CPLR 214(5): Three-Year Statute of Limitations Applied to Action for Abuse of Process

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Court will opt for an outright application of the grouping of contacts test to the borrowing statute. It is to be hoped that the Court's resolution of this conflict will be free of both the mechanical approach of Myers and the ambiguous reasoning of Martin.

CPLR 214(5): Three-year statute of limitations applied to action for abuse of process.

Article 2 of the CPLR contains detailed provisions indicating the appropriate statute of limitations applicable to a cause of action in New York. None of these provisions, however, expressly declares which statute of limitations governs an action for abuse of process. CPLR 215(3) provides a one-year limitation period for actions based on the intentional torts of assault, battery, false imprisonment, malicious prosecution, defamation, or invasion of privacy. Section 214(5) applies a three-year statute of limitations to any "action to recover damages for a personal injury except as provided in section 215." Finally, CPLR 213(1) requires that actions "for which no limitation is specifically prescribed by law" be brought within six years from the accrual of the cause of action. Recently, in Levine v. Sherman, the Supreme Court, Nassau County, in a case of first impression, held that although abuse of process is an intentional tort which would logically fit most neatly among those actions listed in 215(3), the language of the CPLR mandates application of the three-year statute of limitations provided in CPLR 214(5).


CPLR 215(3) states that a one-year limitation period will be applied to an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law . . . .

CPLR 214(5).

CPLR 213(1). The "usual application [of CPLR 213(1)] is to actions in which equitable relief is sought." 1 WK&M 213.01 (footnote omitted); see Ford v. Clendenin, 215 N.Y. 10, 16, 109 N.E. 124, 126 (1915) (applies to any and every form of equitable action); Beresovski v. Warszawski, 28 N.Y.2d 419, 423-25 & n.2, 271 N.E.2d 520, 522-23 & n.2, 322 N.Y.S.2d 673, 675-76 & n.2 (1971) (applies to equitable remedy of specific performance).

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Id. at 999, 384 N.Y.S.2d at 687. Coincidentally, 10 days after this statute of limitations issue was decided by the Levine court as one of first impression, the Supreme Court, New York County, was presented with the same issue in Brecker v. Groosman, 175 N.Y.L.J. 123, June 25, 1976, at 6, col. 4 (Sup. Ct. N.Y. County June 24, 1976). The Brecker court, after
The Levine plaintiff instituted an action for abuse of process almost two and one-half years after the cause of action had accrued. Claiming that plaintiff's cause of action was time barred under the one-year statute of limitations for intentional torts, defendant moved to dismiss the complaint. The court rejected defendant's contention, but implicitly conceded that it was not without merit. Justice Harnett acknowledged that CPLR 215(3) lists most intentional torts, including malicious prosecution, a tort very similar to abuse of process in that both involve an "improper purpose in the use of legal process." The court pointed out, however, that the listing of causes of action subject to the one-year limitation period of CPLR 215(3) is exclusive, and abuse of process is "conspicuously absent" from the enumeration of intentional torts therein.

Noting that despite the similarity between malicious prosecution and abuse of process they are nevertheless "separately classifiable torts with different composing elements," the court declared that even if the omission of abuse of process from CPLR 215(3) was a legislative oversight, "[n]othing gives the court power to add to this list. Only the Legislature can do that."

Having thus rejected the one-year statute of limitations provided by CPLR 215(3), the court held that abuse of process is a "personal injury" within the meaning of CPLR 214(5), which pre-
scribes a three-year limitation period for all personal injury actions not governed by CPLR 215. Justice Harnett felt that this result was mandated by section 37-a of the General Construction Law, which defines “personal injury” as including defamation, malicious prosecution, assault, battery, false imprisonment, “or other actionable injury to the person.”

Unlike the list of intentional torts in CPLR 215(3), the enumeration of actions within the definition of a personal injury was found to be nonexclusive. Accordingly, the court held that abuse of process fits squarely within the statutory framework of CPLR 214(5) rather than the catch-all provision of section 213(1).

