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CPLR 302(a)(3)(ii): Out-of-state conversion deemed sufficient predicate for asserting in personam jurisdiction over nonresident defendant

Despite the absence of any direct contact with the State of New York, CPLR § 302(a)(3)(ii) extends in personam jurisdiction over nonresidents. As originally enacted, CPLR 302(a) stated:

(a) Acts which are the basis of jurisdiction. A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

1. transacts any business within the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. owns, uses or possesses any real property situated within the state.

Ch. 308, [1962] N.Y. Laws 1315. Interpreting paragraph (2), the Court of Appeals in Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965), held that an in-state injury resulting from a defendant's tortious act outside the state was not sufficient to satisfy the requirement of committing a tortious act within the state. Relying upon the statute's legislative history and the express language of CPLR 302(a)(2) that a nondomiciliary "commit a tortious act within the state," the Feathers Court determined that the problem of out-of-state tortious acts causing injury within the state was an issue to be addressed by the legislature. 15 N.Y.2d at 464, 209 N.E.2d at 80, 261 N.Y.S.2d at 24. Professor Reese, in a report to the New York Judicial Conference, recommended that the statute be extended to reach nondomiciliaries whose acts or omissions without the state caused tortious injury within the state, and suggested that such an extension should be conditioned on the nonresident's intention that the act have consequences within the state or that the nonresident should foresee such consequences. Alternatively, the presence of other contacts with the state could make such an exercise of jurisdiction reasonable. See Reese, A Study of CPLR 302 in Light of Recent Judicial Decisions, ELEVENTH ANN. REP. N.Y. JUD. CONFERENCE 132, 135-36 (1966). Professor Reese's study prompted the Judicial Conference to propose the present CPLR 302(a)(3).


3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
   (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
   (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce

Id. at 1348.

Even with the 1966 amendment, CPLR 302 apparently does not extend the reach of the state's jurisdiction to the extent permitted constitutionally. E.g., American Eutectic Welding
nondomiciliaries whose out-of-state tortious acts result in foreseeable injury to person or property within the state,\(^2\) provided that the nonresident derives “substantial revenue” from international or interstate commerce.\(^3\) Enacted in response to the lack of statutory authority for asserting jurisdiction over parties who send defective products into the state,\(^4\) the statute’s application to commercial


\(^3\) The “substantial revenue” test is designed to extend the reach of the statute only to those nondomiciliaries whose business activities are non-local and extensive in nature so that no unfair burden will be imposed on nonresidents whose contact with the state is limited or remote. See FOURTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1966), reprinted in [1966] N.Y. Laws 2780, 2788-89 (McKinney). Such limitation also is designed to prevent discouragement of commerce with the state. 1 WK&M 302.01. CPLR 302(a)(3)(ii), however, does not require a connection between the tortious act and the derivation of substantial revenue from interstate or international commerce. See Gonzales v. Harris Calorific Co., 64 Misc. 2d 287, 291, 315 N.Y.S.2d 51, 56 (Sup. Ct. Queens County), aff’d mem., 35 App. Div. 2d 720, 315 N.Y.S.2d 815 (2d Dep’t 1970); Brown v. Erie-Lackawanna R.R. Co., 54 Misc. 2d 225, 227, 282 N.Y.S.2d 335, 337 (Sup. Ct. Oneida County 1967); FOURTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1966), reprinted in [1966] N.Y. Laws 2780, 2790 (McKinney). Moreover, unlike the in-state transaction of business and tort requirements under CPLR 302(a)(1) and (2), no connection is required between New York and the location from which the nondomiciliary generates revenue, provided the revenue is derived from interstate or international trade and is substantial. See, e.g., Allen v. Auto Specialties Mfg. Co., 45 App. Div. 2d 331, 333, 357 N.Y.S.2d 547, 550 (3d Dep’t 1974).

torts has remained unclear. Recently, in Fantis Foods, Inc. v. Standard Importing Co., the Appellate Division, First Department, held that where a nondomiciliary who derives substantial revenue from international commerce commits an out-of-state conversion, resulting in a foreseeable economic loss in New York, in personam jurisdiction may be obtained pursuant to CPLR § 302(a)(3)(ii).

