

## CPLR 217: Petitioner Must Commence Proceeding for Writ of Prohibition Within a Time "Reasonably Necessary to Protect His Rights"

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opportunity to defend against a stale claim were satisfied herein.<sup>7</sup> The presence of excessive radiation in and on the plaintiffs and their property and the availability of investigative reports confirming contamination from a defective isotope,<sup>8</sup> like the surgical clamps in *Flanagan*, precluded questions of credibility or professional diagnostic judgment. It followed that this evidence obviated the danger of a specious claim as to the defective nature of the isotope and entitled the plaintiffs to the opportunity to prove a causal connection between the radiation and the injuries upon trial.<sup>9</sup>

*LeVine* is an equitable result for plaintiffs unknowingly subjected to radiation injuries.

To bar plaintiffs from bringing their law suit before any manifestation of injury [would be], on the facts presented, unwarranted. . . . To hold otherwise would, in many radiation injury cases, insulate the defendants from any liability either for breach of warranty . . . or negligence.<sup>10</sup>

In addition, *LeVine* portends the adoption of the discovery rule in malpractice and negligence cases where a foreign substance is introduced into the body and there is a substantial delay before a resultant injury can be detected.<sup>11</sup>

*CPLR 217: Petitioner must commence proceeding for writ of prohibition within a time "reasonably necessary to protect his rights."*

In *Roberts v. County Court of Wyoming County*,<sup>12</sup> the Appellate Division, Fourth Department, became the first appellate tribunal<sup>13</sup> in New York to determine whether CPLR 217's four-month statute of limitations for proceedings against a body or officer applies to a proceeding for a writ of prohibition. Prohibition is an extraordinary dis-

<sup>7</sup> 70 Misc. 2d at 751, 334 N.Y.S.2d at 801.

<sup>8</sup> An independent investigation by the Atomic Energy Commission in 1970 confirmed that the source of the contamination was the type of isotope which the defendants had delivered to the co-plaintiff in 1963. *Id.* at 748-49, 334 N.Y.S.2d at 798.

<sup>9</sup> *Id.* at 751, 334 N.Y.S.2d at 801.

<sup>10</sup> *Id.* at 752, 334 N.Y.S.2d at 801.

<sup>11</sup> See *McLaughlin, New York Trial Practice*, 168 N.Y.L.J. 72, Oct. 13, 1972, at 4, col. 2.

Significantly, as the court pointed out, the Legislature has recognized the insidious nature of radiation-induced injuries and extended the ordinary time limitations for recovery of workmen's compensation benefits for such injuries. They are available, *inter alia*, for disabilities caused by radiation when the injury is discovered, regardless of the time of exposure, provided that an action is brought within 90 days after discovery. N.Y. WORKMEN'S COMP. LAW § 28 (McKinney 1970), § 40(2) (McKinney 1966).

<sup>12</sup> 39 App. Div. 2d 246, 333 N.Y.S.2d 882 (4th Dep't 1972).

<sup>13</sup> The court observed that "[i]t appears that the resolution of this question is a matter of first impression for an appellate court in this State." *Id.* at 249, 333 N.Y.S.2d at 886.

cretionary remedy which is available to restrain a court from hearing an action when it has no jurisdiction to do so, or from exceeding its powers in a proceeding over which it has jurisdiction.<sup>14</sup> In the instant case, the petitioner, the District Attorney for Bronx County, sought to prevent a county judge from issuing a writ of habeas corpus for a sanity hearing in another county, contending that such action would constitute an overextension of his power. The proceeding was commenced more than five months after the county judge had issued his order.

In assessing the applicability of CPLR 217, the court acknowledged a division of opinion on the issue. One authority<sup>15</sup> maintains that, although the four-month provision is a general statute of limitations applicable to all article 78 proceedings,<sup>16</sup> the writ of prohibition was intended to be excluded<sup>17</sup> under CPA 1286, the predecessor of CPLR 217.<sup>18</sup> Another<sup>19</sup> contends that the section expressly applies to prohibition.<sup>20</sup> A third<sup>21</sup> argues that, although the limitation period is operable in such proceedings, it may have no actual effect because of the uncertainty as to when it begins to run.

The *Roberts* court, in dictum,<sup>22</sup> adopted the rule that the court

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<sup>14</sup> See *Hogan v. Court of General Sessions*, 296 N.Y. 1, 68 N.E.2d 849 (1946); *Culver Contracting Corp. v. Humphrey*, 268 N.Y. 26, 196 N.E. 627 (1935).

<sup>15</sup> 8 WK&M ¶ 7804.02.

