

CPLR 302(a)(1), CCA § 404(a): Long-Arm Statute Found Inapplicable in Stock Brokerage Situation

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defendants appealed the order on the ground that it was unconstitutional to uphold jurisdiction over a non-resident executor, served without the state, who has not committed any acts or transacted any business in New York.

In affirming the order of the appellate division, the Court of Appeals noted the clear trend toward constitutional expansion of the concept of jurisdiction,⁴¹ and the express authorization of such out-of-state service upon non-resident executors contained in CPLR 302 and 313. Accordingly, there could no longer be any constitutional prohibition against the substitution procedure here employed.⁴²

CPLR 302(a)(1), CCA § 404(a): Long-arm statute found inapplicable in stock brokerage situation.

Broadly speaking, CPLR 302(a)(1) provides that the New York courts may exercise personal jurisdiction over any non-domiciliary, who in person or through an agent transacts any business within the state. Section 404 of the New York City Civil Court Act is the equivalent of CPLR 302, except that whereas 302 requires contact with the state, section 404 requires contact with the City of New York.⁴³

In *Hertz, Newmark & Warner v. Fischman*,⁴⁴ the defendant, a New Jersey domiciliary, bought and sold stock through plaintiff's Newark office. The Newark office, upon receipt of a buy or sell order, would contact the main office in New York City, which would then buy or sell the stock. In this instance, defendant issued a sell order to the Newark office, but upon completion of the sale in New York City, he refused to relinquish the certificate to plaintiff's agent in Newark. Plaintiff was required to purchase replacement shares, and sued to recover their cost. Defendant's motion to dismiss for lack of personal jurisdiction was granted. The court held that since plaintiff's acts within New York City did not arise from an exclusive agency with, or employment by, the defendant, its acts could not be attributed to him for the purpose of securing personal jurisdiction over the defendant pursuant to CCA § 404.⁴⁵

⁴¹ Citing, of course, *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁴² *Rosenfeld v. Hotel Corp. of America*, 20 N.Y.2d 25, 228 N.E.2d 374, 281 N.Y.S.2d 308 (1967).

⁴³ 29A MCKINNEY'S N.Y.C. CIVIL COURT ACT § 404, commentary 103-04 (1963). "[I]f the subject matter is within the court's jurisdiction, and the contacts enumerated in CCA 404(a)(1-3) were with the city, the court may, by virtue of subdivision (b), send its summons as far as the supreme court summons might go if the action had been brought there."

⁴⁴ 53 Misc. 2d 418, 279 N.Y.S.2d 97 (N.Y.C. Civ. Ct. 1967).

⁴⁵ *Id.* at 420-21, 279 N.Y.S.2d at 99-100.

The requirement that the agency be exclusive in order to attribute the acts of the agent to the principal has prior support. In *Millner Co. v. Noudar, Lda.*,⁴⁶ the appellate division, first department, held that where the purported agent is actually an independent broker representing many different companies on an independent basis, in no way under the defendant's control, "the acts of the broker representative . . . are not the acts of the so-called principal, and do not create a basis for jurisdiction against . . . [him]." ⁴⁷

The court in the instant case stated that the exclusive agent doctrine applied only to the factual situation presented therein, *i.e.*, where the agent sues the principal. If a third party had sued the defendant, the court indicated, the acts committed on behalf of the defendant by the agent might have been sufficient to confer jurisdiction over the defendant's person.⁴⁸

CPLR 302(a)(1): Kramer and Millner trend followed.

In *Standard Wine and Liquor Co. v. Bombay Spirits Co.*,⁴⁹ the New York Court of Appeals affirmed the decision of the appellate division, first department,⁵⁰ and held that the defendant Bombay, which maintained no bank account, telephone listing or warehouse, nor employed any salesmen, nor made any sales within the State, was not transacting business in New York. Consequently, service of process upon it in England, pursuant to CPLR 313, was not sufficient to give the New York courts in personam jurisdiction.

The Court rejected the plaintiff's contention that because defendant's goods were ultimately put into commerce in New York, the defendant was transacting business here.⁵¹ Further, neither the fact that the plaintiff signed the contract in New York, nor the fact that it was bound to boost Bombay's sales within the State, were found to be determinative of a transaction of business in New York.⁵²

⁴⁶ 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966).

⁴⁷ *Id.* at 328-29, 266 N.Y.S.2d at 291. The *Millner* case is fully discussed in *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 293 (1966). Cf. *Greenberg v. Lamson Bros. Co.*, 273 App. Div. 57, 75 N.Y.S.2d 233 (1st Dep't 1947); *McKeon v. P. J. McGowan & Sons*, 229 App. Div. 568, 242 N.Y.S. 700 (2d Dep't 1930).

⁴⁸ *Hertz, Newmark & Warner v. Fischman*, 53 Misc. 2d 418, 421, 279 N.Y.S.2d 97, 100 (N.Y.C. Civ. Ct. 1967).

⁴⁹ 20 N.Y.2d 13, 228 N.E.2d 367, 281 N.Y.S.2d 299 (1967).

⁵⁰ 25 App. Div. 2d 236, 268 N.Y.S.2d 602 (1st Dep't 1966).

⁵¹ *Standard Wine & Liquor Co. v. Bombay Spirits Co.*, 20 N.Y.2d 13, 16, 228 N.E.2d 367, 369, 281 N.Y.S.2d 299, 300-01 (1967); see *Kramer v. Vogel*, 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966).

⁵² 20 N.Y.2d at 16, 228 N.E.2d at 369, 281 N.Y.S.2d at 301-02, relying on *Singer v. Walker*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).