

CPLR 302: Held Applicable to Person Who Was Domiciliary at Time of Tort

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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 debate⁷ as to whether a possible gap was created by the language of 302 which might have allowed a nondomiciliary to

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.

avoid being brought to task in New York for a tort committed while he was a domiciliary here.

CPLR 308(3): Server's testimony as to custom and habit allowed exigent circumstances found.

In *Miller v. Alda Corp.*,⁸ a summons and complaint were left at the defendant Hasso's office. The papers were delivered to the defendant several days later by one of his business associates.⁹ The court held the service upon the defendant improper under CPLR 308(1), since it failed to meet that section's requirement of personal delivery,¹⁰ and no special circumstances sufficient to justify departure from the requirement was found.¹¹ It cited two instances where redelivery to the party to be served by one other than plaintiff's agent would generally be allowed: when the redelivery is "so close both in time and space that it can be classified as part of the same act"¹² and when the defendant attempts to evade or block service.¹³ Additionally, it mentioned some recent decisions upholding re-transmission under 308(1) in other than the two generally accepted instances,¹⁴ but distinguished these from the present case. The court maintained that to approve the method of service in the instant case would render CPLR 308(1) similar to 308(3) without that section's safeguard of prior due diligence to make personal service.

The wisdom of the court's decision in the instant case is apparent. Much of the service performed presently is suspect. To expand the exceptions to 308(1) beyond a bare minimum

⁸ 53 Misc. 2d 279, 278 N.Y.S.2d 574 (N.Y.C. Civ. Ct. 1967).

⁹ While the record was unclear as to whether delivery had been made by one Savidge, a co-defendant, or Savidge's wife, not a party to the action, the Court assumed for purposes of its opinion that delivery had been made by the wife, since delivery by Savidge would have been void under CPLR 2103(a).

¹⁰ "Personal service upon a natural person shall be made: (1) by delivering the summons within the state to the person to be served. . . ." CPLR 308(1).

¹¹ *Miller v. Alda Corp.*, 53 Misc. 2d 279-80, 278 N.Y.S.2d 574, 576 (N.Y.C. Civ. Ct. 1967).

¹² *Green v. Morningside Heights Housing Corp.*, 13 Misc. 2d 124, 125, 177 N.Y.S.2d 760, 761 (Sup. Ct. N.Y. County), *aff'd*, 7 App. Div. 2d 708, 180 N.Y.S.2d 104 (1st Dep't 1958).

¹³ *See* *Buscher v. Ehrick*, 12 App. Div. 2d 887, 209 N.Y.S.2d 941 (4th Dep't 1961); 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 308.03 (1966).

¹⁴ *See, e.g.*, *Marcy v. Woodin*, 18 App. Div. 2d 944, 237 N.Y.S.2d 402 (3d Dep't 1963); *Erale v. Edwards*, 47 Misc. 2d 213, 262 N.Y.S.2d 44 (Sup. Ct. Suffolk County 1965). The *Erale* case is treated in length in *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 303, 313 (1966).