St. John's Law Review

Volume 42, January 1968, Number 3 Article 21

CPLR 2303: Limited by Judiciary Law--Subpoena Must Be Served on Witness Within the State

St. John's Law Review

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Recommended Citation

St. John's Law Review (1968) "CPLR 2303: Limited by Judiciary Law--Subpoena Must Be Served on Witness Within the State," *St. John's Law Review*: Vol. 42 : No. 3 , Article 21.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol42/iss3/21

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The appellate division, first department, in *Baker, Voorhis and Co. v. Heckman,*[67] held that it was not an abuse of discretion for the Special Term in Queens County to refer plaintiff's motion for summary judgment to New York County, where the action was initiated. Since plaintiff brought his action in New York County he could, pursuant to CPLR 2212, make a motion returnable in Queens County which adjoins New York County. However, the court stated:

> In the absence of special circumstances, it is considered proper for the Special Terms within the counties in the City of New York to give effect . . . to the prevailing practice in such counties of making motions returnable in the Judicial Department where the action or special proceeding is brought.[68]

Thus while New York and Queens counties are adjoining counties within the contemplation of CPLR 2212, the fact that New York is in the first department and Queens is in the second department was the pivotal factor which enabled the Queens County Court to properly refer plaintiff's motion back to New York County where the action was initiated.

Litigators should use caution in making motions returnable in adjoining counties, since the crossing of the boundaries of *judicial departments* may cause the motion to be referred to the county where the action was originally brought.

Article 23 — Subpoenas, Oaths and Affirmations

CPLR 2303: Limited by Judiciary Law—subpoena must be served on witness within the State.

CPLR 2303 which provides that a subpoena shall be served in the same manner as a summons effects a change from the CPA which required that a copy of a subpoena be personally served or delivered to the witness.[69] The CPLR apparently provides that all of the methods used to serve a summons are available for the service of a subpoena. It is, therefore, logical that a subpoena could be served by any of the means specified in CPLR 308 and by delivery to persons specified in CPLR sections 309 through 312.[70] These provisions have resulted in a major expansion of the means used to serve a subpoena. However, the apparent scope of CPLR 2303 has been severely narrowed by a recent decision.

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[67] 28 App. Div. 2d 673, 280 N.Y.S.2d 940 (1st Dep't 1967).

[68] *Id.*, 280 N.Y.S.2d at 941.

[69] 2 Weinstein, Korn & Miller, New York Civil Practice ¶ 2303.03 (1963).

[70] *Id. See also* 7B McKinney's CPLR 2303, commentary 76 (1963).

In *Beach v. Lost Mountain Manor*,[71] defendant moved to quash a subpoena, served by mail on defendant's attorneys, directing defendant's general manager, a resident of Ohio, to appear as a witness in New York. After first stating that CPLR 2103(b) did not provide for the service of a subpoena on the attorney of a foreign defendant,[72] the court considered the applicability of CPLR 308(4) to service of the subpoena. The court recognized that CPLR 2303 permitted substituted service of a subpoena in a proper case, but said that Section 2-b of the Judiciary Law, which authorizes courts of record to issue subpoenas to persons *found in the state* requiring their attendance as witnesses in causes pending in such courts, was also applicable.[73] The court held that CPLR 2303 did not enlarge the court's authority under the Judiciary Law. The subpoena was quashed, since the prospective witness was not in New York and, therefore, not subject to a subpoena from a New York court. The court also disagreed with those authorities who maintain that a New York domiciliary may be subpoenaed to testify as a witness here by personal delivery of the subpoena to him anywhere in the world.[74]

The instant case appears to limit the utility of subpoena service which CPLR 2303 seeks to foster, by treating the Judiciary Law as a limitation on CPLR 2303 and the other applicable provisions of the CPLR. While the decision is not consistent with the expanding concept of the court's jurisdiction over parties not within the state, the practitioner should be aware of the limitation which this case makes on the applicability of CPLR 308(4) to CPLR 2303.

ARTICLE 31 — DISCLOSURE

CPLR 3101: Examination before trial of Seider v. Roth *type defendant is permissible.*

In *Gazerwitz v. Adrian*,[75] a New York plaintiff brought suit against a New Jersey resident for damages incurred in an automobile accident in New Jersey. The plaintiff acquired in rem jurisdiction, on the authority of *Seider v. Roth*,[76] by attaching defendant's automobile liability insurance policy. Plaintiff moved for an order

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[71] 53 Misc. 2d 563, 279 N.Y.S.2d 93 (Sup. Ct. Monroe County 1967).
[72] 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 2103.02 (1964).
[73] N.Y. JUDICIARY LAW § 2-b.
[74] 7B MCKINNEY'S CPLR 2303, supp. commentary 18 (1967).
[75] 28 App. Div. 2d 556, 280 N.Y.S.2d 233 (2d Dep't 1967) (memorandum decision).
[76] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).