In Fantis, Standard Importing Co. (Standard), a New York corporation which imports various foods, entered into a written agreement in Greece with Synergal, Ltd. (Synergal) for four shipments of feta cheese, f.o.b. Piraeus, Greece. Synergal, the dominant exporter of Greek feta cheese, was organized under the laws of Greece. Additionally, all of Synergal’s offices were located in Greece, and it maintained no offices, agents or assets in New York, nor did it advertise or otherwise conduct business in the United States. While the first shipment was in transit, Synergal allegedly substituted the plaintiff, Fantis Foods, Inc. (Fantis), a New York corporation and Standard’s competitor, as the purchaser on the original bill of lading. Despite the substitution, Standard obtained possession of the first shipment. Fantis commenced an action against Standard for conversion of this shipment, and Standard

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1 The statute itself fails to distinguish between commercial and noncommercial torts, see note 1 supra, and previous state court cases have dealt almost exclusively with negligence and products liability. See, e.g., Tracy v. Paragon Contact Lens Labs., Inc., 44 App. Div. 2d 455, 355 N.Y.S.2d 650 (3d Dep’t 1974); Newman v. Charles S. Nathan, Inc., 55 Misc. 2d 368, 284 N.Y.S.2d 688 (Sup. Ct. Kings County 1967); Gillmore v. Inskip, Inc., 54 Misc. 2d 218, 282 N.Y.S.2d 127 (Sup. Ct. Nassau County 1967). Federal courts, however, have considered the statute’s commercial application and consistently have held that a commercial loss is insufficient to invoke CPLR § 302(a)(3)(ii) where such injury is incurred within the state as a fortuitous consequence of a plaintiff’s domicile, incorporation, or doing business in New York. See Lehigh Valley Indus., Inc. v. Birenbaum, 527 F.2d 87, 94 (2d Cir. 1975); American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 428, 433 (2d Cir. 1971); Friedr. Zoellner Corp. v. Tex Metals Co., 396 F.2d 300, 303 (2d Cir. 1968); Security Nat’l Bank v. UBEEX Corp., 404 F. Supp. 471, 474 (S.D.N.Y. 1975); Chemical Bank v. World Hockey Ass’n, 403 F. Supp. 1374, 1380 (S.D.N.Y. 1975). For a discussion of these cases, see note 33 infra.


3 Id. at 55, 406 N.Y.S.2d at 766.

4 Id. at 53-54, 406 N.Y.S.2d at 766. The contract provided that the buyer was to assume responsibility for the cheese when it left the factory, and delivery was to be effected in the factory or the refrigerated warehouses. Id. at 55, 406 N.Y.S.2d at 765. Payment was guaranteed under an irrevocable credit agreement established by Standard in favor of Synergal. Id. at 54, 406 N.Y.S.2d at 764. After the cheese was marked with Standard’s trademark and segregated in Greece, Standard surrendered an attestation to the product’s weight and quality to Synergal. Id. at 55, 406 N.Y.S.2d at 765.

5 Id. at 59, 406 N.Y.S.2d at 768 (Sullivan, J., dissenting).

6 Id. at 60, 406 N.Y.S.2d at 769 (Sullivan, J., dissenting).

7 Id. at 54, 406 N.Y.S.2d at 764.
impleaded Synergal, alleging breach of contract and conversion of the last three shipments.\(^\text{12}\) Synergal moved to dismiss the third-party action, contending that there was no predicate for the exercise of in personam jurisdiction.\(^\text{13}\) The Supreme Court, New York County, denied the motion and held that Synergal was subject to jurisdiction under New York's long-arm statute.\(^\text{14}\)

