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# CPLR 305(b): Summons Accompanied by Neither Complaint nor 305(b) Notice Constitutes Jurisdictional Defect that Can Deprive Plaintiff of Extension under CPLR 205(a)

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## CIVIL PRACTICE LAW AND RULES

### *CPLR 305(b): Summons accompanied by neither complaint nor 305(b) notice constitutes jurisdictional defect that can deprive plaintiff of extension under CPLR 205(a)*

Under New York law an action may be commenced and personal jurisdiction acquired by the service of a summons upon a defendant.[1] Section 305(b) of the CPLR makes it clear that a summons served without a complaint is effective provided it contains a notice that specifies the nature of the action and the relief sought.[2]

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[1] CPLR 304 (1972); *see* Erickson v. Macy, 236 N.Y. 412, 414-15, 140 N.E. 938, 939 (1923); Copper v. Prokos, 51 Misc. 2d 757, 758, 273 N.Y.S.2d 890, 891 (Sup. Ct. Suffolk County 1966); *see also* SIEGEL §§ 59-60, at 61; 1 WK&M ¶ 301.04, at 3-11 (1984); Farell, *Civil Practice*, 32 SYRACUSE L. REV. 75, 92 (1982) (service of summons commences action). *See generally* Homburger & Laufer, *Appearance and Jurisdictional Motions in New York*, 14 BUFFALO L. REV. 374, 393-95 (1964-1965) (discussion of history of service of summons without complaint). Section 304 of the CPLR "states the fundamental rule that no action . . . is commenced until jurisdiction is acquired." CPLR 304, commentary at 162 (1972); *see* McMullen v. Arone, 79 App. Div. 2d 496, 499, 437 N.Y.S.2d 373, 375 (2d Dep't 1981). The purpose of a summons is to notify the defendant that a judgment is being sought against him and to afford him the opportunity to take any steps necessary to protect his rights and interests. Stuyvesant v. Weil, 167 N.Y. 421, 425, 60 N.E. 738, 739 (1901); Connell v. Hayden, 83 App. Div. 2d 30, 35-36, 443 N.Y.S.2d 383, 389 (2d Dep't 1981). Giving such notice is a fundamental requirement of the Due Process Clause of the 14th amendment. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); *Connell*, 83 App. Div. 2d at 36, 443 N.Y.S.2d at 389; *see also* SIEGEL §§ 58-59, at 59-60 (other requirements, opportunity to be heard and jurisdictional basis). For a further discussion of the relationship between the service of a summons and due process, see *infra* note 43 & text accompanying notes 42-43.

[2] CPLR 305(b) (McKinney Supp. 1983-1984). Section 305(b) provides:

> If the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought, and, except in an action for medical malpractice, the sum of money for which judgment may be taken in case of default.

*Id.*

The 1963 version of 305(b) provided that for default judgment purposes a summons could be served without a complaint if the claim was for a sum certain and a notice stating that sum accompanied the summons. CPLR 305(b) (1963) (current version as amended at CPLR 305(b) (McKinney Supp. 1983-1984)); *see The Biannual Survey*, 40 ST. JOHN'S L. REV. 125, 138 (1965); *infra* notes 25-27 & accompanying text. This version of 305(b) was amended in 1965, *see* ch. 749, § 1, [1965] N.Y. Laws 1783, to provide a plaintiff with the opportunity to secure a default judgment for unliquidated damages without serving a complaint, provided the summons was accompanied with an object notice. *See* CPLR 305(b) (1972); *id.*, commentary at 177; *see also* 1 WK&M ¶ 305.12, at 3-171 (1984); McLaughlin, *Civil Practice*, 17 SYRACUSE L. REV. 331, 334-35 (1965); *infra* notes 32-34 & accompanying text. It was noted at the time of the amendment that the change was compelled by the requirements of the default mechanism. *See, e.g.*, CPLR 305, commentary at 177 (1972); McLaughlin, *supra*, at 334-35. For a further discussion on this version of 305(b), see *infra* notes 28-33 & accompanying text. The current version of 305(b) was enacted in 1978, *see* ch.

