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CPLR 7503(c): Ten Day Period Within Which a Party May Apply to Stay Arbitration Construed as Statute of Limitations by First Department

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respondent's request, it was filed in the county clerk's office. Appellant was served with a copy of the judgment and notice of entry on July 17, 1968. Subsequently, appellant served a notice of appeal on the appellate division, which then granted respondent's motion to dismiss the appeal since more than thirty days had elapsed since the judgment had been entered. The Court of Appeals reversed,[102] holding that where a proposed counter judgment submitted by an appellant requires a party to request that it be entered, as opposed to being automatically entered, and respondent makes the request, appellant's time to appeal begins to run at the time service of judgment with notice of entry is made upon him by the respondent and not when entry of the order is submitted.[103]

It is incumbent upon the practitioner to be familiar with local practice; however, it is suggested that one should always serve his opponent with notice of entry regardless of whose judgment was entered.

ARTICLE 75—ARBITRATION

CPLR 7503(c): Ten day period within which a party may apply to stay arbitration construed as statute of limitations by first department.

In *Jonathan Logan, Inc. v. Stillwater Worsted Mills*,[104] the petitioner, upon being served with a demand for arbitration and within the ten day period of limitation prescribed by CPLR 7503(c), procured a signed order to show cause why the arbitration should not be stayed. However, the order permitted service upon the respondent within a period six days longer than the ten day limitation.

The first department, by a 3-2 decision, affirmed the lower court's dismissal of petitioner's application for the stay on the grounds it was "time-barred." Justice Eager's majority opinion recognized that a special proceeding was necessary for the court to have jurisdiction over an application for a stay of arbitration[105] and that a special proceeding may be commenced by service of an order to show cause.[106] Furthermore, the court acknowledged that the order to show cause was signed by a judge within the ten day period. However, the decisive fact in the court's view was that the petitioner failed to serve respondent within that period. The court held that "the mere signing of the

102 *In re* Stuart & Stuart, Inc. v. New York State Liquor Authority, 23 N.Y.2d 493, 245 N.E.2d 225, 297 N.Y.S.2d 576 (1969).

103 *Id.* at 496, 245 N.E.2d at 226, 297 N.Y.S.2d at 578.

104 31 App. Div. 2d 208, 295 N.Y.S.2d 853 (1st Dep't 1969).

105 CPLR 7502(a): "A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy. . . ."

106 CPLR 304.

order to show cause does not institute a special proceeding."[107] For a special proceeding to be commenced, the petitioner should have served the order within the ten day period.

CPLR 201 commands that "[n]o court shall extend the time limited by law for the commencement of an action." The first department construed this section as mandating the dismissal of petitioner's application. However, CPLR 2004, which was not noted in the opinion, allows a court to grant an extension of time for good cause unless otherwise expressly prescribed by law.[108] By refusing to allow an extension of time by an order to show cause, without considering the circumstances, the court has construed this ten day period as a statute of limitations, though it has not heretofore been considered as such.[109] The first department's holding restricts the discretion given to the courts under CPLR 2004, and thereby precludes any extension for whatever good and meritorious cause a petitioner might have. Since the decision was rendered by a closely divided court, and because of the potential harshness which would result from such an interpretation of the section, one might think that the other courts would be less prone to adopt the court's ruling. However, the Court of Appeals, adopting the first department's opinion, has suprisingly affirmed the *Jonathan Logan* holding in a recent, still unreported decision, from which Chief Judge Fuld and Judge Burke dissented. It is unfortunate that the Court has sanctioned such a harsh rule without fully explicating its own reasons for doing so.

CPLR 7503(c): Fourth department upholds effectiveness of service upon a party's attorney for a stay of arbitration.

In re Bauer,[110] a fourth department case, permits the notice for a stay of arbitration under CPLR 7503(c) to be served upon the attorney for the party seeking the arbitration. This decision is diametrically opposed to the second department's holding in *Statewide Insurance Co. v. Lopez*[111] that such service does not confer jurisdiction for a special proceeding.

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107 31 App. Div. 2d at 210, 295 N.Y.S.2d at 856.

108 "It should also be observed that CPLR 2004, which confers general power on the court to 'extend the time fixed by any statute,' does not apply to statutes of limitations . . . ." 7B McKINNEY'S CPLR 201, commentary 40 (1963).

109 Had the delay been due to a misinterpretation, the court would have had power to extend this time under CPLR 2004. 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 7502.04 (1968).

110 31 App. Div. 2d 239, 296 N.Y.S.2d 675 (4th Dep't 1969). *See also The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 344-45 (1968).

111 30 App. Div. 2d 694, 291 N.Y.S.2d 928 (2nd Dep't 1968). *See also The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 500, 532 (1969).