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Article 11

CPLR 402: All Papers Available on Return Date May Be Considered in Judging Sufficiency of Petition

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CPLR 302(a)(1): Long distance telephone calls into New York are not acts within the state.

CPLR 302(a)(1) creates an extremely fluid jurisdictional standard. However, from the myriad cases that have interpreted the phrase "transacts any business," the minimum requirement of a "purposeful act" in New York may be distilled.[8]

In *Carrolton Associates v. Abrams*,[9] plaintiff-landlords, alleging an oral contract, sought to recover rent, taxes and ground rents from defendants, who were trustees for concessionaires. The alleged contract was negotiated and executed in New York, and as to those defendants who personally participated in these transactions, jurisdiction was found. Jurisdiction was also sought over a defendant who, although not present in New York, participated in the transactions by long distance telephone. Since the defendant was at no time present in New York, jurisdiction over him was denied.

ARTICLE 4 — SPECIAL PROCEEDINGS

CPLR 402: All papers available on return date may be considered in judging sufficiency of petition.

CPLR 402 states that in a special proceeding "[t]here shall be a petition, which shall comply with the requirements for a complaint in an action. . . ." Like a pleading, intended for use in an action, a petition must be "sufficiently particular to give the court and parties notice of the transactions, [or] occurrences . . . intended to be proved." [10] Such particularity may be attained by considering documents which supplement the formal petition itself.

The case of *Reich v. Power* [11] involved a proceeding pursuant to the Election Law to direct the holding of a new Democratic Party Primary Election for the office of Member of Assembly. The Supreme Court, Queens County, dismissed the petition for legal insufficiency. The appellate division reversed, holding that the original petition, when considered along with a work sheet subsequently served and a 25 page affidavit which special term should have considered as proper supplements, was clearly sufficient in law.

A special proceeding is intended to provide a speedy resolution of issues. For example, affidavits are served with the petition so that when no trial is necessary, a case may be summarily deter-

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[8] *See, e.g.*, McKee Elec. Co. v. Rauland-Borg Corp., 20 N.Y.2d 377, 229 N.E.2d 604, 283 N.Y.S.2d 34 (1967).

[9] 57 Misc. 2d 617, 293 N.Y.S.2d 159 (Sup. Ct. N.Y. County 1968).

[10] CPLR 3013.

[11] 30 App. Div. 2d 925, 294 N.Y.S.2d 346 (2d Dep't 1968).

mined.[12] It therefore follows that a court should do all in its power to avoid delay so as to respect the summary nature of the proceeding. As the instant case illustrates, this may be accomplished by consideration of all the relevant papers served prior to the return date in determining the sufficiency of the petition.

ARTICLE 21 — PAPERS

CPLR 2104: Matters not expressly stipulated in writing will not be given effect.

CPLR 2104 provides in part: "An agreement between parties or their attorneys . . . is not binding upon a party unless it is in a writing subscribed by him or his attorney. . . ." This rule grew out of the frequent conflict between attorneys as to their agreements, and was intended to relieve the courts from the burden of resolving questions of fact arising out of such conflicts.[13] However, the rule is not a Statute of Frauds, and courts have the power to give effect to oral stipulations when they find that they were in fact made and that the adverse party relied thereon.[14] In the most common situation fraud is not involved, but rather, there is disagreement as to whether the parties' minds have ever met.[15] In such a situation the courts seem inclined, and properly so, to hold parties to the letter of their written stipulation.

In a recent case, the attorneys stipulated that defendant might defer service of its answer until after completion of an examination of plaintiff. However, defendant did not utilize this extension of time, but rather, served his answer prior to his examination of plaintiff. Plaintiff then moved before examination to dismiss three separate defenses and counterclaims pleaded in defendant's answer. Although the stipulation contained no specific restrictions on plaintiff's so moving, special term concluded that plaintiff had agreed not to move until the examination before trial had been completed, and therefore held plaintiff's application premature. The appellate division, first department, disagreed,[16] holding that, as is required by CPLR 2104, matters stipulated, in order to be given effect, must be set out in writing and that when the attorneys fail to do so, the courts will not examine the writing to determine the intention of the parties.

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[12] *See* 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶402.01 (1968).

[13] 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶2104.04 (1968).

[14] *Id.*

[15] 7B MCKINNEY'S CPLR 2014, supp. commentary 124 (1968).

[16] Columbia Broadcasting System, Inc. v. Roskin Distributors, Inc., 31 App. Div. 2d 22, 294 N.Y.S.2d 804 (1st Dep't 1968).