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Article 21

Removal from Supreme Court to Lower Court

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In that case the process server stated, by affidavit, that when he informed the receptionist at defendant's office that he had a summons to serve on the defendant, the receptionist directed him to present it to the managing agent of the defendant, who was also the executive secretary to the vice president. After the process server informed the managing agent of the nature of his business, she went into the vice president's office. She returned shortly thereafter and told him to leave the summons with her and that "she would take care of it."

Defendant's motion to dismiss raised the question of whether this was valid service upon the corporation. The court, quoting Judge Cardozo's test enunciated in *Tauza v. Susquehanna Coal Co.*,[40] stated that "if their [the agent's] positions are such as to lead to a just presumption that notice to them will be notice to the principal, the corporation must submit. . . ."[41] The agent's position, however, must be one of importance and responsibility. The court observed that the attitude which now appears to be taking hold is that a person can be a managing agent to receive process if his duties entail the exercise of discretion in the handling of the corporation's business and he is in "constant communication with the officers."[42]

The court observed that, in light of the intent of the Legislature to simplify the method of service upon a corporation, "paramount consideration should be given to substance rather than procedural technicalities. . . ."[43] This ruling is in accord with the overall theory of the CPLR, to give primary weight to substance rather than form.[44] But note that the teller at a bank window or at a bowling alley stand is not the "cashier" or "assistant cashier" that section 311(1) contemplates.[45]

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Section 325 of the CPLR provides a procedure for transferring a properly commenced litigation in the supreme court to a court of inferior jurisdiction where the relief sought may be obtained in

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[40] 220 N.Y. 259, 115 N.E. 915 (1917).

[41] *Id.* at 269, 115 N.E. at 918.

[42] B & J Bakery, Inc. v. United States Fid. & Guar. Co., 40 Misc. 2d 839, 842, 244 N.Y.S.2d 284, 288 (Sup. Ct. 1963). To support its position the court quoted from Green v. Morningside Heights Housing Corp., 13 Misc. 2d 124, 125, 177 N.Y.S.2d 760, 761 (Sup. Ct.), *aff'd mem.*, 7 App. Div. 2d 708, 180 N.Y.S.2d 104 (1st Dep't 1958), where Mr. Justice Steuer said: "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."

[43] B & J Bakery, Inc. v. United States Fid. & Guar. Co., 40 Misc. 2d 839, 843, 244 N.Y.S.2d 284, 289 (Sup. Ct. 1963).

[44] 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 311.01 (1963).

[45] Oustecky v. Farmingdale Lanes, Inc., 246 N.Y.S.2d 859 (Sup. Ct. 1964); *cf.* Taylor v. Commercial Bank, 174 N.Y. 181, 66 N.E. 726 (1903).

the lower court. In *Stevens v. MVAIC*,[46] plaintiff sought leave to transfer the action from the supreme court to the New York City Civil Court. The action had arisen out of an alleged hit-and-run accident, and since it was brought directly against MVAIC it was governed by Section 618(a) of the Insurance Law. This section provides that the supreme court has the power to allow an action to be brought directly against MVAIC "in such court." Due to the exactness of this language, the court held that only the supreme court had jurisdiction over such a suit, and therefore removal to the civil court must be denied. Since the civil court lacked *subject matter* jurisdiction, the action could not properly have been commenced there, and hence Section 325 of the CPLR precluded any such removal.

PARTIES GENERALLY

Section 1001 — Necessary Joinder of Parties

Section 1001 of the CPLR, providing for joinder of necessary parties, essentially maintains prior practice but provides for greater flexibility in the resolution of nonjoinder problems. Subdivision (b) of the statute permits the court, under certain enumerated situations, discretion to excuse the nonjoinder of a person who ought to be a party, but over whom jurisdiction cannot be obtained.[47] The determination of whether or not to permit the action to continue without joinder of such a person will not depend on his being classified as "conditionally necessary" or "indispensable," because such language has been eliminated.

The section achieves flexibility by suggesting criteria for the court in its determination of whether or not to dismiss the action for nonjoinder. Essentially, these criteria permit the court to weigh the interests of the litigants, the absentee and the public.[48]

Two cases have recently interpreted this statute. In one,[49] the court held that an action to foreclose a second mortgage would be allowed to continue without the joinder of the first mortgagee since the rights of all the parties presently before the court could be adjudicated without his being joined. The court indicated that prior case law determining which parties were "necessary" would still be important under the CPLR.[50]

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[46] (Sup. Ct., New York County), 151 N.Y.L.J., Feb. 6, 1964, p. 12, col. 3.

[47] 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1001.01 (1964).

[48] For a discussion of these various factors, see 1957 N.Y. LEG. DOC. No. 6(b), FIRST PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 248-52 [hereinafter cited as FIRST REP.].

[49] Commercial Trading Co. v. Little N. Parkway Realty Corp., 41 Misc. 2d 472, 245 N.Y.S.2d 731 (Sup. Ct. 1963).

[50] *Ibid.*