



Columbia Law School

From the Selected Works of Hon. Gerald Lebovits

September, 2012

Drafting NY Civil-Litigation Documents: Part 18—Motions to Dismiss Cont'd

Gerald Lebovits



Available at: https://works.bepress.com/gerald_lebovits/210/

SEPTEMBER 2012

VOL. 84 | NO. 7



NEW YORK STATE BAR ASSOCIATION Journal



Conversation

About Legal Ethics
and Social Media

Edited by Gary Munneke



Also in this Issue

Lawyers in Transition

Dewey Tumbles

Legal Services Delivery

That (Might Be)
Entertainment



Drafting New York Civil-Litigation Documents: Part XVIII — Motions to Dismiss Continued

In the last issue, Part XVII of this series, the *Legal Writer* discussed motions to dismiss, specifically CPLR 3211(a)(7) motions to dismiss for failing to state a cause of action.

The *Legal Writer* discussed CPLR 3211(a)(1) through 3211(a)(6) in Parts XV and XVI of this series.

We continue with more CPLR 3211(a) grounds.

Improper Service of Process

If the basis is improper service of process, you must move to dismiss within 60 days after you've raised the objection in your answer or other responsive pleading.⁴ If you show "undue hardship," a court might extend your time.⁵ The "undue hardship" standard is strict, perhaps an even higher standard than "good cause."⁶ The 60-day

service is deficient on its face, it is insufficient to assert conclusory statements that the service of process was defective because it was not served in accordance with the CPLR.

Once you submit admissible proof to the court, the burden will shift to the plaintiff to show that service was proper. The plaintiff may submit the affidavit of service of its process server

If you move to dismiss and don't raise a CPLR 3211(a)(8) ground in the motion, you waive the jurisdictional ground. If you don't move to dismiss, you may raise your jurisdictional defense in your answer.

Personal Jurisdiction Under CPLR 3211(a)(8)

As the defendant, you may move to dismiss on the basis that the court lacks jurisdiction over your person. You might allege that (1) service of process was improper, (2) the summons was defective, or (3) you're not subject to the court's jurisdiction.¹

If you move to dismiss and don't raise a CPLR 3211(a)(8) ground in the motion, you waive the jurisdictional ground. If you don't move to dismiss, you may raise your jurisdictional defense in your answer.²

As a tactical maneuver, some defendants include the objection to personal jurisdiction as a defense in their answers instead of moving to dismiss under CPLR 3211(a)(8).³ If a court determines later in the action that personal jurisdiction is absent, the plaintiff might have little to no time to re-start the case. The timing will matter if the statute of limitations has run.

rule is strictly applied even if your adversary, the plaintiff, doesn't raise an objection in its opposition papers.⁷

Move to dismiss under CPLR 3211(a)(8) if the plaintiff failed to serve the summons and complaint on you, the defendant. Also move to dismiss if the plaintiff improperly served you. Examples of improper service include (1) service by "nail and mail" without due diligence under CPLR 308(4); (2) service by mail under CPLR 308(2) or CPLR 308(4) to an improper address; and (3) service on an unauthorized party under CPLR 311(a).

If you're contesting service, you need to set forth sufficient facts, in admissible form, of the allegedly improper service or the lack of service. Credibly and specifically refute the process server's affidavit with an affidavit from someone with personal knowledge. An affirmation from an attorney is insufficient to establish sufficient facts.⁸ Unless the affidavit of

or any other evidence in admissible form.

If the plaintiff's process server's affidavit of service indicates on its face that service wasn't effectuated correctly, a court will grant your motion.⁹ The court will not need to hold a hearing on the issue of service.

If the dueling affidavits raise a factual conflict, the court will hold a Traverse hearing: a hearing to determine whether service of process was proper. It's called a Traverse hearing because the court will "determine whether the defendant has traversed the allegations of the affidavit of service."¹⁰

Service of process in summary proceedings is even more technical than in plenary actions.¹¹ In landlord and tenant actions and proceedings, for example, consult New York Real Property Actions and Proceedings Law (RPAPL) 735, which covers service of

CONTINUED ON PAGE 58

process in summary proceedings, and CPLR Article 3, which covers service of process in plenary actions. Service of process under the RPAPL sometimes conforms to the CPLR's rules, but sometimes it doesn't. When gaps exist in the RPAPL's service rules, the CPLR fills them.

