

CPLR 301: Foreign Corporation Held Not Present Within the State Under Either "Agency" or "Control" Predicates

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were amenable to process in New York State.¹⁰ It should be noted that this decision is in accord with the prior law on this point.¹¹

CPLR 203(b): In an impleader action by retailer for indemnification from manufacturer, the statute of limitations begins to run in favor of the manufacturer on the day of sale.

In *Ibach v. Donaldson Service, Inc.*,¹² the Appellate Division, Fourth Department, held that the statute of limitations commences to run on the day that a defective product is sold to the retailer and is available as an affirmative defense to an impleaded manufacturer if the statutory period expires before the commencement of the impleader action.¹³ This decision was merely a logical extension of the principles enunciated in *Mendel v. Pittsburgh Plate Glass Co.*,¹⁴ where the New York Court of Appeals held that a breach of warranty action against the manufacturer of a defective product accrues on the date of sale. Lamentably, this holding sometimes results in the statute of limitations tolling before the potential plaintiff is injured or the potential third-party plaintiff is sued.¹⁵

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

CPLR 301: Foreign corporation held not present within the state under either "agency" or "control" predicates.

When is a non-domiciliary parent corporation, for purposes of jurisdiction, "present" within the state by virtue of the acts its subsidiary performed? Clearly, the mere presence of the subsidiary within the state is not in itself a sufficient basis upon which to exercise jurisdiction over the parent corporation.¹⁶ Such jurisdiction has been up-

¹⁰ CPLR 207.

¹¹ See *Dominion of Canada Gen. Ins. Co. v. Pierson*, 27 App. Div. 2d 484, 280 N.Y.S.2d 296 (3d Dep't 1967); *Glines v. Muszynski*, 15 App. Div. 2d 435, 225 N.Y.S.2d 61 (4th Dep't 1962) (per curiam).

¹² 38 App. Div. 2d 39, 326 N.Y.S.2d 720 (4th Dep't 1971).

¹³ *Id.* at 45, 326 N.Y.S.2d at 726. *Accord*, *Carulloff v. Emerson Radio & Phonograph Corp.*, 445 F.2d 873 (2d Cir. 1971); *Perez v. Chutick & Sudakoff*, 50 F.R.D. 1 (S.D.N.Y. 1970); *C.K.S., Inc. v. Helen Borgenicht Sportswear, Inc.*, 22 App. Div. 2d 650, 253 N.Y.S.2d 56 (1st Dep't 1964) (per curiam); *City & County Sav. Bank v. M. Kramer & Sons, Inc.*, 43 Misc. 2d 731, 252 N.Y.S.2d 224 (Sup. Ct. Albany County 1964). See *The Quarterly Survey*, 46 ST. JOHN'S L. REV. —, — (1972).

¹⁴ 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969). For an excellent critique of the reasoning in the *Mendel* decision, see *Symposium on Mendel v. Pittsburgh Plate Glass Company*, 45 ST. JOHN'S L. REV. 62 *et seq.* (1970).

¹⁵ For further discussion of the impleader problem, see Siegel, *Procedure Catches Up and Makes Trouble*, 45 ST. JOHN'S L. REV. 63, 69 (1970).

¹⁶ See, e.g., *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 52, comment *b* at 180-81 (1969).

held, however, where (1) the subsidiary, having no separate existence of its own, is, in fact, a department of its parent corporation;¹⁷ or (2) where the subsidiary functions in New York as the agent of the parent corporation.¹⁸

In the first instance, the corporate cloak of the subsidiary is completely disregarded; thus, any activity of the subsidiary may be included in the "doing business" equation of the parent. However, where jurisdiction is predicated on the agency relationship between parent and subsidiary, only the subsidiary's acts as agent may be charged to the parent.¹⁹ In the latter situation, the subsidiary is a distinct corporate personality whose activities are controlled in part by the non-domiciliary parent. Precisely what degree of control by the parent warrants a finding of agency for jurisdictional purposes?

On this point *Frummer v. Hilton Hotels International, Inc.*²⁰ indicated that where a subsidiary "does all the business which [the parent] could do were it here by its own officials,"²¹ the foreign parent is subject to in personam jurisdiction. The defendant in *Frummer*, a British corporation, was deemed present within the state as a result of the activities of its New York agent, Hilton Reservation Service. The New York affiliate, operated on a non-profit basis, did publicity work and public relations for the Hotel and, significantly, made and confirmed hotel reservations here. The Hotel and the Reservation Service were in part commonly owned by Hilton Hotels International.²² Discussing this interlocking relationship, the Court of Appeals noted that "the fact that the two are commonly owned is significant only because it gives rise to a valid inference as to the broad scope of the agency in the absence of an express agency agreement. . . ."²³

¹⁷ *Public Adm'r of County of New York v. Royal Bank of Canada*, 19 N.Y.2d 127, 224 N.E.2d 877, 278 N.Y.S.2d 378 (1967); *Taca Int'l Airlines, S.A. v. Rolls-Royce of England, Ltd.*, 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129 (1965), discussed in *The Biannual Survey*, 40 St. JOHN'S L. REV. 122, 132 (1965).

