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APPEARANCE AND CHOICE OF COURT

CPLR 302(a)(3)(ii): Appellate Division vacillates in construction of foreseeability requirement of long-arm statute.

Where a nondomiciliary commits a tortious act outside New York which produces injury to persons or property within the state, CPLR 302(a)(3)(ii) may provide a jurisdictional predicate.⁴⁵ The provision, enacted in 1966, was intended to abrogate the rule of *Feathers v. McLucas*,⁴⁶ which had left a plaintiff, injured under such circumstances, without recourse.⁴⁷

the denial of plaintiff's motion to amend his complaint, refused to apply *Codling* because "the issue was completely litigated and the appeal process carried to its ultimate disposition . . ." 46 App. Div. 2d at 305, 362 N.Y.S.2d at 264. By so deciding, it avoided the question of retroactivity.

Finally, one must consider the position of the retailer. In extending warranty liability, the intent of the Court was to place the burden for the injuries caused by defective products on the manufacturer, *i.e.*, the one who controls production. *See Codling v. Paglia*, 32 N.Y.2d 330, 339-41, 298 N.E.2d 622, 626-28, 345 N.Y.S.2d 461, 467-69; Comment, *The Last Vestige of the Citadel*, in *Symposium on Products Liability*, 2 *HOFSTRA L. REV.* 721, 726 (1974). In light of this purpose, should the retailer be limited in any cross-claim against the manufacturer by a contract statute of limitations? The inequity of this situation is discussed in Siegel, *supra* note 4, at 69-70. The Appellate Division, Fourth Department, in a decision prior to *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), held that a middle-man would not be able to implead the original manufacturer when the contract statute of limitations had expired. The court cited *Mendel* as authority. *Ibach v. Grant Donaldson Serv., Inc.*, 38 App. Div. 2d 39, 45, 326 N.Y.S.2d 720, 725-26 (4th Dep't 1971).

A number of jurisdictions have resolved the question of products liability by legislation. *See* 43 *FORDHAM L. REV.* 322, 328-29 n.53 (1974). A legislative approach has been considered preferable in light of the potential complications that may be unforeseen in any single judicial decision. *See id.* at 328-29.

⁴⁵ CPLR 302(a)(3)(ii) allows for personal jurisdiction over a nondomiciliary if he commits a tortious act without the state causing injury to person or property within the state . . . if he

. . . .
(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

The limitations within subparagraph (ii) of subdivision (a)(3) were inserted, along with subparagraph (i), to keep CPLR 302 "well within constitutional bounds." Legislative Reports, N.Y. Sess. LAWS [1966], at 2749, 2786 (McKinney) [hereinafter cited as Leg. Reports]. *See A. Millner Co. v. Noudar*, 24 App. Div. 2d 326, 329, 266 N.Y.S.2d 289, 293 (1st Dep't 1966), ("[i]n the enactment of the CPLR the Legislature has not extended New York's jurisdiction to the utmost constitutional limit"). *But see Lewin v. Bock Laundry Mach. Co.*, 42 Misc. 2d 599, 601, 249 N.Y.S.2d 49, 51 (Sup. Ct. Kings County), *aff'd mem.*, 22 App. Div. 2d 854, 255 N.Y.S.2d 466 (2d Dep't 1964), *aff'd mem.*, 16 N.Y.2d 1070, 213 N.E.2d 686, 266 N.Y.S.2d 391 (1965) ("New York has committed itself to a full exploitation of jurisdiction over non-domiciliaries").

⁴⁶ 15 N.Y.2d 433, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

⁴⁷ Prior to amending the CPLR, it was stated:

In the light of the *Feathers* decision, it is clear that amendment of CPLR 302 (a)(2) is necessary if legal protection is to be accorded to New York residents who are injured within the state by foreign tort-feasors who cannot be reached through implementation of the transaction of business clause

The tests prescribed to trigger long-arm jurisdiction under CPLR 302(a)(3)(ii) after an injury within the state has occurred are first, foreseeability, and second, the deriving of substantial revenue from either interstate or international commerce.⁴⁸ The condition of foreseeability, as expressed in the statute, requires that the defendant "expects or should reasonably expect the act to have consequences in the state."⁴⁹ This provision has recently been the subject of contradictory interpretations.