In affirming, a divided appellate division\(^\text{15}\) found that Synergal's diversion of the shipment to Fantis “clearly sound[ed] in tort.”\(^\text{16}\) Justice Lupiano, writing for the majority, noted that when CPLR § 302(a)(3)(ii) was enacted, it was “primarily aimed at negligence type situations involving personal injuries or property damage.”\(^\text{17}\) The court reasoned, however, that application of the statute to commercial injuries should not be foreclosed since CPLR § 302(a)(3) fails to distinguish between commercial and noncommercial injuries.\(^\text{18}\) After deciding this threshold issue, the court found that the in-state injury requirement of CPLR § 302(a)(3)(ii) was satisfied since Synergal's “tortious act [had] consequences in New York.”\(^\text{19}\) Noting that subparagraph (ii) requires a nondomiciliary to foresee consequences of his tortious act within the state,\(^\text{20}\) the Fantis court observed that Synergal should have known that its conversion would have consequences in New York because, in addition to Stan-

\(^\text{12}\) Id. By virtue of the express provisions of the contract, see note 8 supra, Standard claimed it had become entitled to rightful possession of the cheese while it was in Greece and that Synergal's alleged subsequent conveyance to Fantis constituted a conversion. Id. at 55, 406 N.Y.S.2d at 765.

\(^\text{13}\) Id. at 54, 406 N.Y.S.2d at 764. Synergal also argued that Standard's only claim was for breach of contract, to which CPLR 302(a)(3)(ii) would be inapplicable. Id. Furthermore, Synergal contended that, pursuant to the forum selection clause in the purchase contract, the defendant had agreed to settle disputes in Greek courts. Id.

\(^\text{14}\) Id.

\(^\text{15}\) In a 3-2 decision, Justices Kuperman and Lane concurred with Justice Lupiano to form the majority. Justice Sullivan dissented in an opinion in which Justice Sandler joined.

\(^\text{16}\) Id. at 55, 406 N.Y.S.2d at 765; see note 13 supra.

\(^\text{17}\) 63 App. Div. 2d at 57, 406 N.Y.S.2d at 766. See notes 4 & 5 and accompanying text supra.

\(^\text{18}\) 63 App. Div. 2d at 57, 406 N.Y.S.2d at 766. The court rejected the reasoning of several federal cases where CPLR 302(a)(3)(ii) was applied more restrictively to torts in the commercial area. See note 33 infra.

\(^\text{19}\) 63 App. Div. 2d at 56, 406 N.Y.S.2d at 766. The court stated that the “most essential condition” under CPLR 302(a)(3) is that injury be sustained in New York. Id. at 55, 406 N.Y.S.2d at 765. Although failing to elaborate on the injury requirement of CPLR 302(a)(3) in its opinion, the court stated in a footnote that “the conversion directly injured Standard in its economic relations in New York” since, in addition to damages incurred from the loss of the cheese itself, Standard lost profits generally because the conversion to Fantis, its local competitor, destroyed Standard's prospects for sales of Greek feta cheese. Id. at 57 n.2, 406 N.Y.S.2d at 766 n.2.

\(^\text{20}\) Id. at 56, 406 N.Y.S.2d at 765-66.
dard and Fantis being New York corporations, Synergal’s monopolistic position in the export market enabled it to control competition between the two New York importers. Thus, the court rejected Synergal’s argument and upheld the lower court’s assertion of jurisdiction.

The dissent maintained that Standard’s claim only supported a breach of contract action. Authoring the dissenting opinion, Justice Sullivan argued that any loss of profits was simply the consequence of Standard’s domicile. Furthermore, since “the damage coalesced with the tortious act,” which occurred in Greece, any injury incurred in New York was too remote to justify the court’s exercise of personal jurisdiction over Synergal. Viewing Synergal’s monopolistic position in relation to New York importers as merely another aspect of domicile, Justice Sullivan reasoned that the “minimum contacts” standard had not been satisfied. The dissent concluded, therefore, that the assertion of personal jurisdiction in this case was constitutionally impermissible.

