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Under CPLR 302(a)(1), a non-domiciliary is subject to the jurisdiction of the New York courts if he "transacts any business" in this state. In a case where a non-domiciliary defendant hires the plaintiff to work for him in New York, the question arises as to whether the acts of the plaintiff may serve as a basis for jurisdiction over the defendant.

In *Winick v. Jackson*,[68] it was held that the retaining of a New York attorney by a non-domiciliary to represent him in New York did not constitute a transaction of business in this state by the non-domiciliary. The court reasoned that an attorney is similar to an *independent contractor* and, therefore, his acts cannot be considered to be those of the defendant. The court was careful to distinguish the instant case from the type of case where the plaintiff is an *employee* of the defendant. In such cases, under the law of principal-agent, the employee's acts are clearly the acts of the employer.[69] This latter type of case is illustrated by *Schneider v. J. & C. Carpet Co.*,[70] which involved an action for breach of contract brought by a sales representative and employee of the non-domiciliary defendant. In that case, the court stated that "the activities of the plaintiff in New York in furtherance of the contract must be considered as being those of the defendant." [71]

In distinguishing *Schneider* from the instant case, the court cited as support *A. Millner Co. v. Noudar, LDA.*,[72] wherein the plaintiff's acts were not attributed to the defendant since the plaintiff was an independent broker. In *Millner*, however, jurisdiction was sustained on other grounds (officers of the defendant had transacted business in New York).

There is one case which the court in *Winick* failed to note and which casts some doubt on the validity of its decision. *Lewis v. American Archives Ass'n* [73] involved an action for breach of contract brought by an attorney hired by an out-of-state domiciliary. The attorney had been hired to conduct examinations before trial in New York. The contract was consummated in New York, and the defendant's vice president came to New York to attend the examinations. On the basis of these facts, the court sustained jurisdiction.

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[68] 49 Misc. 2d 1009, 268 N.Y.S.2d 768 (Sup. Ct. Nassau County 1966).

[69] See *The Biannual Survey of New York Practice*, 39 ST. JOHN'S L. REV. 417 (1965).

[70] 23 App. Div. 2d 103, 258 N.Y.S.2d 717 (1st Dep't 1965).

[71] Schneider v. J. & C. Carpet Co., 23 App. Div. 2d 103, 105, 258 N.Y.S.2d 717, 719 (1st Dep't 1965).

[72] 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966).

[73] 43 Misc. 2d 721, 252 N.Y.S.2d 217 (Sup. Ct. Washington County 1964).

It may be possible to distinguish *Lewis* from *Winick* on the ground that *Lewis* contained additional jurisdictional facts. Because of this difference it will be necessary to await future decisions before predicting with accuracy when New York courts will exercise jurisdiction over a non-domiciliary defendant on the basis of acts performed by the plaintiff in New York on the defendant's behalf. It is evident, however, that if the plaintiff is an employee of the defendant, jurisdiction will be sustained. The area of uncertainty lies where the plaintiff is classified as an independent contractor.

CPLR 308: Parties may not provide for their own methods of service.

In *National Equip. Rental, Ltd. v. Dec-Wood Corp.*,[74] the parties entered into a contract whereby the plaintiff corporation, doing business in New York, leased certain machinery to the non-domiciliary defendants. The contract stipulated that all actions arising out of the agreement were to be litigated in New York, and further provided that any action may be commenced by sending the process by certified mail to the defendants at their out-of-state address. This suit, to recover rent allegedly unpaid, was commenced by service in this manner.

The defendants objected to New York's exercise of jurisdiction on the grounds that (1) New York had no basis for jurisdiction since the defendants never transacted business in New York, and (2) the method of service employed was defective since this method was not authorized by the CPLR.

The court rejected the defendants' first contention that New York had no basis for jurisdiction. In so doing, the court was in accord with prior case law which has established that parties may designate the forum in which the actions arising out of their contracts are to be adjudicated.[75] The court, however, sustained the contention that the method of service was invalid because it lacked statutory authorization. The court based this holding upon the New York State Constitution and those segments of the CPLR which indicate that the legislature *alone* may specify methods of service. The state constitution provides that the legislature shall have the power to regulate "jurisdiction and proceedings in law and in equity . . ." [76] and CPLR 306 states that "proof of service shall specify . . . that the service was made . . . in an authorized manner." These factors, together with the additional fact that the CPLR [77] expressly provides for the manner in which service may

[74] 49 Misc. 2d 538, 267 N.Y.S.2d 820 (Dist. Ct. Nassau County 1966).
[75] Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931).
[76] N.Y. CONST. art. VI, § 30.
[77] CPLR 303, 311, 318.