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Article 9

CPLR 203(e): Notice Requirement of Section Is Not Satisfied When Movant Seeks To Change the Status in Which Party Is Sued

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Implicit in the *Roberson* holding is the proposition that had the subsequent death been caused by injuries sustained in the accident, a prompt motion to amend would have been granted. Apparently, the distinction between amended and supplemental pleadings has become blurred to the point that in and of itself it is not a ground for denying a motion to amend.[8] Instead, the court's power to deny the motion on the basis of prejudice to the opposing party should become the focal point of inquiry. Where, as in *Roberson*, the lapse of time reeks of injustice, the motion to amend is properly denied.

CPLR 203(e): Notice requirement of section is not satisfied when movant seeks to change the status in which party is sued.

Under CPLR 203(e), may a claim asserted in an amended pleading against a party as defendant be deemed to relate back to notice contained in the original complaint which was received by the party in his status as plaintiff? The Supreme Court, Nassau County, answered this question negatively in *Ward v. Marino*.[9]

In *Ward* an action was commenced on behalf of Linda Ward to recover damages for injuries sustained in an automobile accident and on behalf of the estate of Thomas Ward, a passenger in a car driven by Linda Ward, to recover damages for personal injuries and wrongful death. Subsequent to the Court of Appeals decision in *Gelbman v. Gelbman*,[10] the executrix of Thomas Ward's estate sought leave to serve a supplemental summons and amended complaint asserting a claim for personal injuries and wrongful death against Linda Ward. In response, the statute of limitations defense was raised.

The court was confronted with two alternatives in deciding whether the claim was embodied by CPLR 203(e). On the one hand, it could compare the instant situation to the case wherein the plaintiff does not seek to add new parties, but merely to change the capacity in which the defendant is sued, *e.g.*, from trustee capacity to individual capacity. On the other hand, the court could compare the proposed amendment to the instance where a plaintiff is asserting a claim against a third-party defendant. In the former situation, the statute of limitations is not a bar;[11] in the latter case, the claim is time-barred[12] (even

8 *See* Werner Spitz Constr. Co. v. Vanderlinde Elec. Corp., 64 Misc. 2d 157, 314 N.Y.S.2d 567 (Monroe County Ct. 1970) (term "amended" under 203(e) embraces supplemental as well as amended pleadings).

9 64 Misc. 2d 44, 313 N.Y.S.2d 931 (Sup. Ct. Nassau County 1970).

10 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969) (doctrine of intrafamily immunity abolished); *see also* 44 ST. JOHN'S L. REV. 127 (1969).

11 Boyd v. United States Mort. & Trust Co., 187 N.Y. 262, 79 N.E. 999 (1907).

if the third-party defendant had been impleaded before the statute of limitations on plaintiff's claim had expired[13]) and unsalvable despite CPLR 203(e). The court reasoned that the second situation was more closely analogous and denied the motion for leave to amend. Thus, although it cannot be gainsaid that the party received notice of the transaction or occurrence sought to be proved by the amended pleading, the court has limited the operation of CPLR 203(e) to claims asserted by an amended pleading against a party in the same status in which he was originally summoned.

CPLR 205(a): Dismissal for lack of personal jurisdiction does not bar commencement of second action where defendant has been properly served.

CPLR 205(a) permits a diligent suitor to commence a new action, upon the same cause of action,[14] within six months from the termination of a prior action, if the earlier action was timely commenced and was not terminated by voluntary discontinuance, dismissal for neglect to prosecute,[15] or final judgment on the merits.[16] Consequently, a party is enabled to escape the harsh effects of the statute of limitations by demonstrating that the prior action had been "timely commenced." The initiation of an action in good faith[17] by service of process constitutes timely commencement, even though the forum selected by the plaintiff lacks subject matter jurisdiction.[18] Where, however, the defendant is not properly served, the beneficial aspects of CPLR 205 are deemed inapposite.[19]

In *Amato v. Svedi*[20] plaintiff commenced an action in the New

12 McCabe v. Queensboro Farm Prods. Inc., 15 App. Div. 2d 553, 223 N.Y.S.2d 21 (2d Dep't), *aff'd*, 11 N.Y.2d 963, 183 N.E.2d 326, 229 N.Y.S.2d 11 (1962).

13 Trybus v. Nipark Realty Corp., 26 App. Div. 2d 563, 271 N.Y.S.2d 5 (2d Dep't 1966).

14 Under CPA 23, a new action was permitted on "the same cause." Hence, a plaintiff was allowed to commence a second action for breach of warranty after the dismissal of an action for fraud. Titus v. Poole, 145 N.Y. 414, 40 N.E. 228 (1895). Notwithstanding the variance in language, it has been held that *Titus* is still good law under the CPLR. Kavanau v. Virtis Co., 32 App. Div. 2d 754, 300 N.Y.S.2d 977 (1st Dep't 1969) (quantum meruit claim permitted after dismissal of action for breach of contract). *See generally* 7B McKINNEY'S CPLR 205, supp. commentary at 46-47 (1970).

15 For a discussion of dismissals other than those warranted by CPLR 3216 which will bar the commencement of a second action, see 7B McKINNEY'S CPLR 205, supp. commentaries at 47-48, 49 (1968, 1966, 1965).

16 For an interesting application of this section, see Buchholz v. United States Fire Ins. Co., 269 App. Div. 2d 49, 53 N.Y.S.2d 608 (1st Dep't 1945).

17 "The rule of the statute was enacted to meet the exigencies of the ordinary rather than the exceptional case, to save the rights of the honest rather than the fraudulent suitor." Gaines v. City of New York, 215 N.Y. 533, 541, 109 N.E. 594, 596 (1915).

18 *Id.*

19 Erickson v. Macy, 236 N.Y. 412, 140 N.E. 938 (1923) (service pursuant to a void order of publication).