Nevertheless, it was unclear whether a summons served with neither a complaint nor a 305(b) notice was effective.[3] Recently,

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528, § 1, [1978] N.Y. Laws, in an attempt to remove the snare that the prior version had created, *see* CPLR 305, commentary at 132 (McKinney Supp. 1983-1984); *id.* 3012, commentary at 123; FIFTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1977), in TWENTY-THIRD ANN. REP. N.Y. JUD. CONFERENCE 273 (1978). The difficulty with the 1965 amendment arose because of the permissive language contained in the statute itself, *see* CPLR 305(b) (1972), and the mandatory dictates of CPLR 3215(e), *see* CPLR 3215(e) (1970) (current version as amended at CPLR 3215(e) (McKinney Supp. 1983-1984)). For a more complete discussion, see *infra* notes 34-36 & accompanying text.

[3] An examination of existing New York case law reveals the confusion surrounding the validity of service of a bare summons. One view espouses that service of a bare summons will be ineffective solely for purposes of default proceedings, *see, e.g.*, Nuez v. Diaz, 101 Misc. 2d 399, 401, 421 N.Y.S.2d 770, 771 (Sup. Ct. Monroe County 1979); Schoonmaker v. Ford Motor Co., 99 Misc. 2d. 1095, 1095, 418 N.Y.S.2d 288, 289 (Sup. Ct. Ulster County 1979), *aff'd*, 79 App. Div. 2d 1067, 435 N.Y.S.2d 393 (3d Dep't 1981), while the other takes the position that such a summons is a jurisdictional defect that fails to commence an action, *see, e.g.*, Ciaschi v. Town of Enfield, 86 App. Div. 2d 903, 904, 448 N.Y.S.2d 267, 269 (3d Dep't 1982); Limpert v. Garland, 100 Misc. 2d 525, 526, 419 N.Y.S.2d 863, 864 (Sup. Ct. Erie County 1979) (failure to comply with 305(b) a jurisdictional defect); *see also* Premo v. Cornell, 71 App. Div. 2d 223, 224, 423 N.Y.S.2d 64, 65 (3d Dep't 1979) (dictum). *But see* Wagenknecht v. LoRusso, 121 Misc. 2d 45, 46, 467 N.Y.S.2d 532, 533 (Sup. Ct. Nassau County 1983) (defective 305(b) notice constitutes mere irregularity and does not divest court of jurisdiction over defendant).

In *Nuez*, the defendant made a motion to vacate a default judgment claiming that the court lacked jurisdiction to render the judgment since the summons served by the plaintiff failed to recite in sufficient detail the nature of the action and the amount of relief requested. 101 Misc. 2d at 401, 421 N.Y.S.2d at 771. The court held that "the failure to set forth a specific amount requested as damages is jurisdictional and precludes the *entry of default judgment*." *Id.* (emphasis added). In *Schoonmaker*, the 305(b) notice sent by the plaintiff failed to comply with the statutory standards prescribed for such notice, 99 Misc. 2d at 1095, 418 N.Y.S.2d at 289, hence, the defendant contended that such a failure required a jurisdictional dismissal of the action, *id.* at 1096, 418 N.Y.S.2d at 289. The court held that since the summons itself was proper, it was ineffective only for the purpose of entering a default judgment, and since no default had occurred, the bare summons properly commenced the action. *Id.*

In *Ciaschi*, the plaintiff tried to commence an action by the service of a summons without the required 305(b) notice. 86 App. Div. 2d at 903, 448 N.Y.S.2d at 269. The court held that the lack of notice was a jurisdictional defect rendering the summons insufficient both to obtain jurisdiction over the defendant and to commence the action. *Id.* at 904, 448 N.Y.S.2d at 269. The plaintiff in *Premo* served a summons with a notice that stated the nature of the plaintiff's action, but failed to state the amount to be recovered in case of default. 71 App. Div. 2d at 223, 423 N.Y.S.2d at 65. The court, although holding that the lack of the ad damnum was merely an irregularity that could be amended, *id.* at 224-25, 423 N.Y.S.2d at 65, stated, in dicta, that absent the 305(b) notice, the summons is jurisdictionally void, *id.* at 224, 423 N.Y.S.2d at 65. The *Premo* dicta was adopted in Wilson v. Metropolitan Property Liab. Ins. Co., 114 Misc. 2d 992, 453 N.Y.S.2d 138 (Sup. Ct. Nassau County 1982), in which the court held that when a summons is missing all three elements of the mandated 305(b) notice, it is jurisdictionally void, leaving a court without jurisdiction over the defendant. *Id.* at 994-95, 453 N.Y.S.2d 882 at 140.

