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Article 32

CPLR 202: Cause of Action in Negligence Accrues at Place of Injury for Borrowing Statute Purposes

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gence. *Dole* was examined under the *Developments in New York Practice* section in the October *Survey* of this volume.

Other cases of special significance include *Meyers v. Dunlop Tire & Rubber Corp.*, which holds that a cause of action in negligence accrues at the place of injury for borrowing statute purposes; *Goodemote v. McClain,* wherein the court held that the statute of limitations was not tolled for the period of the defendant's absence from the state when personal jurisdiction was obtainable over her through expedient service; *Sunrise Toyota, Ltd. v. Toyota Motor Co.*, wherein a parent corporation was found to be doing business in New York on the theory of agency; *Arden v. Loew's Hotels, Inc.*, which holds that a court is powerless to enter a default judgment where a CPLR 305(b) notice served with a summons fails to state the object of the action; *Schaeffer v. Schaeffer,* in which the court departed from the restrictive approach to pretrial disclosure in matrimonial actions; *Vavolizza v. Krieger,* which holds that a determination made in a criminal prosecution may not be relitigated in a subsequent civil action; and *Gramford Realty Corp. v. Valentin,* wherein the court held that a landlord, by its excessive delay, had forfeited the right to summary resolution of its claims.

Also reported, under article 52, are several decisions illustrating the continued willingness of the courts to protect the abused judgment debtor.

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 space limitations, 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: Cause of action in negligence accrues at place of injury for borrowing statute purposes.

CPLR 202 provides that a cause of action which accrues outside New York is subject to the shorter of the foreign and the New York statute of limitations, except where the cause of action accrued in favor of a New York resident. Problems arise in fixing the place of accrual for borrowing statute purposes when goods manufactured in New York cause out-of-state injuries. In *Myers v. Dunlop Tire &*

Rubber Corp.,[1] a nonresident plaintiff was injured when a tire manufactured in New York by a New York corporation exploded in Kentucky. The Supreme Court, New York County, refused to apply the borrowing statute, holding that causes of action in negligence and breach of warranty accrued in New York. The court reasoned that the place of the "tortious act" giving jurisdiction under CPLR 302[2] should be the same as the place of accrual under CPLR 202.[3] Citing *Mendel v. Pittsburgh Plate Glass Co.*,[4] the court also held that the cause of action for breach of warranty accrued in the state where title passed.[5] The Appellate Division, First Department, unanimously modified the lower court's order,[6] holding that the negligence cause of action accrued at the place of injury and dismissing it as time-barred under the shorter Kentucky statute of limitations.[7]

CPLR 202 was designed to prevent forum shopping by nonresident plaintiffs seeking to use the New York courts to enforce claims which would be time-barred in the jurisdiction in which they arose.[8] A rule fixing the place of accrual at the place of manufacture would frustrate this purpose by allowing a nonresident plaintiff to avoid the limitations period of the jurisdiction where injury occurred by bringing an action in New York against a resident manufacturer. The First Department's choice of the place of injury as the place of accrual is clearly

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1 40 App. Div. 2d 599, 335 N.Y.S.2d 961 (1st Dep't 1972) (mem.).

2 Under CPLR 302, the place of the "tortious act" has been held to be the place of manufacture. Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8, *cert. denied*, 382 U.S. 905 (1965), *discussed in The Biannual Survey*, 40 ST. JOHN'S L. REV. 125, 134 (1965).

3 69 Misc. 2d 729, 330 N.Y.S.2d 461 (Sup. Ct. N.Y. County 1972), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 150 (1972). *See also* Gegan, *Where Does a Personal Injury Action Accrue Under the New York Borrowing Statute?*, 47 ST. JOHN'S L. REV. 62 (1972).

4 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

5 The court found that since the tire was shipped "F.O.B. Buffalo," title passed in New York.

6 The lower court had granted the plaintiff's motion to dismiss the defense of the statute of limitations and denied the defendant's cross-motion for summary judgment.

7 40 App. Div. 2d at 599, 335 N.Y.S.2d at 962, *citing* Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 300-01, 200 N.E. 824, 827 (1936). In response to the lower court's holding in *Myers*, it was strongly urged that the state of injury is the appropriate place to fix the accrual of the action. *See* 7B MCKINNEY'S CPLR 202, supp. commentary at 7 (1972); Gegan, *supra* note 2.

8 In this respect, the section is similar in purpose to certain conflict of law rules which, as to matters of "substance," apply the law of the foreign state having appropriate contacts with the transactions rather than the law of the forum in order to achieve uniformity and avoid forum shopping.
1 WK&M ¶ 202.01.
Professor David D. Siegel has suggested that the place of accrual for borrowing statute purposes should be the state whose substantive law applies under the "grouping of contacts" test. Siegel, *Conflict of Laws*, 19 SYRACUSE L. REV. 235, 255-56 (1968). *See also The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 150 (1972).

preferable. In view of the prevalence of long-arm statutes, a defendant will probably be subject to process in the state where injury occurred. Additionally, the place of injury is probably the place of the plaintiff's residence.[9] It is therefore reasonable to bind a nonresident plaintiff to the limitations period of the place of injury.

CPLR 207: Statute of limitations not tolled for period of absence from state when personal jurisdiction was obtainable over defendant through expedient service.

CPLR 207 provides that 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 period of his absence is not a part of the time within which the action must be commenced. The plaintiff cannot rely on a CPLR 207 toll, however, if personal jurisdiction could have been obtained despite the defendant's absence from the state.[10]

In *Goodemote v. McClain*,[11] the defendant left New York for a fourteen-month period eighteen months after she was involved in a New York automobile accident. The Appellate Division, Fourth Department, unanimously held that the statute of limitations was not tolled for the period of her absence from the state because the plaintiff could have obtained personal jurisdiction over the defendant at any time by obtaining an *ex parte* court order for expedient service under CPLR 308(5).[12]

Since the broad discretionary reach of CPLR 308(5) may be utilized whenever there is a jurisdictional basis, this decision should severely curtail the instances of tolls for absence under CPLR 207.

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9 *See* Gegan, *supra* note 2, at 69.

10 CPLR 207(3).

11 40 App. Div. 2d 22, 337 N.Y.S.2d 79 (4th Dep't 1972).

12 *Id.* at 24, 337 N.Y.S.2d at 82, *citing* Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968), *discussed in The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 310 (1968); Fishman v. Sanders, 15 N.Y.2d 298, 206 N.E.2d 326, 258 N.Y.S.2d 380 (1965). "Under such circumstances service on the Secretary of State under section 254 of the Vehicle and Traffic Law did not confer jurisdiction over the defendant nor operate to toll the statute of limitations." 40 App. Div. 2d at 24, 337 N.Y.S.2d at 82. The plaintiff served the Secretary of State pursuant to § 254, which provides for service of process on residents who leave the state after an accident and remain absent therefrom for thirty days continuously. The copy of the summons and complaint mailed to the defendant's last known address was returned with the postmaster's notation that the forwarding address had expired. The defendant was served personally in New York shortly after the statute of limitations had run.

Pursuant to CPLR 308(5), the court may order service in any reasonable manner when service under CPLR 308(1), (2), and (4) is impracticable. CPLR 313 provides that a New York domiciliary or a person subject to New York jurisdiction under CPLR 301 or 302 may be served outside the state in the same manner as service is made within the state.