Defective Summons

A summons without a complaint or a summons without notice¹² is jurisdictionally defective.¹³ As the defendant, attack the defective summons in a motion to dismiss under CPLR 3211(a)(8). You needn't wait to be served with the complaint.

Before moving to dismiss on the basis of a defective summons, consider your options.¹⁴ Move to dismiss on the basis of a defective summons if the summons is bare and the statute of limitations has run. If the statute of limitations hasn't run, the plaintiff may recommence the action, even if the summons is defective. Even with the defect, a plaintiff's summons might constitute a summons with notice. In that case, you might want to move under CPLR 3012(b) to demand a complaint. Once you receive the complaint, you may move to dismiss the complaint on all possible grounds. If you move to dismiss on the basis of a defective summons and the court rules against you, you won't be able to move to dismiss under CPLR 3211(a) again once you receive the complaint.

CPLR 305(a) explains the information that a summons must contain: "A summons shall specify the basis of the venue designated and if based upon the residence of the plaintiff it shall specify the plaintiff's address, and also shall bear the index number assigned and the date of filing with the clerk of the court." A summons that's missing this information isn't jurisdictionally defective. If you move to dismiss on the basis that the summons is missing this information, a court might deny your motion if the plaintiff cross-moves to amend.

The court might allow the plaintiff to amend the summons nunc pro tunc to include the missing information. Consult CPLR 305(a) for information required in a third-party summons and a summons in a consumer-credit case.

If you're contesting service, you need to set forth sufficient facts, in admissible form, of the allegedly improper service or the lack of service.

Court Has No Jurisdiction Over the Defendant

A plaintiff may serve a defendant outside New York if the defendant is a New York domiciliary or is subject to the jurisdiction of the courts of New York under CPLR 301 or 302.¹⁵

If you, the defendant, were served outside New York, you may move to dismiss under CPLR 3211(a)(8). You may argue that you're not subject to the court's jurisdiction. The basis for your motion is that you're not a New York domiciliary or you're challenging jurisdiction under CPLR 301 or 302.¹⁶ CPLR 302, New York's long-arm statute, sets out the minimum contacts you may have in New York that might give the court personal jurisdiction over you.

Once you've moved to dismiss, the plaintiff in opposition to your motion must show that your contacts with New York give the court personal jurisdiction over you. The court will hold a hearing to determine the issue of jurisdiction if conflicting facts exist between your affidavits and the plaintiff's affidavits.¹⁷ The court might allow disclosure on the issue if it finds that disclosure is appropriate.¹⁸

In Rem and Quasi in Rem Jurisdiction Under CPLR 3211(a)(9)

When you, the defendant, are served outside New York because a res (person, property, or status) is in New York, you may move to dismiss under CPLR 3211(a)(9) on the basis that the res doesn't "give the court jurisdiction over the controversy raised in the action."¹⁹

Invoke in rem jurisdiction "when the plaintiff brings an action that seeks to determine the right to ownership or possession interests in property located in New York."²⁰

Invoke quasi in rem jurisdiction when the plaintiff seeks money and attaches your New York property to obtain personal jurisdiction over you.²¹

When the plaintiff serves you under CPLR 314 or 315, move to dismiss under CPLR 3211(a)(9).

CPLR 314(1)

Under CPLR 314(1), a plaintiff may serve you outside the state of New York and obtain jurisdiction in a matrimonial action: an action for a divorce, separation, or annulment or for a declaration about the validity of a marriage.²² For jurisdiction, "[i]t is sufficient that the plaintiff spouse is a domiciliary of New York."²³ The theory behind this is that the res — the marital status — is located where one of the parties to the marriage is domiciled. The plaintiff must serve the defendant spouse "wherever he or she may be located in order to satisfy the notice requirement of due process."²⁴ The courts of the state where the marital status is located have "power to confirm or alter the status."²⁵

