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CPLR 203(e): Plaintiff Permitted To Add Second Cause of Action Arising Out of Same Occurrence Even Though Statute of Limitations Had Run

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been transferred by motion in the supreme court.[66] In the latter instance, CPLR 326(b) governs, and subsequent proceedings are had in the supreme court "as if the action had been originally commenced there and no process, provisional remedy or other proceedings taken in the court from which the action was removed [is] invalid as the result of removal." Hence, the civil court reasoned that if a similar approach were not adopted when an identical motion was made before it, a lesser measure of relief would be provided and the constitutionally directed procedure might rarely be utilized.[67]

The New York City Civil Court cannot exercise jurisdiction over a cause of action for money damages exceeding $10,000.[68] Prior to the constitutional amendment, unless an application for a transfer was promptly made to the court with the requisite monetary jurisdiction,[69] the practice was for the court in which the action was brought to dismiss the complaint.[70] However, *Kemper* illustrates that the state constitution now gives the civil court the power to transfer causes of action seeking damages in excess of its jurisdiction to the supreme court rather than dismiss the complaint. Inasmuch as the transfer can be effectuated sua sponte by the civil court,[71] the practitioner is encouraged not to ignore a summons and complaint even though that court patently lacks jurisdiction.[72] For, a defendant who fails to serve his responsive pleadings may have no alternative but to submit to the bothersome procedure of moving to open his default in the supreme court.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 203(e): Plaintiff permitted to add second cause of action arising out of the same occurrence even though statute of limitations had run.

CPLR 203(e) declares that claims interposed by an amended pleading relate back to the date of the original pleading unless the

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66 CPLR 325(a) & (b).

67 61 Misc. 2d at 10, 304 N.Y.S.2d at 519.

68 N.Y. CONST. art. 6, § 15 (1962).

69 *See* Taylor v. Goodrich, 284 App. Div. 928, 134 N.Y.S.2d 202 (4th Dep't 1954).

70 *See* Vigil v. Cayuga Constr. Corp., 185 Misc. 676, 54 N.Y.S.2d 94 (N.Y.C. Civ. Ct.), *aff'd*, 185 Misc. 680, 55 N.Y.S.2d 909 (App. T. 1st Dep't), *aff'd*, 269 App. Div. 934, 58 N.Y.S.2d 343 (1st Dep't 1945).

71 *Cf.* Keegan v. Queens County Jockey Club, 34 Misc. 2d 958, 228 N.Y.S.2d 729 (Sup. Ct. Kings County 1962). On the other hand, CPLR 325 requires a motion by the plaintiff. 7B MCKINNEY'S CPLR 325, commentary 623 (1963).

72 Authority that the action must be commenced in a court that had jurisdiction at least over the kind of action brought by the plaintiff is no longer controlling. 7B MCKINNEY'S CPLR 325, commentary 623 (1963). Clearly, therefore, the rationale in *Kemper* is not limited to claims in excess of the monetary jurisdiction of the city court.

latter did not provide notice of the transactions or occurrences sought to be proved pursuant to the amendment. This section is indicative of the legislative intention[73] to afford the practitioner an opportunity to liberally amend or supplement a pleading.[74]

In *Andrews v. Donabella*,[75] the court permitted the plaintiff to interpose a cause of action for property damage in addition to the cause of action for personal injuries set forth in his original complaint[76] despite the fact that the statute of limitations would have barred the property damage cause of action had it been independently commenced at the time the amendment was sought.[77] Relying upon CPLR 203(e), its underlying intent, and prior judicial construction of the section,[78] the court concluded that the amendment was proper since both claims arose from the same occurrence.[79] It would, in fact, be difficult to conceive of a claim more convincingly within the purview of 203(e).[80]

The effect of *Andrews* is to intensify the existing authority in New York which permits an amendment to add a new cause of action and

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73 The section was drafted to overcome the controlling case law of Harriss v. Tams, 258 N.Y. 229, 179 N.E. 476 (1932), where the court refused to relate the claim in an amended pleading back to the date of the original pleading, holding that the statute of limitations was tolled only as to those claims originally asserted. *See* SECOND REP. 50-51.

74 CPLR 3025(b) mandates that leave to supplement or amend a pleading shall be freely given. *See* Town Bd. v. National Sur. Corp., 53 Misc. 2d 23, 277 N.Y.S.2d 872 (Sup. Ct. Sullivan County 1967), *aff'd mem.*, 29 App. Div. 2d 726, 286 N.Y.S.2d 122 (3d Dep't 1968).

In drafting the rules, the Advisory Committee sought to posit "the widest discretion possible" in the courts. FIRST REP. 78. In fact, both CPLR 203(a) and CPLR 3025(b) were intended to permit even greater liberality than the Federal rule, FED. R. CIV. P. 15(a),(c) (1964), after which they were patterned. *See* 1 W. K. & M. ¶ 203.30.

