St. John's Law Review

Volume 45, March 1971, Number 3 Article 34

CPLR 302(a)(3)(ii): National Manufacturer Automatically Satisfies General Forseeability Criterion

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation

St. John's Law Review (1971) "CPLR 302(a)(3)(ii): National Manufacturer Automatically Satisfies General Forseeability Criterion," *St. John's Law Review*: Vol. 45 : No. 3 , Article 34.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol45/iss3/34

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

applied in partial satisfaction of defendant's loan. Plaintiff, a judgment creditor of Hale's, sued to recover that portion of the proceeds which resulted from the surrender by Hale of a lease to property situated in New York. Allegedly, the appropriation by defendant of this money was effected with knowledge of Hale's insolvency and was not authorized by the security agreement. The lower court dismissed the action for lack of jurisdiction. The Appellate Division, First Department reversed, holding that the perfection of the security interest in New York and the partial liquidation of Hale's assets by defendant constituted purposeful transactions under the long-arm statute.

CPLR 302(a)(3)(ii): National manufacturer automatically satisfies general foreseeability criterion.

CPLR 302(a)(3) was recommended by the Judicial Conference[4] and promptly enacted by the Legislature[5] in response to the Court of Appeals decision in *Feathers v. McLucas.*[6] There, the Court dismissed, for want of jurisdiction, an action in tort against a foreign corporation selling steel products on a national scale and presumably realizing that a defective product could be brought into New York.[7] CPLR 302(a)(3)(ii) therefore provides personal jurisdiction over any nondomiciliary who, in person or by an agent, commits a tort (except defamation) outside New York causing injury therein, if he "expects or should reasonably expect the act to have consequences in the state *and* derives substantial revenue from interstate or international commerce."[8] New Yorkers thereby received greater protection, while the restrictions included in this subsection equipped the courts with latitude sufficient to safeguard the rights of nonresident defendants and to insure justice in the particular circumstances of each case.[9]

Theoretically, both elements of CPLR 302(a)(3)(ii) must be satis-

[4] *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 337, 339-44 (1967) [hereinafter TWELFTH REP.].

[5] *See* 7B MCKINNEY'S CPLR 302, supp. commentary at 128 *et seq.* (1966); 1 WK&M ¶ 302.10a (1969); Homburger & Laufer, *Jurisdiction Over Foreign Torts: The 1966 Amendment of New York's Long-Arm Statute,* 16 BUFFALO L. REV. 67 (1967).

[6] 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8, *cert. denied,* 382 U.S. 905 (1965).

[7] *Id.* at 458, 209 N.E.2d at 76, 261 N.Y.S.2d at 19-20.

[8] Emphasis added. There need not be a connection between the tort and the derivation of substantial revenue from interstate or international commerce. 1 WK&M ¶ 302.10a.

[9] "Enthusiasm 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 . . . ." A. Millner Co. v. Noudar, LDA, 24 App. Div. 2d 326, 329, 266 N.Y.S.2d 289, 294 (1st Dep't 1966).

The limitations were inserted deliberately to keep the provision "well within constitutional bounds." TWELFTH REP. 341.

fied in order to sustain jurisdiction over a nonresident;[10] yet, it appears that few defendants in our nuclear society can defeat the imputation of foreseeability of forum consequences. Indeed, one commentator has phrased his dissatisfaction with this ephemeral requirement by asking, "[i]f the defendant's business is both substantial and interstate or international in nature, must he not always reasonably expect some of his products or some of his activities to have effect in this state?"[11]

That foreseeability of New York consequences will be imputed to a nationwide manufacturer is suggested by *Gonzales v. Harris Calorific Co.*[12] There, the court held cognizable, under CPLR 302(a)(3)(ii), causes of action for negligence and breach of warranty against an Ohio corporation. In response to defendant's contention that it did not anticipate New York consequences, the court ruled that the foreseeability requirement was satisfied when the defendant designated a local corporation as its sole distributor for the metropolitan area; foreseeability of the specific injury-producing event is unnecessary.[13]

