St. John's Law Review

Volume 45, December 1970, Number 2 Article 11

CPLR 302(a)(3)(ii): 1 Percent of Gross Income Does Not Constitute "Substantial Revenue from Interstate Commerce"

St. John's Law Review

sustaining jurisdiction in problematical cases: the agreement to indemnify could be deemed implicitly to include the burden of defending in any forum where the indemnitee is forced to litigate. Although *Ferrante* displays something of a jurisdictional paralysis, *Aquascutum* suggests that the outer limits of CPLR 302(a)(1) are yet to be reached.

CPLR 302(a)(3)(ii): 1 percent of gross income does not constitute "substantial revenue from interstate commerce."

Responding to the Court of Appeals decision in *Feathers v. McLucas*,[14] the Judicial Conference recommended passage[15] of what is now CPLR 302(a)(3).[16] Although designed to afford protection to New York residents injured within the state by foreign tortfeasors who could not otherwise be reached under the long-arm statute,[17] the restrictions contained in this subsection are such that the courts have ample latitude within which to safeguard the rights of nonresident defendants.[18] *Gluck v. Fasig Tipton Co.*[19] provides a recent example of judicial unwillingness to extend CPLR 302(a)(3) to the point where the burden of defending an action in New York would be oppressive.

In *Gluck* the plaintiff alleged fraud and breach of warranty arising out of the sale of a mare at an auction in Saratoga, New York. In addition to the seller and the auctioneer, a Kentucky-based veterinarian, who, allegedly, falsely certified the mare to be pregnant, was named as a defendant. The latter's motion to dismiss for lack of jurisdiction was granted despite plaintiff's contention that both CPLR 302(a)(2) and (a)(3) provided the court with personal jurisdiction.

---

14 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

15 *Report to the 1966 Legislature in Relation to the Civil Practice Law and Rules*, TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK 12, 15, 17 (1967) [hereinafter TWELFTH REP.].

16 CPLR 302(a)(3) states that a nondomiciliary will be subject to in personam jurisdiction in New York when he

> commits a tortious act without the state causing injury to person or property within the state, . . . if he . . . (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce. . . .

17 For example, under CPLR 302(a)(2) the tortious act must be committed within the state. Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). *See generally* 7B MCKINNEY'S CPLR 302, supp. commentary at 139-41 (1965).

18 In safeguarding the nonresident's rights, the New York courts are also protecting a New York domiciliary since the "[e]nthusiasm for extending jurisdiction over foreign persons . . . in limited contact cases, . . . may well be tempered by the expectation that the same rule will be reciprocally applied in remote countries against our citizens here." A. Millner Co. v. Noudar LDA, 24 App. Div. 2d 326, 329, 266 N.Y.S.2d 289, 294 (1st Dep't 1966).

19 63 Misc. 2d 82, 310 N.Y.S.2d 809 (Sup. Ct. N.Y. County 1970).

As to CPLR 302(a)(2), the court, relying chiefly upon the restrictive interpretation found in *Feathers v. McLucas*[20] and *Kramer v. Vogl*,[21] held that the fraud was not committed within the state and that neither the owner nor auctioneer could be considered agents of the veterinarian.

With reference to CPLR 302(a)(3)(ii), the court was willing to assume that the veterinarian had expected his act to have consequences in New York. Nonetheless, in view of uncontradicted income figures furnished by defendant, which demonstrated that he derived less than 1 percent of his gross income from services rendered outside Kentucky, the court ruled that defendant had not derived "substantial revenue from interstate or international commerce."[22]

Determining whether or not a particular defendant has derived "substantial revenue from interstate commerce" is a difficult task because no precise guidelines have been fixed.[23] Undoubtedly, utilizing a percentage of interstate income in relation to total income criterion is one method of measuring a defendant's ability to handle out-of-state litigation.[24] However, it should not be viewed as the sole criterion of substantial revenue; instead, courts should also consider the *volume* of income derived from interstate commerce.[25] Admittedly, the *Gluck* outcome would not have been different if this test were applied inasmuch as the volume of interstate income did not amount to more than $7,000 in any of the three years for which figures were supplied. Nevertheless, if a particular defendant's 1 percent interstate income amounts to $50,000 or more, is he not in a better position to defend a New York action than a defendant whose 10 percent interstate income amounts to $25,000?

---

20 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

21 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966) (defendant in Austria made false representations to induce plaintiff to become its exclusive agent in New York).

22 The conditions listed under CPLR 302(a)(3)(i) are used alternatively. However, under subparagraph (ii) both conditions must be met. *See* TWELFTH REP. 21.

23 The Judicial Conference was of the opinion that the amendment should not be construed so as to secure jurisdiction over a nondomiciliary whose business operations are of a local character. TWELFTH REP. 21. In fact, its report intimates that the defendant should be engaged in "extensive" interstate activities. *Id.* at 18.

24 *Cf.* Chunky v. Blumenthal Bros. Chocolate Co., 299 F. Supp. 110 (S.D.N.Y. 1969).

It is generally accepted that one who is substantially involved in interstate commerce is well-equipped to hande litigation away from his primary business location. *See* 1 WK&M ¶ 302.10a.

25 In determining what constitutes "substantial revenue" under CPLR 302(a)(3)(i), the courts have applied both the percentage and dollar volume tests. *See, e.g.*, Gillmore v. Inskip, 54 Misc. 2d 218, 282 N.Y.S.2d 127 (Sup. Ct. Nassau County 1967).