

## CPLR 312: Personal Service Upon a Court

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to exhaust CPLR 308 possibilities before moving *ex parte* for a court order. Although the order may be granted, service will be ineffectual if defendant sets up the defense that he has acquired a new residence. Aside from the inconvenience of commencing the action anew, in some cases, the statute of limitations would bar the action.

*CPLR 312: Personal service upon a court, board or commission.*

In *Cale-Rome, Inc. v. Board of Assessors*,<sup>61</sup> petitioner brought a proceeding to review a tax assessment on its property under Article 7 of the Real Property Tax Law. Respondents moved to dismiss alleging lack of jurisdiction due to faulty service. Section 708 of the Real Property Tax Law provides that service shall be made upon the clerk of the assessing unit (the assessing unit here being the City of Rome). A provision of the city charter designated the *City Clerk* as clerk of all city boards unless one was otherwise specified. No clerk had been designated for the board of assessors.

One Garrimone proceeded to serve the petition on the Clerk of the Board of Assessors. In an office at city hall designated "Board of Assessors," he found three people and inquired as to the identity of the assessors' clerk. Hughes, who was the Assessors' Aide, stated that all three were clerks. Garrimone, thereupon, served the papers on Hughes. The court stated that service would have been defective if section 708 were the sole method of service permitted since no attempt was made to serve the City Clerk. However, since CPLR 403(c) provides that a notice of petition shall be served in the same manner as a summons, and since Section 704(2) of the Real Property Tax Law states that the review proceeding shall be maintained against the assessors either by naming them individually or by using the official name of the assessing unit, service could also have been made under CPLR 311(3)<sup>62</sup> or 312.<sup>63</sup> The court held that service was valid under CPLR 312 even though not personally given to the Clerk of the Board of Assessors. Had the facts been merely that Garrimone handed the papers to Hughes, without anything more, there would have been no compliance. However, the process server had taken all the steps that anyone under similar circumstances would, or could have taken.

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<sup>61</sup> 44 Misc. 2d 675, 255 N.Y.S.2d 12 (Sup. Ct. 1964).

<sup>62</sup> Under CPLR 311(3), personal service upon any city other than New York City shall be made by delivering the summons "to the mayor, comptroller, treasurer, counsel or clerk . . . ."

<sup>63</sup> CPLR 312 provides that personal service upon a board or commission having a chairman or presiding officer, secretary or clerk may be made by delivering the summons to that person.

The court found that no one could have possibly served the Clerk of the Board of Assessors without knowing his personal identity, and thus, it appeared to be a "trap purposefully set for the unwary."<sup>64</sup> This finding was confirmed by the city's admission that it had delayed its motion until the thirty days in which the papers could have been served again had expired.<sup>65</sup>

The result in the instant case, however just, appears to hold valid, service by estoppel. Technically, service was defective even under CPLR 312, but it appears just and proper to dispense with formal requirements when to adhere thereto would result in substantial injustice.<sup>66</sup>

*The interstate commerce objection: A stay under CPLR 2201 may best serve interests of justice.*

The doctrine of forum non conveniens allows a court, in its discretion, to refuse to entertain jurisdiction in an action between non-residents upon a cause of action arising outside the state of New York. This doctrine as applied to corporations has been codified by Section 1314 of the New York Business Corporation Law [hereinafter referred to as BCL]. It appears that if a particular case comes within the ambit of section 1314(b)(1)-(4) the court must hear that case.<sup>67</sup> But where section 1314(b)(5) controls, the court may in its discretion refuse jurisdiction.<sup>68</sup> In the discretionary area courts generally will assume jurisdiction only where a special circumstance exists.<sup>69</sup> For example, if the statute of limitations would bar any remedy in another jurisdiction New York courts have found this to be a special circumstance.<sup>70</sup>

In the recent case of *Ceravit Corp. AG v. Black Diamond Steamship Corp.*,<sup>71</sup> a Swiss corporation sued a foreign corporation licensed to do business in New York for damage to cargo shipped from Philadelphia to Switzerland. In the particular transaction involved the defendant's ship had no contact with New York.

<sup>64</sup> *Cale-Rome, Inc. v. Board of Assessors*, 44 Misc. 2d 675, 678, 255 N.Y.S.2d 12, 15 (Sup. Ct. 1964).

<sup>65</sup> N.Y. REAL PROP. TAX LAW § 702 provides that a proceeding to review a tax assessment must be commenced within thirty days after the fully completed assessment roll.

<sup>66</sup> *Cf. Avery v. O'Dwyer*, 201 Misc. 989, 110 N.Y.S.2d 569 (Sup. Ct.), modified on other grounds, 280 App. Div. 766, 113 N.Y.S.2d 686 (1st Dep't 1952), *aff'd*, 305 N.Y. 658, 112 N.E.2d 428 (1953).

<sup>67</sup> N.Y. BUS. CORP. LAW § 1314, comments.

<sup>68</sup> See, *e.g.*, *Yesuvida v. Pennsylvania R.R.*, 200 Misc. 815, 111 N.Y.S. 2d 417 (Sup. Ct. 1951).

<sup>69</sup> *Id.* at 818, 111 N.Y.S.2d at 420.

<sup>70</sup> See, *e.g.*, *Williamson v. Palmer*, 181 Misc. 610, 43 N.Y.S.2d 532 (Sup. Ct. 1943); *Randle v. Inecto, Inc.*, 131 Misc. 261, 226 N.Y. Supp. 686 (Sup. Ct. 1928).

<sup>71</sup> 44 Misc. 2d 484, 254 N.Y.S.2d 253 (Civ. Ct. 1964).