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CPLR 213(2): Guarantee of Contract Involving Sale of Goods Governed by 6-Year Statute of Limitations

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lower New York courts. Among these are *Lombardo v. Doyle, Dane & Bernbach, Inc.*, in which the Appellate Division, Second Department, expressly recognized a theory of recovery based upon the existence of a right of publicity, a right independent of the traditional right of privacy embodied in sections 50 and 51 of the Civil Rights Law. Another decision of that same court, *Carter v. Carter*, also is analyzed. The *Carter* court held that child support is no longer to be considered the primary obligation of the father but rather a responsibility of both parents to the extent of their financial ability. It is hoped that *The Survey's* discussion of these and other developments will serve to aid the practitioner in keeping abreast of the major trends in New York practice.

ARTICLE 2—LIMITATIONS OF TIME

CPLR 213(2): Guarantee of contract involving sale of goods governed by 6-year statute of limitations.

While actions on contracts which involve the sale of goods are restricted by the 4-year statute of limitations set forth in article 2 of the Uniform Commercial Code (UCC),[1] suits to enforce other types of contractual obligations are governed by the 6-year limitations period contained in CPLR 213(2).[2] Recently, in *American Trading Co. v. Fish*,[3] the Court of Appeals held that the guarantee of a party's performance of a contract for the sale of goods was an undertaking separate and distinct from the underlying sales agreement and therefore was controlled by the CPLR's 6-year provision.[4]

In *American Trading*, plaintiff entered into a contract with Kinematix, Inc. and defendant Fish, Kinematix's sole shareholder, providing for the opening of a new branch of plaintiff's business at the Kinematix office. The agreement required Kinematix to buy all of its business materials from plaintiff at a certain price and issue trade acceptances and bills of exchange to plaintiff.[5] Pursuant to the

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[1] N.Y.U.C.C. § 2-725(1) (McKinney 1964).

[2] Article 2 of the CPLR sets out the various limitations periods within which a New York litigant must commence a given action "unless a different time is prescribed by law or a shorter time is prescribed by written agreement." CPLR 201.

[3] 42 N.Y.2d 20, 364 N.E.2d 1309, 396 N.Y.S.2d 617 (1977), *rev'g* 50 App. Div. 2d 764, 376 N.Y.S.2d 1014 (1st Dep't 1975), *aff'g mem.* 78 Misc. 2d 210, 357 N.Y.S.2d 337 (Sup. Ct. N.Y. County 1974).

[4] 42 N.Y.2d at 26-27, 364 N.E.2d at 1312-13, 396 N.Y.S.2d at 620.

[5] *Id.* at 23, 364 N.E.2d at 1310, 396 N.Y.S.2d at 617-18. In Atterbury v. Bank of Wash. Heights, 241 N.Y. 231, 149 N.E. 841 (1925), the Court defined trade acceptance as a " 'draft or bill of exchange drawn by the seller on the purchaser of goods sold, and accepted by such purchaser.' " *Id.* at 239, 149 N.E. at 843 (quoting FED. RES. BD. REGS., ACCEPTANCES § A, ¶

terms and conditions of the contract, Fish was designated the sole employee and branch manager of the franchise and he unconditionally guaranteed Kinematix's performance of its contractual obligations. All of the trade acceptances executed by Kinematix in furtherance of the contract subsequently were dishonored. Timely judgments obtained by plaintiff against Kinematix were uncollectible due to insolvency.[6] Thereafter, plaintiff instituted the present action against Fish as guarantor of Kinematix's performance. As a consequence of plaintiff's alleged difficulty in serving Fish,[7] however, this suit was delayed until 4½ years after the date of the last trade acceptance. Upholding defendant's motion to dismiss, the Supreme Court, New York County, ruled that the basis of the guarantee action was a contract for the sale of goods and that the suit was thus time barred by the UCC's 4-year limitations period.[8] The appellate division affirmed[9] and plaintiff appealed.

V(a)). *See* Dubler v. Toscana Straw Goods Corp., 142 Misc. 369, 370, 254 N.Y.S. 464, 466 (N.Y.C. City Ct. N.Y. County 1932).

