

CPLR 213: Statute of Limitations Held Not To Bar an Action for Declaratory Judgment So Long as Concurrent Action at Law Is Not Barred

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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. Graham & 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).

would begin to run on a declaratory judgment action when "the controversy, which is the subject of the action, is known to exist."²⁸ However, this rule is susceptible to criticism because its application may lead to results which are patently unjust. This fact is well illustrated by the decision reached by the Appellate Division, Second Department, in *Sorrentino v. Mierzwa*.²⁹

In *Sorrentino*, the plaintiff brought an action for a declaration of her marital status, in order to establish her eligibility for a widow's pension from the New York City Police Department. In 1951 her husband had obtained a Nevada "divorce" and had remarried on the same day the divorce decree was rendered. Plaintiff contended that the divorce was void because of her now deceased husband's failure to establish a bona fide residence in Nevada. The supreme court declared the Nevada divorce void, but the appellate division reversed, and citing *Freund*, held that the statute began to run when the plaintiff first became aware that her marital status was in dispute, *i.e.*, in 1951. The Court of Appeals,³⁰ in turn, reversed the appellate division, pointing out that if the *Freund* rule were to be upheld the plaintiff would lose her right to a widow's pension before that right matured. The Court opted for what it deemed to be a more reasonable rule:

Notwithstanding the existence of a justiciable controversy which has given rise to the right to bring an action for a declaratory judgment, appellant was free to bring the instant action so long as the Statute of Limitations had not barred the enforcement of her right to the pension fund.³¹

Thus, the Court not only established a rule governing the commencement of the statute of limitations, but also held applicable to the declaratory judgment action the same statute which would have applied if the traditional remedy (enforcement of the widow's right to the pension fund) had been sought.³²

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 302(a)(1): Validity of "agent-independent contractor" distinction questioned by federal and state courts.

²⁸ 208 Misc. at 662, 144 N.Y.S.2d at 611.

²⁹ 30 App. Div. 2d 549, 290 N.Y.S.2d 585 (2d Dep't 1968).

³⁰ 25 N.Y.2d 59, 250 N.E.2d 58, 302 N.Y.S.2d 565 (1969).

³¹ *Id.* at 63, 250 N.E.2d at 60, 302 N.Y.S.2d at 568.

³² *Accord*, *Calder v. Teachers' Retirement Bd.*, 4 Misc. 2d 166, 156 N.Y.S.2d 494 (Sup. Ct. N.Y. County 1956); *Riesner v. Young*, 198 Misc. 624, 100 N.Y.S.2d 488 (Sup. Ct. N.Y. County 1950). *But cf.* *Simeti v. Commissioner of Welfare*, 212 N.Y.S.2d 785 (Sup. Ct. Kings County 1961) (dictum). *See generally* 1 WK&M ¶ 213.02 (1969).