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1

Article 27

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## CPLR 305(b): Amendment

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ducting activities within the forum State, thus invoking the benefits and protections of its laws."<sup>74</sup>

Hence, the position taken that there is a needless distinction drawn between tort and tortious act in the instant cases does open the door to the further problem of drawing the line between the situations where CPLR 302(a)(2) can be constitutionally applied and those wherein its application would be unconstitutional.

The fact that such a problem would face the courts, however, should not act as a deterrent to proper construction of the statute, but rather, should serve as a stimulus towards meeting the problem created when combining the due process requirements of "minimum contacts" with the expanded jurisdictional bases now being utilized.

*CPLR 302(a)(3): Ownership, use or possession of real property.*

*Tebedo v. Nye*,<sup>75</sup> one of the infrequent decisions construing CPLR 302(a)(3), involved a cause of action for failure to convey real property. Defendant Nye, after agreeing to sell the disputed land to the plaintiffs and accepting the consideration, conveyed the entire parcel to defendant McLaughlin. McLaughlin, allegedly with knowledge of a prior agreement to convey to the plaintiffs, conveyed the realty to a third party. Subsequently, McLaughlin established residence in Florida where he was served personally under CPLR 302(a)(3). The court held that irrespective of the fact that the defendant McLaughlin no longer had any interest in the land, nor owned any other real estate in New York, jurisdiction would nonetheless be sustained on the basis of "the relationship existing between the defendant and the realty out of which the cause of action arose at the time the cause of action arose."<sup>76</sup>

*CPLR 305(b): Amendment.*

CPLR 305(b), as originally enacted, provided that for purposes of a default judgment it would not be necessary to serve a complaint with the summons if (1) the claim was for a sum certain, and (2) a notice stating this sum was served with the summons. The CPLR 305(b) notice would take the place of the complaint for default purposes. In 1965, this was amended to provide for the expanded use of such notice, *i.e.*, a statement of the nature of the action and the relief demanded in monetary as well as non-monetary actions. There is some disagreement as

<sup>74</sup> *Ibid.*

<sup>75</sup> 45 Misc. 2d 222, 256 N.Y.S.2d 235 (Sup. Ct. Onondaga County 1965).

<sup>76</sup> *Id.* at 223, 256 N.Y.S.2d at 236.

to the scope of the statutory language,<sup>77</sup> although it is agreed that the legislature did intend the notice to be available in any action.<sup>78</sup>

*CPLR 308(3): Substituted service.*

In *Huntington Utilities Fuel Corp. v. McLoughlin*,<sup>79</sup> an action to impose a trust on lands allegedly purchased with money taken from the plaintiffs, defendants moved to dismiss on the ground of insufficient service. They contended that substituted service was not available where the *number* of times that plaintiffs attempted personal service did not amount to "due diligence."<sup>80</sup> In refusing to set aside service, the court held that it would not adjudicate the question of "due diligence" where the parties disagree simply about the number of attempts at personal service which must be shown to permit the employment of substituted service.

The number of attempts necessary to constitute "due diligence" is not subject to exact determination. However, it is quite possible to foresee situations in which twenty or even thirty attempts would be insufficient.<sup>81</sup> Thus, the facts of each case must be examined to determine whether under the particular circumstances "due diligence" was employed, so as to permit substituted service.

In *Polansky v. Paugh*,<sup>82</sup> plaintiff knew that defendant had left his last known residence prior to attempted substituted service. The court, in a per curiam opinion, held that substituted service by mail was violative of due process where it appeared that prior to mailing the defendant did not reside at the stated address.

It is submitted that the court's statement should not be accepted by the practitioner as a general principle. In the enactment of CPLR 308(3), the legislature has chosen to afford a defendant greater protection<sup>83</sup> than that required by federal due

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<sup>77</sup> Compare 7B MCKINNEY'S CPLR 305, supp. commentary 74 (1965), with 7B MCKINNEY'S CPLR 3215, supp. commentary 155 (1965).

<sup>78</sup> 1965 JUDICIAL CONFERENCE REPORT, MCKINNEY'S SESSION LAW NEWS A80.

<sup>79</sup> 45 Misc. 2d 79, 255 N.Y.S.2d 679 (Sup. Ct. Suffolk County 1965).

<sup>80</sup> See FIFTH REP. 266, wherein it is stated that the "due diligence" required by CPLR 308(3) is based upon "present requirements," *i.e.*, as required by the CPA. In this regard see *Gurland v. D'Erbstein*, 106 N.Y.S.2d 210 (Sup. Ct. 1951), wherein it was stated that substituted service is in derogation of the common-law rule that process must be personally served within the court's jurisdiction, and hence, directions pertaining to substituted service must be strictly construed and fully carried out. *Id.* at 211.

<sup>81</sup> *E.g.*, X attempts personal service by delivery at Y's home each day at the same time for thirty weekdays. Each time this "attempt" is made, the plaintiff knows that the defendant will not be at home but will be at work in another city.

<sup>82</sup> 23 App. Div. 2d 643, 256 N.Y.S.2d 961 (1st Dep't 1965).

<sup>83</sup> FIFTH REP. 266.