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Section 311--Personal Service Upon a Corporation

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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 311 [81] 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.

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[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. . . ."

In *B & J Bakery, Inc. v. United States Fid. & Guar. Co.*,[82] an action commenced prior to the effective date of the CPLR, process was served on the executive secretary to the vice-president in charge of defendant's New York office. Upon being directed to the secretary, the process server informed her of the nature of his business. Thereupon, she went into the vice-president's office and, when she returned, directed the process server to leave the summons with her. The supreme court denied defendant's motion to dismiss, holding that the executive secretary could, under the circumstances, be treated as a managing agent.[83] The appellate division reversed on the ground that there was no proof that service had been attempted pursuant to subdivisions (1) and (2) of section 229 or that the secretary was a managing agent.

The lower court had utilized the reasoning of *Tauza v. Susquehanna Coal Co.*,[84] that if the agents' positions are "such as to lead to a . . . presumption that notice to them will be notice to the principal, the corporation must submit . . . ." [85] On the facts, it would appear that the lower court reached a reasonable conclusion and merited affirmance under CPLR 10003, which governs in transition cases. The facts showed that the secretary accepted service after conferring with the vice-president, who was in close proximity at the time service was made, and that as an executive secretary she was a person entrusted with some measure of responsibility and discretion. It should not be important, moreover, whether she could be characterized as a managing agent. Service upon her was, for all intents and purposes, service upon the vice-president. As stated in *Green v. Morningside Heights Housing Corp.*,[86] "where the delivery is so close both in time and space that it can be classified as a part of the same act service is effected." [87]

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[82] 21 App. Div. 2d 783, 250 N.Y.S.2d 562 (2d Dep't 1964).

[83] B & J Bakery, Inc. v. United States Fid. & Guar. Co., 40 Misc. 2d 839, 244 N.Y.S.2d 284 (Sup. Ct. 1963). This case was reported in 38 ST. JOHN'S L. REV. 415 (1964).

[84] 220 N.Y. 259, 115 N.E. 915 (1917); *accord,* International Business Machs. Corp. v. Barrett Div. Allied Chem. & Dye Corp., 16 App. Div. 2d 487, 229 N.Y.S.2d 547 (3d Dep't 1962); Mastan v. Desormeau Dairy-Vend Serv., Inc., 11 App. Div. 2d 860, 203 N.Y.S.2d 343 (3d Dep't 1960); Benjamin v. Logan, 34 Misc. 2d 46, 227 N.Y.S.2d 1009 (Sup. Ct. 1962).

[85] Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 269, 115 N.E. 915, 918 (1917).

[86] 13 Misc. 2d 124, 177 N.Y.S.2d 760 (Sup. Ct.), *aff'd,* 7 App. Div. 2d 708, 180 N.Y.S.2d 104 (1st Dep't 1958).

[87] *Id.* at 125, 177 N.Y.S.2d at 761.