however, in *Parker v. Mack*,[4] the Court of Appeals held that the service of a "bare summons" constituted a jurisdictional defect that prevented the commencement of an action[5] and, therefore, precluded the availability of the 6-month extension provided by CPLR section 205(a).[6]

In *Parker*, the plaintiff wife was injured when her car collided with the defendant's automobile.[7] One day before the statute of limitations was to expire, two summonses unaccompanied by complaints were served on the defendant.[8] Neither summons, however, contained, nor had attached thereto, the required 305(b) notice.[9] Thereafter, complaints were forwarded to the defendant's attorneys, who returned them and moved to dismiss on the ground that the summonses were jurisdictionally defective.[10] Rather than oppose the motion to dismiss, the plaintiffs cross-moved for an additional 6 months in which to recommence the action pursuant to CPLR 205(a).[11] Special term granted both defendant's motion to dismiss and plaintiffs' 205(a) extension request.[12] The Appellate

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[4] 61 N.Y.2d 114, 460 N.E.2d 1316, 472 N.Y.S.2d 882 (1984).

[5] *Id.* at 115, 460 N.E.2d at 1316, 472 N.Y.S.2d at 882.

[6] *Id.* at 115-16, 460 N.E.2d at 1316, 472 N.Y.S.2d at 882; *see* CPLR 205(a) (McKinney Supp. 1983-1984). Section 205(a) provides in pertinent part:

> If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction . . . within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action.

*Id.* For a plaintiff to be able to invoke this provision, a prior action must have been commenced. *See infra* notes 39-41 & accompanying text. For a complete discussion of 205(a), see *infra* notes 37-44 & accompanying text.

[7] 61 N.Y.2d at 120, 460 N.E.2d at 1319, 472 N.Y.S.2d at 885 (Meyer, J., dissenting).

[8] *Id.* at 116, 460 N.E.2d at 1316, 472 N.Y.S.2d at 882. The first summons served upon the defendant was for an action by Mrs. Parker, the second for an action by her husband. *Id.* at 120, 460 N.E.2d at 1319, 472 N.Y.S.2d at 885 (Meyer, J., dissenting).

[9] *Id.* (Meyer, J., dissenting). Each summons set forth the name and address of the plaintiff together with the name, address, and telephone number of the plaintiffs' attorney. *Id.* (Meyer, J., dissenting). The summonses called upon the defendant to serve a notice of appearance within 20 days or a judgment by default would be taken against him for the relief demanded in the complaint. *Id.* (Meyer, J., dissenting).

[10] *Id.* at 116, 460 N.E.2d at 1316, 472 N.Y.S.2d at 882.

[11] *Id.* at 116, 460 N.E.2d at 1317, 472 N.Y.S.2d at 882-83. The reason the plaintiffs cross-moved for the inclusion of a 205(a) provision was because the statute of limitations on the negligence action already had expired. *Id.*

[12] *Id.* at 116, 460 N.E.2d at 1317, 472 N.Y.S.2d at 883. Special term concluded that a summons served without the 305(b) mandated notice was not a jurisdictional defect and therefore did not prevent the actions from being commenced. *Id.*

Division, Third Department, modified the special term decision by reversing that part of the order granting plaintiffs' 205(a) cross-motion.[13]

On appeal, the Court of Appeals affirmed, stating that no action can be commenced by the service of a bare summons.[14] The majority[15] reaffirmed a prior holding of the Court[16] and asserted that the imperative language of 305(b) mandates that to commence an action, a summons must contain at least a 305(b) notice.[17] Judge Jones therefore concluded that the plaintiff was precluded from invoking the benefits of 205(a) since, due to the defective service, the earlier action had not been timely commenced.[18]

Dissenting, Judge Meyer contended that the majority's holding, based upon a one word change in 305(b) effected by a 1978 amendment,[19] evidenced a complete disregard of the legislative

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[13] *Id.* at 116-17, 460 N.E.2d at 1317, 472 N.Y.S.2d at 883. The Appellate Division, Third Department, held that the service of a bare summons neither conferred jurisdiction over the defendant nor constituted the timely commencement of an action. *Id.* at 117, 460 N.E.2d at 1317, 472 N.Y.S.2d at 883.

