

# CPLR 203(a): "Continuous Treatment" Doctrine Extended to Malpractice Action Against Architect

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tempt to expand *Dole v. Dow Chemical Co.* to permit a personal counterclaim against a plaintiff suing in a representative capacity.

The *Survey* hopes the reader will find this installment of both value and interest. Reader comments on this issue and suggestions for future issues are welcome.

## ARTICLE 2 — LIMITATIONS OF TIME

### *CPLR 203(a): "Continuous treatment" doctrine extended to malpractice action against architect.*

Malpractice is defined as any act of professional negligence, whether resulting in personal injury or in property damage.<sup>1</sup> The topic of medical malpractice has been the center of heated debate in recent times because of the medical profession's rebellion against the high cost of malpractice insurance coverage.<sup>2</sup> This cost has grown in part because the application of theories tolling the statute of limitations<sup>3</sup> has extended a physician's vulnerability to malpractice actions. By analogy, these theories have been applied to extend liability in other professions as well.

Under CPLR 203(a) the period of limitation is computed from the time the cause of action accrues.<sup>4</sup> It is the general rule in New York that the cause of action accrues at the time of the professional's wrongful act or omission.<sup>5</sup> Among the exceptions to this rule is the "con-

<sup>1</sup> *Seger v. Cornwell*, 44 Misc. 2d 994, 255 N.Y.S.2d 744 (Sup. Ct. Albany County 1964) (malpractice action against surveyor); 7B MCKINNEY'S CPLR 214, commentary at 432-33 (1972). *Contra*, *Editorial Notes*, 3 B'KLYN L. REV. 284 (1934) (personal injury only).

<sup>2</sup> See 173 N.Y.L.J. 95, May 16, 1975, at 1, col. 3; N.Y. Times, May 24, 1975, at 28, col. 5; *id.*, May 20, 1975, at 28, col. 1; *id.*, May 17, 1975, at 28, col. 4; *id.*, May 16, 1975, at 1, col. 3; *id.*, May 15, 1975, at 36, col. 6.

<sup>3</sup> These theories, the "continuous treatment" and "foreign object" doctrines, are discussed in note 6 *infra*.

CPLR 214(6), as amended, ch. 109, § 5, [1975] N.Y. Laws 134 (McKinney), fixes a three-year statute of limitations for malpractice actions which are other than medical. A new provision, CPLR 214-a, reduces the statutory period for medical malpractice to two years and six months. Ch. 109, § 6, [1975] N.Y. Laws 136 (McKinney). This section was approved on May 21, 1975 by the New York State Legislature in an attempt to appease the medical profession. See N.Y. Times, June 1, 1975, at 1, col. 1; *id.*, May 20, 1975, at 28, col. 1; *id.*, May 17, 1975, at 28, col. 4; *id.*, May 15, 1975, at 36, col. 6.

<sup>4</sup> For a discussion of CPLR 203(a), which superseded CPA 11, and of cause of action accrual in general, see 1 WK&M ¶ 203.01.

<sup>5</sup> *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963); *Schmidt v. Merchant's Despatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936); *Gilbert Properties, Inc. v. Millstein*, 40 App. Div. 2d 100, 338 N.Y.S.2d 370 (1st Dep't 1972), *aff'd mem.*, 33 N.Y.2d 857, 307 N.E.2d 257, 352 N.Y.S.2d 198 (1973); *Conklin v. Draper*, 229 App. Div. 227, 241 N.Y.S. 529 (1st Dep't), *aff'd mem.*, 254 N.Y. 620, 173 N.E. 892 (1930).

tinuous treatment" doctrine.<sup>6</sup> The doctrine provides that when a professional continues to service a client or patient after the commission of an act of malpractice, and for a related purpose, the statute of limitations is tolled until the relationship is terminated.<sup>7</sup> First applied to the profession of medicine,<sup>8</sup> this exception has been extended to the professions of dentistry,<sup>9</sup> law,<sup>10</sup> and public accounting.<sup>11</sup>

