

CPLR 7503(c): Conflict as to Service Resolved in Second Department

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to prevent granting relief in a case where claimant adheres to his contract and seeks arbitration. The sections apparently do not forbid provisional remedies where the claimant goes to court first in contradiction of his agreement to arbitrate.

CPLR 7503(c): Conflict as to service resolved in second department.

Under CPLR 7502 a special proceeding is used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action. After a notice of intention to arbitrate is served, CPLR 7503(c) allows an application to stay the arbitration to be served. A conflict has arisen as to whether the application to stay may be served on the attorney named in the notice of intention to arbitrate or whether it must be served on a party.

Matter of Bauer,¹⁵⁷ a fourth department case, held that service has to be made on a party. *Appis v. Employers Liability Assurance Corp.*,¹⁵⁸ a Westchester County case, held that the claimant's attorney was designated as his representative in the notice of intention to arbitrate and therefore service by certified mail on the attorney was within the intentment of 7503(c).

In *Statewide Insurance Co. v. Lopez*,¹⁵⁹ the appellate division, second department, has resolved the conflict for its own department by holding that service must be made upon a party. The court explained that while under the CPA arbitration was itself a special proceeding, commenced when a notice to arbitrate was served, such is no longer the case. Today, if there is no action pending, a special proceeding must be initiated to bring before a court the first application arising out of an arbitrable controversy. Since, as a general rule, initiatory process must be served upon the party over whom jurisdiction is sought, service upon his attorney was deemed a jurisdictional defect.

GENERAL MUNICIPAL LAW

GML § 50-i: Construed in a wrongful death action.

Section 67 of the Town Law provides that any claim against a town "for damages for wrong or injury to person or property or for the death of a person" must be made and served in compliance

¹⁵⁷ 55 Misc. 2d 991, 287 N.Y.S.2d 206 (Sup. Ct. Wyoming County 1968); see *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 344-45 (1968).

¹⁵⁸ 56 Misc. 2d 969, 290 N.Y.S.2d 617 (Sup. Ct. Westchester County 1968).

¹⁵⁹ 30 App. Div. 2d 694, 291 N.Y.S.2d 928 (2d Dep't 1968).