

Complaint Must Allege a Cause of Action Arising from the Acts Enumerated in Section 302

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opposed to a hammer or a tank loaded with gas, which would be dangerous to life and property if negligently manufactured. Another consideration is whether the defendant is obtaining the benefit and protection of the state's laws.⁷⁵ For example, non-resident motorist statutes have been upheld on the ground that one who enjoys the benefits of the state's highways should be compelled to answer for his negligent act in operating such a dangerous instrumentality as an automobile in that state.⁷⁶ The "balance of convenience" test is another factor to be weighed carefully. If several plaintiffs have a cause of action against a non-resident corporation, it may be less inconvenient for the corporation to defend in a jurisdiction foreign to it than to force individual plaintiffs to pursue defendant in a jurisdiction where the corporation is present.⁷⁷ But if, on all of the facts, the burden placed on the defendant would be disproportionate to the convenience afforded the plaintiff, defendant should not be subjected to jurisdiction in the forum state.

Complaint must allege a cause of action arising from the acts enumerated in section 302.

*Lebensfeld v. Tuch*⁷⁸ was an action by plaintiffs to rescind a sale of assets and recover them from a non-resident defendant as constructive trustee thereof. The defendant, Weisz, was personally served in California pursuant to section 302(a)(2). He was charged with receiving assets from defendant Tuch, knowing that Tuch had defrauded plaintiff of these assets in New York. The complaint did not allege that Tuch acted as the agent of Weisz. The court dismissed the action against Weisz on the ground that "if at the time of service, no cause of action based on an act specified in CPLR 302 was asserted against Weisz, no personal jurisdiction of Weisz was obtained."⁷⁹

The court further stated that since it had no jurisdiction in the first place, it could not grant leave to amend the complaint because it was defective when it was made. Here summons and complaint were served together. The court indicated that it might have allowed the amendment had the summons been served alone, because the action would not have been, in effect, contaminated in such instance by a complaint which did not on its face show jurisdiction under CPLR 302. That aspect of the court's holding seems unduly technical. While it is salutary to allege in the complaint the ground of jurisdiction relied upon under CPLR 302,

⁷⁵ *International Shoe Co. v. Washington*, *supra* note 72, at 319.

⁷⁶ *Hess v. Pawloski*, 274 U.S. 352 (1927).

⁷⁷ *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

⁷⁸ 43 Misc. 2d 919, 252 N.Y.S.2d 594 (Sup. Ct. 1964).

⁷⁹ *Id.* at 921, 252 N.Y.S.2d at 596.

there is nothing in the CPLR expressly requiring it. The entire tenor of the CPLR, on the other hand, is that, in regard to pleadings, we are today to be influenced more by what the facts really are than the way in which the pleadings set them down. Even if, on motion, a complaint is dismissed for failing to state a cause of action—meaning that the complaint omits entirely the requisite allegations of the cause of action itself—the court has power, under CPLR 3211(e), to permit amendment of it, thereby preserving the action and obviating its commencement anew. So it should be with jurisdictional allegations, too, especially where there is no statutory requirement that jurisdictional bases be alleged in the complaint.

The foregoing conclusions are given strong support by analogy to federal jurisdictional allegations in pleadings. There, where allegations to the effect that there is a federal question in the case or diversity of citizenship are requisite to subject-matter (not merely to personal) jurisdiction, it is expressly provided by statute that “defective allegations of jurisdiction may be amended”⁸⁰

The holding of the instant case may also have the tendency to discourage that which should surely be encouraged: the service of the summons and complaint together. The plaintiff serving his summons alone may amend the complaint to allege CPLR 302 jurisdiction if, when later the complaint is served, the allegations are defective, or are omitted altogether, while the plaintiff who serves his summons and complaint together—which service is surely more convenient to the defendant—is penalized by having his complaint held unamendable to supply or to correct jurisdictional allegations. It would be more appropriate to permit the amendment if the facts of jurisdiction are present.

Section 311—Personal service upon a corporation.

Section 311⁸¹ abolishes the distinction that existed under the CPA between foreign and domestic corporations. It also abolishes the distinction between classes of persons upon whom service can be made. Under Section 229(3) of the CPA, service could be effected on, *e.g.*, a cashier or managing agent only if service could not be made with due diligence upon an officer of the corporation or upon a person designated by law to accept service of process.

⁸⁰ 28 U.S.C. § 1653 (1948).

⁸¹ Section 311 provides that personal service shall be made by delivering the summons upon any domestic or foreign corporation “to an officer, director, managing or general agent . . . [or] any other agent authorized by appointment or by law to receive service. . . .”