More recently, in *County of Broome v. Vincent J. Smith, Inc.*,<sup>12</sup> the Supreme Court, Broome County, extended the "continuous treatment" exception to a malpractice action against an architect.<sup>13</sup> In

<sup>6</sup> *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962), discussed in 31 *FORDHAM L. REV.* 842 (1963) & 37 *ST. JOHN'S L. REV.* 385 (1963); 2 *CARMODY-WAIT* 2d § 13:191, at 584-85 (1965); H. WACHTEL, *NEW YORK PRACTICE UNDER THE CPLR* 65-66 (4th ed. 1973). With regard to medical malpractice, the "continuous treatment" exception recently received statutory recognition with the adoption of CPLR 214-a. See note 3 *supra*. This section provides:

An action for medical malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure . . . .

Ch. 109, § 6 [1975] N.Y. Laws 136 (McKinney).

Another exception to the general rule, but restricted to medical malpractice, is the "foreign object" doctrine which states that when a physician negligently leaves a foreign object in the patient's body, the statute of limitations does not begin to run until the patient could have reasonably discovered the malpractice. See *Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969) (surgical clamps left in patient's abdomen); *Sly v. Van Lengen*, 120 Misc. 420, 198 N.Y.S. 608 (Sup. Ct. Onondaga County 1923) (although the court places the case in the "continuous treatment" exception, it more accurately belongs in that of "foreign object," as it involves a sponge left in the patient's body). This discovery rule is also incorporated in CPLR 214-a. Ch. 109, § 6, [1975] N.Y. Laws 136-37 (McKinney).

<sup>7</sup> "[W]hen the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint, the 'accrual' comes only at the end of the treatment." *Borgia v. City of New York*, 12 N.Y.2d 151, 155, 187 N.E.2d 777, 778, 237 N.Y.S.2d 319, 321 (1962). Accord, *O'Laughlin v. Salamanca Hosp. Dist. Auth.*, 36 App. Div. 2d 51, 319 N.Y.S.2d 128 (4th Dep't 1971), discussed in *The Quarterly Survey*, 46 *ST. JOHN'S L. REV.* 147, 150 (1971); *Piedmont v. Society of the N.Y. Hosp.*, 25 Misc. 2d 41, 204 N.Y.S.2d 592 (Sup. Ct. Queens County 1960).

The above cases are to be distinguished from those in which the course of treatment by the professional includes repeated acts of malpractice. See *Hammer v. Rosen*, 7 N.Y.2d 376, 165 N.E.2d 756, 198 N.Y.S.2d 65 (1960); *Ferraro v. New York Univ. Bellevue Medical Center*, 13 Misc. 2d 131, 177 N.Y.S.2d 788 (Sup. Ct. N.Y. County 1958).

<sup>8</sup> *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962).

<sup>9</sup> *Stern v. Hausberg*, 22 App. Div. 2d 669, 253 N.Y.S.2d 447 (1st Dep't 1964) (per curiam).

<sup>10</sup> *Siegel v. Kranis*, 29 App. Div. 2d 477, 288 N.Y.S.2d 831 (2d Dep't 1968); *Gilbert Properties, Inc. v. Millstein*, 40 App. Div. 2d 100, 338 N.Y.S.2d 370 (1st Dep't 1972) (dictum), discussed in *The Quarterly Survey*, 47 *ST. JOHN'S L. REV.* 725, 727 (1973); *Wilson v. Econom*, 56 Misc. 2d 272, 288 N.Y.S.2d 381 (Sup. Ct. N.Y. County 1968).

<sup>11</sup> *Wilkin v. Dana R. Pickup & Co.*, 74 Misc. 2d 1025, 347 N.Y.S.2d 122 (Sup. Ct. Allegany County 1973).

<sup>12</sup> 78 Misc. 2d 889, 358 N.Y.S.2d 998 (Sup. Ct. Broome County 1974).