[14] *Id.* at 115, 119, 460 N.E.2d 1316, 1318, 472 N.Y.S.2d at 882, 884.

[15] Judge Jones wrote the opinion of the Court in which Chief Judge Cooke and Judges Wachtler and Kaye concurred. Judge Meyer wrote a dissenting opinion in which Judge Jasen concurred. Judge Simons took no part in the decision.

[16] 61 N.Y.S.2d at 117, 460 N.E.2d at 1317, 472 N.Y.S.2d at 883; *see* Markoff v. South Nassau Community Hosp., 61 N.Y.2d 283, 286, 288, 461 N.E.2d 1253, 1254-55, 473 N.Y.S.2d 766, 767-68 (1984). In *Markoff*, the Court of Appeals held that when an action is dismissed for lack of personal jurisdiction because the summons was either defective or never served, 205(a) will be unavailable because the action never was commenced within the meaning of 205(a). 61 N.Y.2d at 288, 461 N.E.2d at 1254-55, 473 N.Y.S.2d at 767-68. The Court premised its holding in *Markoff* on the fact that "[a]n action will not be deemed 'commenced,' . . . until there has been proper service of a summons upon a defendant in compliance with the appropriate method prescribed by the CPLR." *Id.* at 286, 461 N.E.2d at 1254, 473 N.Y.S.2d at 767; *see Parker*, 61 N.Y.2d at 117, 460 N.E.2d at 1317, 472 N.Y.S.2d at 883. In so holding, the *Markoff* Court noted that it was not creating a new exception to 205(a), but was merely recognizing that a timely commenced action is a condition precedent to the use of 205(a). *Markoff*, 61 N.Y.2d at 288, 461 N.E.2d at 1255, 473 N.Y.S.2d at 768; *see infra* notes 39-40 & accompanying text.

[17] 61 N.Y.2d at 117, 460 N.E.2d at 1317, 472 N.Y.S.2d at 883.

[18] *Id.* at 115-17, 460 N.E.2d at 1316-17, 472 N.Y.S.2d at 882-83.

The Court also reasoned that the legislative intent behind the amendment of 305(b) was to acknowledge a defendant's right to information concerning the claim being asserted against him. *Id.* at 117-18, 460 N.E.2d at 1317, 472 N.Y.S.2d at 883. The majority noted that requiring the plaintiff to give a 305(b) notice along with the summons would impose no burden or hardship. *Id.* In rebuttal to the assertion in the dissent that a bare summons would be a jurisdictional defect solely for the purposes of default judgments, Judge Jones stated that if the legislature intended such an effect it would have provided for it in the statute expressly. *Id.* at 118, 460 N.E.2d at 1317-18, 472 N.Y.S.2d at 883-84.

[19] *Compare* CPLR 305(b) (1972) (summons "may" contain) *with* CPLR 305(b) (McKinney Supp. 1983-1984) (summons "shall" contain).

history of the amendment.[20] Judge Meyer asserted that the legislative history of the 1978 amendment indicates that it was adopted to alleviate the confusion surrounding default judgments and to establish that deviations from the 305(b) notice requirements would constitute jurisdictional defects only for purposes of default proceedings.[21] The dissent, moreover, asserted that the broad, remedial, and liberal purpose of the tolling provision of 205(a) precludes a narrow construction of that section.[22] Judge Meyer also noted that the majority's holding was incompatible with CPLR 304 and 305(c) because the court, in its discretion, is empowered to allow an amendment of a summons.[23] Lastly, the dissent asserted that the majority's holding was contrary to the express directive of the CPLR that it is to be liberally construed.[24]

It is submitted that the Court's interpretation of 305(b) as a jurisdictional requirement to the commencement of an action is inconsistent with the true purpose of the statute, which is to ensure compliance with default procedure.

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[20] 61 N.Y.2d at 119, 460 N.E.2d at 1318, 472 N.Y.S.2d at 884 (Meyer, J., dissenting).

[21] *Id.* at 121-23, 460 N.E.2d at 1320-21, 472 N.Y.S.2d at 886-87 (Meyer, J., dissenting). For a discussion of the historical development of and the intent behind 305(b), see *infra* notes 25-36 & accompanying text.

[22] 61 N.Y.2d at 123-25, 460 N.E.2d at 1321-22, 472 N.Y.S.2d at 887-88 (Meyer, J., dissenting). The dissent, quoting Judge Cardozo, stated:

> The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts.

