

July 2012

CPLR 207: Statute of Limitations Not Tolled By Defendant's Absence from the State Where There Is a Statutory Means of Obtaining Jurisdiction Over Him

St. John's Law Review

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Recommended Citation

St. John's Law Review (1977) "CPLR 207: Statute of Limitations Not Tolled By Defendant's Absence from the State Where There Is a Statutory Means of Obtaining Jurisdiction Over Him," *St. John's Law Review*. Vol. 51 : No. 4 , Article 6.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol51/iss4/6>

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Consideration also is given to significant developments in the area of *Dole* actions for contribution. In *Klinger v. Dudley*, the Court of Appeals held that a judgment against a third-party defendant who is liable for contribution may not be enforced by the initial defendant until the latter has paid an amount in excess of his *Dole* share to the plaintiff. A further embellishment of *Dole* is found in *Blum v. Good Humor Corp.*, wherein the Appellate Division, Second Department, refused to strike a laches defense interposed in a suit for contribution which was instituted 13 months after settlement of the original tort action.

Finally, *The Survey* examines two cases illustrating recent modifications of the law of evidence in New York. In *Halloran v. Virginia Chemicals, Inc.*, the Court of Appeals approved the admission of evidence of a plaintiff's habitual carelessness to establish his contributory negligence in a products liability action. This evidence was found logically probative of the plaintiff's actions on the day of the accident in question. An extension of the categories of admissible evidence is found in *Barry v. Manglass*, wherein the Appellate Division, Second Department, sanctioned the admission of an automobile manufacturer's recall letter as some evidence of the existence of a defect in a particular vehicle. Through *The Survey's* discussion of these and other refinements in New York law, it is our intention to be of continuing assistance to the practicing attorney.

ARTICLE 2—LIMITATIONS OF TIME

CPLR 207: Statute of limitations not tolled by defendant's absence from the state where there is a statutory means of obtaining jurisdiction over him.

Under CPLR 207, when a person against whom an action has accrued leaves the state for a continuous period of 4 months or more, "the time of his absence . . . is not a part of the time within which the action must be commenced."¹ Subdivision 3 of that section renders this tolling provision inapplicable, however, while personal jurisdiction over the absent defendant "can be obtained" without personal delivery of a summons within the state.² The phrase "can

¹ CPLR 207 provides in pertinent part:

If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for four months or more, . . . the time of his absence . . . is not a part of the time within which the action must be commenced.

² CPLR 207(3) states that the tolling provision of that section does not apply "while

be obtained" has been interpreted by some authorities as creating an exception to the tolling provision only when process may effectively be served upon the defendant.³ Other authorities have construed the phrase to preclude a toll whenever statutory authorization for obtaining jurisdiction exists, even though the defendant is not amenable to service.⁴ This latter, broad interpretation of CPLR 207(3) recently was adopted by the Court of Appeals in *Yarusso v. Arbotowicz*.⁵

The *Yarusso* plaintiff was injured in a Nassau County automobile accident on November 24, 1968. Defendant, a resident of New York at the time of the accident, moved to Florida in November 1970. Although he traveled extensively, defendant maintained a residence in Florida until January, 1974, at which time he returned to New York.⁶ In 1971, plaintiff *Yarusso* attempted to obtain personal jurisdiction over defendant by serving him under the provisions of the Vehicle and Traffic Law (VTL).⁷ The VTL deems the

jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to him within the state."

³ Dean McLaughlin has contended that the statute of limitations should be tolled unless the absent defendant effectively can be served outside the state. CPLR 207, commentary at 241 (McKinney 1972). To support his contention that the courts are leaning toward a narrow construction of 207(3), he cited *Ellis v. Riley*, 53 Misc. 2d 615, 279 N.Y.S.2d 382 (Sup. Ct. Kings County 1967), *aff'd mem.*, 29 App. Div. 2d 562, 286 N.Y.S.2d 451 (2d Dep't 1967) (statute of limitations tolled because defendant had given incorrect address in an accident report). See also *Molter v. Carieri*, 39 Misc. 2d 587, 241 N.Y.S.2d 700 (Sup. Ct. Queens County 1963) (limitations period tolled because of inability to ascertain defendant's address). The authority of *Ellis* is less than compelling, however, since the case was decided under the CPA, which contained no counterpart to CPLR 207(3). Nevertheless, by analogy, *Ellis* provides limited support for a narrow construction of 207(3).

