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CPLR 205(a): Prior Dismissal for Failure to Serve Timely Complaint Not a Bar to Extension

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extent that it abates the plaintiff's demand.[7] However, unlike prior expressions of the equitable recoupment doctrine in New York,[8] the CPLR does not require the counterclaim or defense to be based on the same theory as the complaint.[9] Instead, the defense or counterclaim need only stem from the "transactions, occurrences, or series of transactions or occurrences . . ." out of which the complaint arises.[10] Thus, where a claim in a complaint is based on contract, a counterclaim in tort arising from the same transactions, as in the *Chevron* case, should be allowed to be interposed to the extent that it abates a plaintiff's claim, regardless of the fact that it would be barred as an independent cause of action by the statute of limitations.

CPLR 205(a): Prior dismissal for failure to serve timely complaint not a bar to extension.

CPLR 205(a), a saving statute, allows a plaintiff to commence a new action on the same cause within six months after the cessation of the original action even though the statute of limitations would have since run,[11] provided the original action is not terminated,[12] *inter alia*, by a dismissal of the complaint for neglect to prosecute.[13] One issue which has repeatedly confronted the courts both under the CPA and the CPLR is whether a dismissal for failure to serve a timely complaint[14] constitutes a dismissal for failure to prosecute.[15]

In the recent case of *Virgilio v. Ketchum*,[16] the court was faced with the issue of whether plaintiffs should be allowed to commence, for a second time, two actions after they were dismissed initially pursuant to CPLR 3012(b), without prejudice, for failure to serve timely complaints. The causes of action arose on November 6, 1966 and were dismissed on April 24, 1967. The new

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[7] *See* Title Guar. & Trust Co. v. Hicks, 283 App. Div. 723, 127 N.Y.S.2d 340 (2d Dep't 1954).

[8] *See* Fish v. Conley, 221 App. Div. 609, 225 N.Y.S. 27 (3d Dep't 1927).

[9] For a complete discussion of the equitable recoupment doctrine under the CPLR, *see generally* 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 203.25 (1963).

[10] CPLR 203(c).

[11] This section is based upon CPA § 23; the only change is a reduction of the saving period from one year to six months.

[12] The word terminated includes a judgment reversed on appeal without awarding a new trial. SECOND REP. 52.

[13] Additionally, CPLR 205 is inapplicable where the action is terminated by a voluntary discontinuance or a final judgment on the merits. CPLR 205(a).

[14] *See* CPLR 3012(b).

[15] *See* CPLR 3216.

[16] 54 Misc. 2d 111, 281 N.Y.S.2d 376 (Sup. Ct. Broome County 1967).

actions were instituted on May 27, 1967. The date of the service of the summons for each initial action was not specifically determined, but they were served no later than March 27, 1967. The supreme court, Broome County, ruled that, although the plaintiffs should have more properly proceeded by seeking to open their defaults under CPLR 5015,[17] the delay of the plaintiffs in serving the complaints was minor and of short duration and they could, therefore, bring new actions under CPLR 205(a). Thus, the instant case intimates that a court will look to the particular CPLR 3012 dismissal to determine whether the plaintiff will gain the benefit of CPLR 205.

Plaintiffs' counsel in the present case failed to note to the court that 205(a) bore no relevance to the facts presented. CPLR 205(a) was clearly meant to be only a saving provision. In *Virgilio*, the suits were for libel, which has a one year period of limitation.[18] And, since at the time of decision the original statute of limitations had not yet expired, *Virgilio* was not a proper case for the invocation of CPLR 205(a). The plaintiffs, therefore, should have been forced to open their defaults through the procedure of CPLR 5015.

CPLR 207(3): Tolling provision applicable where non-resident motor vehicle owner's address is incorrectly given.

Under CPA § 19, the predecessor of and essentially similar to CPLR 207, if a person were without the state when a cause of action accrued against him, or, if a person left the state for four months or more after such cause of action had accrued against him, the statute of limitations would be tolled during the period of his absence. Section 19, however, was inapplicable "[w]hile a designation or appointment, voluntary or involuntary, made in pursuance of law, of a resident or non-resident . . . private or public officer on whom a summons may be served within the state for another resident or non-resident person . . . with the same legal force and validity as if served personally on such person . . . within the state, remains in force."[19]

The test as to whether CPA § 19 was applicable, *i.e.*, whether the statute of limitations continued to run regardless of the defendant's absence, was whether the defendant was amenable to

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[17] *See* Salinger v. Hollander, 19 App. Div. 2d 559, 241 N.Y.S.2d 43 (2d Dep't 1963).

[18] CPLR 215(3).

[19] CPA § 19(1).