*Id.* at 123-24, 460 N.E.2d at 1321, 472 N.Y.S.2d at 887 (Meyer, J., dissenting) (quoting Gaines v. City of New York, 215 N.Y. 533, 539, 109 N.E. 594, 596 (1915)) (emphasis omitted).

[23] 61 N.Y.2d at 126-27, 460 N.E.2d at 1322-23, 472 N.Y.S.2d at 888-89 (Meyer, J., dissenting). Judge Meyer, after noting that an action is commenced and jurisdiction acquired by service of a summons, *id.* at 126, 460 N.E.2d at 1323, 472 N.Y.S.2d at 888 (Meyer, J., dissenting); *see supra* note 1 & accompanying text, suggested that to classify a bare summons as no summons "is to ignore the fact that '[t]he object of the summons is to apprise the . . . defendant that the plaintiff . . . seeks a judgment against him so that he may take such steps as may seem advisable to protect his interests . . . ,'" 61 N.Y.2d at 126, 460 N.E.2d at 1323, 472 N.Y.S. at 888 (Meyer, J., dissenting) (quoting Stuyvesant v. Weil, 167 N.Y. 421, 425, 60 N.E. 738, 739 (1901)); *see supra* note 1. Judge Meyer also noted that under the terms of CPLR 305(c) courts are granted broad discretion to allow an amendment to the summons, which, he asserted, indicates a legislative intent for a liberal rather than a restrictive reading of that subdivision. 61 N.Y.2d at 126-27, 460 N.E.2d at 1323, 472 N.Y.S.2d at 889 (Meyer, J., dissenting).

[24] 61 N.Y.2d at 128-29, 460 N.E.2d at 1324, 472 N.Y.S.2d at 890 (Meyer, J., dissenting); *see, e.g.*, CPLR 104 (1972).

In its 1963 form,[25] 305(b) enabled a plaintiff to obtain a default judgment for a sum certain without service of a complaint provided the summons was accompanied by a default notice.[26] The default notice was essential because the absence of both a complaint and a default notice precluded the entry of a default judgment.[27] 305(b) was amended in 1965[28] solely to provide a plaintiff who claimed unliquidated damages the opportunity to secure a default judgment.[29] The amended statute would permit the entry of a

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[25] CPLR 305(b) (1963) (current version as amended at CPLR 305(b) (McKinney Supp. 1983-1984)). In 1963, CPLR 305(b) provided:

> If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, and the complaint is not served with the summons, the plaintiff may serve with the summons, a notice stating the sum of money for which judgment will be taken in case of default.

*Id.*

[26] *Id.*; *see* Everitt v. Everitt, 4 N.Y.2d 13, 16, 148 N.E.2d 891, 893, 171 N.Y.S.2d 836, 838 (1958); CPLR 305, commentary at 177 (1972); CPLR 305, commentary at 454 (1963); *see also The Biannual Survey*, *supra* note 2, at 138 (discussion of 1965 amendment of 305(b)). The 1963 version of 305(b) differed from pre-CPLR versions in that default notices could be used in any action involving a sum certain and were not limited only to contract actions. *See* CPLR 305, commentary at 454 (1963). The primary value of the default notice was that it enabled the plaintiff to enter a default judgment with the clerk of the court without application to the court. *Id.*; CPLR 305, commentary at 177 (1972).

[27] CPLR 3215(e) (1970); *see* Malone v. Citarella, 7 App. Div. 2d 871, 871, 182 N.Y.S.2d 200, 201 (2d Dep't 1959). CPLR 3215(e) provides in pertinent part:

> On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 . . . .

CPLR 3215(e) (1970 & Supp. 1983-1984). This section prohibits the entry of a default judgment when the summons is unaccompanied by a complaint or a 305(b) notice. *See* Mantell v. Servidone Constr. Corp., 61 App. Div. 2d 1071, 1071, 403 N.Y.S.2d 141, 142 (3d Dep't 1978); CPLR 305, commentary at 177 (1972); CPLR 3012, commentary at 123 (McKinney Supp. 1984-1984); *see also* McLaughlin, *supra* note 2, at 334-35 (originally 305(b) did not address whether a default judgment could be entered on a naked summons). A default judgment entered without a 305(b) notice was considered a nullity and void for any purpose. *See Malone*, 7 App. Div. 2d at 871, 182 N.Y.S.2d at 201.

