

## CPLR 205(a): Dismissal for Lack of Personal Jurisdiction Does Not Bar Commencement of Second Action Where Defendant Has Been Properly Served

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if the third-party defendant had been impleaded before the statute of limitations on plaintiff's claim had expired<sup>13</sup>) and unsalvageable 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,<sup>14</sup> 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,<sup>15</sup> or final judgment on the merits.<sup>16</sup> 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<sup>17</sup> by service of process constitutes timely commencement, even though the forum selected by the plaintiff lacks subject matter jurisdiction.<sup>18</sup> Where, however, the defendant is not properly served, the beneficial aspects of CPLR 205 are deemed inapposite.<sup>19</sup>

In *Amato v. Svedi*<sup>20</sup> plaintiff commenced an action in the New

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<sup>12</sup> *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).

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

<sup>14</sup> 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).

<sup>15</sup> 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).

<sup>16</sup> 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).

<sup>17</sup> "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).

<sup>18</sup> *Id.*

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

York City Civil Court, Queens County, to recover damages for an assault allegedly committed by a Suffolk County resident in Suffolk County. The action was dismissed on the ground that the court lacked jurisdiction over a nonresident of New York City who committed an assault beyond its geographical borders.<sup>21</sup> Within six months after the dismissal, but more than one year after the assault, plaintiff commenced a new action in the Supreme Court, Queens County. Defendant invoked the statute of limitations; plaintiff relied upon CPLR 205(a). Special term dismissed the action, reasoning that in the absence of personal jurisdiction in the prior action a timely action had not been commenced. The Appellate Division, Second Department, reversed, ruling that plaintiff's error in selecting the proper forum was distinguishable from the failure to properly serve the defendant: it is only in the latter instance that no action is deemed to have been timely commenced.

It has been posited that *Erickson v. Macy*<sup>22</sup> established the generic rule that CPLR 205 does not apply when an action has been dismissed for lack of personal jurisdiction.<sup>23</sup> Nevertheless, as indicated in *Amato*, the pivotal consideration in determining the availability of CPLR 205 relief is whether the defendant has been properly served and apprised of the pendency of an action before the statute of limitations has run. If the court is satisfied that these conditions have been met, then CPLR 205 should be employed to defeat a statute of limitations objection.

*CPLR 208: Surviving spouse is one "entitled to commence an action" even though incapacity prevents her appointment.*

Although the Estates, Powers & Trusts Law unambiguously prescribes that a wrongful death action must be commenced within two years from the date of death,<sup>24</sup> a problem arises where, for one reason or another, the sole distributee is incapacitated. Under CPLR 208 the statute of limitations is tolled during a disability due to infancy, insanity or imprisonment.<sup>25</sup> However, the person "entitled to commence" a wrongful death action within the meaning of section 208 is not the distributee but the personal representative.<sup>26</sup> Hence, the representative

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<sup>20</sup> 164 N.Y.L.J. 66, Oct. 2, 1970, at 17, col. 5 (2d Dep't).

<sup>21</sup> CCA § 404.

<sup>22</sup> 236 N.Y. 412, 140 N.E. 938 (1923).

<sup>23</sup> See 7B MCKINNEY'S CPLR 205, supp. commentary at 49 (1964).

<sup>24</sup> N.Y. E.P.T.L. § 5-4.1 (McKinney 1967).

<sup>25</sup> Since the period of limitations is less than three years for a wrongful death action, there would be a toll for the entire period of the disability for an infant and for a maximum of ten years for an incompetent or imprisoned party. See 7B MCKINNEY'S CPLR 208, supp. commentary at 58 (1967).

<sup>26</sup> N.Y. E.P.T.L. § 5-4.1 (McKinney 1967).