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Article 34

CPLR 1001(a): Motion to Dismiss for Nonjoinder of an "Indispensible" Party

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read with BCL § 102(a)(10), required that venue be laid in the county designated by the plaintiff in its application for authority, as the location of its office, regardless of the quantity or quality of the contacts plaintiff had with that county.[110]

Under CPLR 503(c), a corporation is considered a resident of the county in which its "principal office" is located. BCL § 102(a)(10) states that the county in which such office is located is that stated in the foreign corporation's application for authority. However, in the BCL the term "principal office" is not used; the section refers merely to the "office of the corporation."

This discrepancy has led to certain misconceptions as to what factors control the venue in an action where the plaintiff is a corporation. The frequently asserted contention that a corporate plaintiff is at liberty to bring an action in the county where it is a de facto resident, although its de jure residence is elsewhere, appears to be conclusively refuted by the ruling in the instant case.

Of greater significance, however, is that the ruling in this case dispels the erroneous impression, conveyed by certain recent opinions, that the office named in the application of authority or certificate of incorporation must be a "principal office."[111] The decision seems to effectuate the design of the drafters of the BCL in that they have conspicuously omitted from section 102 the qualifying terminology found in former Section 3(16) of the General Corporation Law.[112]

ARTICLE 10 — PARTIES GENERALLY

CPLR 1001(a): Motion to dismiss for nonjoinder of an "indispensable" party.

In *Blumenthal v. Allen*,[113] a stockholder's derivative action, defendant claimed that the court lacked jurisdiction over the cor-

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[110] *Id.* at 453, 257 N.Y.S.2d at 122.

[111] See Lande v. Deborah Hosp. (Sup. Ct. N.Y. County), 151 N.Y.L.J., April 20, 1964, p. 17, col. 1; Shultz v. O'Connell (Sup. Ct. N.Y. County), 150 N.Y.L.J., Oct. 8, 1963, p. 14, col. 3.

[112] *Compare* N.Y. GEN. CORP. LAW § 3(16): "The term 'office of a corporation' means its *principal office* within the state, or *principal place of business* within the state if it has no *principal office* therein." (Emphasis added.), *with* N.Y. BUS. CORP. LAW § 102(a)(10): "'Office of the corporation' means the office the location of which is stated in the certificate of incorporation of a domestic corporation or in the application of authority of a foreign corporation . . . . Such office need not be a place where business activities are conducted by such corporation."

[113] 46 Misc. 2d 688, 260 N.Y.S.2d 363 (Sup. Ct. Nassau County 1965). *Contra,* Polar Distributors, Inc. v. Granger Realty Corp. (Sup. Ct. Queens County), 151 N.Y.L.J., Feb. 21, 1964, p. 20, col. 1.

porate beneficiary, an indispensable party. Pursuant to CPLR 3211(a)(10), a motion was made to dismiss the complaint upon the ground that "the court should not proceed in the absence of a person who should be a party." In ruling on the motion, the court was faced with the question of whether the CPA's dual-motion procedure was incorporated into the CPLR. Under prior practice,[114] it was necessary to make two motions: first, to direct the plaintiff to join the omitted party; and, second, if plaintiff refused, to dismiss the complaint.[115]

The court adopted the view put forth by the *Biannual Survey of New York Practice*[116] that in light of CPLR 104, the former dual-motion requirement was merely an unnecessary delay.

CPLR 1007: Vouching-in notice — third-party practice.

At common law a defendant having a third party liable over to him could vouch him into the litigation, and, by giving him proper notice of the suit, bind him by a final judgment.[117] Vouching-in, though still available, is seldom employed since CPLR 1007 provides a much easier method of impleading a third-party defendant. However, vouching-in remains an integral part of our procedural law since it can be employed to reach a third-party defendant when the impleading party cannot meet the requirements of CPLR 1007.[118]

Bouleris v. Cherry-Burrell Corp.[119] discusses some of the more significant aspects of the vouching-in procedure. *Bouleris* involved a proceeding on a motion to vacate a vouching-in notice prior to a trial on the merits. In denying the motion to vacate, the court held that the only ground upon which such a motion can be granted, at that stage of the proceeding, is untimely notice.[120]

The ruling in the instant case is based upon an examination of the nature of notice procedures for vouching-in. The court found that vouching-in is merely an invitation to a party, whom the defendant considers to be liable over to him, to come in and defend. If that party defaults, the third-party defendant will be held liable for any judgment that might be recovered against the third-party

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[114] RCP 102; CPA §§ 192-93.

[115] *E.g.*, Wolff v. Brontown Realty Corp., 281 App. Div. 752, 118 N.Y.S.2d 74 (2d Dep't 1953); Marsico v. Tramutolo, 135 N.Y.S.2d 258 (Sup. Ct. Queens County 1954).

[116] 38 ST. JOHN'S L. REV. 447-48 (1964).

[117] Note, 11 BUFFALO L. REV. 90 (1962).

[118] For instance, if the defendant were a domiciliary of a foreign state and not amenable to service under CPLR 301 or 302(a).

[119] 45 Misc. 2d 318, 256 N.Y.S.2d 537 (Sup. Ct. Albany County 1964).

[120] *Id.* at 319, 256 N.Y.S.2d at 538; see also Urback v. City of New York, 46 Misc. 2d 503, 259 N.Y.S.2d 975 (Sup. Ct. Kings County 1965).