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CPLR 202: Court Applies Liberal Test of Residency for Borrowing Statute Purposes Where Plaintiff Was En Route to Permanent Domicile in New York At Time Cause of Action Accrued

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a notice of intention to arbitrate to apply for a stay within the statutory period concedes not only the arbitrability of the controversy but also the adversary's choice of arbitrator.

Also reported are selected amendments to the CPLR and a significant addition to the Judiciary Law which allows administrative vacatur of improperly obtained default judgments.

The reader may have noticed that the *Survey* has a new title, which eliminates "Quarterly" from the former one. The reason for this change is that the *Survey* will no longer appear in all four issues of each volume; henceforth, the December issue will be devoted entirely to the *Second Circuit Note.*

The *Survey* sets forth in each installment those cases which are deemed to make the most significant contribution to New York's procedural law. Due to limitations of space, however, many other less important, but, nevertheless, significant cases cannot be included. While few cases are exhaustively discussed, it is hoped that the Survey accomplishes its basic purpose, *viz.*, to key the practitioner to significant developments in the procedural law of New York.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 202: Court applies liberal test of residency for borrowing statute purposes where plaintiff was en route to permanent domicile in New York at time cause of action accrued.

When a cause of action accrues without the state, the borrowing statute prescribes the time within which it must be brought. The statute provides that a non-resident plaintiff's action will be time-barred in New York if the limitations period of either New York or the state of accrual has expired.[1] The resident plaintiff is favored in that his action need only be timely under the New York limitations period. The test of residency for borrowing statute purposes has been strict.[2] The courts have denied the favored resident status to plaintiffs who became New York residents only after their actions had accrued.[3] An additional

1 CPLR 202. *See, e.g.*, Daigle v. Leavitt, 54 Misc. 2d 651, 283 N.Y.S.2d 328 (Sup. Ct. Rockland County 1967); Burris v. Alexander, 51 Misc. 2d 543, 273 N.Y.S.2d 542 (Sup. Ct. N.Y. County 1966).

2 One example is American Lumberman Mut. Cas. Co. v. Cochrane, 129 N.Y.S.2d 489 (Sup. Ct. N.Y. County 1954), *aff'd mem.*, 284 App. Div. 884, 134 N.Y.S.2d 473 (1st Dep't 1954), *aff'd mem.*, 309 N.Y. 1017, 133 N.E.2d 461 (1956), *discussed in* Lindsay, *Statute of Limitations — Licensed Foreign Corporation Held Non-Resident Under CPA 13*, 4 BUFFALO L. REV. 363 (1955), wherein a foreign corporation qualified to do business in New York was held to be a non-resident for borrowing statute purposes.

3 *See* Cellura v. Cellura, 24 App. Div. 2d 59, 263 N.Y.S.2d 843 (4th Dep't 1965), *discussed in The Quarterly Survey*, 42 ST. JOHN'S L. REV. 128, 131 (1967); Oglesby v. Cranwell, 250 App. Div. 720, 293 N.Y.S. 67 (2d Dep't 1937) (per curiam) (construing CPA 13).

stricture was imposed when "resident" was recently construed as synonomous with "domiciliary."[4]

In *Jones v. Greyhound Bus Lines*,[5] the Supreme Court, Orange County, applied a more generous test of residency in a borrowing statute case. The plaintiff was riding in the defendant's bus to a new residence in New York when she was injured in Virginia in a traffic accident. She had completely given up her Florida domicile and had rented an apartment in New York to which most of her possessions had already been transported by a friend. After the accident, she proceeded to the New York apartment where she resided continuously to the date of the action. She commenced an action for personal injury two years and eleven months after the accident, within the New York three year limitation period[6] but after the Virginia two year period[7] had elapsed. While recognizing that under established principles of law, the plaintiff was not a New York domiciliary at the time her cause of action accrued,[8] the court denied the defendant's motion to dismiss the action as time-barred under the Virginia two year statute of limitations and the borrowing statute. The court reasoned that, in light of the unique circumstances of the case, "to mechanically apply the statute . . . when there is no question of forum shopping and no evidence of prejudice to defendant would be unjust and contrary to the Legislative intent."[9] In distinguishing previous cases wherein contrary results were reached[10] the court deemed important the plaintiff's previously established contacts with New York and her complete renunciation of her former domicile. These factors clearly indicated a pre-existing intent to be-