While it appears that the Fantis court properly held CPLR § 302(a)(3)(ii) applicable to commercial torts, its application of the

21 Id. at 57, 406 N.Y.S.2d at 766.
22 Id. The failure of Synergal to challenge the constitutionality of the statute at the trial level precluded treatment of this issue on appeal, id. at 58, 406 N.Y.S.2d at 767, since statutes are presumed constitutional, and the right to rebut such presumption must be exercised either in the pleadings or at trial. Id.; accord, Dodge v. Cornelius, 168 N.Y. 242, 244-45, 61 N.E. 244, 245 (1901); Jahn v. Berzon, 255 App. Div. 1023, 1024, 8 N.Y.S.2d 640, 642 (2d Dep’t 1938).
23 63 App. Div. 2d at 60, 406 N.Y.S.2d at 768 (Sullivan, J., dissenting). Justice Sullivan contended that a tort claim could be sustained only if Standard obtained a right to title in Greece, and that this question was to be determined under Greek law. Id. at 61, 406 N.Y.S.2d at 769 (Sullivan, J., dissenting); see M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 228, 186 N.E. 679, 682 (1933). Moreover, in view of Standard pleading the same facts in support of both the tort and breach of contract claims, the dissent argued that Standard’s claim against Synergal for the balance of the shipment for which it bargained but failed to receive sounded solely in contract. Id. at 61, 406 N.Y.S.2d at 769 (Sullivan, J., dissenting).
24 63 App. Div. 2d at 64, 406 N.Y.S.2d at 770-71 (Sullivan, J., dissenting).
25 Id. at 63, 406 N.Y.S.2d at 770 (Sullivan, J., dissenting).
26 Id. at 63-64, 406 N.Y.S.2d at 770-71 (Sullivan, J., dissenting).
27 Id. at 64, 406 N.Y.S.2d at 771 (Sullivan, J., dissenting).
28 Id. (Sullivan, J., dissenting). The dissent expressed the fear that the majority’s holding would extend jurisdiction beyond the constitutional limits of International Shoe Co. v. Washington, 326 U.S. 310 (1945), by allowing a nondomiciliary to be sued in New York merely because a loss of profits appears on the corporation’s records solely by reason of the plaintiff’s New York domicile. 63 App. Div. 2d at 64, 406 N.Y.S.2d at 771 (Sullivan, J., dissenting).
29 In a case decided after Fantis, the Court of Appeals, in Sybron v. Wetzel, 46 N.Y.2d 197, 385 N.E.2d 1055, 413 N.Y.S.2d 127 (1978), applied CPLR 302(a)(3)(ii) to a commercial tort. Noting that since the preliminary studies and the expert draftsmen of the statute did not exclude commercial torts, the Court concluded that the statute should be construed
statute's jurisdictional requirements seems questionable. Before long-arm jurisdiction may be obtained, the defendant must cause an "injury to person or property within the state" and "reasonably expect [his tortious] act to have consequences in the state." The Fantis court, while acknowledging the requirements of the statute, apparently merged the foreseeable consequences and injury requirements. After finding loss of profits in New York to be a foreseeable consequence of Synergal's tortious conduct, the court merely added that the loss was sufficient to satisfy the requirement of injury within the state. Since the injury requirement provides an important nexus with the forum state, the Fantis court should have further explained its reasons for accepting loss of profits as an injury within the meaning of the statute. The majority's conclusion, if

broadly. Id. at 205, 385 N.E.2d at 1085, 413 N.Y.S.2d at 131. The Sybron Court held that a New York court could issue an injunction against a nondomiciliary where it was deemed probable that the nondomiciliary's continued out-of-state conduct would eventually result in the commission of a commercial tort causing injury within New York, provided such injury was foreseeable and the nonresident was engaged in interstate or international commerce. Id. at 204-06, 385 N.E.2d at 1059-60, 413 N.Y.S.2d at 132-33.

30 CPLR § 302(a)(3) (1972).

31 Id. § 302(a)(3)(ii). Before a court may exercise jurisdiction under CPLR 302(a)(3)(ii), four prerequisites must be satisfied. In addition to the two injury requirements, injurious consequences within the state must have been foreseen or reasonably should have been foreseen by the tortfeasor. Finally, the tortfeasor must be engaged in interstate or international commerce and derive substantial revenue therefrom. D. Siegel, New York Practice § 88, at 103-04 (1978). Regarding the second requirement of injury within the state, the courts, in noncommercial cases, have "look[ed] to the imparting of the original injury within the State of New York and not resultant damage." Black v. Oberle Rentals, Inc., 55 Misc. 2d 398, 400, 285 N.Y.S.2d 226, 229 (Sup. Ct. Onondaga County 1967). Thus, a physical injury incurred outside the state has been held insufficient to satisfy CPLR 302(a)(3)(ii)'s injury requirement, even though the manifestations of the injury remain or develop when an injured resident returns to New York. See, e.g., Kramer v. Hotel Los Monteros S.A., 57 App. Div. 2d 756, 394 N.Y.S.2d 415 (1st Dep't 1977). It is submitted that in commercial tort cases a similar standard should be employed. See note 38 and accompanying text infra.


