St. John's Law Review

Volume 42
Number 1 *Volume 42, July 1967, Number 1*

Article 21

CPLR 308(3): Interpretation of "Usual Place of Abode"

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involved a defendant who was a nonresident at the time of execution. It then proceeded to enumerate certain factual circumstances which tended to indicate a sufficient contact with the state to support the assumption of jurisdiction.[13] However, the issue in *Kochenthal* was not whether there were sufficient contacts to constitutionally support jurisdiction, but whether CPLR 302(a)(1) authorized the assumption of jurisdiction by the courts in cases involving non-commercial transactions of business.

It would seem that, absent a clear declaration of legislative intent, there is little reason to assume that the word "business" in the statute was meant to preclude non-commercial transactions. Substantial negotiations, both financial and otherwise, culminating in a separation agreement would appear to be transactions of business within the scope of 302(a)(1).

CPLR 308(3): Interpretation of "usual place of abode."

In *Rich Prods. Corp. v. Diamond,*[14] service of process was made pursuant to CPLR 308(3) by mailing a copy of the summons, with return receipt requested, and affixing a copy to the main entrance of defendant's residence in Buffalo, New York. Defendant moved to vacate service on the ground that he had changed his domicile to the state of Michigan two days prior to the first attempt at service, and had not been physically present in New York since that date. The supreme court, Erie County, held that the defendant had failed to meet his burden of proof on the issue of change of domicile as he had not shown that the out-of-state facilities he had rented were "complete, adequate, furnished or occupied by him." [15]

Defendant relied principally on the fact that he had rented an apartment on a one-year lease in Michigan which he intended to make his home; that he had filed a certificate of incorporation in Michigan; and that he had registered his automobile in that state. In the face of these allegations, plaintiff's affidavit noted that defendant was a registered voter in Erie County; that he was the owner of record of a residence in New York worth approximately $56,000 which was apparently in use at the time of service; that he was currently listed in the city's directory; that he was being billed for a telephone at that address; and that he maintained a checking account at a local bank. It was further indicated that the defendant had not moved his personalty from New York to Michigan on the alleged date of his change of domicile, nor had he done so at any other time.

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[13] *Id.* at 443, 275 N.Y.S.2d at 956.
[14] 51 Misc. 2d 675, 273 N.Y.S.2d 687 (Sup. Ct. Erie County 1966).
[15] *Id.* at 678, 273 N.Y.S.2d at 690.

It should also be noted that the defendant had actually received the mailed summons and thereby had notice of the prospective litigation. Therefore, the defendant could not defend on the basis of lack of notice. Moreover, it is apparent that the defendant had not sustained his burden of proving that the Buffalo residence was no longer his "usual place of abode" within the meaning of the statute. Procedurally, *Rich* has as its salient feature the fact that the party alleging a change of domicile will be required to make a substantial showing of a severance of his ties with New York in addition to the acquisition of out-of-state facilities.

CPLR 308(4): Service by publication authorized in negligence action.

In *Deredito v. Winn*,[16] the nonresident defendant was involved in an automobile accident in New York. Since the defendant's address was unknown to plaintiff, personal jurisdiction was predicated upon service by publication alone. The appellate division, second department, unanimously held that:

> article 3 of the CPLR does not authorize service by publication upon . . . nondomiciliary defendants . . . where: (a) no prior attachment of their property in this state has occurred and (b) a finding could not properly be made that service by publication would give notice to them of the action and an opportunity to defend themselves.[17]

Subsequent to *Deredito*, the appellate division, second department, handed down the companion decisions of *Sellars v. Raye* [18] and *Dobkin v. Chapman*.[19] *Dobkin* held that due process was satisfied by service effected by the mailing of the summons to an address given by the defendant at the scene of an automobile accident, despite the fact that the defendant no longer resided there. The *Sellars* court, under factually similar circumstances, held that service upon the Secretary of State, plus registered mail sent to the address supplied by the defendant at the accident, as well as publication in the vicinity of that address was sufficient. Dissenting opinions in both *Sellars* and *Dobkin* reasoned that there was no distinction between the facts of *Deredito* and those of *Sellars* and *Dobkin*, and, therefore, *Deredito* was controlling.

A recent supreme court decision in the second department, *Gibbs v. Baldwin*,[20] has held that service by publication was

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[16] 23 App. Div. 2d 849, 259 N.Y.S.2d 200 (2d Dep't 1965).
[17] *Id.* at 849-50, 259 N.Y.S.2d at 201.
[18] 25 App. Div. 2d 757, 269 N.Y.S.2d 7 (2d Dep't 1966).
[19] 25 App. Div. 2d 745, 269 N.Y.S.2d 49 (2d Dep't 1966).
[20] 52 Misc. 2d 268, 275 N.Y.S.2d 861 (Sup. Ct. Suffolk County 1966).