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Article 9

CPLR 203(a): Conflict Develops as to When Cause of Action Based on "Strict Tort Liability" Accrues

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ARTICLE 1 — SHORT TITLE; APPLICABILITY AND DEFINITIONS

CPLR 103(c): Correction made where proceeding brought in improper form.

Two recent cases, *Phalen v. Theatrical Protective Union*,[1] from the Court of Appeals, and *Lakeland Water District v. Onondaga County Water Authority*,[2] from the appellate division, fourth department, have demonstrated the usefulness of CPLR 103(c). This section provides that once a court has jurisdiction over the parties to a civil judicial proceeding, that proceeding shall not be dismissed solely because it is brought in the improper form. The court is directed to make whatever order is required for the proper prosecution of the suit. Thus, wide discretion is vested in the court to take whatever steps are necessary to keep the parties before it so as to litigate their grievances.[3]

In *Lakeland*, an Article 78 proceeding, improperly used as a vehicle for seeking a determination of the validity of a water authority's rate increase, was converted into an action for a declaratory judgment. In *Phalen*, an Article 78 proceeding, used to secure admission of petitioners to respondents' labor union, was reversed and remanded with instructions that it should proceed as an ordinary action in equity for injunction against economic discrimination and for incidental damages.

In *Phalen*, the Court of Appeals also pointed out the significance of CPLR 3017(a) in conjunction with its discussion of 103(c). Section 3017(a) provides that a court can "grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded."

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 203(a): Conflict develops as to when cause of action based on "strict tort liability" accrues.

In *Mendel v. Pittsburgh Plate Glass Co.*,[4] plaintiffs instituted suit for personal injuries arising out of an accident which occurred in 1965 on the premises of defendant bank. Alleged as the cause of the accident was the installation of a faulty glass door by defendant, Pittsburgh Plate, the manufacturer, in 1958. Proceeding on the basis of "strict tort liability," [5] plaintiffs contended

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[1] 22 N.Y.2d 34, 238 N.E.2d 295, 290 N.Y.S.2d 881 (1968).
[2] 29 App. Div. 2d 1042, 289 N.Y.S.2d 875 (4th Dep't 1968).
[3] *See* 7B McKINNEY'S CPLR 103 commentary 13 (1963).
[4] 57 Misc. 2d 45, 291 N.Y.S.2d 94 (Sup. Ct. Monroe County 1967).
[5] Plaintiffs relied on Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

that the time limitations provided by Uniform Commercial Code § 2-725 for breach of warranty were inapplicable. The court, however, deemed the suit to be for breach of warranty[6] and held that it was untimely.

The court reasoned that although persons whose use of an article is contemplated may take advantage of a manufacturer's implied warranty, nevertheless, the statute of limitations begins to run against them when the breach occurs, *i.e.*, at the time of sale or installation. Contrary reasoning would mean that a manufacturer would be liable for breach of warranty to a contemplated user ad infinitum, whereas the vendee would be limited to the statutory period.

A different approach to "strict tort liability" was taken in *Wilsey v. Sam Mulkey Co.*[7] Plaintiff commenced an action for personal injuries in 1965 arising out of an accident that occurred in 1963. The alleged cause of the accident was an improperly manufactured hay elevator which was sold by the defendant manufacturer in 1956. In a lengthy opinion which cites the arguments of plaintiff's and defendant's counsel extensively, the court concluded that plaintiff's cause for "strict tort liability" sounded in tort. The cause of action was thus held to accrue at the time of the accident allowing the plaintiff three years therefrom to commence his action.

Does "strict tort liability" sound in warranty, or in tort, or is it a hybrid theory? Should a plaintiff be allowed the substantive advantage of proving a warranty cause of action and the procedural advantage of tort accrual rules in such a suit? With conflicting lower court decisions now available, it would be advisable to watch carefully for the first appellate court authority on the subject.

CPLR 208: Running tolled for disability once commenced will continue despite return of disability.

If certain disabilities, for example, insanity or imprisonment, exist at the time a cause of action accrues, running of the statute of limitations is tolled. It is settled law, however, that once the disability is removed, the time period of the statute will begin to run and continue to run notwithstanding return of the disability.[8]

Jordan v. State[9] is an illustration of this proposition. Claimant Jordan filed a claim, in 1964, for damages for wrongful

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[6] It is not accepted that "strict tort liability" is either warranty or tort. *See, e.g.*, Miller, *Significant New Concepts of Tort Liability—Strict Liability*, 17 SYRACUSE L. REV. 25 (1965).

[7] 56 Misc. 2d 480, 289 N.Y.S.2d 307 (Sup. Ct. Delaware County 1968).

[8] *See* Gershinsky v. State, 6 App. Div. 2d 964, 966, 176 N.Y.S.2d 667, 670, *aff'd*, 6 N.Y.2d 798, 159 N.E.2d 681, 188 N.Y.S.2d 190 (1959).

[9] 56 Misc. 2d 1032, 290 N.Y.S.2d 621 (Ct. Cl. 1968).