<sup>16</sup> Article 78 establishes the uniform procedure for the common-law writs of certiorari to review, mandamus, and prohibition. See CPLR 7801.

<sup>17</sup> See THIRD ANNUAL REPORT OF THE N.Y. JUDICIAL COUNCIL 183 (1937), wherein it is stated: "There is no need for applying a time limitation to what are now prohibition proceedings, for they are preventive remedies."

<sup>18</sup> The authority contends that, since CPLR 217 re-enacted CPA 1286 without substantial change, the exclusion of prohibition under that section (see note 17 *supra*) was intended to be continued. However, CPA 1286 applied to a proceeding "to review a determination, or to compel performance of a duty specifically enjoined by law" (referring to certiorari and mandamus, respectively), while CPLR 217 applies to "a proceeding against a body or officer." The inference from this legislative modification of language is that the present provision is meant to apply to all three writs embodied in article 78 proceedings against a body or officer.

<sup>19</sup> 24 CARMODY-WAIT 2d, § 145:238, at 11 (1968). The author states, however, that the matter

is usually academic, because a person in the position of needing relief by prohibition will normally act immediately, because he will not want to be faced with the accomplishment of that which he seeks to restrain.

<sup>20</sup> See *Feldman v. Matthews*, 32 Misc. 2d 996, 223 N.Y.S.2d 604 (Sup. Ct. Monroe County 1962) (holding that prohibition is within the four-month limitation of CPA 1286); note 18 *supra*.

<sup>21</sup> 7B MCKINNEY'S CPLR 217, commentary at 508 (1972).

<sup>22</sup> The court's precise holding is somewhat unclear. Justice Goldman stated that, were it necessary to hold that the proceeding was time-barred, he would have done so. 39 App. Div. 2d at 250, 333 N.Y.S.2d at 887. He subsequently held that the county judge whom the petitioner had sought to restrain had not exceeded his powers in granting the habeas corpus writ. *Id.* at 251, 333 N.Y.S.2d at 887. The court stated earlier that the petitioner's application for the writ of prohibition should be denied because he had not taken advan-

in its discretion should determine the applicable period of limitations on the basis of the facts in each case, and that the proceeding should be barred if not commenced by the petitioner within a time "reasonably necessary to protect his rights."<sup>23</sup> Here, said the unanimous court, the proceeding would not be maintainable because "[t]he District Attorney is not an unsophisticated litigant and should be expected to act promptly"<sup>24</sup> in such a situation.

Thus, litigants are forewarned not to presume that no time limitation will apply to a petition for a writ of prohibition. If a point in time at which the improper assumption of jurisdiction took place can be pinpointed, the application will be barred if not seasonably made.

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

*CPLR 302(a)(1): Attorney cannot predicate jurisdiction in action against client on attorney's legal services in state for client.*

Under CPLR 302(a)(1) a nonresident who individually or through an agent "transacts any business within the state" is subject to in personam jurisdiction. In *Perlman v. Martin*,<sup>25</sup> the plaintiff, a New York attorney, sought recovery of legal fees for professional services allegedly rendered in New York for the defendant, a nondomiciliary, and contended that personal jurisdiction over the defendant could be exercised pursuant to CPLR 302(a)(1) on the basis of the plaintiff's performance of legal services here.

Finding that the mere performance of such services was not an independent basis for long-arm jurisdiction,<sup>26</sup> the Supreme Court, Nassau County, emphasized that a lawyer's role is that of an independent contractor.<sup>27</sup> Thus, the critical issue, as the court noted, was whether the client himself engaged in purposeful activity within the state.<sup>28</sup> Finding the defendant's telephone calls from Washington to New York to retain the plaintiff not a "transaction of business" pursu-

tage of the appeal procedure available to him as to the order granted by the county judge. *Id.* at 249, 333 N.Y.S.2d at 885.

<sup>23</sup> *Id.* at 250, 333 N.Y.S.2d at 887.

<sup>24</sup> *Id.*

<sup>25</sup> 70 Misc. 2d 169, 332 N.Y.S.2d 360 (Sup. Ct. Nassau County 1972) (mem.).

<sup>26</sup> *Id.* at 170, 332 N.Y.S.2d at 362.

<sup>27</sup> *Id.* at 171, 332 N.Y.S.2d at 363.

<sup>28</sup> *Id.*, citing *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970), discussed in *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 145, 147 (1970); *Reich v. Pines Hotel*, 68 Misc. 2d 1001, 328 N.Y.S.2d 918 (N.Y.C. Civ. Ct. Queens County 1972), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 183 (1972).