¹⁸ *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967), cert. denied, 390 U.S. 996 (1968), discussed in *The Biannual Survey*, 39 St. JOHN'S L. REV. 406, 415 (1965); *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, cert. denied, 389 U.S. 923 (1967), discussed in *The Quarterly Survey*, 42 St. JOHN'S L. REV. 436, 444 (1968).

¹⁹ 7B MCKINNEY'S CPLR 301, commentary at 10 (1972).

²⁰ 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41 (4-3), cert. denied, 389 U.S. 923 (1967).

²¹ *Id.* at 537, 227 N.E.2d at 854, 281 N.Y.S.2d at 44.

²² *Hilton Hotels International, Inc.* owned all but one share of the British corporate defendant. *International*, a Delaware corporation, is partly owned by *Hilton Hotels Corp.*, also a Delaware corporation. These two corporations jointly own *Hilton Credit Corporation*. *Hilton Reservation Service* was a branch of this latter affiliate. *Id.* at 540, 227 N.E.2d at 855-56, 281 N.Y.S.2d at 47 (Breitel, J., dissenting).

²³ *Id.* at 538, 227 N.E.2d at 854, 281 N.Y.S.2d at 45.

In *Delagi v. Volkswagenwerk AG*,²⁴ a unanimous Court of Appeals clarified this statement and the basis of the *Frummer* decision, which arguably synthesized the "departmental" and "agency" predicates.²⁵ The *Delagi* Court, reversing the Appellate Division, Second Department, dismissed the complaint against a foreign corporation, holding that where a subsidiary and a parent, not commonly owned, maintain separate corporate identities, the foreign parent is not present within the state merely because one of its subsidiary's franchises does business in New York.²⁶ Rejecting the plaintiff's argument that jurisdiction could be obtained on the basis of the defendant's alleged control over its subsidiary's franchises, the Court held that the instant facts lacked: (1) the prerequisite subsidiary-parent relationship, and (2) a sufficient degree of control by the parent to warrant such a finding.²⁷

Plaintiff's agency argument centered on defendant's undisputed contact with New York through a wholly-owned subsidiary, Volkswagen of America, Inc., a New Jersey corporation which is the exclusive importer of defendant's products and provides it with substantial income in the form of dividends. Volkswagen of America, Inc., in turn, franchised fourteen wholesale distributors who purchased its cars at various delivery ports. These distributors, in turn, resold to independent franchised dealers. Distinguishing *Frummer*, where an affiliate, sharing a common owner, was deemed an agent of a non-domiciliary corporation, the Court noted that these fourteen wholesale distributors and specifically the New York franchise were in no way directly related to the defendant and were connected to its subsidiary only by the distributorship agreement. Neither the defendant nor its subsidiary owned any stock of the New York franchise. In fact, the distributorship agreement between Volkswagen of America, Inc. and its franchises specifically provided that Volkswagen of America, Inc. acted "on its own behalf and for its own account; it [had] no power or authority whatsoever to act as agent or otherwise for or on account or on behalf of [the defendant]."²⁸

Thus rejecting plaintiff's assertion that defendant pursued a regular and systematic course of conduct in New York through the acts of its subsidiary, the Court reached the question whether defendant's

²⁴ 29 N.Y.2d 426, 278 N.E.2d 895, 328 N.Y.S.2d 653 (1972).

²⁵ See *Delagi v. Volkswagenwerk AG*, 35 App. Div. 2d 952, 953, 317 N.Y.S.2d 881, 883 (2d Dep't 1970) (mem.), *rev'd*, 29 N.Y.2d 426, 278 N.E.2d 895, 328 N.Y.S.2d 653 (1972).

²⁶ *Id.* at 431, 278 N.E.2d at 897, 328 N.Y.S.2d at 656.

²⁷ *Id.* at 432, 278 N.E.2d at 897, 328 N.Y.S.2d at 657.

²⁸ *Id.* at 430 n.1, 278 N.E.2d at 896 n.1, 328 N.Y.S.2d at 655 n.1.

alleged control of its subsidiary's wholesale distributor and dealer franchises subjected it to jurisdiction under CPLR 301 on the theory that the franchises were in fact departments of the defendant. Answering this question in the negative, the Court noted that whenever a foreign corporation has been deemed present on the basis of control, "at least a parent-subsidary relationship" has existed.²⁹

Moreover, the defendant's alleged control of the franchises through standardized service departments, a minimum sale requirement, and a prior approval policy, if proven, was deemed insufficient to make the New York franchise a "mere department" of the defendant.³⁰

In addition, the Court reaffirmed the rule that advertising by a defendant's subsidiary on behalf of its parent in New York media could not subject the defendant to jurisdiction here, it being no more than "mere solicitation" of business.³¹ The Court thus distinguished *Gelfand v. Tanner Motor Tours, Ltd.*,³² where a Nevada corporation was considered "present" within the state on the basis of the activities of an independent travel agent. This jurisdictional "agent" did publicity work for the defendant and confirmed reservations for its Grand Canyon tour. The agent's bookings constituted three-sevenths of the defendant's business for that tour (\$120,000).

