

- (1) expect or should reasonably expect the act to have consequences in New York, and
- (2) derive substantial revenue from interstate or international commerce.²⁷

Subdivision (a)(3) of the section was added in 1966 after having been recommended by the Judicial Conference. The Conference made the recommendation after the New York Court of Appeals, in *Feathers v. McLucas*,²⁸ had narrowly construed CPLR 302(a)(2) by requiring the tortious act, as contrasted with the resulting injury, to be committed within the state. CPLR 302(a)(2) was therefore unavailable to reach a non-domiciliary, not doing business or transacting business in New York, who, through an act or omission without the state, caused a tortious injury within the state.²⁹

In *Black v. Oberle Rentals, Inc.*,³⁰ a third-party defendant moved to dismiss the complaint against it for lack of jurisdiction. The third-party defendant was an Indiana corporation, not authorized to do business in New York, who manufactured parts used in a trailer unit which jack-knifed in Massachusetts resulting in consequential damages to the New York plaintiff.

In dismissing the action against the third-party defendant, the court held that in order to predicate jurisdiction on CPLR 302(a)(3), the *original* injury had to occur *within* the state.

²⁶ A. Millner Co. v. Noudar, Ltd., 24 App. Div. 2d 326, 329, 266 N.Y.S.2d 289, 294 (1st Dep't 1966).

²⁷ CPLR 302(a)(3)(i) and (ii).

²⁸ 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

²⁹ See 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 302.10b (1967).

³⁰ 55 Misc. 2d 398, 285 N.Y.S.2d 226 (Sup. Ct. Onondaga County 1967).