

CPLR 302(a)(3): Held Non-Applicable If Original Injury Occurs Without the State

St. John's Law Review

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Moreover, it should be expected that any jurisdiction exercised by New York courts over non-domiciliaries will be reciprocally exercised by foreign courts over New York domiciliaries.²⁶

CPLR 302(a)(3): Held non-applicable if original injury occurs without the state.

In order to obtain personal jurisdiction over a non-domiciliary under CPLR 302(a)(3), defendant must:

- (1) regularly do or solicit business in New York, or
- (2) engage in a persistent course of conduct within the State, or derive substantial revenue from goods used or consumed or services rendered in New York.

Or, the defendant must:

- (1) expect or should reasonably expect the act to have consequences in New York, and
- (2) derive substantial revenue from interstate or international commerce.²⁷

Subdivision (a)(3) of the section was added in 1966 after having been recommended by the Judicial Conference. The Conference made the recommendation after the New York Court of Appeals, in *Feathers v. McLucas*,²⁸ had narrowly construed CPLR 302(a)(2) by requiring the tortious act, as contrasted with the resulting injury, to be committed within the state. CPLR 302(a)(2) was therefore unavailable to reach a non-domiciliary, not doing business or transacting business in New York, who, through an act or omission without the state, caused a tortious injury within the state.²⁹

In *Black v. Oberle Rentals, Inc.*,³⁰ a third-party defendant moved to dismiss the complaint against it for lack of jurisdiction. The third-party defendant was an Indiana corporation, not authorized to do business in New York, who manufactured parts used in a trailer unit which jack-knifed in Massachusetts resulting in consequential damages to the New York plaintiff.

In dismissing the action against the third-party defendant, the court held that in order to predicate jurisdiction on CPLR 302(a)(3), the *original* injury had to occur *within* the state.

²⁶ A. Millner Co. v. Noudar, Ltd., 24 App. Div. 2d 326, 329, 266 N.Y.S.2d 289, 294 (1st Dep't 1966).

²⁷ CPLR 302(a)(3)(i) and (ii).

²⁸ 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

²⁹ See 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 302.10b (1967).

³⁰ 55 Misc. 2d 398, 285 N.Y.S.2d 226 (Sup. Ct. Onondaga County 1967).

Although there is no Court of Appeals decision construing this issue, lower court decisions appear to be in accord with the instant case.³¹

The facts of the case show an injury *without* the state which, however, resulted in consequential damages within the state through loss of earnings, hospital expenses and the like. In *Feathers* both the original injury and the consequential damages occurred within New York. Since the Conference intended to overrule the result reached in *Feathers*,³² it is doubtful that the amendment was meant to go beyond the facts of that case. In any event, keeping in mind the narrow approach taken by the Court of Appeals, it is unlikely that a more far-reaching effect would be recognized.

This conclusion is strengthened by the decision in *Platt Corp. v. Platt*,³³ where jurisdiction over the defendant was predicated on CPLR 302(a)(2). Defendant was a director of plaintiff corporation and did not attend meetings or perform any duties in New York. While the decision was predicated on the absence of a "tortious act within the state" under 302(a)(2), the Court did mention that even under the then proposed amendment to Section 302 (302(a)(3)), there would be no jurisdictional predicate. It would appear then that under 302(a)(3), the Court of Appeals will require some physical contact with the state and this means that the original injury must occur *within* the state itself. Moreover, realizing that every accident results in consequential damages in the plaintiff's home state, a holding to the contrary would most probably encounter serious due process questions.

*CPLR 308(4): Insurer who disclaims liability is
'without standing to object to substituted service.'*

CPLR 308(4) authorizes a court, upon ex parte motion, to provide for substituted service where service is "impracticable," under CPLR 308(1), (2) and (3). A method thus devised by a court is subject to the due process requirement that service be reasonably calculated to give the defendant notice of the pending suit and an opportunity to be heard.³⁴

In *Atomic Development & Machine, Corp. v. De Stefano*,³⁵ defendant's insurance carrier "unequivocally" disclaimed liability

³¹ E.g., *Rose v. Sans Souci Hotel, Inc.*, 51 Misc. 2d 1099, 274 N.Y.S.2d 1000 (Sup. Ct. Nassau County 1966).

³² *Judicial Conference Report on the Civil Practice Law and Rules*, 2 MCKINNEY'S SESSION LAWS 2780, 2786-90 (1966).

³³ 17 N.Y.2d 234, 217 N.E.2d 134, 270 N.Y.S.2d 408 (1966).

³⁴ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Milliken v. Meyer*, 311 U.S. 457 (1940), *rehearing denied*, 312 U.S. 712 (1941).

³⁵ 55 Misc. 2d 210, 284 N.Y.S.2d 873 (App. T. 1st Dep't 1967).