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CPLR 1007: Right of Impleader Extended to Insurer Prior to Payment of Claim

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The present decision follows prior New York case law established in *Kramer v. Vogl*[53] and *Millner Co. v. Noudar, Lda.*[54]

CPLR 308(1): Redelivery doctrine liberalized

The supreme court, Queens County, in *Pitagno v. Staiber*,[55] held that delivery of the summons to the defendant by his wife, who found it in a sealed envelope beneath the mail slot in their home, met the requirements of CPLR 308(1)[56] and constituted valid service. The fact that no affidavit of service had been made was deemed to be immaterial, since testimony given by defendant's wife in open court establishing personal service upon defendant was of greater force than an affidavit would have been.[57]

It should be noted that in the instant case, and in a prior case[58] cited by the court to support its argument, there were compelling circumstances favoring a finding that the service was valid: had the court held the service of process invalid, the causes of action would have been barred by the statute of limitations.[59]

ARTICLE 10 — PARTIES GENERALLY

CPLR 1007: Right of impleader extended to insurer prior to payment of claim.

CPLR 1007 provides that " [a]fter the service of his answer, a defendant may proceed against a person not a party who is or may be liable to him for all or part of the plaintiff's claim against

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[53] 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966). The Court of Appeals held that the phrase of 302(a) (1), "transacts any business within the state," did not encompass Austrian defendants who carried on no sales, promotion or advertising activities within the State, made all arrangements in Austria and sold their goods, eventually destined for New York, F.O.B. Austria.

[54] 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966). There the court held that the acceptance, signing, and mailing of a contract in New York was not an "act" of the foreign defendant here, nor was it sufficient to warrant the assumption of jurisdiction over it.

[55] 53 Misc. 2d 858, 280 N.Y.S.2d 178 (Sup. Ct. Queens County 1967).

[56] CPLR 308(1) requires that "[p]ersonal service upon a natural person shall be made: (1) by delivering the summons within the state to the person to be served. . . ."

[57] 53 Misc. 2d at 860, 280 N.Y.S.2d at 180-81.

[58] Marcy v. Woodin, 18 App. Div. 2d 944, 237 N.Y.S.2d 402 (3d Dep't 1963) (memorandum decision).

[59] In a recent case, where the action would not have been barred, the court refused to sustain the validity of the service stating that to dispense with the requirement of compelling circumstances to allow a departure from statutory mandate of direct delivery would erase the distinctions between CPLR 308(1) and CPLR 308(3). *See* Miller v. Alda Corp., 53 Misc. 2d 279, 278 N.Y.S.2d 574 (N.Y.C. Civ. Ct. 1967). *See generally The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 283, 288 (1967).

him. . . ." [60] In 1963, the Court of Appeals, in *Ross v. Pawtucket Mutual Insurance Co.*,[61] stated that the resolution of the issue of whether an insurer may implead the wrongdoing third party depended "upon the nature of the subrogation right and the terms of the policy itself." [62] The Court concluded that the attempt by the defendant insurance company to implead prior to payment of the claim to its insured was premature because of the contingent nature of the right of subrogation.[63] It is to be noted that, according to the insurance policy involved in the *Ross* decision, the insured's right was subrogated to the defendant only when payment for loss was made.

The appellate division, first department, in *Krause v. American Guarantee and Liability Insurance Co.*,[64] has recently held that, absent a covenant not to sue prior to payment, an insurance company may implead a negligent third party prior to payment on the policy to the insured.

Other decisions expounding this principle have been rendered since 1963,[65] and the *Krause* case seems to make it certain that the holding of the Court of Appeals in *Ross* will be limited to cases where a covenant not to sue prior to payment is contained in the insurance policy.

ARTICLE 22 — STAY, MOTIONS, ORDERS AND MANDATES

CPLR 2212: Motion returnable in adjoining county in another department referred back to county where action was commenced.

CPLR 2212(a) provides that " [a] motion on notice in an action in the supreme court shall be noticed to be heard in the judicial district where the action is triable or in a county adjoining the county where the action is triable. . . ." [66]

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[60] This section is based upon CPA § 193-a and RCP 54, and contemplates little change from prior law. 7B McKINNEY'S CPLR 1007, commentary 333 (1963). It corrects earlier defects in impleader practice. For example, that the main claim and the third-party claim must be the same or at least based on the same grounds, *see* Debby Junior Coat & Suit Co. v. Wollman Mills, Inc., 207 Misc. 330, 137 N.Y.S.2d 703 (Sup. Ct. N.Y. County 1955). is no longer the rule.

[61] 13 N.Y.2d 233, 195 N.E.2d 892, 246 N.Y.S.2d 213 (1963). For an analysis of the *Ross* decision, *see generally The Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 406, 422 (1964).

[62] 13 N.Y.2d at 234, 195 N.E.2d at 893, 246 N.Y.S.2d at 214.

[63] *Id.* at 235, 195 N.E.2d at 893, 246 N.Y.S.2d at 214.

[64] 27 App. Div. 2d 353, 279 N.Y.S.2d 235 (1st Dep't 1967).

[65] New Walden, Inc. v. Federal Ins. Co., 22 App. Div. 2d 4, 253 N.Y.S.2d 383 (4th Dep't 1964); Sol Lenzner Corp. v. Aetna Cas. & Sur. Co., 20 App. Div. 2d 305, 246 N.Y.S.2d 950 (4th Dep't 1964).

[66] CPLR 2212(a).