[6] 42 N.Y.2d at 23, 364 N.E.2d at 1310, 396 N.Y.S.2d at 618. Even where the principal debtor is discharged by a bankruptcy court, the guarantor's obligation remains unaffected. *See, e.g.*, Union Trust Co. v. Willsea, 275 N.Y. 164, 9 N.E.2d 820 (1937) (acceptance of stock as settlement directed by bankruptcy court and guarantor's participation in the proceeding does not relieve guarantor of liability); First Nat'l City Bank v. Cooper, 50 App. Div. 2d 518, 375 N.Y.S.2d 118 (1st Dep't 1975) (mem.) (guarantor of 11 demand notes issued to finance purchase of goods of bankrupt corporation liable for debt not satisfied by bankrupt's assets notwithstanding alleged oral agreement with creditor not to enforce notes); Chemical Bank N.Y. Trust Co. v. Amory, 27 App. Div. 2d 730, 277 N.Y.S.2d 459 (1st Dep't 1967) (mem.) *aff'd mem.*, 21 N.Y.2d 832, 235 N.E.2d 918, 288 N.Y.S.2d 916 (1968) (recovery of maker's payment on note as preferential payment by his trustee in bankruptcy does not relieve guarantor of liability). *See also* Eizenstat & Hull, *Bankruptcy of Principal: Reclamation and Other Common Bankruptcy Problems Facing the Principal and its Surety*, 12 FORUM 200 (1976).

[7] 42 N.Y.2d at 23, 364 N.E.2d at 1310, 396 N.Y.S.2d at 618. Responding to defendant's statute of limitations defense, plaintiff contended that whereas it had taken 6 extra months to locate Fish since the latter was residing in Illinois, the limitations period should have been tolled pursuant to CPLR 207. CPLR 207(3), however, provides that there is no tolling of the statute when in personam jurisdiction over a defendant may be procured without resort to personal service within the state. Since the guarantor had consented in the contract to jurisdiction in New York and there had been no fraud or concealment involved, the trial court held that the statute had not ceased to run. 78 Misc. 2d at 212-13, 357 N.Y.S.2d at 340. *See* Yarusso v. Arbotowicz, 41 N.Y.2d 516, 362 N.E.2d 600, 393 N.Y.S.2d 968 (1977); Nationwide Mut. Ins. Co. v. Holbert, 39 Misc. 2d 782, 785, 241 N.Y.S.2d 589, 593 (Sup. Ct. Broome County 1962), *aff'd mem.*, 19 App. Div. 2d 683, 241 N.Y.S.2d 1021 (3d Dep't 1963). In addition to this consensual predicate for the exercise of in personam jurisdiction, it should be noted that pursuant to CPLR 302(a)(1) defendant was subject to jurisdiction for causes of action arising from the contract which was negotiated and entered into within New York's boundaries. The negotiation and execution of a contract in New York have been held to constitute sufficiently purposeful activity to satisfy the nexus requirements of long-arm jurisdiction. *See, e.g.*, American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 428, 431-32 (2d Cir. 1971); Karlin v. Avis, 326 F. Supp. 1325, 1328 (E.D.N.Y. 1971); George Reiner & Co. v. Schwartz, 41 N.Y.2d 648, 363 N.E.2d 551, 394 N.Y.S.2d 844 (1977).

[8] 78 Misc. 2d at 211-12, 357 N.Y.S.2d at 339-40.

The Court of Appeals, while acknowledging that a narrow construction of the tripartite agreement might suggest the existence of nothing more than an ordinary sales contract,[10] held that the agreement in fact embodied separate undertakings, each of which should be subject to different limitations periods.[11] Defendant Fish, the Court reasoned, was liable upon a contract of guarantee rather than one of coobligation since his undertakings differed from those assumed by Kinematix.[12] In particular, the Court noted that the contract "did not grant defendant [Fish] the right to enforce the sales aspect of the agreement against [plaintiff] American."[13] Accordingly, defendant could not be characterized as a beneficiary of the 4-year statute of limitations which controlled actions instituted upon the sales contract.[14] Rather, Judge Cooke, writing for a unanimous panel, held that the suit against Fish should be governed by the 6-year limitations period applicable to contract actions. Thus, the Court rejected the notion that the liability of a guarantor necessarily must be coextensive with that of the primary obligor,[15] and

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[9] 50 App. Div. 2d at 764, 376 N.Y.S.2d at 1014.

[10] 42 N.Y.2d at 24, 364 N.E.2d at 1311, 396 N.Y.S.2d at 618.

[11] *Id.*

[12] *Id.* Fish had argued that his obligation was coextensive with that of the corporation and that it would be incongruous, therefore, to apply a different limitations period to the guarantee provision. *Id.* at 23-24, 364 N.E.2d at 1310-11, 396 N.Y.S.2d at 618.

[13] *Id.* at 24, 364 N.E.2d at 1311, 396 N.Y.S.2d at 619.

