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Article 10

CPLR 208: Running Tolled for Disability Once Commenced Will Continue Despite Return of Disability

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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).

detention based upon an improper judgment of conviction for second degree burglary in 1943. The parties stipulated that claimant's imprisonment provided a toll until 1959. In 1959 the claimant was released on parole, but was subsequently reincarcerated eight months later for a parole violation. The court held that the two year period of limitation prescribed by the Court of Claims Act began to run upon claimant's release on parole and continued to run despite claimant's subsequent reincarceration. The action was thus time barred.

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

CPLR 302: Possible extension in matrimonial actions.

In *Venizelos v. Venizelos*,[10] a separation action, the appellate division, second department, affirmed the denial of defendant husband's motion to dismiss for lack of personal jurisdiction and the allowance of wife's cross-motion for an injunction with respect to husband's proceedings in Greece. It was found that the defendant who was married in New York, where the matrimonial domicile was maintained for nine years and where the children of the marriage resided, was subject to personal jurisdiction although he had returned to his native Greece.

While there is authority for holding that the preparation and execution of a separation agreement is a transaction of business which will subject an absentee spouse to in personam jurisdiction as to causes of action arising out of it,[11] there was no separation agreement mentioned here. The court stated:

> whether defendant was a domiciliary of New York or not at the time of commencement of this action, it is our opinion that his contacts with this State and the interests of New York in the litigation are sufficient to subject him, under the appropriate statutes, to the jurisdiction of our courts in an action for separation. . . . It was proper . . . to enjoin defendant from taking any steps to enforce the foreign decree and from instituting an action for divorce in Greece.[12]

Thus, it appears that a new extension of long-arm jurisdiction is about to be charted.

The court, however, refused to base its decision entirely on such tenuous grounds. It was held that the defendant had waived

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[10] 30 App. Div. 2d 856, 293 N.Y.S.2d 20 (2d Dep't 1968).
[11] *See* 7B MCKINNEY'S CPLR 302, supp. commentary, 104, 106-07 (1967).
[12] 30 App. Div. 2d 856, 293 N.Y.S.2d 20, 21 (2d Dep't 1968).