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Article 8

CPLR 203(b): Section's Tolling Provisions Not Rendered Inoperative by General Municipal Law Section 50-i

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action was "finalized." There are instances when a court retains jurisdiction for specific purposes even though it has rendered a "final" judgment. CPLR 4404, for example, permits post-trial motions for judgment and/or a new trial. And New York courts have long retained jurisdiction for matters incidental to the judgment in matrimonial actions.[9]

It must be concluded that to subject both the movants and the state to the costs rising from a completely new action seems unnecessary and unfortunate in light of the alternatives available to the court.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 203(b): Section's tolling provisions not rendered inoperative by General Municipal Law section 50-i.

Prior to the amendment of the General Municipal Law in 1959, the tolling provisions pertaining to municipal tort liability were so varied as to render unclear exactly what tolls a plaintiff was entitled to invoke.[10]

For purposes of uniformity and clarity, the Legislature enacted section 50-i of the General Municipal Law, which extends the period within which an action must be brought against municipalities[11] to one year and ninety days. The section further provides that this time limitation "shall be applicable notwithstanding any inconsistent provisions of law. . . ."[12] The legislative intent behind the enactment of the section was not only to extend the time limitation for actions within its scope but also to render inoperative the various tolls which were available under CPA 24 (now CPLR 204(a)), as that section applied to actions against municipalities.[13] It must be remembered, however, that section 50-i is a statute of limitations, and computation of the time period under it should otherwise follow applicable law.[14]

A 1968 case, *Family Bargain Centers, Inc. v. Village of Herkimer*,[15] seemingly violated this principle by holding that section 50-i obviates

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9 *See, e.g.*, Fox v. Fox, 263 N.Y. 68, 188 N.E. 160 (1933); Freund v. Burns, 268 App. Div. 989, 51 N.Y.S.2d 642 (2d Dep't 1944).

10 McLaughlin, *Civil Practice, 1967 Survey of New York Law*, 19 SYRACUSE L. REV. 501, 508 (1967).

11 The word "municipalities" is here employed in its broadest sense. Section 50-i encompasses actions against a "city, country, town, village, fire district or school district."

12 N.Y. GEN. MUNIC. LAW § 50-i (2) (McKinney 1965).

13 Joiner v. City of New York, 26 App. Div. 2d 840, 274 N.Y.S.2d 362 (2d Dep't 1966).

14 McLaughlin, *Civil Practice, 1968 Survey of New York Law*, 20 SYRACUSE L. REV. 449, 455 (1968).

15 56 Misc. 2d 768, 290 N.Y.S.2d 207 (Sup. Ct. Herkimer County 1968). *See also* McLaughlin, *supra* note 14, at 455; 7B MCKINNEY'S CPLR 203, supp. commentary 34 (1965); 1 WK&M ¶ 203.13 (1969).

any extension resulting from the use of CPLR 203(b)(4), which provides in part that a complaint is interposed when:

> [t]he summons is delivered for service upon the defendant to the sheriff in a county in which the defendant resides . . . if the summons is served upon the defendant within sixty days after the period of limitation would have expired but for this provision. . . .

The holding of the fourth department in *Zeitler v. City of Rochester*[16] has weakened, if not overruled, the decision in *Family Bargain*, although the *Zeitler* court made no mention of the earlier case in its opinion. *Zeitler* presented the question of whether section 50-i would render the toll otherwise available from CPLR 203(b)(1) inoperative. The latter section declares that a claim is interposed against the defendant or any co-defendant united in interest with him when the defendant is served with the summons.

The defendants in *Zeitler*, a municipality and an individual, were found to be united in interest by virtue of their employer-employee relationship.[17] Service was made upon the individual defendant within the prescribed one year and ninety day period of limitation; however, service upon the municipality was not completed until two days after the expiration of that period. The appellate division, in denying defendant's motion to dismiss, stated that there was absent any legislative intent indicating section 50-i(2) was meant to interfere with the effectiveness of the toll available pursuant to CPLR 203(b)(4). Thus, it can be reasoned that the other tolls available under 203(b) are also unaffected by the General Municipal Law provision and that the lower court decision in *Family Bargain* is no longer controlling in the fourth department.

CPLR 205(a): Section liberally construed.

CPLR 205(a) provides that if an action is terminated for any reason other than voluntary discontinuance,[18] neglect to prosecute,[19] or a decision on the merits,[20] the plaintiff has six months in which to

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16 32 App. Div. 2d 728, 302 N.Y.S.2d 207 (4th Dep't 1969).

17 For brief discussions of the "united in interest" theory as it relates to employer-employee relationships see 7B McKINNEY'S CPLR 203, supp. commentary 30 (1968); 1 WK&M ¶¶ 203.05-.06 (1969); *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 140, 143 (1968).

18 *See, e.g.*, Friedman v. Long Island R.R., 273 App. Div. 786, 75 N.Y.S.2d 466 (2d Dep't 1947), *aff'd*, 298 N.Y. 702, 82 N.E.2d 791 (1948).

19 *See, e.g.*, Hymowitz v. Soprinsky, 24 App. Div. 2d 750, 263 N.Y.S.2d 822 (1st Dep't 1965).

20 Since a decision on the merits would not entitle a plaintiff to the six-month extension, it is important to distinguish between a dismissal on the merits and one, say, for failure to prosecute. *See, e.g.*, DeMarco v. Boghossian, 37 Misc. 2d 701, 236 N.Y.S.2d 585 (Westchester County Ct. 1962).