The *Delagi* Court, however, indicated that this profit element is not controlling, noting that "mere sales of a manufacturer's product in New York, however substantial, have never made the foreign corporation manufacturer amenable to suit in this jurisdiction."³³

A very liberalized interpretation of the "presence" required under CPLR 301 raises a constitutional issue: what contact beyond "mere solicitation" reasonably justifies burdening a foreign or non-domiciliary corporation with the litigation of a cause of action not arising here and which may be unrelated to its contact here? In *Hanson v. Denckla*,³⁴ the Supreme Court broadly answered this question, stating that

there [must] be some act by which the defendant purposefully

²⁹ *Id.* at 432, 278 N.E.2d at 897, 328 N.Y.S.2d at 657, citing *Public Adm'r of County of New York v. Royal Bank of Canada*, 19 N.Y.2d 127, 224 N.E.2d 877, 278 N.Y.S.2d 378 (1967); *Taca Int'l Airlines, S.A. v. Rolls-Royce, Ltd.*, 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129 (1965).

³⁰ 29 N.Y.2d at 432, 278 N.E.2d at 897, 328 N.Y.S.2d at 657, citing *Fergus Motors, Inc. v. Standard-Triumph Motor Co.*, 130 F. Supp. 780 (S.D.N.Y. 1955).

³¹ 29 N.Y.2d at 432, 278 N.E.2d at 898, 328 N.Y.S.2d at 657, citing *Miller v. Surf Properties, Inc.*, 4 N.Y.2d 475, 151 N.E.2d 874, 176 N.Y.S.2d 318 (1958).

³² 385 F.2d 116 (2d Cir. 1967), cert. denied, 390 U.S. 996 (1968).

³³ 29 N.Y.2d at 433, 278 N.E.2d at 898, 328 N.Y.S.2d at 657.

³⁴ 357 U.S. 235 (1958).

avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.³⁵

The appellate division had upheld jurisdiction on the basis of the broad language of *Frummer* and *Gelfand*. By rejecting this approach, the Court of Appeals remained within the boundaries expressed in *Hanson*. From a pragmatic viewpoint, German Volkswagenwerk AG's activities were only those basic to engaging in international commerce — establishment of a subsidiary and shipment of goods to it. Certainly, these activities, indistinct from those employed in interstate commerce, are not a basis for in personam jurisdiction.

CPLR 325(d): Damages sought limited by monetary jurisdiction in lower court after transfer by supreme court without plaintiff's consent.

CPA 110-b provided that the written consent of the plaintiff was necessary to transfer a case from the supreme court to a lower court.³⁶ In 1962, however, a new state constitution was adopted. Article VI, section 19(a), provides that

[t]he supreme court may transfer any action or proceeding, except one over which it shall have exclusive jurisdiction which does not depend upon the monetary amount sought, to any other court having jurisdiction of the subject matter within the judicial department provided that such court has jurisdiction over the classes of persons named as parties.³⁷

This provision has generally been viewed as self-executing.³⁸ It was devised to enable the supreme court to directly relieve its calendar congestion.³⁹ Article VI, section 19(k), of the state constitution states that

[t]he legislature may provide that the verdict or judgment in actions and proceedings so transferred shall not be subject to the limitation of monetary jurisdiction of the court to which the actions and proceedings are transferred if the limitation be lower than that of the court in which the actions and proceedings were originated.⁴⁰

³⁵ *Id.* at 253.

³⁶ *Martirano v. Valger*, 19 App. Div. 2d 544, 240 N.Y.S.2d 792 (2d Dep't 1963) (mem.). CPLR 325(c) incorporates this consent requirement.

³⁷ N.Y. CONST. art. VI, § 19(a) (McKinney 1969).

³⁸ *American Mut. Liab. Ins. Co. v. Bova*, 32 App. Div. 2d 527, 300 N.Y.S.2d 86 (1st Dep't 1969) (mem.); *Turntables, Inc. v. M.B. Plastics Corp.*, 31 App. Div. 2d 792, 297 N.Y.S.2d 51 (1st Dep't 1969) (per curiam); *Trussell v. Strongo*, 29 App. Div. 2d 851, 288 N.Y.S.2d 125 (1st Dep't 1968) (per curiam); *Garland v. Raunhein*, 29 App. Div. 2d 383, 288 N.Y.S.2d 417 (1st Dep't 1968), discussed in *The Quarterly Survey*, 43 *ST. JOHN'S L. REV.* 302, 316 (1968); 1 *WK&M* ¶ 325.04.

³⁹ *The Quarterly Survey*, 44 *ST. JOHN'S L. REV.* 313, 330 (1969).

⁴⁰ N.Y. CONST. art. VI, § 19(k) (McKinney 1969).