St. John's Law Review

Volume 46, December 1971, Number 2 Article 8

CPLR 302: Dual Jurisdictional Aspects of Matrimonial Action Upheld

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The cause of action had arisen in July, 1965, but the complaint was not filed until August, 1969.

The timeliness of an action commenced under the Civil Rights Act is governed by the statute of limitations which the state courts would apply in a similar state action.[4] It was determined that the plaintiff's suit would be subject to the three-year limitation period embodied in CPLR 214(2).[5] It is therefore evident, that since the complaint was not filed within three years from the date the cause of action arose, the suit would be barred unless the tolling provision of CPLR 208 were invoked.

It was the contention of the state, that the applicability of CPLR 208 is limited to those situations where New York law would preclude an imprisoned felon from initiating a suit,[6] and that the New York "civil death" statute does not debar a state prisoner from suing under the Federal Civil Rights Act. Thus, since plaintiff had the legal capacity to bring the action while incarcerated, the toll should not be available.

Rather than adopt the seemingly tenable position of the state, the court concluded that practical considerations mandated a literal application of the tolling provision. The decision relied upon the legislative intent as evidenced by an advisory committee report pertaining to the adoption of CPLR 208.[7] The report alluded to the impeditive difficulties which a prisoner would be confronted with upon attempting to bring an action during incarceration.[8]

Literal interpretation of CPLR 208 is certainly warranted in view of the pragmatic considerations.

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

CPLR 302: Dual jurisdictional aspects of matrimonial action upheld.

Matrimonial actions have a dual function: (1) determination of the parties' marital status and (2) provision of support for the plaintiff. In rem jurisdiction empowers a court to grant the first form of

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4 *See* Swan v. Board of Higher Educ., 319 F.2d 56 (2d Cir. 1963).

5 CPLR 214(2) provides that "an action to recover upon a liability, penalty or forfeiture created or imposed by statute . . ," must be commenced within three years.

6 *See* N.Y. CIV. RIGHTS LAW § 79 (McKinney Supp. 1970).

7 SECOND REP. 58.

8 The provisions for extension because of the existence of the stated disabilities present controversial policy questions but the committee concluded that no change should presently be made in the grounds for extension. . . . As to a person imprisoned, legal capacity to sue, if it exists, is only a theoretical right. Litigants have difficulty enough, though they be at large, tracking down their obligors and determining the nature of the liability and where, when and whether to sue. *Id.*

relief. A monetary award, such as alimony, however, requires in personam jurisdiction over the defendant.[9]

Thus, in *Renaudin v. Renaudin*,[10] where plaintiff wife sought divorce, alimony, support and counsel fees, from defendant husband, a Virginia resident served there, the Supreme Court, New York County, denied defendant's motion to dismiss the action, for want of in personam jurisdiction, insofar as alimony, support and counsel fees were requested. The Appellate Division, First Department, reversed, three to two.[11]

The majority, observing that "CPLR 302 applies only to specifically enumerated classes of actions [and that] [m]atrimonial actions are not among them . . .,"[12] reasoned that mere service upon the nondomiciliary defendant in Virginia could not confer in personam jurisdiction upon the court.[13] Additionally, the court found that "no moral or equitable ground for deviating from well-settled law of New York"[14] was shown.[15] Therefore, it denied alimony, support and counsel fees.

Contrastingly, the dissent not only found support for denial of the husband's motion to dismiss in the record but also in general authority.[16] Instead of viewing the marital actions as a dichotomous proceeding in rem and in personam, they argued that the power to order alimony, support and counsel fees is an incident of a court's statutory power to entertain a divorce action.[17] Secondly, they found

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9 *See, e.g.*, Geary v. Geary, 272 N.Y. 390, 6 N.E.2d 67 (1936); Matthews v. Matthews, 247 N.Y. 32, 159 N.E. 713 (1928); Cockrum v. Cockrum, 20 App. Div. 2d 642, 246 N.Y.S.2d 376 (2d Dep't 1964) (mem.); Weiss v. Weiss, 20 App. Div. 2d 824, 247 N.Y.S.2d 350 (3d Dep't 1964) (mem.), *cited in* Renaudin v. Renaudin, 37 App. Div. 2d 183, 323 N.Y.S.2d 145 (1st Dep't 1971) (3-2).

10 37 App. Div. 2d 183, 323 N.Y.S.2d 145 (1st Dep't 1971) (3-2).