[14] *Id.*

[15] *Id.* at 26-27, 364 N.E.2d at 1312, 396 N.Y.S.2d at 619-20. A guarantee is a secondary obligation, General Phoenix Corp. v. Cabot, 300 N.Y. 87, 89 N.E.2d 238 (1949), and the guarantor is under no duty to perform until the principal debtor has defaulted, L. SIMPSON, THE LAW OF SURETYSHIP § 3 (1950). The guarantor's obligation is conditioned expressly upon the principal debtor's breach. The guarantor is not in privity with the debtor with respect to the principal obligation and the debtor is not a party to the guarantee. *Id.* § 6; *see* Draper v. Snow, 20 N.Y. 331 (1854); Kings County Sav. Bank v. Fulton Sav. Bank, 268 App. Div. 452, 454, 52 N.Y.S.2d 47, 49 (2d Dep't 1944) (per curiam); Pink v. Investors' Syndicate Title & Guar. Co., 246 App. Div. 172, 175, 285 N.Y.S. 155, 159 (3d Dep't), *aff'd mem.*, 273 N.Y. 483, 6 N.E.2d 414 (1936). Therefore, the duty of the guarantor does not arise until after the last day for the debtor's performance has passed. L. SIMPSON, THE LAW OF SURETYSHIP § 14 (1950); *see, e.g.*, Galloway v. Barnesville Loan, Inc., 74 Ohio App. 23, 57 N.E.2d 337 (1943). The guarantor then becomes absolutely liable when notified of his principal's default. *See generally* RESTATEMENT OF SECURITY § 82 (1941).

Since a guarantee is a collateral contract by definition, separate and distinct from the contract which it insures, there appears to be little reason why it cannot differ from the main contract with respect to the obligations it imposes upon the guarantor. *See, e.g.*, Evansville Nat'l Bank v. Kaufmann, 93 N.Y. 273 (1883); Standard Brands, Inc. v. Straile, 23 App. Div. 2d 363, 260 N.Y.S.2d 913 (1st Dep't 1965) (per curiam); Marburt Holding Corp. v. Picto Corp., 5 App. Div. 2d 617, 173 N.Y.S.2d 762 (1st Dep't 1958); Cross v. Rosenbaum, 7 Misc. 2d 309, 161 N.Y.S.2d 337 (Sup. Ct. Kings County 1957). Yet, in reaching its decision that the liability of a guarantor need not be coextensive with that of the principal, the *American Trading* Court felt compelled to distinguish Cheesman v. Cheesman, 236 N.Y. 47, 139 N.E. 775 (1923). The *Cheesman* opinion stated:

focused upon the nature of the underlying obligations assumed within the agreement. Since the UCC neither expressly nor impliedly superseded the CPLR's applicability to guarantees,[16] the Court had little difficulty in reversing the lower court's decision and applying the 6-year limitations period.[17] As an alternative ground for its holding, the Court noted that the 6-year statute of limitations for suits on trade acceptances was applicable to the action, since Fish's guarantee covered trade acceptances executed and issued by Kinematix pursuant to the original sales contract.[18]

> It is the general rule that a surety is not liable if the original debt is barred by the Statute of Limitations. In such a case no recovery may be had even where the principal has allowed judgment to be taken against him. The surety may avail itself of the statute in an action brought against it.

Id. at 51, 139 N.E. at 776 (citing Dawes v. Shed, 15 Mass. 6 (1818) and McMullen v. Rafferty, 80 N.Y. 456 (1882)). *Cheesman* involved a claim for Workmen's Compensation by a minor employed by his father. The claim was not filed, however, until after the 1-year statute of limitations contained in the Workmen's Compensation Law, ch. 634, § 4, [1918] N.Y. Laws 2020 (current version at N.Y. WORK. COMP. LAW § 28 (McKinney Supp. 1977-1978) (now 2 years)), had expired. The father, the principal obligor, had not objected to this late filing, but the carrier, who was a surety as to the employee under the Workmen's Compensation Law, ch. 41, § 10, [1914] N.Y. Laws 222, ch. 622, §§ 2, 6, [1916] N.Y. Laws 2041, 2048, ch. 634, § 3, [1918] N.Y. Laws 2018 (current version at N.Y. WORK. COMP. LAW §§ 10, 11, 13, 26 (McKinney 1965 & Supp. 1977-1978)), had raised the statute of limitations defense. The Court held that the insurer could successfully invoke the 1-year statute of limitations defense, even though the principal had chosen to waive it. No discussion of whether the general statute of limitations as opposed to the Workmen's Compensation statute of limitations should apply was undertaken, as a reading of the Workmen's Compensation statute of limitations demonstrated the legislature's intent that it apply to the carrier:

> "The right to claim compensation . . . shall be forever barred unless within one year after the accident . . . a claim for compensation thereunder shall be filed . . . *but the employer and insurance carrier shall be deemed to have waived the bar of the statute* unless the objection of the failure to file the claim . . . is raised before the Commission on the hearing."