<sup>13</sup> *Id.* at 892-93, 358 N.Y.S.2d at 1002-03. By way of dictum, the Appellate Division, Second Department, recently indicated acceptance of the "continuous treatment" doctrine

*Broome*, defendant-architect contracted with plaintiff-county in 1966 to design and supervise construction of a building. Upon completion of the project in 1968, leaks appeared in the roof, whereupon the defendant-architect negotiated with the contractor and subcontractor to correct the faulty condition. During this period of remedial work, the parties communicated regularly, defendant assuring plaintiff that the roof would be satisfactorily repaired. Nevertheless, plaintiff remained dissatisfied and ultimately initiated this malpractice action on September 3, 1971.

Defendant claimed that the relationship between the parties had terminated on June 17, 1968, the date of final certificate of payment, and that the three-year limitation period would therefore bar any action.<sup>14</sup> The court found, however, that the relationship had been maintained throughout the period in which defendant attempted to correct the problem. Accordingly, it held that the cause of action did not "accrue" until the termination of the parties' further association.<sup>15</sup> Since the corrective measures were related to the original defects, the requirements of the doctrine of "continuous treatment" were met.<sup>16</sup>

In support of its holding, the court noted the "continuous treatment" doctrine's relevance for and applicability to the profession of architecture.<sup>17</sup> As is the case with the other professions to which the doctrine has been applied, the relationship between the architect and his client is based on confidence and trust. The client, lacking the knowledge and experience of the professional, is forced to rely on the other's advice and "treatment." The client is in a subordinate position and cannot reasonably be expected to know, or in most situations even to question, whether or not the professional is performing his work properly. Moreover, he cannot be expected to interrupt presumably corrective treatment to initiate a lawsuit.<sup>18</sup> As the court stated, "Fairness and justice dictate that a cause of action of this nature accrue only after the professional relationship has been terminated . . . ."<sup>19</sup>

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for architect malpractice actions, but it found the rule inapplicable to the facts of the case. *Sosnow v. Paul*, 43 App. Div. 2d 978, 352 N.Y.S.2d 502 (2d Dep't 1974) (mem.).

<sup>14</sup> 78 Misc. 2d at 893, 358 N.Y.S.2d at 1003.

<sup>15</sup> *Id.* Had the defendant not engaged in reparative work, the court emphasized, the relationship would not have been extended and thus the action would have been time barred. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 892, 358 N.Y.S.2d at 1002.

<sup>18</sup> *Id.*, 358 N.Y.S.2d at 1003, citing *Borgia*, 12 N.Y.2d at 156, 187 N.E.2d at 779, 237 N.Y.S.2d at 321-22 & *Siegel*, 29 App. Div. 2d at 480, 288 N.Y.S.2d at 834-35.

<sup>19</sup> 78 Misc. 2d at 893, 358 N.Y.S.2d at 1003.

By enlarging the number of professions subject to the "continuous treatment" exception, *Broome* signifies a further liberalization of the statute of limitations in the area of malpractice. It also encourages clients to allow professionals to perform corrective work. Absent such an exception, clients would be forced to bypass potentially satisfactory adjustments in order to commence an immediate lawsuit. Yet *Broome* leaves unanswered the question of whether the "continuous treatment" doctrine would be appropriate should there be an extended timelag between the malpractice and the corrective treatment. Although the doctrine, as expounded in an earlier medical malpractice case,<sup>20</sup> specifies that the treatment must run continuously,<sup>21</sup> the *Broome* court did not take issue with the fact that at least three weeks had elapsed between the date final payment to the architect was made and the date corrective measures were begun. Perhaps the court considered the work completed not upon payment, but upon completion of construction of the building, which, being the same day the leakage was discovered and presumably the day the architect was advised thereof, coincidentally involved no lapse of time. This point was not clarified.<sup>22</sup>

Other issues suggested by *Broome* are even more problematical.

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20 *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962).  
21 *Id.* at 155, 187 N.E.2d at 778, 237 N.Y.S.2d at 321.