4 Banasik v. Reed Prentice Div. of Package Mach. Co., 34 App. Div. 2d 746, 310 N.Y.S.2d 127 (1st Dep't 1970) (mem.), *aff'd mem.*, 28 N.Y.2d 770, 269 N.E.2d 918, 321 N.Y.S.2d 376 (1971). "Residence" generally requires merely dwelling at a specified place whereas "domicile" requires both dwelling at a specified place and an intent to make that place a fixed and permanent home. Isaacson v. Heffernan, 189 Misc. 16, 64 N.Y.S.2d 726 (Sup. Ct. Bronx County 1946).

5 73 Misc. 2d 109, 341 N.Y.S.2d 159 (Sup. Ct. Orange County 1973).

6 CPLR 214(5).

7 VA. CODE ANN. § 8-24 (1950), *as amended* (Supp. 1973).

8 73 Misc. 2d at 111, 341 N.Y.S.2d at 161, *quoting* 17 N. Y. JUR., *Domicile and Residence* § 26 (1961) (The "domicil of one who is in itinere from an old to a new home continues to be the old domicil until the new is reached"). The court also cited Colorado v. Harbeck, 189 App. Div. 865, 179 N.Y.S. 510 (1st Dep't 1919), *rev'd on other grounds*, 232 N.Y. 71, 133 N.E. 357 (1921).

9 73 Misc. 2d at 111, 341 N.Y.S.2d at 161.

10 In Banasik v. Reed Prentice Div. of Package Mach. Co., 34 App. Div. 2d 746, 310 N.Y.S.2d 127 (1st Dep't 1970) (mem.), *aff'd mem.*, 28 N.Y.2d 770, 269 N.E.2d 918, 321 N.Y.S.2d 376 (1971), the plaintiff resided in Rhode Island when her cause of action accrued and for a period of time thereafter. Additionally, she had given Rhode Island as her address on several occasions. In Cellura v. Cellura, 24 App. Div. 2d 59, 263 N.Y.S.2d 843 (4th Dep't 1965), the plaintiff had no contacts with New York prior to the accrual of the action.

come a New York resident, thus precluding the possibility that the plaintiff was forum shopping.[11]

The *Jones* decision is a laudable departure from the strict residency test. CPLR 202 seeks to protect New York residents from injustice by exempting them from the bar of foreign and probably unfamiliar limitation periods. Clearly this exemption should extend to the plaintiff in *Jones* who had no contacts with the state where she was injured and became a New York resident immediately after her cause of action accrued. The court's stress on the unique circumstances present should prevent the decision from being used as a precedent for forum shopping.

CPLR 202: Court examines "place of accrual" concept under the borrowing statute.

Under New York's borrowing statute,[12] a cause of action accruing without the state, when sued upon by a non-resident plaintiff, is time-barred if the statute of limitations of either New York or the jurisdiction wherein the cause of action accrued has expired. The facts of *Sack v. Low*,[13] a case recently decided by the Court of Appeals for the Second Circuit, illustrate unresolved issues with respect to the borrowing statute.

In *Sack*, the plaintiffs, residents of Massachusetts, brought an action for alleged federal securities violations against a New York-based brokerage firm. The District Court for the Southern District of New York had dismissed the action on the theory that a previous dismissal of an identical suit involving the same parties by the District Court of Massachusetts on statute of limitations grounds was a decision on the merits and thus operated as a res judicata bar. In vacating the district court's order, the Second Circuit held that the Massachusetts court's adjudication with respect to the statute of limitations was not on the merits. In the absence of an applicable federal statute of limitations, the Second Circuit was then obliged to determine whether the action was time-barred under New York limitations laws.[14] Finding the record

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11 The borrowing statute is designed to prevent forum shopping by non-resident plaintiffs seeking to take advantage of longer New York limitation periods. *See* 1 WK&M ¶ 202.01; 7B McKINNEY's CPLR 202, commentary at 81 (1972).

12 CPLR 202:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

13 478 F.2d 360 (2d Cir. 1973).

14 *Id.* at 365, *citing* UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966); Holmberg v. Armbrecht, 327 U.S. 392 (1946); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951).