Several cases imply that a narrow construction might be preferable but require that plaintiff at least attempt service before the tolling provision becomes operative. See, e.g., *Nelson v. Fraboni*, 38 App. Div. 2d 633, 326 N.Y.S.2d 934 (3d Dep't 1971) (mem.); *Caruso v. Bard*, 20 Misc. 2d 887, 194 N.Y.S.2d 535 (Sup. Ct. Nassau County 1959).

⁴ See, e.g., *Goodemote v. McClain*, 40 App. Div. 2d 22, 337 N.Y.S.2d 79 (4th Dep't 1972); *Morgan v. Gould*, N.Y.L.J., March 10, 1975, at 17, col. 5 (Sup. Ct. App. T., 1st Dep't) (mem.); *Nucci v. Judson*, 74 Misc. 2d 670, 346 N.Y.S.2d 670 (Sup. Ct. Seneca County 1973).

⁵ 41 N.Y.2d 516, 362 N.E.2d 600, 393 N.Y.S.2d 968 (1977), *rev'g* 52 App. Div. 2d 582, 382 N.Y.S.2d 535 (2d Dep't 1976), *aff'g mem.* N.Y.L.J., May 13, 1975, at 19, col. 5 (Sup. Ct. Suffolk County).

⁶ 41 N.Y.2d at 517, 362 N.E.2d at 601, 393 N.Y.S.2d at 969. Defendant lived aboard a ship moored at a Florida marina until February 1971, when he moved to an apartment in Miami. *Id.* The trial court found that, after leaving New York, defendant visited several states and the Virgin Islands and therefore was not amenable to service. N.Y.L.J., May 13, 1975, at 19, cols. 6-7.

⁷ N.Y. VEH. & TRAF. LAW §§ 253-254 (McKinney 1970). Pursuant to § 253(1), a nonresident driving into the state is deemed to have appointed the secretary of state his attorney who may be served with process in any action arising out of an automobile accident. Service is made by mailing or personally delivering a copy of the summons to the secretary of state

secretary of state the attorney for service of a resident who has left the state after an accident and has remained absent for 30 days.⁸ Service is made *inter alia*, by delivering copies of the process to the secretary and the defendant.⁹ Accordingly, plaintiff mailed copies of the summons and complaint to both the secretary of state and defendant, but service to the latter was returned bearing the notation "addressee unknown."¹⁰ In May, 1974, plaintiff moved for a default judgment.¹¹ Defendant cross-moved for dismissal, successfully contending that the incomplete service resulted in a lack of personal jurisdiction.¹² While these motions were pending, defendant was personally served in New York with another summons and complaint, whereupon he moved for summary judgment, contending that this second action was time-barred.¹³ The Supreme Court, Suffolk County, denied the motion, finding that defendant's extensive travel created a situation in which jurisdiction over him could not

and sending notice of such service with a copy of the summons and complaint to the defendant by registered or certified mail, return receipt requested. If the defendant receives or refuses to accept process, service is complete after plaintiff complies with certain filing requirements. *Id.* § 253(2). Section 254 provides, in part, that the above procedures apply to residents who have left the state subsequent to an accident and have remained continuously absent for 30 days. *Id.* § 254.

⁸ See note 7 *supra*.

⁹ *Id.*

¹⁰ 41 N.Y.2d at 517, 362 N.E.2d at 601, 393 N.Y.S.2d at 970. Plaintiff sent the first set of papers to a Florida marina at which defendant had stayed. Since defendant had departed from the marina 7 months earlier, the papers were returned to plaintiff. In his second attempt, plaintiff mailed the documents to the wrong street address, and they were returned marked "addressee unknown." *Id.* Consequently, service was never completed under the Vehicle and Traffic Law.