11 *Id.* at 186, 323 N.Y.S.2d at 148.

12 *Id.* at 185, 323 N.Y.S.2d at 147, *citing* Whitaker v. Whitaker, 32 App. Div. 2d 595, 299 N.Y.S.2d 482 (3d Dep't 1969); Tarshish v. Tarshish, 27 App. Div. 2d 909, 278 N.Y.S.2d 718 (1st Dep't 1967); DeCammillus v. DeCammillus, 26 App. Div. 2d 817, 274 N.Y.S.2d 273 (1st Dep't 1966), *aff'd*, 19 N.Y.2d 880, 227 N.E.2d 879, 281 N.Y.S.2d 79 (1967).

13 *See* cases cited in note 1 *supra*.

14 37 App. Div. 2d at 185, 323 N.Y.S.2d at 148.

15 After their marriage in Louisiana, the parties resided in New York for several months in 1966 and again in 1969 while the defendant completed his residency at a New York hospital. Thereafter, defendant resided in Virginia. The marriage was childless. *Id.* at 184, 323 N.Y.S.2d at 146.

16 *Id.* at 186, 323 N.Y.S.2d at 148 (Eager, J., dissenting).

17 *Id.* at 187, 323 N.Y.S.2d at 148-49 (Eager, J., dissenting), *quoting* 7B McKINNEY's CPLR 314, supp. commentary at 232 (1970). The dissenters agreed with Professor McLaughlin that "at least in matrimonial actions . . . certain limited incursions into territory heretofore regarded as in personam," may be justified under the "minimum contacts" theory. *See* Venizelos v. Venizelos, 30 App. Div. 2d 856, 293 N.Y.S.2d (2d Dep't 1968) (mem.) (alternate holding), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 313, 318-19 (1969); *The Quarterly Survey*, 43 *id.* 498, 503-04 (1969).

that the defendant retained sufficient contacts with New York to enable the court to grant incidental in personam relief without "offend-[ing] traditional notions of fair play and substantial justice,"[18] and that

> [p]ublic policy and interest of the State in the marital status and financial support of a dependent wife dictate that this court should assume such jurisdiction in matrimonial actions . . . as may be constitutionally permissible.[19]

Although the dissenting opinion is supported by authority in foreign jurisdictions, until the Legislature acts to include marital actions under the long-arm statute,[20] no in personam relief should be awarded against a nondomiciliary served without the state who does not appear in the action or otherwise consent to in personam jurisdiction. Until that time, plaintiffs may seek support either by a Uniform Support Act proceeding[21] or by bringing an action in the defendant's state or domicile.

CPLR 302(a)(1): Further construction of the phrase "transaction of business."

The Southern District Court of New York has chosen, in *Monclair Electronics, Inc. v. Electra Midland Corp.*,[22] to exercise personal jurisdiction over a foreign corporation under CPLR 302(a)(1)[23] rather than under CPLR 301.[24] Defendant's contacts with this state, which the court concluded constituted transaction of business, included: (1) preliminary negotiations in New York by a high level corporate officer; (2) three trips by another corporate officer concerning the contract, both before and after its execution; (3) expectation of substantial economic benefit from the above excursions into the state; (4) maintenance of a New York bank account; and (5) advertisement of its products in two New York trade publications.[25]

Compared with *McKee Electric Co. v. Rauland-Barg Corp.*,[26] the

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18 37 App. Div. 2d at 187, 323 N.Y.S.2d at 149 (Eager, J., dissenting), *quoting* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

19 37 App. Div. 2d at 187, 323 N.Y.S.2d at 149 (Eager, J., dissenting).

20 *See, e.g.*, Mizner v. Minzer, 84 Nev. 268, 439 P.2d 679, *cert. denied*, 393 U.S. 847, *rehearing denied, id.* 972 (1968).

21 *See* DRL §§ 31-42 (McKinney 1964).

22 326 F. Supp. 839 (S.D.N.Y. 1971).

23 CPLR 302(a)(1) provides that "a court may exercise personal jurisdiction over any nondomicilary . . . who in person or through an agent . . . transacts any business within the state."

24 326 F. Supp. at 841.

25 *Id.* at 841-42.

26 20 N.Y.2d 377, 229 N.E.2d 604, 283 N.Y.S.2d 34 (1967), *discussed in The Quarterly Survey*, 42 ST. JOHN'S L. REV. 616, 617 (1968).