22 In *Fonda v. Paulsen*, 46 App. Div. 2d 540, 363 N.Y.S.2d 841 (3d Dep't 1975), discussed in *McLaughlin, New York Trial Practice*, 173 N.Y.L.J. 70, Apr. 11, 1975, at 4, cols. 3-4, a case decided prior to the change in the medical malpractice statute of limitations, see notes 3 & 6 *supra*, the plaintiff sought assistance from two doctors who had, five years prior to the commencement of the action, improperly diagnosed his condition from a biopsy. Relying upon the "continuous treatment" doctrine, the Appellate Division, Third Department, reversed a summary judgment which had been based on the statute of limitations. Justice Greenblott of the Appellate Division reasoned that postoperative observation by a physician constitutes "treatment" just as much as do affirmative acts. 46 App. Div. 2d at 543, 363 N.Y.S.2d at 844.

Since there had been no contact between the patient and the doctors for a 20-month period between consultations, an issue was raised as to whether the treatment could be deemed "continuous." The court concluded that the "salutary purposes of *Borgia*," *id.* at 544, 363 N.Y.S.2d at 845 (footnote omitted), *i.e.*, to encourage the patient to seek corrective treatment from the doctor(s) involved, justified its decision to invoke the doctrine and consider the treatment "continuous."

Similarly, the court did not time-bar the plaintiff's action against the pathologist who had improperly evaluated his tissue sample. In spite of a 32-month gap between consultations and notwithstanding the fact that plaintiff had never been in direct contact with the diagnostician, the court declared that

where the pathologist should have reasonably expected that his work would be relied on by other practitioners in determining the mode of treatment, . . . it [is] appropriate to impute to that pathologist . . . constructive participation in that treatment so long as it continued.

*Id.* at 545, 363 N.Y.S.2d at 846.

Considering the differences between the doctor-patient and architect-client relationships, it is still difficult to posit whether a court would apply the "continuous treatment" exception if corresponding timelags were found in an action against an architect.

For example, had the relationship between the parties otherwise terminated, and had the plaintiff-client not noticed the defect within three years of the alleged malpractice and thus not requested remedial treatment, he would have been without a remedy.<sup>23</sup> Similarly, if during the period of repair of the leaky roof the client had discovered another latent defect, but such discovery had occurred after the expiration of the limitation period, he may have been remediless as to this second defect since it could be argued that the corrective work did not relate directly to the act of malpractice and that the "continuous treatment" exception, therefore, did not toll the statute of limitations as to that defect.<sup>24</sup> It seems extremely harsh to so penalize a client for failing to discover the hidden negligent acts of a trusted, paid professional.<sup>25</sup>

In an effort to eliminate this inequity, many have debated the question of when, for the purposes of CPLR 203, a malpractice cause of action should accrue. One analysis considers the application of CPLR 203(f) to malpractice actions.<sup>26</sup> Under this provision, the time to commence a malpractice suit would be either within the prescribed statutory period running from the commission of the wrong or two years from discovery of the wrong, whichever is longer.<sup>27</sup> Another recommendation is to toll the limitation period until discovery, provided that the action be commenced within a maximum period from the time of the alleged malpractice.<sup>28</sup>

<sup>23</sup> CPLR 214(6), as amended, ch. 109, § 5, [1975] N.Y. Laws 134 (McKinney).

<sup>24</sup> See note 7 *supra*.

<sup>25</sup> Knowledge of the wrong is generally deemed irrelevant to the determination of when the statute of limitations starts to run. See, e.g., *Schmidt v. Merchant's Despatch Transp. Co.*, 270 N.Y. 287, 300, 300 N.E. 824, 827 (1936); 7B MCKINNEY'S CPLR 203, commentary at 111 (1972); 31 FORDHAM L. REV. 842, 843 (1963).