The plaintiff's New York domicile alone won't provide a sufficient basis for a court to award alimony, maintenance, or support. To obtain monetary relief, the plaintiff will have to obtain "in personam jurisdiction over the defendant, or the defendant must have property within the state over which the court may exercise its power."²⁶ The plaintiff will obtain in personam jurisdiction by serving the defendant in New York or by serving the defendant anywhere if the defen-

dant is a New York domiciliary or by serving the defendant under CPLR 302(b), New York's long-arm jurisdiction statute.²⁷

A plaintiff may also obtain quasi in rem jurisdiction over a defendant spouse's property located in New York.²⁸

CPLR 314(2)

Under CPLR 314(2), a plaintiff may serve a summons and complaint (or summons with notice) outside New York and obtain jurisdiction when the plaintiff "demand[s] that the person to be served be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state." CPLR 314(2) also

tiff's claim to that property, gives the court "power to alter the defendant's interest in the property."³² This is all premised on whether the defendant is properly served even though the defendant is located somewhere other than New York.³³

The last sentence of CPLR 314(2) refers to interpleader actions. Interpleader actions may "be predicated on in rem jurisdiction where conflicting claims are made to specific property held by a third party in New York."³⁴

CPLR 314(3)

A plaintiff will obtain quasi in rem jurisdiction over a nondomiciliary defendant when the plaintiff has a claim for money damages and has no basis in

A plaintiff cannot obtain jurisdiction over an out-of-state defendant who has property in New York unless a nexus exists between the New York property and the plaintiff's cause of action with the defendant.⁴⁰ When a plaintiff invokes quasi in rem jurisdiction, a court will inquire about "the presence or absence of the constitutionally mandated minimum contacts"⁴¹ — a fact-specific inquiry.

CPLR 315

CPLR 315 explains service by publication. Service by publication is constructive — not actual — notice of an action. You, the plaintiff, must first diligently attempt service on the defendant by one of the CPLR's conventional service

Invoke quasi in rem jurisdiction when the plaintiff seeks money and attaches your New York property to obtain personal jurisdiction over you.

provides that the plaintiff may obtain jurisdiction when the plaintiff seeks to enforce, regulate, define or limit "an interest or lien in favor of either party; or otherwise affecting the title to such property, including an action of interpleader or defensive interpleader." In plain English, CPLR 314(2) describes actions in which in rem jurisdiction permits plaintiffs to effectuate service of process on defendants outside New York.

The Appellate Division, First Department, defined in rem jurisdiction well: "In rem jurisdiction . . . involves an action in which a plaintiff is after a particular thing, rather than seeking a general money judgment, that is, he wants possession of the particular item of property, or to establish his ownership or other interest in it, or to exclude the defendant from an interest in it."²⁹

The property — "specific real or personal property" — on which the plaintiff is seeking an interest or lien must be in New York.³⁰ The subject matter of the plaintiff's action is the New York property.³¹ The New York property, together with the plain-

which to obtain in personam jurisdiction over the defendant, but attaches the defendant's New York property. Thus, the plaintiff brings the defendant's New York property within the "court's power."³⁵ Under CPLR 314(3), a plaintiff may serve a defendant outside New York and obtain jurisdiction when the defendant's property has been attached or seized in New York.

Assuming that the plaintiff obtains quasi in rem jurisdiction and that the plaintiff wins the case, the court will apply the defendant's attached property to satisfy the plaintiff's judgment.³⁶ The plaintiff's judgment "is unenforceable beyond the value of the attached property even if the defendant appears in the action and defends the case on the merits."³⁷

The rules for attachment are in CPLR Article 62. As the plaintiff, you'll need to obtain an order of attachment from a court and then arrange for a sheriff or marshal to levy upon the defendant's property.³⁸ When you're attaching a defendant's property to obtain jurisdiction over the defendant, the levy must precede the service of process.³⁹

methods. You must exhaust all the potential service methods, including seeking an ex parte court order under CPLR 308(5) when effectuating service is "impracticable." According to CPLR 308(5), service will be effectuated "in such manner as the court, upon motion without notice, directs." If all fails, obtain a court order before serving by publication. The court must find that you could not have served the defendant "by another prescribed method with due diligence."⁴²

Moving to Dismiss Under Both CPLR 3211(a)(8) and (a)(9)