In view of the ease with which courts are able to identify foreseeability of forum consequences, the substantial revenue requirements become crucial if the rights of the defendant are to remain inviolate. Unfortunately, the term "substantial revenue" is not defined in the statute, the Judicial Conference Report, or the Uniform Interstate and International Procedure Act.[14] Consequently, an important issue remains unresolved: is substantial revenue an absolute term, which is satisfied by a certain number of dollars, or a relative term, which is satisfied by a minimum percentage of gross income?[15] To date, courts have applied both the percentage[16] and dollar volume tests[17] in deter-

---

10 TWELFTH REP. 343.

11 7B MCKINNEY'S CPLR 302, supp. commentary at 132-33 (1966).

12 64 Misc. 2d 287, 315 N.Y.S.2d 51 (Sup. Ct. Queens County), *aff'd on opinion below*, 35 App. Div. 2d 720, 315 N.Y.S.2d 815 (2d Dep't 1970).

13 *See also* 1 WK&M ¶ 302.10a.

14 Gillmore v. J. S. Inskip, Inc., 54 Misc. 2d 218, 221, 282 N.Y.S.2d 127, 132 (Sup. Ct. Nassau County 1967). The Judicial Conference stated, however, that the substantial revenue condition should be construed to exclude from in personam jurisdiction nondomiciliaries whose businesses are local in character and implied that the defendant should be engaged in extensive interstate activities before the court exercises jurisdiction. *See* TWELFTH REP. 342-43.

15 Professor McLaughlin has suggested a 10 percent test, 7B MCKINNEY'S CPLR 302, supp. commentary at 131 (1966). This proposal was followed in denying jurisdiction in Chunky v. Blumenthal Bros. Chocolate Co., 299 F. Supp. 110 (S.D.N.Y. 1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 532, 544 (1970); *see generally* 1 WK&M 302.10a; H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 32-33 (3d ed. 1970).

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

17 *E.g.*, Rietsch v. S.A. Des Automobiles Peugot, 45 Misc. 2d 274, 277-78, 256 N.Y.S.2d 772, 775 (Sup. Ct. Queens County 1965).

mining whether the "substantial revenue" requirement was satisfied. Undoubtedly, however, there is an urgent need for a legislative or an appellate pronouncement regarding minimum amounts under either test in order to prevent needless, time-consuming litigation.

CPLR 316: Notice effected by advertisements and handbills in condemnation proceedings deemed adequate in view of the circumstances.

The United States Supreme Court considered the constitutional requirements regarding notice in *Schroeder v. City of New York.*[18] Therein, condemnation proceedings were brought to acquire the right to divert a portion of a river some twenty-five miles upstream from plaintiff's summer home. Notice was attempted only by publication in local newspapers and by posting signs on trees and poles along the river during the winter. The Court ruled that this mode of service was constitutionally deficient with respect "to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."[19]

In re Massapequa — Woodbury Road[20] claimants, owners of a gas station adjacent to a condemned street, contended that they had not received actual notice of the condemnation proceedings. The court nonetheless ruled that the required advertisement and the posting of handbills on or near the property to be acquired satisfied the notice requirements of the Constitution under the facts of this particular case.[21]

At first glance, it seems incongruous to hold that the plaintiff in *Schroeder,* whose property was twenty-five miles from the condemned area, was entitled to actual notice, while the claimants in the instant case, owners of property abutting the taking area, do not have the same right. Nonetheless, the criterion for notice consistent with the due process clause is that "reasonably calculated, under all the circumstances, to apprise interested parties" of the pendency of an action.[22] If for no reason other than the fact that the proposed acquisition by the state is likely to be a conversational topic among the local residents, it seems reasonable to presume that a party who owns property in the proximate vicinity will be sufficiently informed of his rights by means of advertisements and handbills.

---

[18] 371 U.S. 208 (1962).

[19] *Id.* at 212-13.

[20] 64 Misc. 2d 976, 316 N.Y.S.2d 489 (Sup. Ct. Nassau County 1970).

[21] *Id.* at 979, 316 N.Y.S.2d at 491-92.

[22] Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950).