In *Tracy v. Paragon Contact Lens Laboratories, Inc.*,⁵⁰ a New York resident, allegedly injured by the breaking of a contact lens in her eye, brought a claim in negligence and breach of warranty against the Louisiana supplier of the lens. Plaintiff, formerly of Tioga County, New York, had traveled across the New York-Pennsylvania state border and ordered the lens from a Pennsylvania clinic. The clinic, in turn, had ordered and received the lens from the Louisiana defendant.⁵¹

Leg. Reports, *supra* note 45, at 2786. The amendment of CPLR 302(a)(2) resulted in the addition of the current CPLR 302(a)(3). For a discussion of the 1966 amendment and its effects, see *The Quarterly Survey*, 41 ST. JOHN'S L. REV. 466, 471-73 (1967).

⁴⁸ CPLR 302(a)(3)(ii). See Leg. Reports, *supra* note 45 at 2790. In predicated jurisdiction on 302(a)(3)(ii), it should be realized that "the mere occurrence of a tortious injury in New York still does not suffice as the basis of personal jurisdiction." 7B MCKINNEY'S CPLR 302, commentary at 87 (1972). A showing of substantial revenue from either interstate or international commerce is necessary. However, the commerce in which the defendant is involved need not be connected with New York. Leg. Reports, *supra* note 45, at 2790. See *Path Instruments Int'l Corp. v. Asahi Optical Co.*, 312 F. Supp. 805 (S.D.N.Y. 1970); *Gonzales v. Harris Calorific Co.*, 64 Misc. 2d 287, 315 N.Y.S.2d 51 (Sup. Ct. Queens County), *aff'd mem.*, 35 App. Div. 2d 720, 315 N.Y.S.2d 815 (2d Dep't 1970). The question of whether a defendant is deriving substantial revenue from interstate or international commerce is "one exclusively for the courts," and is not within the jury's province. 7B MCKINNEY'S CPLR 302, commentary at 93 (1972). See *Shippey v. Berkey*, 6 App. Div. 2d 473, 179 N.Y.S.2d 366 (3d Dep't 1958).

Courts may use different approaches in determining if the substantial revenue test has been satisfied. Such determination could

be construed to require comparison of New York (or interstate or international) gross sales revenue with a defendant's total gross sales revenue . . . or New York, interstate or international net profits with a defendant's total net profit, but there are cases which deal with the question of substantiality in terms of dollar volume of sales or profit in the abstract

Gillmore v. J.S. Inskip, Inc., 54 Misc. 2d 218, 221, 282 N.Y.S.2d 127, 132 (Sup. Ct. Nassau County 1967) (citations omitted).

An interesting parallel issue concerns discovery. The question may arise whether a court has jurisdiction to order a defendant to submit to pre-trial disclosure in order to determine if the defendant is involved in substantial interstate or international business where the defendant asserts that he is not subject to in personam jurisdiction. In *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 310 N.E.2d 513, 354 N.Y.S.2d 905 (1974), it was held that a plaintiff, asserting a nonfrivolous claim of jurisdiction under CPLR 302(a)(1), need not establish prima facie jurisdiction in order to invoke the benefit of 3211(d), which permits discovery to determine if sufficient facts exist to support jurisdiction. The *Peterson* holding might prove useful in actions arising under CPLR 302(a)(3)(ii).

⁴⁹ See note 45 *supra*.

⁵⁰ 44 App. Div. 2d 455, 355 N.Y.S.2d 650 (3d Dep't 1974).

⁵¹ *Id.* at 456, 355 N.Y.S.2d at 651.

