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CPLR 302(a)(3): Sufficient Contacts Further Defined

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Also noteworthy is the case of *Spectacular Promotions, Inc.* v. *Radio Station WING,* which contains an excellent analysis of the situs of an injury for purposes of 302(a)(3) in an unfair competition action.

The editors of the *Law Review* would welcome suggestions from our readers concerning the treatment of topics which would be of interest to the practicing bar. Since the primary purpose of the *Quarterly Survey* is to impart information which will keep practitioners abreast of New York's procedural law, we feel that its subject matter should correlate with what attorneys want to know. And, from what better place can this be divined than from the attorneys themselves? We look forward, then, to correspondence with respect to procedural problems confronting our readers, and we will try out best to treat them.

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

CPLR 302(a)(3): Sufficient contacts further defined.

In *McKee Electric Co. v. Rauland-Borg Corp.*,[1] plaintiff was one of several New York distributors for defendant, an Illinois corporation not doing business in the State.[2] When friction developed between plaintiff and certain of its customers, defendant sent to New York its representative, whose domicile and office were in New Jersey. The representative made a few visits to New York in an unsuccessful attempt to ease the friction. On one of his visits he was accompanied by a manager of the Illinois corporation.

Upon defendant's termination of the distributorship agreement, plaintiff brought an action alleging breach of contract and conspiracy, basing jurisdiction on CPLR 302(a)(1) and (2). Defendant's motion to dismiss for lack of personal jurisdiction was granted.

Though the plaintiff's affidavits were ambiguous, the trial court gave "plaintiff the benefit of the doubt" and inferred that the original distributorship contract was made in New York. Sub-

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[1] 20 N.Y.2d 377, 229 N.E.2d 604, 283 N.Y.S.2d 34 (1967).

[2] Defendant had "no place of business here, no officers, agents or employees, no property either real or personal, and no telephone listing" in New York. Orders from the New York distributors were made by mail to Chicago where they were accepted or rejected.

sequent renewals of the contract took place in Illinois. It was also found that less than five percent of defendant's sales were attributable to its New York distributors.

On appeal, the Court of Appeals summarily disposed of plaintiff's 302(a)(2) basis on the authority of *Feathers v. McLucas*,[3] holding that the act complained of, viz., the termination of the distributorship agreement, occurred in Illinois.[4] Since the action was commenced prior to the effective date of CPLR 302(a)(3), that section was not available in this action. However, the Court suggested that the defendant's extra-state acts might constitute a sufficient jurisdictional basis for a later suit by plaintiff under 302(a)(3).[5]

Likewise it was held that plaintiff lacked the remaining jurisdictional predicate alleged—transaction of business by defendant in New York. After weighing the facts, the Court concluded that the defendant's business contacts with the State were so "infinitesimal" that it could not be ordered to defend in New York.

The majority suggested that "enthusiasm to implement the reach of the long-arm statute" should not transcend the general rule that defendants should be subject to suit "where they are normally found, that is, at their pre-eminent headquarters, or where they conduct substantial general business activities."[6]

The minority found that jurisdiction could be sustained on the basis of the defendant's negotiations in New York, and its shipments and sending of representatives into New York. These contacts, the three dissenting judges determined, gave rise to a more substantial basis for jurisdiction than those in *Kramer v. Vogl*,[7] where jurisdiction was denied, and closely approached in substance the contacts present in *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*,[8] where jurisdiction was sustained.

Prior to the decision in the present case, it had been suggested by one commentator that sending of representatives into New York would be a sufficient additional contact by a non-resident who ships goods into New York to subject it to long-arm

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[3] 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). For a discussion of the *Feathers* case, see *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122 (1965).

[4] The Court, in passing, noted that the breach of the distributorship agreement, debatably might constitute a tort as well as a breach of contract.

[5] McKee Elec. Co. v. Rauland-Borg Corp., 20 N.Y.2d 377, 383, 229 N.E.2d 604, 608, 283 N.Y.S.2d 34, 38-39 (1967).

[6] *Id.* at 383, 229 N.E.2d at 607, 283 N.Y.S.2d at 38.

[7] 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966) (mere shipment of goods). *See The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 292 (1966).

[8] 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965) (purposeful activity of representatives). *See The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 133 (1965).

jurisdiction, since the presence of representatives would evidence an intent to perform purposeful acts in New York.[9] Seemingly, the Court in *McKee* has qualified this proposition so that where the visits of the representative are few and the primary purpose is to participate in general discussions that fail to accomplish substantial results, there is no purposeful activity in New York sufficient to constitute a transaction of business.

To construe CPLR 302(a)(1) otherwise would, as observed by the Court of Appeals, create a risk of in personam jurisdiction as to any corporation "whose officers or sales personnel happen to pass the time of day with a New York customer in New York. . . ." [10]

CPLR 302(a)(3): Recent Developments.

Under New York's amended long-arm statute, personal jurisdiction may be exercised over non-domiciliaries who commit tortious acts without the state causing injury within the state if certain criteria are met.[11] The original tort provision of the CPLR, 302(a)(2), still found in the statute, allowed for personal jurisdiction to be exercised over non-domiciliaries who committed tortious acts within the state.[12]

While the Supreme Court of Illinois had interpreted its long-arm statute—similar to and a model for the New York act—to include a tortious act originating outside the state culminating in injury within the state to be a tortious act committed within the state,[13] the New York Court of Appeals, in *Feathers v. McLucas*,[14] gave a strict and literal interpretation to CPLR 302(a)(2), stating that the language of the statute was "too plain and precise" to

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[9] *See* 7B McKINNEY's CPLR 302, supp. commentary 81 (1966).

[10] 20 N.Y.2d at 382, 229 N.E.2d at 607, 283 N.Y.S.2d at 37.

[11] That is, the 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. CPLR 302(a)(3)(i). 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. CPLR 302(a)(3)(ii).

[12] CPLR 302(a)(2).

[13] Gray v. American Radiator & Standard Sanitary Corp., 23 Ill. 2d 432, 176 N.E.2d 761 (1961). The Ohio manufacturer of a defective valve which caused injury in Illinois was held to be within the "tortious act" provision of Illinois' long-arm statute since there could be no distinction between the negligent act of manufacturing and the injury caused thereby.

[14] 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). *See generally The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 134 (1965).