

CPLR 208: Surviving Spouse Is One "Entitled To Commence an Action" Even Though Incapacity Prevents Her Appointment

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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.²¹ 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*²² established the generic rule that CPLR 205 does not apply when an action has been dismissed for lack of personal jurisdiction.²³ 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,²⁴ 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.²⁵ However, the person "entitled to commence" a wrongful death action within the meaning of section 208 is not the distributee but the personal representative.²⁶ Hence, the representative

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

²¹ CCA § 404.

²² 236 N.Y. 412, 140 N.E. 938 (1923).

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

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

²⁵ 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).

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

cannot escape the defense of the statute of limitations by pointing out a disability — *e.g.*, infancy — of the distributee.²⁷

In *Pulsifep v. Olcott*²⁸ the Supreme Court, Essex County, was confronted with the question whether the insanity of a surviving spouse tolled the statute of limitations until a committee was appointed. In *Pulsifep* the intestate died in April of 1965, allegedly as a result of injuries caused by defendant. An order appointing a committee for the widow was entered March 16, 1967. Subsequently, letters of administration were granted and the committee instituted a wrongful death action on March 6, 1968.

In view of the facts, the court reasonably concluded that the action was timely commenced. A strict construction of CPLR 208 would have dictated a contrary conclusion on the theory that a person is not entitled to commence an action which requires a representative plaintiff until that person is *actually* appointed to the fiduciary position. Nevertheless, the court recognized the injustice of such an interpretation in the instant case inasmuch as there were only two remaining members of the family, the incompetent wife and a young child, and had the wife been sane, her appointment as administratrix would have been routine.²⁹ It would seem therefore that a practitioner seeking to avail himself of the tolling provisions contained in CPLR 208 must show that the disabled party had a prior right to letters of administration. This would serve to prove that the real party in interest was in fact the incapacitated one.³⁰

CPLR 214(6): Second Department extends Flanagan rule of discovery in foreign-object medical malpractice cases.

CPLR 214(6) provides that an action to recover damages for malpractice must be commenced within three years of its accrual. In medical malpractice cases, the general rule is that the cause of action accrues on the date of commission of the wrongful act,³¹ unless treatment has

²⁷ *Mossip v. F.H. Clement & Co.*, 256 App. Div. 469, 10 N.Y.S.2d 592 (4th Dep't 1939), *aff'd*, 283 N.Y. 554, 27 N.E.2d 279 (1940).

²⁸ 63 Misc. 2d 524, 312 N.Y.S.2d 219 (Sup. Ct. Essex County 1970).

²⁹ See N.Y. Surr. Ct. Proc. Acr § 1001 (McKinney 1967).

³⁰ If the infant in *Pulsifep* had been an adult it could be speculated that the result would have been different. For, the adult daughter, rather than the disabled wife, would have the right to letters of administration. N.Y. Surr. Ct. Proc. Acr § 1001 (McKinney 1967). Since the real party in interest would be an adult, section 208 would be inapplicable. *Cf. Lamb v. DuPont*, 181 Misc. 657, 42 N.Y.S.2d 49 (Sup. Ct. N.Y. County 1943) (statute of limitations is not tolled by reason of infancy in derivative action where the real party in interest is a corporation).

³¹ See *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *cert. denied*, 374 U.S. 808 (1963); *Conklin v. Draper*, 229 App. Div. 227, 241 N.Y.S. 529 (1st Dep't), *aff'd*, 254 N.Y. 620, 173 N.E. 892 (1930).