236 N.Y. at 50, 139 N.E. at 776 (quoting Workmen's Compensation Law § 28, ch. 634, § 4, [1916] N.Y. Laws 2020 (current version at N.Y. WORK. COMP. LAW § 28 (McKinney Supp. 1977-1978)) (emphasis added). No such clear legislative intent to apply a 4-year limitations period to guarantees of sales contracts is present in the UCC. The *American Trading* Court found, therefore, that the *Cheesman* language should not be construed as authorizing the automatic release of a guarantor upon the running of the statute of limitations in favor of the principal.

[16] 42 N.Y.2d at 27, 364 N.E.2d at 1313, 396 N.Y.S.2d at 620.

[17] *Id.*

[18] *Id.* at 27-28, 364 N.E.2d at 1313, 396 N.Y.S.2d at 620. Trade acceptances, being negotiable instruments within the meaning of N.Y.U.C.C. § 3-104(2) (McKinney 1964), National Bank of North America v. Beinhorn, 10 UCC Rep. Serv. 847 (N.Y. Sup. Ct. Nassau County 1972); *see* Merson v. Sun Ins. Co., 44 Misc. 2d 131, 132, 253 N.Y.S.2d 51, 52 (N.Y.C. Civ. Ct. N.Y. County 1964) (citing Citizens Trust Co. v. R. Prescott & Sons, Inc., 221 App. Div. 420, 422, 223 N.Y.S. 184, 187 (4th Dep't 1927)), are governed by the 6-year statute of limitations set forth in CPLR 213(2). *See* Seligson v. Chase Manhattan Bank, 50 App. Div. 2d 206, 376 N.Y.S.2d 899 (1st Dep't 1975) (certified check); Richman v. Kauffman, 48 App. Div. 2d 988, 369 N.Y.S.2d 565 (3d Dep't 1975) (mem.) (promissory note).

It is suggested that the defense of the underlying UCC statute of limitations in the *American Trading* situation is akin to a personal defense which bars relief against the principal obligor but which does not affect the guarantor's liability.[19] Under this view, the Court's ruling that the guarantee of a sales contract, like that accompanying any other contract, is governed by the CPLR's 6-year limitations period seems just and logical. The holding is consonant with decisions in most other jurisdictions[20] and therefore promotes the consistent procedural application of the UCC.[21]

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

CPLR 308(2): Delivery of summons and complaint to doorman in apartment house lobby deemed valid service upon apartment dweller in certain circumstances.

CPLR 308(2) provides that personal service of a summons upon a natural person may be made "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served at his last known residence."[22] This method of service may be effected even in the absence of prior attempts to deliver the summons to the defendant personally. Problems of interpretation

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[19] *See, e.g.*, Rhodia, Inc. v. Steel, 32 App. Div. 2d 753, 300 N.Y.S.2d 1005 (1st Dep't 1969) (mem.) (defense based on defects in merchandise sold to principal debtor not available to guarantor); Ralston Purina Co. v. Siegel's Poultry, Inc., 24 App. Div. 2d 926, 264 N.Y.S.2d 601 (3d Dep't 1965) (mem.) (principal's claim against creditor for negligence in performance of service provision of sales contract guaranteed, not available to guarantor either as defense or setoff). *See generally* Ettlinger v. National Sur. Co., 221 N.Y. 467, 117 N.E. 945 (1917).

[20] *See, e.g.*, Weems v. Carter, 30 F.2d 202 (4th Cir. 1929); Bloom v. Bender, 48 Cal. 2d 793, 313 P.2d 568 (1957); Bank of Nev. v. Friedman, 82 Nev. 417, 420 P.2d 1 (1966); Fidelity & Cas. Co. v. Lackland, 175 Va. 178, 8 S.E.2d 306 (1940). *But see* First Nat'l Bank v. Drake, 185 Iowa 879, 171 N.W. 115 (1919).

[21] Besides promulgating simple and clear rules to govern modern commercial transactions without restricting ongoing expansion through custom, usage, and agreement as to commercial practices, the aim of the UCC is "to make uniform the law among the various jurisdictions." N.Y.U.C.C. § 1-102(2) (McKinney 1964).

[22] Under CPLR 308(2) service may be made

> by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served at his last known residence; proof of such service shall be filed within twenty days thereafter with the clerk of the court designated in the summons; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service . . . .