St. John's Law Review

Volume 44
Issue 3 *Volume 44, January 1970, Number 3*

Article 9

December 2012

CPLR 205(a): Section Liberally Construed

St. John's Law Review

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

---

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).

bring a new action based upon the same cause of action.[21] Since the section was intended to provide the "diligent suitor" with his day in court on the merits of his case, it should be construed in a liberal fashion.[22]

Such a liberal construction of CPLR 205(a) was recently rendered in *Kavanau v. Virtis Co.*[23] In an earlier suit brought against the defendant by the plaintiff's assignor,[24] the Court of Appeals had affirmed a dismissal of the cause of action for an accounting without prejudice to any potential action in quantum meruit. Plaintiff subsequently brought the present action in quantum meruit within six months of the dismissal but after the statute of limitations had expired. The appellate division, reversing the lower court, held that the action was timely under CPLR 205(a) even though a different theory for recovery had been urged in the pleadings.

The court made it clear that technical differences between causes of action would not suffice to bar the application of the section:

> The present complaint rests upon the same general allegations and operative facts as the previous action; the subject matter is the same, the apparati and items pertaining thereto are the same, the alleged breach of contract involves the same transaction, and the grievance is the same. . . .[25]

The criteria set forth by the court should provide valuable guidelines for future determinations as to whether or not a second cause of action, otherwise time-barred, is based "upon the same cause of action" for purposes of CPLR 205 (a).

CPLR 213: Statute of limitations held not to bar an action for declaratory judgment so long as concurrent action at law is not barred.

In an action for declaratory judgment, the question may arise as to when the applicable statute of limitations begins to run.[26] In *Hebrew Home for Orphans and Aged v. Freund*,[27] it was held that the statute

---

21 *See The Quarterly Survey*, 43 ST. JOHN'S L. REV. 686, 689 (1969). *See generally* 7B MCKINNEY'S CPLR 205, supp. commentaries 47-48 (1966, 1968-1969); 1 WK&M ¶¶ 205.01-.07 (1969).

22 *Cf.* Streeter v. Grahm & Norton Co., 237 App. Div. 258, 262 N.Y.S. 16 (3d Dep't 1932), *rev'd on other grounds*, 263 N.Y. 39, 188 N.E. 150 (1933) (construing CPA 23, the predecessor of CPLR 205).

23 32 App. Div. 2d 754, 300 N.Y.S.2d 977 (1st Dep't 1969).

24 Jernberg v. Virtis Co., Inc., 21 N.Y.2d 837, 235 N.E.2d 921, 288 N.Y.S.2d 920 (1968).

25 32 App. Div. 2d at 754-55, 300 N.Y.S.2d at 978.

26 It has been recognized that actions for declaratory judgments actually raise two statute of limitation problems: "(1) the appropriate period of limitations and (2) the time when this period begins to run." 3 WK&M ¶ 3001-19 (1969).

27 208 Misc. 658, 144 N.Y.S.2d 608 (Sup. Ct. Bronx County 1955); *accord*, Pollack v. Josephy, 162 Misc. 238, 294 N.Y.S. 219 (Sup. Ct. Kings County 1937).