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CPLR 7502; 7503: First Application to Court Arising Out of Arbitrable Controversy Must Be Served in Accordance with CPLR 7503

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ARTICLE 63 — INJUNCTION

CPLR 6312: Preliminary injunction may be granted despite lack of a pleading.

Section 211 of the Domestic Relations Law forbids the service of a complaint in divorce actions for 120 days from the service of a summons or until the expiration of conciliation proceedings. In *Aqualina v. Aqualina*,[208] plaintiff-wife served a summons seeking divorce and a complaint seeking an accounting and praying that a trust be impressed on certain bank accounts. The court dismissed the complaint on the basis of section 211,[209] but granted injunctive relief reasoning that no pleading was required to justify a preliminary injunction in the circumstances disclosed.

To obtain a preliminary injunction a plaintiff must establish two elements: first, he must establish a prima facie cause of action; second, he must establish that there are grounds for the issuance of an injunction.[210] *Aqualina* stands for the proposition that where the two elements are established, a preliminary injunction can be granted despite the lack of a complaint.

ARTICLE 75 — ARBITRATION

CPLR 7502; 7503: First application to court arising out of arbitrable controversy must be served in accordance with CPLR 7503.

Under CPLR 7502(a), a "special proceeding shall be 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." Thus, the general procedure of Article 4 governing all special proceedings is applicable. Under CPLR 7503(c), after a notice of intention to arbitrate is served, the party served has 10 days to make an application to stay arbitration. "Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested."[211]

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[208] 56 Misc. 2d 357, 288 N.Y.S.2d 671 (Sup. Ct. Kings County 1968).

[209] It was the opinion of the court that DRL § 211 forbids the service of any complaint with the summons in an action for divorce. For a general discussion of New York's "cooling-off" statute see *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 615, 634 (1968).

[210] 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 6312.02; 12 CARMODY-WAIT 2d, CYCLOPEDIA OF NEW YORK PRACTICE § 78:62 (1966).

[211] The inclusion of service by registered mail was suggested by the bar associations, as it was the prevalent practice. SIXTH REP. 647.

In a recent case, *Matter of Bauer*,[212] the petitioners served MVAIC with a notice of intention to arbitrate. Within 10 days thereafter, MVAIC served notice that it would apply for an order staying the arbitration. This notice was served on the petitioner's attorney. The court found that such service was null. Since the application to stay the arbitration was the first application to a court arising out of this arbitrable controversy, it had to be served in accordance with CPLR 403 or CPLR 7503. In other words, since it was not merely a motion, but rather the commencement of a special proceeding, service had to be made in the same manner as a summons or by registered mail or certified mail, return receipt requested.

CPLR 7511: Arbitrator's award difficult to set aside.

Generally, an arbitrator's award is not reversible by a court for errors of law or fact.[213] CPLR 7511(b) provides grounds for vacating an award where a party's rights have been prejudiced by (1) corruption, fraud or misconduct, (2) partiality of an arbitrator appointed as neutral, or (3) where an arbitrator exceeded his powers, or so imperfectly executed them, that a final and definite award was not made.

In *Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd.*,[214] the appellate division, first department, reversed an order vacating and setting aside an arbitration award to a buyer of defective goods. The amount of the award was in excess of four times the purchase price of the goods shipped, notwithstanding that the contract purported to limit the amount of the buyer's damages to the difference in value between the goods specified and the goods actually delivered. The court, in determining whether the arbitrator exceeded his power under 7511(b), first examined the arbitration clause,[215] finding it to be a broad arbitration clause. The court then examined the clause which purported to limit damages and decided that it would not be irrational for the arbitrator to find this clause un-

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[212] 55 Misc. 2d 991, 287 N.Y.S.2d 206 (Sup. Ct. Wyoming County 1968).

[213] *E.g.*, *In re* Wilkins, 169 N.Y. 494, 62 N.E. 575 (1902); *In re* Colletti, 23 App. Div. 2d 245, 248, 260 N.Y.S.2d 130, 133 (1st Dep't), *aff'd*, 17 N.Y.2d 460, 213 N.E.2d 894, 266 N.Y.S.2d 814 (1965).

[214] 29 App. Div. 2d 303, 287 N.Y.S.2d 765 (1st Dep't 1968).

[215] "ARBITRATION. Any controversy or claim arising out of or relating to this contract shall be settled by arbitration." *Id.* at 305, 287 N.Y.S. 2d at 767. This is a broad arbitration clause. In New York, where there is a broad arbitration clause, the rules of law which apply are those that the arbitrator deems appropriate. *In re* Exercycle Corp., 9 N.Y.2d 329, 334, 174 N.E.2d 463, 464, 214 N.Y.S.2d 353, 355 (1961).