It is submitted that the court properly held the language of CPLR 215(3) to create a “closed set,” not amenable to judicial expansion. This holding clearly follows the general rule of statutory construction that the inclusion of one thing implies the exclusion of the other. Thus, the specific listing of torts in CPLR 215(3) necessarily implies the exclusion of all others, and, therefore, CPLR 215(3) should not be deemed to incorporate the unlisted tort of abuse of process.

There is also substantial support for the court’s finding that abuse of process is a “personal injury” within the ambit of CPLR 214(5). It has been repeatedly held that the term personal injury is to be interpreted broadly and is not limited to physical contact. Indeed, the term has been found to include “every variety of injury to a person’s body, feelings or reputation.” Since abuse of process usually involves coercion, it is clear that some degree of personal

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1 N.Y. Gen. Constr. Law § 37-a (McKinney 1951) (emphasis added). In so holding, the Levine court rejected the contention that the controlling statute of limitations is CPLR 213(1). That section mandates that actions “for which no limitation is specifically prescribed by law” must be commenced within six years after the cause of action accrues. In practice, CPLR 213(1) is primarily utilized when the cause of action sounds in equity. See note 35 supra.

2 86 Misc. 2d at 999, 384 N.Y.S.2d at 687.


5 Bonilla v. Reeves, 49 Misc. 2d 273, 279, 267 N.Y.S.2d 374, 381 (Sup. Ct. N.Y. County 1966) (interference with right to sepulcher is personal injury).

Despite the court's thorough reasoning and apparent accuracy, the *Levine* decision has at least one unfortunate aspect. The court's holding may be viewed as logically inconsistent with the statutory scheme of limitation periods inasmuch as it applies a three-year statute of limitations to abuse of process, whereas malicious prosecution, an intentional tort closely analogous to abuse of process, is governed by a one-year statute of limitations. Although the two actions are distinguishable in that their respective elements are not identical, it is difficult to justify the application of different statutes of limitations. The major reason for the comparatively short one-year limitations period applied to malicious prosecution is that its perpetration is "known promptly to the person injured." Since the abuse of process tort usually involves coercion, its perpetration will similarly be readily apparent.

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An action for abuse of process, on the other hand, is based on misuse of process which has been legally issued, see note 32 supra, and requires a showing that the process was in fact used for a purpose outside of the one for which it was issued, Dean v. Kochendorfer, 237 N.Y. 384, 390, 143 N.E. 229, 231 (1924). The elements of an action for abuse of process are: (1) regularly issued process; (2) harmful intent on the part of the person who caused the process to be issued; (3) use of the process to achieve "some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process." Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 403, 343 N.E.2d 278, 283, 380 N.Y.S.2d 635, 642 (1975). It should be noted that the mere existence of a malicious motive for the use of process does not constitute abuse of process; the process must be used for other than that for which it was intended. Bohm v. Holzberg, 47 App. Div. 2d 764, 365 N.Y.S.2d 262 (2d Dep't 1975) (mem.).

The main distinction between the two causes of action is that an action for abuse of process arises from the improper use of process after it has been issued, whereas an action for malicious prosecution lies as a result of the defendant causing process to unlawfully issue. Assets Collecting Co. v. Myers, 167 App. Div. 133, 138, 152 N.Y.S. 930, 933 (1st Dep't 1915).
This criticism, however, is more properly addressed to the legislature than the courts. It is submitted that CPLR 215(3) should be amended to include abuse of process among the intentional torts subject to a one-year statute of limitations. Until such an amendment is forthcoming, however, the Levine court's application of a three-year period is the proper result.

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

CPLR 303: Counterclaim by Seider-predicated third-party Dole defendant does not constitute commencement of an action.

CPLR 303 provides that the commencement of an action in New York by a person not otherwise amenable to personal jurisdiction exposes the plaintiff to full in personam jurisdiction in any action brought by a party to the original action which "would have been permitted as a counterclaim had the action been brought in the supreme court." Thus, a nonresident who commences an action in New York assumes the risk that a party to the action may assert a claim against him, for which, pursuant to CPLR 303, he is subject to full in personam jurisdiction. Recently, in *Green v. Bender*, the Supreme Court, Westchester County, was confronted with the novel question whether a Seider-predicated third-party...