If you're in doubt about the kind of jurisdiction the plaintiff is asserting, move to dismiss under both CPLR 3211(a)(8) and (a)(9). Invoking both grounds is a precautionary measure.⁴³ Include in your motion a request that the court specify in its order the jurisdiction — in personam, in rem, or quasi in rem — the court is sustaining.⁴⁴ Ensuring that the court's disposition is clear is important because "[d]ifferent consequences, involving the law of

CONTINUED ON PAGE 60

appearances, append to different conduct of a defendant following disposition of a jurisdictional motion.”⁴⁵

Absence of Indispensable Party, CPLR 3211(a)(10)

Consult CPLR 1001 and CPLR 1003 before moving to dismiss under CPLR 3211(a)(10).

A court’s dismissal of a case under CPLR 3211(a)(10) is “rare.”⁴⁶

If you move to dismiss under CPLR 3211(a)(10), a court will have to determine whether the party is a necessary party under CPLR 1001(a). The court will then determine whether that party can be joined under CPLR 1001(b). The court might order the plaintiff to join that party to the action.

If that party cannot be joined, the court will determine whether nonjoinder is excused under CPLR 1001(b).

The court might dismiss the action for absence of an indispensable party if the party is necessary and joinder isn’t excused. A party is “indispensable” if a necessary party cannot be made a party to the action and if the action cannot proceed in the party’s absence.⁴⁷

Dismissal Under CPLR 3211(a)(11) Because of Immunity Under the Not-for-Profit Corporation Law

Unpaid officers and directors of not-for-profit corporations have immunity for any activity they’ve performed for the corporation unless the activity amounts to gross negligence or they’ve carried out the activity with the intent to harm the plaintiff.⁴⁸

Move to dismiss under CPLR 3211(a)(11) if you’re a member of the protected class under the Not-for-Profit Corporation Law and if the plaintiff’s complaint doesn’t allege gross negligence or intent to harm.

If you demonstrate that you’re a member of the protected class, the burden shifts to the plaintiff to offer admissible evidence of gross negligence or intent to harm.

The court will dismiss the case if the plaintiff fails to meet its burden. If the plaintiff meets its burden, the court may resolve the issue of immunity at trial.⁴⁹

In the *Journal’s* next issue, the *Legal Writer* will continue with one more column on motions to dismiss and then, in later columns, discuss drafting summary-judgment motions. ■

1. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, *New York Civil Practice Before Trial* § 36:130, at 36-19 (2006; Dec. 2009 Supp.).
2. CPLR 3211(e).
3. David D. Siegel, *New York Practice* § 266, at 464 (5th ed. 2011).
4. CPLR 3211(e).
5. *Id.*
6. Siegel, *supra* note 3, at § 266, at 464 (citing *Abitol v. Schiff*, 180 Misc. 2d 949, 951, 691 N.Y.S.2d 753, 755 (Sup. Ct. Queens County 1999)).
7. Barr et al., *supra* note 1, § 36:153, at 36-20 (citing *Wiebusch v. Bethany Memorial Reform Church*, 9 A.D.3d 315, 315, 781 N.Y.S.2d 6, 7 (1st Dep’t 2004)).
8. *Id.* § 36:151, at 36-19.
9. *Id.* § 36:152, at 36-20.
10. *Id.*
11. See generally Gerald Lebovits & Matthias W. Li, *Service of Process and Traverse Hearings in Landlord-Tenant Actions and Proceedings*, 34 N.Y. Real Prop. L.J. 32, 32 (Spring 2006).
12. See Part I of this series on litigation documents for more information on summons and a complaint and summons with notice: *Drafting New York Civil-Litigation Documents: Part I — An Overview*, 82 N.Y. St. B.J. 64, 54–55 (Sept. 2010).
13. CPLR 305(b).
14. Barr et al., *supra* note 1, § 36:140, at 36-19.
15. CPLR 313.
16. Barr et al., *supra* note 1, § 36:160, at 36-20.
17. *Id.* at § 36:162, at 36-20.
18. *Id.* (citing *Cerchia v. V.A. Mesa, Inc.*, 191 A.D.2d 377, 378, 595 N.Y.S.2d 212, 213 (1st Dep’t 1993) (holding that Supreme Court improperly granted defendant’s motion to dismiss on jurisdictional grounds before letting plaintiff conduct disclosure on the issue)).
19. *Id.* § 36:130, at 36-19.
20. *Id.* § 36:170, at 36-20.
21. *Id.* § 36:170, at 36-20, 36-21.
22. CPLR 105(p).
23. CPLR 314 cmt. 314:2 at 45 (citing Restatement (Second) of Conflict of Laws § 71 (1971); *Carr v. Carr*, 46 N.Y.2d 270, 273, 413 N.Y.S.2d 305, 307, 385 N.E.2d 1234, 1236 (1978)).
24. CPLR 314 cmt. 314:2 at 45 (citing CPLR 313, 315; N.Y. Dom. Rel. Law § 232; Restatement (Second) of Conflict of Laws § 69 (1971)).