75 60 Misc. 2d 1007, 304 N.Y.S.2d 266 (Sup. Ct. Onondaga County 1969).

76 The collision and negligence complained of occurred on January 2, 1964; the original papers were served in October of 1969; and the order to show cause was filed September 23, 1969. Memorandum in Support of Motion, Andrews v. Donabella, 60 Misc. 2d 1007, 304 N.Y.S.2d 266 (Sup. Ct. Onondaga County 1969).

77 CPLR 214 prescribes a three-year statute of limitations for damage to property.

78 *See* Town Bd. v. National Sur. Corp., 53 Misc. 2d 23, 277 N.Y.S.2d 872 (Sup. Ct. Sullivan County 1967), *aff'd mem.*, 29 App. Div. 2d 726, 286 N.Y.S.2d 122 (3d Dep't 1968); Ringle v. Bass, 46 Misc. 2d 896, 260 N.Y.S.2d 1006 (Sup. Ct. Ulster County 1965); Berlin v. Goldberg, 48 Misc. 2d 1073, 266 N.Y.S.2d 475 (N.Y.C. Civ. Ct. N.Y. County 1966).

79 While the court characterized the claim for property damage as a new cause of action, a strong argument could be presented for the proposition that the amendment is merely an additional claim for damages. *See* H. PETERFREUND & J. MCLAUGHLIN, NEW YORK PRACTICE 572, 1285 (2d ed. 1968).

80 The notice requirement of CPLR 203(e) is certainly satisfied by a complaint alleging a collision caused by the defendant's negligence. The amount and type of property damage, severity of impact, and the facts determining liability would enter into the action for personal injury in any event. Moreover, the defendants were fully aware of the extent of damage to the plaintiff's car, and were in possession of photographs of the damage. Affidavit & Order to Show Cause, Andrews v. Donabella, 60 Misc. 2d 1007, 304 N.Y.S.2d 266 (Sup. Ct. Onondaga County 1969).

thus overcome the otherwise harsh effect of the statute of limitations.[81] These results are clearly justifiable, because in circumstances where no prejudice to a defendant is evident, the statute of limitations is satisfied by sufficient notice in the original pleading.

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

CPLR 303: Court declares personal delivery to be the only acceptable method of service.

Pursuant to CPLR 303, the commencement of an action in New York by one who is not himself subject to personal jurisdiction in the state is an automatic designation of his attorney in the action, during its pendency, as his agent for service of process.[82] The section also contains a provision to the effect that service upon such an agent is deemed to be service upon his principal only in any other action in which the principal is a defendant and a party to the principal's original action is a plaintiff if the subsequent action, had it been brought in the supreme court, would have been permitted as a counterclaim.[83] However, the statute does not indicate what manner of service must be employed. In *Twentieth Century-Fox Film Corp. v. Dupper*,[84] the first department, in a per curiam opinion, recently held that since the statute is silent on this point, only personal delivery will suffice; substituted service, apparently employed in *Twentieth Century-Fox*, will be deemed void.

Pre-CPLR case law would seem to support the court's conclusion.

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81 *See, e.g.*, Ringle v. Bass, 46 Misc. 2d 896, 260 N.Y.S.2d 1006 (Sup. Ct. Ulster County 1965); Berlin v. Goldberg, 48 Misc. 2d 1073, 266 N.Y.S.2d 475 (N.Y.C. Civ. Ct. N.Y. County 1966).

Where a defendant has notice of an action for personal injuries arising from an automobile collision and is thereby apprised of possible liability for property damage, there is no reason to allow the statute to continue running. In such an instance it is appropriate to apply the principle of laches; and, where no prejudice is shown, the amendment is proper. 1 W. K. & M. ¶ 203.30.

82 Although it would seem that the section cannot be employed where the defendant is, in fact, subject to personal jurisdiction when his agent is served, a federal district court has held that no attempt at service upon the defendant is necessary in the first instance. Miller v. Massa, 237 F. Supp. 915 (S.D.N.Y. 1965).

The resultant agency relationship begins with the service of process and terminates with entry of the final judgment in the action commenced by that service. Concourse Super Serv. Station, Inc. v. Price, 33 Misc. 2d 503, 226 N.Y.S.2d 651 (Sup. Ct. Bronx County 1962). Similar statutory schemes have been upheld as a proper exercise of the state's jurisdiction. *E.g.*, Adam v. Saenger, 303 U.S. 59, 67-68 (1938).

83 It has been recognized that this provision is expansive rather than restrictive, as it permits the plaintiff to bring his action without being bound by jurisdictional monetary limits in the court in which the first action was brought. 1 W. K. & M. ¶ 303.07.

84 33 App. Div. 2d 682, 305 N.Y.S.2d 918 (1st Dep't 1969).