Plaintiff, having had no direct dealings with the Louisiana defendant, claimed that defendant knew "that its contact lenses dispensed through . . . [the clinic], located on the New York-Pennsylvania border, would be used by and purchased by residents of . . . New York."⁵²

Rejecting this argument, the Appellate Division, Third Department, reversed the order of the trial court and dismissed plaintiff's complaint, holding that CPLR 302(a)(3)(ii) afforded no basis for personal jurisdiction over the defendant.⁵³ The court felt that neither the trial court's knowledge of the proximity of the Pennsylvania clinic to New York nor the fact of such proximity itself was controlling over whether the defendant could be said to reasonably expect his act to have consequences in New York.⁵⁴ In applying what may fairly be labeled a subjective test, the court refused to impute knowledge of proximity to the defendant, stating that "it is the *defendant's* expectation of forum consequences that controls."⁵⁵

The holding in *Tracy* has been deprived of its vitality in light of the Third Department's more recent decision in *Allen v. Auto Specialties Manufacturing Co.*⁵⁶ Without specifically overruling *Tracy*,⁵⁷ the Third Department retreated from its position of two months prior, stating that "[t]he test of whether a defendant expects or should

⁵² 44 App. Div. 2d at 458, 355 N.Y.S.2d at 653. Within the *Tracy* opinion, there is no mention of how the plaintiff attempted to satisfy the condition of substantial revenue under CPLR 302(a)(3)(ii). The court accepted the defendant's contention that "approximately 15% of its business is interstate, primarily in Alabama, Mississippi, and Pennsylvania." *Id.* at 456, 355 N.Y.S.2d at 651 (footnote omitted). The defendant did no business in New York. *Id.* Since the court based its decision on plaintiff's failure to establish the defendant's reasonable expectation of potential consequences in New York, there was no finding as to whether the 15% interstate commerce would have satisfied the substantial revenue condition. See generally note 48 *supra*.

⁵³ Since the transaction did not occur in New York and the defendant was not doing business in New York, the court found no other basis for jurisdiction. Accordingly, the complaint was dismissed. 44 App. Div. 2d at 457, 355 N.Y.S.2d at 652.

⁵⁴ *Id.* at 458, 355 N.Y.S.2d at 653.

⁵⁵ *Id.* (emphasis in original). The court cited Homburger & Laufer, *Expanding Jurisdiction Over Foreign Torts: The 1966 Amendment of New York's Long-Arm Statute*, 16 BUFFALO L. REV. 67, 74 (1966), wherein it is stated: "The jurisdictional tests set forth in subparagraph (ii) depend upon the defendant's state of mind, namely his reasonable expectation of forum consequences." It is interesting to note, however, that within the same article, the authors stated:

[T]he courts are experienced in applying as determinants of negligence standards of comparable breadth such as those of the reasonable man or foreseeability of harm. If these standards have any relevance, they also indicate that the phrase "reasonably expects" will be given an objective rather than a subjective meaning.

Id.

⁵⁶ 45 App. Div. 2d 331, 357 N.Y.S.2d 547 (3d Dep't 1974).

⁵⁷ Justice Staley, author of the *Allen* opinion, cited *Tracy* for the proposition that "[a]ll that must be found is that 'the presence of defendant's product in New York with some potential consequences was reasonably foreseeable rather than fortuitous.'" *Id.* at 333, 357 N.Y.S.2d at 550.

reasonably expect his act to have consequences within the State is an objective rather than a subjective one."⁵⁸

In *Allen*, the Michigan defendant had entered into an agreement with its New York agents to solicit sales for its automobile specialty equipment, including truck stands and lifts.⁵⁹ Plaintiff, an auto mechanic employed by a purchaser of defendant's product, was injured when a stand, used to support a pickup truck under which he was working, collapsed.⁶⁰ The court sustained jurisdiction over defendant on the basis of CPLR 302(a)(3)(ii). Defendant's solicitation of business in New York through its agents and employees was held determinative of the foreseeability issue.⁶¹

It seems clear that the better approach to construing the foreseeability condition of CPLR 302(a)(3)(ii) is to employ an objective test.⁶² If, instead, a subjective test is utilized, the court must inquire into the defendant's state of mind⁶³ rather than address itself to the statutory prescript of whether the defendant should "*reasonably* expect the act to have consequences in the state."⁶⁴ Under the latter approach, the

⁵⁸ *Id.*

⁵⁹ *Id.* at 332, 357 N.Y.S.2d at 549. From these facts, no issue was raised by the court as to whether defendant was transacting business in New York under CPLR 302(a)(1). CPLR 302(a)(1) states that "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state . . ." In *Singer v. Walker*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965), jurisdiction was found under CPLR 302(a)(1) following an accident in which the plaintiff sustained injuries from a defectively manufactured hammer. The defendant was found to be "transacting business," since it had "shipped substantial quantities of its products into this State as the result of solicitation here through a local manufacturer's representative. . . ." *Id.* at 466, 209 N.E.2d at 81, 261 N.Y.S.2d at 26.