25. CPLR 314 cmt. 314:2 at 45 (citing *Geary v. Geary*, 272 N.Y. 390, 399, 6 N.E.2d 67, 71 (1936); *Rodgers v. Rodgers*, 32 A.D.2d 558, 559, 300 N.Y.S.2d 275, 277 (2d Dep’t 1969)).

26. CPLR 314 cmt. 314:2 at 45 (citing Restatement (Second) of Conflict of Laws § 77(1)).

27. CPLR 314 cmt. 314:2 at 45–46.

28. CPLR 314 cmt. 314:2 at 46 (citing N.Y. Dom. Rel. Law § 233 (sequestration)). One commentator noted that section 233 “provides quasi in rem jurisdiction and a financial remedy in situations where the defendant could not be personally served with process; it is not available as a means to preserve marital assets.” N.Y. Dom. Rel. Law § 233 cmt. at 420.

29. CPLR 314 cmt. 314:3 at 47 (quoting *Majique Fashions, Ltd. v. Warwick & Co.*, 67 A.D.2d 321, 326, 414 N.Y.S.2d 916, 920 (1st Dep’t 1979)).

30. CPLR 314 cmt. 314:3 at 47.

31. *Id.*

32. *Id.*

33. CPLR 313.

34. CPLR 314 cmt. 314:3 at 47.

35. CPLR 314 cmt. 314:4 at 50.

36. *Id.*

37. *Id.* (citing CPLR 320(c)(1)).

38. *Id.* 314:4 at 50.

39. *Id.* (citing *Nemetsky v. Banque de Developpement de la Republique du Niger*, 48 N.Y.2d 962, 964, 425 N.Y.S.2d 277, 277, 401 N.E.2d 388, 388 (1979)).

40. Barr et al., *supra* note 1, § 36:173, at 36-21 (citing *Banco Ambrosiano S.P.A. v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 72–74, 476 N.Y.S.2d 64, 67–69, 464 N.E.2d 432, 435–37 (1984); *contra Landoil Resources Corp. v. Alexander & Alexander Services, Inc.*, 77 N.Y.2d 28, 33–37, 563 N.Y.S.2d 739, 741–43, 565 N.E.2d 488, 490–92 (1990)).

41. CPLR 314 cmt. 314:4 at 52 (quoting *Banco Ambrosiano S.P.A.*, 62 N.Y.2d at 72, 476 N.Y.S.2d at 67, 464 N.E.2d at 435 (holding that sufficient relationship existed among the defendant, the state, and the cause of action to satisfy due process)).

42. CPLR 315 cmt. at 69.

43. Siegel, *supra* note 3, at § 267, at 465.

44. *Id.*

45. *Id.*

46. *Id.*

47. Barr et al., *supra* note 1, § 36:280, at 36-26.

48. *Id.* at § 36:490, at 36-37 (noting Not-for-Profit Corporation Law § 720-a).

49. *Id.* at § 36:491, at 36-37 (citing *Brown v. Albany Citizens Council on Alcoholism, Inc.*, 199 A.D.2d 904, 906, 605 N.Y.S.2d 577, 579 (3d Dep’t 1993)).

GERALD LEOVITS, a New York City Civil Court judge, teaches part time at Columbia, Fordham, and NYU law schools. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits’s email address is GLebovits@aol.com.