<sup>26</sup> See 7B MCKINNEY'S CPLR 214, commentary at 435 (1972), which had considered the application of CPLR 203(f) to medical malpractice cases involving foreign objects. For a recent supreme court case which first permitted such an application, see *Slagen v. Marwill*, 78 Misc. 2d 275, 356 N.Y.S.2d 511 (Sup. Ct. Saratoga County 1974). *Contra*, *Monko v. St. John's Queens Hosp.*, 41 Misc. 2d 993, 246 N.Y.S.2d 511 (Sup. Ct. N.Y. County 1963). As part of the recent legislation regarding medical malpractice, CPLR 203(f) was amended to exclude actions under CPLR 214-a, ch. 109, § 4, [1975] N.Y. Laws 136 (McKinney), which itself incorporates a discovery rule.

<sup>27</sup> CPLR 203(f), as amended, ch. 109, § 4, [1975] N.Y. Laws 136 (McKinney).

<sup>28</sup> 1962 LAW REVISION COMM'N REP. 229, 231-33 (six-year time period); 1942 LAW REVISION COMM'N REP. 135, 141-43 (six-year time period). *Accord*, *Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 435, 248 N.E.2d 871, 876, 301 N.Y.S.2d 23, 30 (1969) (Breitel, J., dissenting). The legislature, however, continuously rejected these proposals. For a discussion of the New York Legislature's inaction in this regard and an analysis of the response in other states, see *id.* at 431-32, 248 N.E.2d at 873, 301 N.Y.S.2d at 27-28.

Professor Richard B. Lillich contends that a discovery rule would eliminate the need for the "continuous treatment" doctrine. Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339, 370 (1962); Lillich, *The Malpractice Statute of Limitations in New York's New Civil Practice Law and Rules*, 14 SYRACUSE L. REV. 42, 46 (1962). Such an approach, however, would appear to encourage litigation since the statute of limitations would not be tolled by any attempts at corrective measures.

The obvious objection to having the statute of limitations run from the time of discovery is that it might subject professionals to increased liability. Conceivably, limiting the period of liability from the discovery of the wrong could extend liability forever. This problem of unlimited professional liability was also left unresolved in *Broome* since no mention was made of any time limit to the "continuous treatment." Thus, if a professional were engaged in reparative work, the limitation period would be tolled indefinitely until the termination of that treatment. It is suggested that a more equitable approach would be to establish some absolute time limit after commission of the wrong beyond which liability would cease. However the New York courts or Legislature ultimately resolves this issue, fairness to the public should be balanced with concern for reasonable professional liability.

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

*CPLR 311(1): Jurisdiction expanded.*

Personal service upon a domestic or foreign corporation within New York is obtained under CPLR 311(1). This provision requires that delivery of a summons be made to an officer, director, agent, cashier, or "to any other agent authorized by appointment or by law to receive service."<sup>29</sup>

An examination of this section was recently made in *Board of Education v. Half Hollow Hills Teachers Association*,<sup>30</sup> wherein the Supreme Court, Suffolk County, in a special proceeding to set aside an arbitration award, was faced with determining the validity of service of process upon defendant's attorney.<sup>31</sup> The Association's attorney had been designated a qualified agent to receive process pursuant to Rule 36 of the Voluntary Labor Arbitration Rules of the American Arbitration Association (Rule 36).<sup>32</sup> Even though defendant impliedly con-

<sup>29</sup> CPLR 311(1).

<sup>30</sup> 79 Misc. 2d 223, 358 N.Y.S.2d 285 (Sup. Ct. Suffolk County 1974).

<sup>31</sup> This special proceeding was brought by the Board of Education pursuant to CPLR 7511(b). The Board argued that the arbitrator had exceeded his power in determining that the Board had violated its agreement with the Teachers Association and requested that the court vacate the arbitration award by which the parties were otherwise bound.

<sup>32</sup> AM. ARB. ASS'N VOL. LAB. R. 36 (1974). Rule 36 provides:

Each party to a Submission or other agreement which provides for arbitration under these Rules shall be deemed to have consented and shall consent that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or the entry of judgment on an award made thereunder, may be served upon such party (a) by mail addressed to such party or his attorney at his last known address, or (b) by personal service, within or without the state wherein the arbitration is to be held.

*Id.* (emphasis added).