It is possible that CPLR 302(a)(1) covers a nonresident who does not come to New York himself, but who merely sends goods into the state pursuant to an order sent from New York. In view of the Court of Appeals' opinion in *Singer*, there would appear to be no doubt of jurisdiction if a nonresident had salesmen in New York or solicited business by means of catalogues and advertisements circulated in the state. Leg. Reports, *supra* note 45 at 2785.

The defendant in *Allen* had received orders from its agent, a sales representative, who solicited orders in New York. 45 App. Div. 2d at 332, 357 N.Y.S.2d at 549. It is uncertain, therefore, why the court failed to explore the possibility of predicated jurisdiction upon CPLR 302(a)(1).

⁶⁰ 45 App. Div. 2d at 332, 357 N.Y.S.2d at 549.

⁶¹ *Id.* at 333, 357 N.Y.S.2d at 550.

⁶² *Accord*, *Brown v. Erie-Lackawanna R.R.*, 54 Misc. 2d 225, 227, 282 N.Y.S.2d 335, 337 (Sup. Ct. Oneida County 1967), wherein it was stated: "The test of whether the defendant expects or should reasonably expect the act [occurring outside the state] to have consequences in this State is an objective not a subjective (i.e., what is in the mind of the nonresident) one, and should be so construed . . ."

⁶³ Presumably, even under a subjective approach, once a defendant is found to have knowledge of his product's ultimate destiny, his anticipation of consequences within that jurisdiction would follow as an inescapable conclusion. 44 App. Div. 2d at 458, 355 N.Y.S.2d at 653.

⁶⁴ CPLR 302(a)(ii) (emphasis added).

word "reasonably" would be deprived of all meaning. Moreover, opting in favor of a subjective test would place a serious obstacle in the path of a plaintiff who would be required to prove an actual expectation on the part of the defendant.⁶⁵

As an ancillary issue in its construction of the foreseeability requirement of 302(a)(3)(ii), the *Tracy* court considered the weight to be given to the nature of the article causing injury in New York.⁶⁶ If the personal nature of a contact lens requires the seller to foresee that it will accompany the owner on all his travels, the nature of the goods would become conclusive on the foreseeability issue. Such a blanket test of foreseeability, however, was specifically rejected.⁶⁷ The unanimous court, speaking through Justice Greenblot, cautioned that if the nature of the article were determinative, "the foreseeable consequences test would lose all substance, for who can say that it is never foreseeable . . . that a defect in a readily movable item of a personal nature could have consequences in New York."⁶⁸

In so holding, the *Tracy* court has typified the prevailing hesitancy on the part of some courts to support jurisdiction by means of a liberal standard of foreseeability.⁶⁹ This approach, however, may be unduly solicitous when one bears in mind that the legislature incorporated the substantial revenue test into CPLR 302(a)(3)(ii) as an additional safeguard of constitutionality.⁷⁰ A better approach, perhaps,

⁶⁵ It must be remembered that CPLR 302(a)(3)(ii) was intended to insure legal protection for New York residents who are injured within the state by a nondomiciliary who cannot otherwise be reached. Leg. Reports, *supra* note 45, at 2786. Injection of the defendant's subjective knowledge into the foreseeability test of CPLR 302(a)(3)(ii), places a greater burden on a plaintiff attempting to utilize this basis of jurisdiction. The foreseeability test has been characterized as less than a commodious obstacle in the determination of jurisdiction.

Dean Joseph M. McLaughlin maintains that the requirement of substantial revenue under CPLR 302(a)(3)(ii) is more reassuring in the maintenance of a reasonable long-arm statute than that of foreseeability, since "in how many cases can it be said to be unreasonable to foresee that a product will wind up in New York?" 7B MCKINNEY'S CPLR 302, commentary at 91 (1972). Cf. *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (4th Cir. 1956) *discussed in* note 69 *infra*.