¹¹ *Id.* At this time, defendant had not yet received a summons or complaint to which he could respond. See note 10 *supra*. Nevertheless, the plaintiff moved for a default judgment pursuant to CPLR 3215, alleging that the defendant failed to respond to service made in compliance with the Vehicle and Traffic Law. *Id.*

¹² 41 N.Y.2d at 517, 362 N.E.2d at 601, 393 N.Y.S.2d at 970. A court need not always dismiss an action because of incomplete service. Minor defects in service may be corrected, as long as no prejudice to the defendant results. See, e.g., *Genovese v. Sanaseverino*, 26 Misc. 2d 191, 206 N.Y.S.2d 220 (Sup. Ct. Monroe County 1960) (mailing summons and complaint to defendant without notice that the secretary of state had been served not a fatal error); *Kimball v. Midwest Haulers, Inc.*, 195 Misc. 231, 89 N.Y.S.2d 119 (Sup. Ct. Herkimer County 1949) (defendant not prejudiced by not receiving notice that secretary of state had been served until 3 weeks after receiving summons and complaint). In the absence of substantial compliance with the statutory method of service, however, the court often will hold that it lacks personal jurisdiction over the defendant. See, e.g., *Furey v. Milgrom*, 44 App. Div. 2d 91, 353 N.Y.S.2d 508 (2d Dep't 1974) (attempted service by nail and mail method invalid where mailing was made 1 day after limitations period expired); *Metcalf v. Cowburn*, 44 App. Div. 2d 650, 352 N.Y.S.2d 740 (4th Dep't 1974) (mem.) (service under Vehicle and Traffic Law invalid because defendant received summons and notice instead of summons and complaint).

¹³ 41 N.Y.2d at 517-18, 362 N.E.2d at 601, 393 N.Y.S.2d at 970.

"be obtained."¹⁴ Consequently, under CPLR 207, the statute of limitations was tolled during defendant's absence.¹⁵ The Appellate Division, Second Department, affirmed on the basis of the lower court's holding that service upon the secretary of state under the VTL tolls the statute of limitations.¹⁶

The Court of Appeals reversed, holding that CPLR 207 does not toll the statute of limitations if statutory authorization exists for obtaining jurisdiction over an absent defendant, irrespective of whether the defendant actually can be served.¹⁷ Judge Jones, who authored the unanimous opinion, explained that this construction of 207(3) results in the out-of-state defendant being afforded the same treatment as in-state defendants.¹⁸ Noting that the *Yarusso* plaintiff theoretically could have perfected jurisdiction under CPLR 313 and 302,¹⁹ or the VTL,²⁰ the Court concluded that since jurisdiction "could have been acquired" within the meaning of 207(3), the statute of limitations was not tolled.²¹ The fact that *Yarusso* unsuccessfully had attempted to serve process upon defendant was deemed inconsequential.²²

The Court of Appeals also intimated that delivery of process to the secretary of state pursuant to the VTL does not in itself toll the statute of limitations.²³ In so holding, the Court distinguished several appellate division decisions holding time limitations tolled by such service.²⁴ In these cases, as in *Yarusso*, plaintiffs had served the secretary of state within the statutory period but had been unsuccessful in timely completing service upon defendants.²⁵ Each defen-

¹⁴ N.Y.L.J., May 13, 1975, at 19, cols. 6-7.

¹⁵ See *id.* at 19, col. 6.

¹⁶ 52 App. Div. 2d at 582, 382 N.Y.S.2d at 536.

¹⁷ 41 N.Y.2d at 518-19, 362 N.E.2d at 602, 393 N.Y.S.2d at 970-71.

¹⁸ *Id.* at 519, 362 N.E.2d at 602, 393 N.Y.S.2d at 971.

¹⁹ Since defendant was a nondomiciliary who had committed a tortious act within the state, he was subject to in personam jurisdiction under CPLR 302(a)(2). Moreover, pursuant to CPLR 313 he was subject to service outside the state in any manner which is permissible within the state.

²⁰ N.Y. VEH. & TRAF. LAW §§ 253-254 (McKinney 1970).

²¹ 41 N.Y.2d at 518, 362 N.E.2d at 601, 393 N.Y.S.2d at 970.

²² *Id.*

²³ *Id.* at 519, 362 N.E.2d at 602, 393 N.Y.S.2d at 971.

²⁴ *Sadek v. Stewart*, 38 App. Div. 2d 655, 327 N.Y.S.2d 271 (3d Dep't 1971) (mem.); *Dominion of Canada Gen. Ins. Co. v. Pierson*, 27 App. Div. 2d 484, 280 N.Y.S.2d 296 (3d Dep't 1967); *Glines v. Muszynski*, 15 App. Div. 2d 435, 225 N.Y.S.2d 61 (4th Dep't 1962) (per curiam).