33 See note 19 supra. The federal cases require that the injury within the state be direct, and have deemed "the place where the plaintiff lost business" to be the situs of the injury, American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 428, 433 (2d Cir. 1971) (quoting Spectacular Promotions, Inc. v. Radio Station WING, 272 F. Supp. 734, 737 (E.D.N.Y. 1967)), since the place where business is lost usually will be a forum reasonably foreseeable to the tortfeasor and ordinarily the location of crucial events connected with the disagreement. 439 F.2d at 433. Thus, where loss of profits results from a domiciliary's loss of business outside the state, as, for example, where a foreign corporation induced salesmen to leave the employ of a New York corporation and used confidential customer lists, federal courts have viewed the injury within New York as merely the fortuitous result of the plaintiff's domicile and too indirect to satisfy CPLR 302(a)(3)(ii)'s injury requirement. See, e.g., id. at 455. A virtual destruction of the plaintiff's New York business through a depletion of nonresident customers, however, might yield a different result. See id. In Friedr. Zoellner Corp. v. Tex Metals Co., 278 F. Supp. 52 (S.D.N.Y. 1967), aff'd, 396 F.2d 300 (2d Cir. 1968), the
logically extended, would subject to the state's jurisdiction any non-resident who enters into a contract with a New York domiciliary, if it was foreseeable that a conversion would cause a loss of profits and the nonresident derived substantial revenue from interstate or international commerce.\textsuperscript{34}

The difficulties presented by the Fantis opinion may stem from the fact that the tort of conversion does not lend itself to the jurisdictional analysis traditionally employed in personal injury actions.\textsuperscript{35} When a defective product is sent into the state, the tort is
personal injury or property damage, the tort is completed in New York. If the manufacturer can foresee ramifications within the state and is substantially engaged in interstate or international commerce, jurisdiction may be exercised pursuant to CPLR 302(a)(3)(ii). See, e.g., Newman v. Charles S. Nathan, Inc., 55 Misc. 2d 368, 370, 285 N.Y.S.2d 688, 690 (Sup. Ct. Kings County 1967). This is the classic application of CPLR 302(a)(3)(ii) contemplated by the drafters. See Fourth Ann. Rep. of the Jud. Conference on the CPLR (1966), reprinted in [1966] N.Y. Laws 2780, 2788 (McKinney). It has been held, however, that jurisdiction is not obtained under CPLR 302(a)(3)(ii) where a defective product manufactured outside the state causes injury to New York domiciliaries while they are outside the state. See, e.g., Black v. Oberle Rentals, Inc., 55 Misc. 2d 398, 285 N.Y.S.2d 226 (Sup. Ct. Onondaga County 1967). In such a situation the tort is completed outside the state. Accordingly, any loss of earnings or other damages incurred are deemed consequential since they stem from the original personal injury and occur in New York solely because the injured party is domiciled here. Id. at 400, 285 N.Y.S.2d 226, 229. This situation is analogous to cases involving the tort of conversion where the tort is complete when the goods are converted. See note 37 and accompanying text infra. Thus, any loss of profits is similar to loss of earnings in a personal injury case.


38 If the theoretical argument can be circumvented it may be argued that the injury occurred where Standard lost sales or customers, see note 34 supra, since actual loss of customers or sales is more likely to be considered a direct “injury” than a mere balance sheet loss of profits. Even if this line of reasoning is pursued, however, it appears as though Standard would have lost customers or sales in Chicago, where the shipments were to be delivered.

39 See note 35 supra.