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Article 13

CPLR 308(1): Court of Appeals Rules on Redelivery Problem

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any objection to personal jurisdiction by the execution of two stipulations.

CPLR 302(a) (1): Entering state to receive medical treatment deemed a transaction of business.

Under CPLR 302(a)(1), a nondomiciliary who transacts business in New York subjects himself to personal jurisdiction as to causes of action arising out of that transaction.[13] As 302(a)(1) is continuously applied to novel fact situations, light is shed on its outer limits.

In *Cohen v. Haberkorn*,[14] the appellate division, second department, recently held that a nondomiciliary who enters the state to receive medical treatment "transacts business" under 302(a)(1) and thus becomes amenable to personal jurisdiction in an action by the physician to recover the value of his services.

CPLR 308(1): Court of Appeals rules on redelivery problem.

The Court of Appeals has recently addressed itself to the problem of whether a summons, originally delivered to an improper person, is valid if through eventual redelivery it comes into the possession of the party to be served. In *McDonald v. Ames Supply Co.*,[15] the summons, seeking to secure jurisdiction over defendant, a foreign corporation, was delivered to a building receptionist who was not an employee of the defendant. The receptionist subsequently delivered the summons to a proper party, but the service was held invalid. (Had the receptionist been an employee of the defendant, service would probably still have failed since CPLR 311 provides that service upon a foreign corporation be made by delivering the summons to "an officer, director, managing or general agent, or cashier or assistant casheir.")

The Court stated that generally, original personal delivery to the wrong person constitutes improper service even though the summons is shortly received by the correct person.[16] It pointed out that any other rule would undermine the statutory procedure for setting aside a defectively served summons, since the motion to set aside is itself evidentiary of eventual receipt of the summons.

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[13] *See generally* 7B MCKINNEY'S CPLR 302, supp. commentary 104 (1968).

[14] 30 App. Div. 2d 530, 291 N.Y.S.2d 119 (2d Dep't 1968).

[15] 22 N.Y.2d 111, ... N.E.2d ....., 291 N.Y.S.2d 328 (1968).

[16] *See, e.g.*, Clark v. Fifty Seventh Madison Corp., 13 App. Div. 2d 693, 213 N.Y.S.2d 849 (2d Dep't) *appeal dismissed*, 10 N.Y.2d 808, 178 N.E.2d 225, 221 N.Y.S.2d 509 (1961); Commissioners of State Ins. Fund v. Singer Sewing Mach. Co., 281 App. Div. 867, 119 N.Y.S.2d 802 (1st Dep't 1953).

The Court, however, conceded that under the proper conditions a redelivery might be sustained. It distinguished from the instant case, situations where the process server acted reasonably, and with due diligence, by placing the summons within the recalcitrant defendant's grasp or within his general vicinity.[17] The Court also indicated that cases upholding redelivery where it was so close in time and space to the original delivery as to constitute one act could still be sustained.[18]

The most doubtful cases were deemed to be those where delivery is made to an improper person under a reasonable belief that he is the proper person, and the proper person eventually receives the summons.[19] The Court indicated that it regards due diligence on the part of the process server to fulfill the statutory mandate as the most important factor in sustaining or striking down a redelivery case. Such an approach is realistic and at the same time discourages sloppy service.

CPLR 309(a): Judicial power to appoint a guardian ad litem.

In a recent case, *Soto v. Soto*,[20] the appointment of a guardian ad litem was vacated by the appellate division, first department, since that appointment had been made prior to obtaining jurisdiction over the infant defendant. However, in *Matter of Beyer*,[21] a special proceeding under Article 77, the same court has held that the power to appoint a guardian ad litem exists, upon application by the proper parties, when a proposed order to show cause initiating a special proceeding is submitted to the court. This apparent contradiction, may perhaps be clarified by contrasting the prerequisites under the CPLR for the exercise of judicial power in an action and the prerequisites in a special proceeding.

CPLR 304 states that "[a]n action is commenced and jurisdiction acquired by service of summons. A special proceeding is commenced and jurisdiction acquired by service of a notice of petition or order to show cause." In the instant case, therefore, the court merely reasserted the necessity of proper service of a summons as the primary step before the exercise

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[17] *See, e.g.*, Buscher v. Ehrich, 12 App. Div. 2d 887, 209 N.Y.S.2d 941 (4th Dep't 1961); Chernick v. Rodriguez, 2 Misc. 2d 891, 150 N.Y.S.2d 149 (Sup. Ct. Kings County 1956).

[18] *See* Green v. Morningside Heights Housing Corp., 13 Misc. 2d 124, 177 N.Y.S.2d 760, *aff'd mem.*, 7 App. Div. 2d 708, 180 N.Y.S.2d 104 (1st Dep't 1958).

[19] *See* Marcy v. Woodin, 18 App. Div. 2d 944, 237 N.Y.S.2d 402 (3d Dep't 1963). For a general discussion see 7B McKINNEY'S CPLR 308 supp. commentary 174 (1964).

[20] 30 App. Div. 2d 651, 291 N.Y.S.2d 37 (1st Dep't 1968).

[21] 21 App. Div. 2d 152, 249 N.Y.S.2d 320 (1st Dep't 1964).