

CPLR 207(3): Statute of Limitations Not Tolled for Defendant's Absence Where Expedient Service Is Available

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in *Citizens Utilities Co. v. American Locomotive Co.*,⁷ the Court of Appeals held that a warranty that machinery would operate at full capacity for thirty years was a present one, and thus was breached on the date of sale. The Code now simply states that a warranty is prospective (*i.e.*, the discovery rule applies) if it "explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance. . . ."⁸

The Second Department in *Mittasch* did not consider itself bound by *Citizens Utilities* because of the alignment of judges on the warranty issue in that case.⁹ It is submitted, however, that irrespective of the precedential value to be accorded Judge Desmond's opinion, section 2-725(2) should be controlling, in light of the language of the warranty and the nature of the product. If this be the case, it is questionable how much is left of *Citizens Utilities*.¹⁰ The Court of Appeals should at first opportunity clear up the confusion in this area by defining the distinction between present and prospective warranties.

CPLR 207(3): Statute of limitations not tolled for defendant's absence where expedient service is available.

Where a potential defendant leaves the state after a cause of action has accrued against him, CPLR 207 suspends the statute of limitations for the period of his absence, provided it exceeds four months. Subdivi-

introduced into plaintiff's body, not when actual deterioration of body structure occurs); *Citizens Util. Co. v. American Locomotive Co.*, 11 N.Y.2d 409, 184 N.E.2d 171, 230 N.Y.S.2d 194 (1962) (sale of four electric generating sets with alleged implied warranty that they would operate for thirty years held to be warranty of present characteristics in 4-3 decision. Judge Fuld, dissenting, stated that a warranty could not be breached until the machine failed to function.); *Munn v. Security Controls Inc.*, 23 App. Div. 2d 813, 258 N.Y.S.2d 475 (4th Dep't 1965) (mem.); *W.T. Grant Co. v. Uneceda Doll Co.*, 19 App. Div. 2d 361, 243 N.Y.S.2d 428 (1st Dep't 1963) (per curiam), *aff'd mem.*, 15 N.Y.2d 571, 203 N.E.2d 299, 254 N.Y.S.2d 834 (1964); *Kakargo v. Grange Silo Co.*, 11 App. Div. 2d 796, 204 N.Y.S.2d 1010 (2d Dep't 1960) (mem.); *Outwater v. Miller*, 215 N.Y.S.2d 838 (Sup. Ct. Nassau County 1961); *Liberty Mut. Ins. Co. v. Sheila-Lynn Inc.*, 185 Misc. 689, 57 N.Y.S.2d 707 (App. T. 1st Dep't 1945), *aff'd mem.*, 270 App. Div. 835, 61 N.Y.S.2d 373 (1st Dep't 1946).

⁷ 11 N.Y.2d 409, 184 N.E.2d 171, 230 N.Y.S.2d 194 (1962), noted in 31 *FORDHAM L. REV.* 609 (1963).

⁸ N.Y. U.C.C. § 2-725(2) (McKinney 1964).

⁹ 42 App. Div. 2d at 574, 344 N.Y.S.2d at 103. Only two other judges concurred in the portion of Chief Judge Desmond's opinion dealing with the warranty question. Judge Froessel voted to affirm on a different ground, 11 N.Y.2d at 417-18, 184 N.E.2d at 175, 230 N.Y.S.2d at 199.

¹⁰ Doubt has been expressed about the present vitality of the *Citizens Utilities* rule outside the realm of implied warranties. H. PETERFREUND & J. McLAUGHLIN, *NEW YORK PRACTICE* 147 n.3 (3d ed. 1973). See 37 *FORDHAM L. REV.* 247 (1968), maintaining that an implied warranty can be prospective within the meaning of UCC 2-275(2). But see *Binkley Co. v. Teledyne Mid-America Corp.*, 333 F. Supp. 1183, 1186 (E.D. Mo. 1971), and authorities cited therein ("explicit" defined by *Webster* as "not implied").

sion (3) of that section provides, however, that where in personam jurisdiction is obtainable without personal service upon the defendant, there will be no toll.¹¹

