St. John's Law Review

Volume 42
Number 2 *Volume 42, October 1967, Number 2*

Article 7

CPLR 203(b)(4): Delivery of Summons in Wrong County of New York City Not a Bar to Sixty-Day Extension

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tool for predicting the reactions of the New York courts to the new enactment. In the absence of case law under the new section, discussion of reaction or prediction would be tenuous indeed.

The basic purpose of the *Quarterly Survey* is to key the practising attorney to significant developments in New York practice. To this end, in each installment of the survey are set forth those cases which have a weighty impact upon the procedural law of New York. Ideally, all the significant cases concerning New York's procedural law would be covered. But, because of space limitations, many other less important, but, nevertheless, significant cases cannot be included.

Considering the *raison d'etre* of the *Survey* to be the imparting of information geared to keeping practitioners abreast of the New York law of procedure, feedback from attorneys would be an important aid in an analysis of our efforts. The *St. John's Law Review* would, therefore, welcome critiques from the readers of the *Survey*. In this way, perhaps, any disjunction between the material in the *Survey* and the needs of the attorneys might be effectively healed.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 203(b)(4): Delivery of summons in wrong county of New York City not a bar to sixty-day extension.

CPLR 203(b)(4) provides for an automatic sixty-day extension of the statute of limitations by delivery of the summons to the sheriff of the county where the defendant resides, is employed, or is doing business. If the defendant is a corporation, the summons may be delivered to the sheriff "in the county in which [the corporation] . . . may be served. . . ."

Under CPA Section 17, the predecessor of CPLR 203(b)(4), the courts required delivery to the sheriff of the *proper* county as a condition to the extension where the defendant was a *natural person*.[1] However, this requirement was waived under the CPLR in *Kosofsky v. Spivak*,[2] where the delivery was made in Kings County, although defendant, a real person, lived in Bronx County and worked in New York County. Recently, in *Wieboldt v. Rentways, Inc.*,[3] the supreme court held that the

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[1] Kleila v. Miller, 1 App. Div. 2d 697, 147 N.Y.S.2d 589 (2d Dep't 1955); Balter v. Janis, 200 Misc. 635, 107 N.Y.S.2d 837 (Sup. Ct. Kings County 1951).

[2] (Sup. Ct. N.Y. County), N.Y.L.J., Aug. 12, 1964, p. 11, col. 1.

[3] 52 Misc. 2d 931, 277 N.Y.S.2d 216 (Sup. Ct. Nassau County 1967).

statute of limitations did not bar a suit against a *corporate* defendant, even though the summons was delivered in the wrong county. The extension was allowed despite delivery to the sheriff's office in New York County instead of in Queens County where the corporation could have been served. The court said that " 'an error in the choice of the proper sheriff's office should be disregarded if no real prejudice to the defendant . . .' " would result.[4]

It must be noted, however, that the courts in both *Kosofsky* and *Wieboldt* were dealing specifically with a county in New York City. The CPLR, in at least one instance, provides that for a specific purpose, the five counties within New York City are to be considered one.[5] Therefore, it is conceivable that the ruling in *Wieboldt* may be limited in that respect, *i.e.*, applicable only in New York City.

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 302: Held applicable to person who was domiciliary at time of tort.

The Court of Appeals, in *State v. Davies*,[6] affirmed a ruling by the appellate division, third department, that CPLR 302 is applicable to an individual who was a domiciliary at the time he committed a tort and a nondomiciliary at the time of service upon him. This affirmance by New York's highest Court seemingly ends the debate [7] as to whether a possible gap was created by the language of 302 which might have allowed a nondomiciliary to

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[4] *Id.* at *932*, *277* N.Y.S.2d at 218.

[5] CPLR 3110. The court may also have been aware of the Advisory Committee's report concerning 203(b)(4) wherein it suggested that delivery to the sheriff of New York City should be allowed to be made in any of the five counties of New York City for convenience of administration. 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 203.15 (1965).

[6] 18 N.Y.2d 950, 223 N.E.2d 570, 277 N.Y.S.2d 146 (1966) (memorandum decision). The prior history of the case is discussed in *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 303, 309 (1966), and *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 121, 129 (1966).

[7] *See* O'Conner v. Wells, 43 Misc. 2d 1073 (Sup. Ct. Greene County 1965) (held CPLR 302 applicable to one a domiciliary at the time of the act); Voskrenskava v. Bary, (Sup. Ct. N.Y. County), N.Y.L.J., Aug. 6, 1964, at 9, col. 2. *Contra*, 7B MCKINNEY'S CPLR 302, supp. commentary 83 (1964), which stated that 302 could not be read to allow jurisdiction to be acquired over a nondomiciliary defendant who committed one of the prescribed acts while a domiciliary of the state.