²⁵ In *Dominion of Canada Gen. Ins. Co. v. Pierson*, 27 App. Div. 2d 484, 280 N.Y.S.2d 296 (3d Dep't 1967), plaintiff served a summons upon the sheriff of the county in which defendant had lived. *Id.* at 485, 280 N.Y.S.2d at 298. Such service has the effect of extending

dant appeared, but unlike the *Yarusso* defendant, raised only a statute of limitations defense without objecting to the courts' personal jurisdiction.²⁶ By appearing generally, the *Yarusso* court reasoned, these defendants waived all objections relating to service and thereby foreclosed their later claims that service was not completed within the statutory period.²⁷ Since the *Yarusso* defendant had not submitted to the lower court's jurisdiction by making a general appearance, however, the Court of Appeals found that he was not precluded from successfully contending that untimely service rendered the action time-barred.²⁸

In *Yarusso*, the Court of Appeals has construed CPLR 207(3) in a manner which recognizes the increased liberality of New York's long-arm jurisdiction. During the period when section 19 of the CPA, the predecessor to CPLR 207, was operative, considerable disparity existed between the availability of jurisdiction over those persons found within the state and those found without. Indeed, section 19 contained no provision precluding a toll in an instance where jurisdiction could be obtained over an absent defendant, perhaps in recognition of the fact that jurisdiction over such a defendant rarely was available. With the advent of liberal long-arm jurisdiction, however, the need for a special tolling provision in actions against out-of-state defendants has diminished. As noted by the Court, "[i]t is not significantly more difficult (if indeed it is more difficult at all) to locate persons residing outside the State of New York than those within its borders."²⁹ Thus, as an equalizing influence on the treatment of in-state and out-of-state defendants, *Yarusso* represents a realistic approach to modern long-arm jurisdictional practice.

the statute of limitations for 60 days. See CFLR 203(b)(5); *Cyens v. Town of Roxbury*, 40 App. Div. 2d 915, 337 N.Y.S.2d 732 (3d Dep't 1972) (mem.). Plaintiff was unable to complete service within the 60-day extension period.

In *Sadek v. Stewart*, 38 App. Div. 2d 655, 327 N.Y.S.2d 271 (3d Dep't 1971) (mem.), the court signed an order for substitute service under CPLR 308(5) after the statute of limitations had run. *Id.* at 656, 327 N.Y.S.2d at 272.

Defendant in *Glines v. Muszynski*, 15 App. Div. 2d 435, 225 N.Y.S.2d 61 (4th Dep't 1962) (per curiam), received service by mail more than 3 years after the automobile accident had occurred. *Id.* at 436, 225 N.Y.S.2d at 63.

²⁶ 41 N.Y.2d at 519-20, 362 N.E.2d at 602-03, 393 N.Y.S.2d at 971.

²⁷ *Id.* at 521, 362 N.E.2d at 603, 393 N.Y.S.2d at 972. Under CPLR 3211(e), if a party pleads a statute of limitations defense without simultaneously pleading lack of personal jurisdiction, the jurisdictional claim is waived. Consequently, he is within the court's jurisdiction and objections based upon propriety or completeness of service are precluded.

²⁸ 41 N.Y.2d at 521, 362 N.E.2d at 603, 393 N.Y.S.2d at 972.

²⁹ *Id.* at 519, 362 N.E.2d at 602, 393 N.Y.S.2d at 971.

In ruling that defendant preserved his statute of limitations defense by contesting the lower court's jurisdiction, the Court of Appeals may have anticipated the ultimate resolution of a conflict in the appellate division. This conflict is illustrated by the divergent results reached in *Goodemote v. McClain*³⁰ and *Sadek v. Stewart*.³¹ In both cases, the secretary of state had been served under the VTL, but the process mailed to the defendants had been returned. After the statute of limitations would have run if not tolled, defendants were served pursuant to CPLR 308.³² Defendants appeared as a result of the second service and moved to dismiss, pleading only a statute of limitations defense. In *Goodemote*, the fourth department found that defendant had no reason to contest the court's jurisdiction, since she was personally served within the state.³³ Consequently, the court held that the failure to seek a dismissal on jurisdictional grounds did not preclude defendant's statute of limitations defense, which was held to be meritorious.³⁴ A contrary result was reached in *Sadek*, wherein the third department held that by appearing generally, defendant had foreclosed the question of personal jurisdiction.³⁵ Accordingly, the incomplete service made pursuant to the VTL was deemed valid. Since this service was completed before the statute of limitations had run, plaintiff's action was considered timely.³⁶

