

CPLR 302(a)(2): Careful Distinction Between Contract and Tort Actions Espoused

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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.).

that defendant never intended to fulfill the contract and "in effect, committed a fraud by inducing shipment on the basis of a promise never intended to be kept."⁴⁰

The federal district court, in rejecting this contention, stressed the careful distinction drawn between tort and contract actions in CPLR 302.⁴¹ It concluded that the consequences of permitting characterization of a contract case as a tort action necessitates that the statutory distinction be judicially enforced. Otherwise,

a plaintiff could, merely by alleging that a contracting party never intended to fulfill his promise, create a tortious action in fraud, [and] there would be no effective way of preventing almost every contract case from being converted to a tort for jurisdictional purposes.⁴²

The plain intent of CPLR 302 supports the court's rejection of plaintiff's interpretation of the statute.⁴³ Moreover, a contrary decision would extend New York's long-arm jurisdiction drastically, thereby violating established judicial policy to refrain from assuming a legislative role.⁴⁴

CPLR 308(2): Construction of "dwelling place."

CPLR 308(2)⁴⁵ prescribes that, except in matrimonial actions, personal service upon a natural person may be effected without prior attempt to personally deliver the summons to the named defendant, "by delivering the summons within the state⁴⁶ to a person of suitable age and discretion⁴⁷ at the actual place of business, dwelling place⁴⁸ or

⁴⁰ *Id.* at 795.

⁴¹ Compare CPLR 302(a)(2)&(3) with CPLR 302(a)(1)&(4).

⁴² 325 F. Supp. at 796, citing *Old Westbury Golf & Country Club, Inc. v. Mitchell*, 44 Misc. 2d 687, 689, 254 N.Y.S.2d 679, 682 (Sup. Ct. Nassau County 1964), *aff'd*, 24 App. Div. 2d 636, 262 N.Y.S.2d 438 (2d Dep't 1965), *aff'd*, 18 N.Y.2d 670, 219 N.E.2d 868, 273 N.Y.S.2d 418 (1966).

⁴³ Cf. *American Eutectic Welding Alloys Sales Co., v. Dytron Alloys Corp.*, 439 F.2d 428 (2d Cir. 1971), discussed in *The Quarterly Survey*, 46 Sr. JOHN'S L. REV. 147, 155 (1971).

⁴⁴ See *Feathers v. McLucas*, 15 N.Y.2d 443, 464, 209 N.E.2d 68, 80, 261 N.Y.S.2d 8, 24, *cert. denied*, 382 U.S. 905 (1965), discussed in *The Biannual Survey*, 40 Sr. JOHN'S L. REV. 122, 134-38 (1965).

⁴⁵ Chapter 852 of the Laws of 1970 repealed the former CPLR 308 and replaced it with a new § 308, effective September 1, 1970.

⁴⁶ "Where there is a basis of jurisdiction so that service may be made outside New York under CPLR 313 or 314, 'the state' should be construed to refer to the state where the summons is being served." 7B MCKINNEY'S CPLR 308, *supp. commentary* at 196 (1970).

⁴⁷ See *Bradian v. Chavez*, 159 N.Y.L.J. 79, Apr. 23, 1968, at 16, col. 6 (delivery to the thirteen-year-old son of the defendant was held to be valid). See also 7B MCKINNEY'S CPLR 308, *supp. commentary* at 197 (1970): "[T]he statute should be satisfied if the summons is left with a person who has enough sense to know what it is."

⁴⁸ "'Dwelling house' means a house in which a person dwells, lives or abides . . .