

BILL TEXT:

STATE OF NEW YORK

4615

2005-2006 Regular Sessions

IN ASSEMBLY

February 11, 2005

Introduced by M. of A. DINOWITZ, WEINSTEIN -- read once and referred to the Committee on Judiciary

AN ACT to amend the civil practice law and rules, in relation to the time of service

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 306-b of the civil practice law and rules, as
2 amended by chapter 473 of the laws of 2001, is amended to read as
3 follows:

4 § 306-b. Service of the summons and complaint, summons with notice,
5 third-party summons and complaint, or petition with a notice of petition
6 or order to show cause. Service of the summons and complaint, summons
7 with notice, third-party summons and complaint, or petition with a
8 notice of petition or order to show cause shall be made within one
9 hundred twenty days after the [~~filing of the summons and complaint,~~
10 ~~summons with notice, third party summons and complaint, or petition~~]
11 commencement of the action or proceeding, provided that in an action or
12 proceeding, except a proceeding commenced under the election law, where
13 the applicable statute of limitations is four months or less, service
14 shall be made not later than fifteen days after the date on which the
15 applicable statute of limitations expires. If service is not made upon
16 a defendant within the time provided in this section, the court, upon
17 motion, shall dismiss the action without prejudice as to that defendant,
18 or upon good cause shown or in the interest of justice, extend the time
19 for service.

20 § 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD02771-01-5

SPONSORS MEMO:

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(e)

BILL NUMBER: A4615

SPONSOR: Dinowitz (MS)

RETRIEVE BILL

TITLE OF BILL: An act to amend the civil practice law and rules, in relation to the time of service

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon recommendation of his Advisory Committee on Civil Practice.

The Committee recommends the amendment of CPLR section 306-b to correct a time of service problem that can occur when a court order extending time for filing is granted pursuant to CPLR section 304.

CPLR section 306-b presently requires service of the summons and complaint, summons with notice, third-party summons and complaint, petition with notice of petition or order to show cause within 120 days after filing, with appropriate modifications where the statute of limitations is four months or less. With but one exception, this is fully consistent with the provision of section 304 that an action or proceeding is commenced by filing, since valid service cannot be made until the action has been commenced and that occurs upon filing.

The exception occurs when, pursuant to section 304, a court finds that circumstances prevent immediate filing and signs an order requiring the subsequent filing at a specific time and date not later than five days thereafter. In this instance it is the signing of the order, and not the filing of the pleading that commences the action or proceeding.

The laudable purpose of this exception clearly was to provide a safeguard against the expiration of the statute of limitations on a date, usually a weekend, when the county clerk's office is closed and timely filing to commence the action or proceeding could not be made. However, this section 304 exception can be and often is utilized in situations where a party requires a restraining order to prevent the occurrence of an event on a holiday or weekend when filing cannot occur but immediate service is critical. In this limited situation, although the action or proceeding has been commenced, service often must be made before the order can be filed. At least one court has held that under these circumstances service was premature and re-service was required because section 306-b mandates service after filing.

A simple amendment to section 306-b to provide that service be made within 120 days "after commencement of the action or proceeding" should rectify the problem created by the section 304 exception, without having any adverse affect upon the more usual situation where the action is commenced by filing of the pleading. In either event, whether the action is commenced by filing or by the signing of an order which extends the time for filing, post commencement service will occur.

This measure, which would have no fiscal impact upon the State, would take effect immediately.

LEGISLATIVE HISTORY:

2004 A11228 - passed Assembly
S7248 Referred to rules