⁶⁶ 44 App. Div. 2d at 458, 355 N.Y.S.2d at 653.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (4th Cir. 1956), wherein Judge Sobeloff exemplified the unwillingness courts have displayed in allowing jurisdiction to be predicated merely on foreseeability. By means of a hypothesis, the court acknowledged the ease with which foreseeability for jurisdictional purposes can be met. The court noted

the hesitancy a California dealer might feel if asked to sell a set of tires to a tourist with Pennsylvania license plates, knowing that he might be required to defend in the courts of Pennsylvania a suit . . . for heavy damages in case of accident attributed to a defect in the tires.

Id.

⁷⁰ See 7B MCKINNEY'S CPLR 302, commentary at 91 (1972). See also note 55 *supra*.

would be to treat the personal nature of the article as establishing prima facie a reasonable expectation of forum consequences once the defective product is placed in the mainstream of commerce.

CPLR 308(4): Both timely nailing and mailing required to toll statute of limitations.

Where a natural person is to be served with process but such service cannot be made upon the defendant personally, CPLR 308 provides for "substituted" means.⁷¹ After reasonable attempts have been made to effect in-hand delivery or mail and delivery service in accordance with subparagraphs (1) and (2) of CPLR 308, a plaintiff may resort to "nail and mail" service pursuant to 308(4).⁷² Two steps are contemplated by this form of service. First, the summons must be attached to the door of the defendant's actual place of business, dwelling or usual abode.⁷³ Second, a copy of the summons must be mailed to the defendant's last known residence. Failure to perform either step will result in lack of jurisdiction over the defendant.⁷⁴

⁷¹ CPLR 308 has been deemed to provide for a "hierarchy of alternative means of service, in which the primary place is given to the delivery of process to the defendant in person." *Dobkin v. Chapman*, 21 N.Y.2d 490, 502, 236 N.E.2d 451, 457, 289 N.Y.S.2d 161, 170 (1968). See generally 1 WK&M ¶ 308.01-.02a.

⁷² CPLR 308 provides in part:

Personal service upon a natural person shall be made by any of the following methods:

1. by delivering the summons within the state to the person to be served; or
2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or actual abode of the person to be served and by mailing the summons to the person to be served at his last known residence

When a plaintiff, using due diligence, has exhausted the possibility of service under the above subparagraphs, he may then proceed, without court order, to employ the nail and mail form of service

by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by mailing the summons to such person at his last known residence

Id. 308(4). The affidavit of service, filed with the clerk of the court following the 308(4) service, must set forth the details, including dates and hours, of the efforts made to serve the defendant personally, in order to show that the plaintiff has acted with due diligence. *Blatz v. Benschine*, 53 Misc. 2d 352, 354-55, 278 N.Y.S.2d 533, 536 (Sup. Ct. Queens County 1967) (mem.); *Iroquois Gas Corp. v. Collins*, 42 Misc. 2d 632, 636, 248 N.Y.S.2d 494, 498 (Sup. Ct. Erie County 1964), *aff'd*, 23 App. Div. 2d 823, 258 N.Y.S.2d 376 (4th Dep't 1965) (mem.).

⁷³ The "nailing" obligation requires that the summons be affixed to a place where the defendant *in fact* resides or works. While the "mailing" requirement may be satisfied by mailing to the last known address of the defendant, the service will be vitiated upon proof that the nailing was to a place where the defendant no longer lives or works. *Polansky v. Paugh*, 23 App. Div. 2d 643, 256 N.Y.S.2d 961 (1st Dep't 1965) (per curiam); *Entwistle v. Stone*, 53 Misc. 2d 227, 278 N.Y.S.2d 19 (Sup. Ct. Onondaga County 1967) (mem.); *Todd v. Todd*, 51 Misc. 2d 94, 272 N.Y.S.2d 455 (Sup. Ct. Nassau County 1966) (mem.).

⁷⁴ See *Mittelman v. Mittelman*, 45 Misc. 2d 445, 447-48, 257 N.Y.S.2d 86, 88-89 (Sup. Ct. Queens County 1965), cited in 7B MCKINNEY'S CPLR 308, commentary at 209 (1972).