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CPLR 403(c) and (d): Care Required to Fulfill Court's Specifications as to Service of an Order to Show Cause

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Under CPLR 325(a), the successor to CPA § 110, the problem remains as to whether it is necessary that the original court have some semblance of jurisdiction before removal can be obtained.⁴⁴

It would seem that this problem has been resolved to some extent by the judiciary article of the state constitution⁴⁵ which grants the courts express power to transfer cases over which they lack jurisdiction. While there might be some doubt as to the interpretation of the term "lack of jurisdiction," authorities have recognized that it encompasses those situations wherein the court had no jurisdiction whatever over the case.⁴⁶

However, since the CPLR was drafted prior to the amendment of the judiciary article, some inconsistencies have resulted. Under CPLR 325(a), a motion to remove the action must be made in the supreme court. Section 19 of the judiciary article, however, directs the court of first instance to make the transfer. Moreover, under section 19, the court may transfer on its own initiative.

In *Weiser v. Burick*,⁴⁷ the county court held that it lacked jurisdiction to dissolve a partnership or provide for an accounting. Despite the absence of any semblance of jurisdiction, the court did not dismiss. Rather, it stayed the proceedings for thirty days so that either party could make an application for removal to a proper forum under CPLR 325.

Thus, the court followed that line of CPA § 110 cases and the judiciary article, which hold that even where the lower court does not have jurisdiction, removal is available. In effecting removal, the court utilized CPLR 325's procedure, and required that a motion be made to the supreme court. However, under the provisions of the judiciary article, it seems that the county court, by its own motion, could have removed the case to a proper forum.

ARTICLE 4—SPECIAL PROCEEDINGS

CPLR 403(c) and (d): Care required to fulfill court's specifications as to service of an order to show cause.

CPLR 304 provides for the commencement of a special proceeding by service of a notice of petition or an order to show cause. A notice of petition must be served in the same manner as

Dep't 1954); *Collesion v. Collesion*, 2 Misc. 2d 10, 154 N.Y.S.2d 345 (Westchester County Ct. 1955).

⁴⁴ See 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 325.06 (1965).

⁴⁵ N.Y. CONST. art. VI, § 19.

⁴⁶ *Weiser v. Burick*, 47 Misc. 2d 962, 263 N.Y.S.2d 506 (Westchester County Ct. 1965); 7B MCKINNEY'S CPLR 325, commentary 623 (1963).

⁴⁷ *Supra* note 46.

a summons.⁴⁸ The court, however, is expressly permitted to allow a special proceeding to be initiated by service of an order to show cause at such time and in such manner as it specifies.⁴⁹ The primary advantage of the order to show cause is that it is not subject to the return time limitations which are attached to the notice of petition. However, when commencing a special proceeding by means of an order to show cause, the court's directives as to time and manner must be exactly complied with by the practitioner.

In *the Matter of Graffagnino*,⁵⁰ a proceeding on motion of MVAIC to conform an arbitration award⁵¹ pursuant to the standard policy endorsement,⁵² the movant's order to show cause provided that service be made "upon petitioners' attorneys, either personally or by registered mail." The movant's affidavit indicated that service of moving papers was made only by regular mail. The court held that the non-appearance of petitioners did not entitle MVAIC to a granting of the motion by default, but on the contrary, that failure to serve the petitioners in the manner specified precluded substantive consideration of the application.

Another question of interest to practitioners was broached by the court when it stated that it would only assume, without deciding, that it was jurisdictionally appropriate to commence a special proceeding by registered mail upon the attorneys without a showing of due diligence in respect to other more direct methods of service. The court seemed concerned that in service of an order to show cause there is no guarantee of due diligence such as is provided by CPLR 308(4). However, the intent of the legislature seems to have been to place the responsibility for determining the time and method in which an order to show cause will issue⁵³ entirely upon the courts. Therefore, New York procedural requirements would appear to be satisfied if counsel can persuade a court of proper jurisdiction to issue the order. Furthermore, it is clear that service of an order to show cause is not subject to the CPLR 308 type of service requirements. However, an individual court may require due diligence before it permits substituted service of the order to show cause. Thus, any court-specified method of service of the order to show cause which satisfies federal due process requirements, *i.e.*, which is reasonably calculated to insure notice, is valid to commence a special proceeding.

⁴⁸ CPLR 403(c).

⁴⁹ CPLR 403(d).

⁵⁰ 48 Misc. 2d 441, 264 N.Y.S.2d 483 (Sup. Ct. N.Y. County 1965).

⁵¹ Arbitration of a controversy is not itself a special proceeding under the CPLR. *Id.* at 441, 264 N.Y.S.2d at 484. A special proceeding is the vehicle by which the first application arising out of an arbitrable controversy is brought before the court. CPLR 7502. See also CPA § 1459.

⁵² N.Y. INS. LAW § 167 (2a).

⁵³ THIRD REP. 157-58.