The significance of this exception was greatly expanded when the Appellate Division, Fourth Department, in *Goodmote v. McClain*,¹² held it inapplicable where expedient service via CPLR 308(5) is available.¹³ It was then predicted that this holding would virtually eliminate CPLR 207 tolling¹⁴ where a jurisdictional basis is present, and a recent decision by the Supreme Court, Seneca County, illustrates that this may well be the case. In *Nucci v. Judson*,¹⁵ the defendant's absence from the state was held not to interrupt the running of the statute of limitations where service was possible through the Vehicle and Traffic Law,¹⁶ or, failing that, by court order pursuant to CPLR 308(5). CPLR 302(a)(2) provided the jurisdictional basis over the defendant's person.

CPLR 207(3) was enacted to "take advantage of the expanded concepts of jurisdiction introduced with the CPLR."¹⁷ This is compatible with the purpose of tolling, which is to protect the plaintiff who has been unable to obtain jurisdiction over a defendant, rather than one who has been merely dilatory.¹⁸ It is important, therefore, for a plaintiff to carefully pursue every conceivable means of effecting service upon an absent defendant lest his action become time-barred.

¹¹ Dean McLaughlin has noted that the phrase "can be obtained" in CPLR 207(3) may create some ambiguity. While it could be interpreted as meaning merely that "there is a basis of personal jurisdiction" even if the defendant cannot be found, the better view, as exemplified by *Ellis v. Riley*, 53 Misc. 2d 615, 279 N.Y.S.2d 382 (Sup. Ct. Kings County), *aff'd*, 29 App. Div. 2d 562, 286 N.Y.S.2d 451 (2d Dep't 1967), discussed in *The Quarterly Survey*, 42 St. JOHN'S L. REV. 436, 441 (1968), is that no toll will occur where "process can be effectively served outside the state and personal jurisdiction thus acquired." 7B MCKINNEY'S CPLR 207, commentary at 241 (1972) (emphasis in original).

¹² 40 App. Div. 2d 22, 337 N.Y.S.2d 79 (4th Dep't 1972), discussed in *The Quarterly Survey*, 47 St. JOHN'S L. REV. 580, 584 (1973); see also *Nelson v. Fabroni*, 38 App. Div. 2d 633, 326 N.Y.S.2d 934 (3d Dep't 1971) (mem.).

¹³ CPLR 308(5) is "purely a notice statute" in that a jurisdictional basis must exist before application is made to the court. 7B MCKINNEY'S CPLR 308, commentary at 212 (1972). It is "intended for use in 'unpredictable circumstances' where the plaintiff, unable to follow the usual methods of service . . . requires a more flexible or appropriate manner of service . . ." 1 WK&M ¶ 308.18.

¹⁴ 7B MCKINNEY'S CPLR 207, *supp.* commentary at 12 (1973); *The Quarterly Survey*, 47 St. JOHN'S L. REV. 580, 584 (1973).

¹⁵ 74 Misc. 2d 670, 346 N.Y.S.2d 670 (Sup. Ct. Seneca County 1973).

¹⁶ N.Y. VEH. & TRAF. LAW §§ 253-254 (McKinney 1970). See 1 WK&M ¶ 207.02; *Ellis v. Riley*, 53 Misc. 2d 615, 279 N.Y.S.2d 451 (2d Dep't 1967). CPLR 207(1) provides that the statute will not toll "while there is in force a designation, voluntary or involuntary, made pursuant to law, of a person to whom a summons may be delivered within the state with the same effect as if served personally within the state . . ."

¹⁷ 1 WK&M ¶ 207.02. "Under the CPLR before the question of tolling because of defendant's absence is reached, a plaintiff should show that personal jurisdiction cannot be asserted by the methods provided in CPLR 301 and 302." 1 WK&M ¶ 207.03.

¹⁸ *Chapin v. Posner*, 299 N.Y. 31, 38, 85 N.E.2d 172, 175 (1949); 1 WK&M ¶ 207.01.