[28] Ch. 749, § 1, [1965] N.Y. Laws 1783-84 (CPLR 305(b) prior to 1978 amendment). The version of 305(b) as amended in 1965 provided:

> If the complaint is not served with the summons, the summons may contain or have attached thereto a notice stating the object of the action and the relief sought, and, in an action for a sum certain or for a sum which can by computation be made certain, the sum of money for which judgment will be taken in case of default.

CPLR 305(b) (1972) (current version as amended at CPLR 305(b) (McKinney Supp. 1983-1984)).

[29] *See* CPLR 305(b), commentary at 177 (1972); 1 WK&M ¶ 305.12, at 3-171 (1984); McLaughlin, *supra* note 2, at 334-35. Under the pre-1965 version of 305(b), there was no opportunity for the plaintiff to enter a default judgment when no complaint was served with the summons and a default notice was unavailable because the damages were not computa-

default judgment provided the plaintiff served an "object notice"[30] along with the summons.[31] Notwithstanding the permissive "may" language of the 1965 amendment,[32] it generally was believed that inclusion of an object notice with a summons was necessary to preserve the right to a default judgment.[33] In an effort to remove the confusion resulting from the permissive language of the statute,[34]

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ble. *See* CPLR 305(b), commentary at 177 (1972); McLaughlin, *supra* note 2, at 335. As one commentator noted, "[p]rior to the 1965 amendment . . . it was apparently impossible for a plaintiff who had commenced his action by service of a summons alone to enter a default judgment . . . certainly an anomaly when a plaintiff was supposedly entitled to commence an action by serving a summons alone." CPLR 305, commentary at 177 (1972). The amended version afforded a plaintiff in any action the opportunity to secure a default judgment by the service of a summons and an object notice. *See id.* 305(b); 1 WK&M ¶ 305.12, at 3-171 (1984).

[30] *See* CPLR 305, commentary at 177 (1972). An object notice consists of a general statement concerning the subject matter of the action and the relief sought. *Id.* A default notice, on the other hand, is limited to actions for a sum certain and states the actual amount that the plaintiff would take if the defendant defaulted. *Id.* The most significant distinction between default and object notices is that the latter do not permit the entry of default with the clerk; a formal application to the court has to be made, and an inquest must be conducted. *Id.*; *see supra* note 26.

[31] *See* 1 WK&M ¶ 305.12, at 3-171 (1984); McLaughlin, *supra* note 2, at 335. The failure of the plaintiff to include an object notice with the service of the summons would leave the court without jurisdiction to enter a default judgment. *See, e.g.*, A.J. Eckert Co. v. George A. Fuller Co., 51 App. Div. 2d 844, 844-45, 380 N.Y.S.2d 353, 354 (3d Dep't 1976); Arden v. Loew's Hotels, Inc., 40 App. Div. 2d 894, 894-95, 337 N.Y.S.2d 669, 670 (3d Dep't 1972); McDermott v. Hoenig, 32 App. Div. 2d 838, 838, 302 N.Y.S.2d 280, 281 (2d Dep't 1969).

In *McDermott*, the defendant moved to vacate a default judgment on the ground that neither a complaint nor a 305(b) notice had been served with the summons. *See* 32 App. Div. 2d at 838, 302 N.Y.S.2d at 281. The court held that the default judgment was a nullity since the clerk was without authority to enter the judgment absent proof of service of the summons and either the complaint or a 305(b) notice. *Id.* The court also stated that, except for the jurisdictional defect, the judgment would have been upheld. *Id.* at 838-39, 302 N.Y.S.2d at 281. In *Eckert*, the object notice served failed to set forth the relief sought and therefore was not in compliance with 305(b). 51 App. Div. 2d at 844, 380 N.Y.S.2d at 354. The court, in affirming an order vacating a default judgment taken by the plaintiff, stated that the 305(b) requirement is jurisdictional and precludes entry of the default. *Id.* at 844-45, 380 N.Y.S.2d at 354.

[32] *See* CPLR 305(b) (1972); *supra* note 28.

[33] *See* CPLR 305, commentary at 177 (1972); 1 WK&M ¶ 305.12, at 3-172 (1984).

