

CPLR 302(a)(1): Third Party's Video Tape Distribution in New York of Monologue Not a "Transaction of Business" by Performer

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facts of *Monclair* are clearly sufficient to constitute a "transaction of business"²⁷ under 302(a)(1).²⁸ In *McKee*, where jurisdiction under 302(a)(1) was denied, the defendant had made less than five percent of its sales to independent distributors in New York.²⁹ Additionally, two of its representatives had conferred in New York for approximately two hours with the plaintiff, and its northeastern representative had visited a co-defendant New York company³⁰ "a few times"³¹ concerning this dispute. While it is clear that "every corporation whose officers or sales personnel happen to pass the time of day with a New York customer in New York [should not run] the risk of being subjected to the personal jurisdiction of our courts,"³² where, as in *Monclair*, no such danger exists,³³ jurisdiction under 302(a)(1) should be upheld.

CPLR 302(a)(1): Third party's video tape distribution in New York of monologue not a "transaction of business" by performer.

Whether a nondomiciliary who defames without the state may be subject to in personam jurisdiction depends upon whether the defamation constitutes "transaction of business" under CPLR 302(a)(1).³⁴ This, in turn, may depend upon the contractual relationships of various parties.

In *Streslin v. Barrett*,³⁵ the nondomiciliary defendant, a television newscaster, allegedly libeled the plaintiff in a monologue broadcast in New York. The monologue had been performed by defendant Barrett and recorded by her co-defendant, Metromedia, Inc., in California. The trial court denied defendant Barrett's motion to dismiss for want

²⁷ Moreover, there was a second basis of jurisdiction: (1) solicitation by two commission companies and their distributors, who had received the exclusive right to sell defendant's products in New York; and (2) the advertisement in the two New York trade magazines.

²⁸ In addition to the fact that *Monclair* presents a dramatic increase in contact with New York, it is noteworthy that denial of jurisdiction in *McKee* was by a vote of four to three.

²⁹ 20 N.Y.2d at 379, 229 N.E.2d at 605, 283 N.Y.S.2d at 35.

³⁰ *Id.* at 380, 229 N.E.2d at 606, 283 N.Y.S.2d at 36.

³¹ *Id.* (italics omitted).

³² 20 N.Y.2d at 382, 229 N.E.2d at 607, 283 N.Y.S.2d at 37.

³³ In *Monclair*, the activity of the defendant's representatives in New York was a necessary part of the transaction. By contrast, the New York activity in *McKee* was neither significant nor necessary to the transaction between the parties.

³⁴ CPLR 302(a)(2) expressly provides that defamation is not a tort whose commission without the state permits the exercise of in personam jurisdiction. However, "if the defamation grows out of the transaction of business in New York, the preceding subdivision [302(a)(1)] would ensnare the defendant since no exceptions are made therein for defamation." 7B MCKINNEY'S CPLR 302, commentary at 443 (1963). See SECOND REP. 39. See also *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 138 (1969).

³⁵ 36 App. Div. 2d 923, 320 N.Y.S.2d 885 (1st Dep't 1971) (per curiam).

of jurisdiction, but the Appellate Division, First Department, unanimously reversed on the law, specifically finding that defendant Barrett's participation in the alleged libel terminated with her performance in Los Angeles. Since defendant Barrett had no contact with New York regarding the alleged libel, the court concluded that there was no jurisdictional basis.³⁶

Clearly, the determinative fact in *Streslin* was the complete control exercised by co-defendant Metromedia concerning distribution of the tapes of defendant Barrett's performances. Indeed, this element distinguishes a similar case, *Totero v. World Telegram Corp.*,³⁷ where jurisdiction under 302(a)(1) was sustained. In *Totero*, a nondomiciliary defendant had mailed articles, in accordance with his contract, directly from Spain to United Features Syndicate, Inc. in New York. Thereafter, United Features, under contract with its members, distributed defendant's articles. Defendant moved to dismiss, alleging he had no contract with the syndicate member in New York which published the libel, and therefore, was not subject to the jurisdiction of New York courts. The Supreme Court, New York County, rejected this assertion, holding that defendant's activity of sending articles into New York and the distribution of them by United Features pursuant to a contract with the defendant, constituted a "transaction of business."³⁸

This decision implicitly concludes then, that the third-party intervention did not prevent the defendant from actively participating in the distribution process. In this light the denial of long-arm jurisdiction in *Streslin* seems justifiable, since the defendant therein was not involved in the tape distribution.

CPLR 302(a)(2): Careful distinction between contract and tort actions espoused.

*Stanat Manufacturing Co. v. Imperial Metal Finishing Co.*³⁹ was an action against a foreign corporation which neither did business under CPLR 301 nor transacted business under CPLR 302(a)(1). A dispute had arisen from the breach of a sales contract. In order to obtain in personam jurisdiction under CPLR 302(a)(2), which concerns commission of torts within New York by nondomiciliaries, plaintiff alleged

³⁶ *Id.*, 320 N.Y.S.2d at 886, citing *Ferrante Equip. Co. v. Lasker-Goldman Corp.*, 26 N.Y.2d 280, 258 N.E.2d 20, 309 N.Y.S.2d 913 (1970). See also *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 342, 345-48 (1970).

³⁷ 41 Misc. 2d 594, 245 N.Y.S.2d 870 (Sup. Ct. N.Y. County 1963), discussed in *The Biannual Survey*, 38 ST. JOHN'S L. REV. 406, 410 (1964).

³⁸ *Id.* at 597, 245 N.Y.S.2d at 886.

³⁹ 325 F. Supp. 794 (E.D.N.Y. 1971) (Weinstein, J.).