Because the defendant in *Yarusso* had pleaded lack of jurisdiction, the Court of Appeals was not called upon to resolve the *Goodemote-Sadek* conflict. Judge Jones' opinion intimated, however, that the Court may adopt the *Sadek* view when presented with the issue.³⁷ Thus, in an action where untimely service within the state has been preceded by incomplete service under the VTL, a statute of limitations defense might only be available if the defendant also asserts a lack of personal jurisdiction.³⁸

In practical effect, the *Yarusso* decision may nullify the tolling provision of CPLR 207. Pursuant to CPLR 308(5), a court may

³⁰ 40 App. Div. 2d 22, 337 N.Y.S.2d 79 (4th Dep't 1972).

³¹ 38 App. Div. 2d 655, 327 N.Y.S.2d 271 (3d Dep't 1971) (mem.).

³² The *Sadek* defendant was served by court order pursuant to CPLR 308(5). *Id.* at 656, 327 N.Y.S.2d at 272. In *Goodemote*, defendant was served by personal delivery within the state in accordance with CPLR 308(1). 40 App. Div. 2d at 24, 337 N.Y.S.2d at 81.

³³ *Id.* at 25, 337 N.Y.S.2d at 82.

³⁴ *Id.*, 337 N.Y.S.2d at 82-83.

³⁵ 38 App. Div. 2d at 656, 327 N.Y.S.2d at 272.

³⁶ *Id.*

³⁷ 41 N.Y.2d at 519, 521, 362 N.E.2d at 602, 603, 393 N.Y.S.2d at 971, 972.

³⁸ *See id.*

direct service in any manner it deems constitutional when other methods of service fail.³⁹ This section, together with the long-arm jurisdiction and methods of service provided by CPLR 302 and 313, seems to ensure that a plaintiff will almost always have a means available to obtain jurisdiction over an absent defendant. As a result, the toll provided by CPLR 207 will rarely be utilized, since jurisdiction usually will be obtainable by some statutory means other than personal delivery within the state. In addition, while *Yarusso* does not conclusively resolve the *Goodemote-Sadek* controversy, it does increase the likelihood that courts will follow the *Sadek* position. A practitioner defending an action involving the *Goodemote-Sadek* situation therefore should plead lack of jurisdiction or risk losing his client's statute of limitations defense.

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

CPLR 302: Application of the transacting business predicate to acquire in personam jurisdiction over nonresident individuals.

The demise of the territoriality concept of jurisdiction⁴⁰ and the emergence of a "minimum contacts" approach⁴¹ to the exercise of

³⁹ CPLR 308(5).

⁴⁰ The Supreme Court, in *Pennoyer v. Neff*, 95 U.S. 714 (1878), indicated that the validity of an "in personam" judgment against a nonresident is dependent upon the defendant's presence in the forum state. This notion of territoriality developed into a rigid rule, severely circumscribing the power of state courts over nonresident defendants. As the nation's transportation and communication facilities increased in sophistication, however, this inflexible concept proved to be inadequate. Consequently, the territoriality theory ultimately waned. See note 41 *infra*.

⁴¹ Before the "minimum contacts" approach was adopted, courts began developing methods to circumvent the rigid territoriality concept. To deal with the problems presented by *Pennoyer's* narrow view of state power, the fictions of "implied consent" and "presence" were used to obtain jurisdiction over nondomiciliaries. See CPLR 302, commentary at 60-61 (McKinney 1972); 1 WK&M ¶ 302.02. Thereafter, in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Supreme Court departed from *Pennoyer* and reasoned that an individual granted the privilege of conducting activities within a state is charged with assuming certain obligations with respect to that state. Thus, should a suit arise out of that individual's activity within the forum state, it is not unjust to require him to defend the action in that forum. *Id.* at 320. The *International Shoe* Court went on to promulgate guidelines for the exercise of personal jurisdiction over nonresidents: "[I]n order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." *Id.* at 316 (emphasis added) (citation omitted).

In two major cases that followed the *International Shoe* decision, the Supreme Court seemed to emphasize the qualitative aspect of a defendant's contact with the forum state. In *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), a single contact was considered to