[34] *See* CPLR 305, commentary at 132 (McKinney Supp. 1983-1984); *id.* 3012, commentary at 123; FIFTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1977), in TWENTY-THIRD ANN. REP. N.Y. JUD. CONFERENCE 273, 275 (1978). The current version of 305(b) differs significantly in two ways from its predecessor. The first difference is the change in the language from "may" to "shall". *Compare* CPLR 305(b) (1972) (summons "may" contain requisite notice) *with* CPLR 305(b) (McKinney Supp. 1983-1984) (summons "shall" contain requisite notice). The intent and purpose behind this change was to remove the trap laid by the permissive language of the prior version. *See* CPLR 3012, commentary at 123 (McKinney Supp. 1983-1984); FIFTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1977),

305(b) was again amended by simply adopting the "mandatory" aspect of serving notice.[35] As throughout the history of 305(b), the dictates of default procedure continue to mandate that entry of a default judgment cannot be maintained without the service of either a complaint or a 305(b) notice.[36] Based on the historical purpose and development of 305(b), it is suggested that the language contained in the rule is addressed solely to default proceedings and that service of a bare summons is not a jurisdictional defect that precludes the commencement of an action.

It is submitted that the court, by concluding that the service of a bare summons precludes invocation of the 6-month extension provided by 205(a),[37] has created an unnecessary restraint upon a plaintiff's right to benefit from 205(a). Section 205(a) affords a

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in TWENTY-THIRD ANN. REP. N.Y. JUD. CONFERENCE 273 (1978). The trap was created by the mandate of CPLR 3215(e), which governs default judgments. *See* CPLR 3215(e) (McKinney Supp. 1983-1984); *supra* note 27 & accompanying text; *infra* note 36 & accompanying text. The amendment of 305(b) finally made it clear that no default judgment could be entered by the service of a summons unaccompanied by either a complaint or a 305(b) notice. *See* CPLR 305, commentary at 132 (McKinney Supp. 1983-1984); *id.* 3012, commentary at 123 . Part of the rationale for the amendment of the statute was that, under the prior version, a defendant could "stymie" the plaintiff by doing nothing if the summons was served without the 305(b) notice. *Id.* 3012, commentary at 123. With the mandatory language of the current version, the requisite for the entry of a default judgment under § 3215(e) will be satisfied. *Id.* As the court noted in Bal v. Court Employment Project, Inc., 73 App. Div. 2d 69, 424 N.Y.S.2d 715 (1st Dep't 1980): "CPLR 305(b) was intended as a shield to protect an unwary defendant from default judgment without proper notice, not a sword to trap a tardy or inattentive plaintiff into dismissal." *Id.* at 71, 424 N.Y.S.2d at 717.

The second change, resulting from the 1978 amendment to 305(b), eliminated the distinction between an object notice and a default notice. CPLR 305, commentary at 132 (McKinney Supp. 1983-1984). With the enactment of the current version of 305(b), the plaintiff is now required to serve "nature" notice if the summons is served without a complaint. *Id.* This notice must state the "nature of the action and the relief sought." *Id.* 305(b); *see id.* 305, commentary at 132. The nature notice must also contain a statement, except in medical malpractice cases, reciting the sum of money sought, so the defendant is aware of his maximum liability in the event of default. *Id.* 305(b); *see id.* 305, commentary at 132.

[35] *See* CPLR 305(b) (McKinney Supp. 1983-1984).

[36] *See* Nuez v. Diaz, 101 Misc. 2d 399, 401, 421 N.Y.S.2d 770, 771 (Sup. Ct. Monroe County 1979); CPLR 3215(e) (1970 & Supp. 1983-1984). If the plaintiff fails to comply with the demands of 305(b), the summons will be jurisdictionally fatal for the purposes of default procedures, *see* Aversano v. Town of Brookhaven, 77 App. Div. 2d 641, 641-42, 430 N.Y.S.2d 133, 134 (2d Dep't 1980); Bal v. Court Employment Project, Inc., 73 App. Div. 2d 69, 70, 424 N.Y.S.2d 715, 716 (1st Dep't 1980); Schoonmaker v. Ford Motor Co., 99 Misc. 2d 1095, 1096, 418 N.Y.S.2d 288, 289 (Sup. Ct. Ulster County 1979), *aff'd*, 79 App. Div. 2d 1067, 435 N.Y.S.2d 393 (3d Dep't 1981) (dictum); *see also* 1 WK&M ¶ 305.12, at 3-172.2 (Supp. 1983) (interpreting *Aversano*, 77 App. Div. 2d 641, 430 N.Y.S.2d 133), and any default judgment entered thereon will be void, *see Nuez*, 101 Misc. 2d at 401, 421 N.Y.S.2d at 771; *Schoonmaker*, 99 Misc. 2d at 1095, 418 N.Y.S.2d at 289.

[37] *Parker*, 61 N.Y.2d at 115-16, 460 N.E.2d at 1316, 472 N.Y.S.2d at 882.

plaintiff an additional 6 months within which to recommence a terminated action, unless any of three exceptions applies.[38] In addition to these exceptions, a judicially created prerequisite[39] necessitates that the original action be commenced by the acquisition of personal jurisdiction over the defendant.[40] As interpreted by commentators and the courts, this prerequisite can be satisfied by the mere service of a summons upon the defendant.[41] The service of a summons acquires jurisdiction over the defendant[42] and comports with the due process requirements that the defendant receive notice of the claim against him and be afforded an opportunity to be heard.[43] The *Parker* Court, it is suggested, failed to recognize that the service of a summons without the required 305(b) notice satisfies the judicially created prerequisite to the availability of 205(a), and should therefore avail a plaintiff of the benefits of 205(a).[44]

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[38] CPLR 205(a) (McKinney Supp. 1983-1984); *see supra* note 6. A plaintiff may not invoke the benefits of 205(a) if the prior action was terminated because of a voluntary discontinuance, a dismissal for neglect to prosecute, or a final judgment upon the merits. CPLR 205(a) (McKinney Supp. 1983-1984).

[39] *See* George v. Mt. Sinai Hosp., 47 N.Y.2d 170, 175, 390 N.E.2d 1156, 1159, 417 N.Y.S.2d 231, 234 (1979); CPLR 205, commentary at 79 (McKinney Supp. 1983-1984); SIEGEL § 52, at 54.

[40] *See* Markoff v. South Nassau Community Hosp., 61 N.Y.2d 283, 288, 461 N.E.2d 1253, 1255, 473 N.Y.S.2d 766, 767 (1984); CPLR 205, commentary at 196 (1972); SIEGEL § 52, at 54. The acquisition of subject matter jurisdiction is not considered a prerequisite to the invocation of 205(a). *See* CPLR 205, commentary at 196 (1972).

[41] *See* Limpert v. Garland, 100 Misc. 2d 525, 526, 419 N.Y.S.2d 863, 864 (Sup. Ct. Erie County 1979); CPLR 3012, commentary at 125 (McKinney Supp. 1983-1984); SIEGEL § 52, at 54. The courts have held that the only time the prerequisite to 205(a) is not met is when there is a complete failure to serve a summons or when the summons itself is defective. *See, e.g.*, Markoff v. South Nassau Community Hosp., 61 N.Y.2d 283, 286, 288, 461 N.E.2d 1253, 1254-55, 473 N.Y.S.2d 766, 767-68 (1984); George v. Mt. Sinai Hosp., 47 N.Y.2d 170, 175, 390 N.E.2d 1156, 1159, 417 N.Y.S.2d 231, 234 (1979); *see also* CPLR 3012, commentary at 125 (McKinney Supp. 1983-1984) (205(a) inapplicable when dismissal was for lack of personal jurisdiction); SIEGEL § 52, at 54.

[42] *See supra* note 1 & accompanying text.

[43] *See* Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 313-14 (1950); Connell v. Hayden, 83 App. Div. 2d 30, 35-36, 443 N.Y.S.2d 383, 389 (2d Dep't 1981); SIEGEL §§ 58-59, at 59-61. The provisions that provide for service must render probable that the defendant will be apprised of the action against him and will have reasonable opportunity to defend. 3 CARMODY-WAIT 2D § 24:1, at 652 (R. Hursh ed. 1965). If the summons is personally delivered in New York, all due process requirements will be satisfied simultaneously. SIEGEL § 59, at 60.

[44] "The one combination of results which would seem . . . untoward would be to hold the defect sufficiently jurisdictional to warrant a dismissal and at the same time conclude that there is no CPLR 205(a) time in which to bring a new action." CPLR 3012, commentary at 125 (McKinney Supp. 1983-1984).