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CPLR 207(3): Tolling Provision Applicable Where Non-Resident Motor Vehicle Owner's Address Is Incorrectly Given

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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).

process under appropriate statutory provisions, such as Sections 253 and 254 of the Vehicle and Traffic Law.[20]

In *Ellis v. Riley*,[21] a case decided recently, but governed by the CPA, the supreme court, Kings County, ruled that if the driver of an automobile owned by a non-resident gives the non-resident owner's address incorrectly, and the plaintiff is not able to discover the non-resident's correct address, then the defendant is not amenable to process within the meaning of Section 253 of the Vehicle and Traffic Law. Hence, CPA § 19(1) was inapplicable and, during the period of time it took the plaintiff to discover the non-resident's address, the statute of limitations was tolled.

Although the CPLR was inapplicable to *Ellis*, the decision hints that the rule would be the same under CPLR 207(3),[22] assuming, of course, due diligence on the part of the plaintiff.

CPLR 210(b): Held to be a tolling provision.

CPLR 210(b) provides that the "period of eighteen months after the death . . . of a person against whom a cause of action exists is not a part of the time within which the action must be commenced against his executor or administrator." This provision is "substantially unchanged"[23] from its predecessors, CPA §§ 12 and 21, which were uniformly held to mean that the death of the potential defendant immediately tolled the statute of limitations for eighteen months.[24]

Regardless of the legislative and decisional history surrounding this section, the supreme court, Bronx County, in *Schwartz v.*

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[20] Harvey v. Fussell, 13 Misc. 2d 602, 177 N.Y.S.2d 234 (Sup. Ct. Queens County), *aff'd*, 7 App. Div. 2d 742, 181 N.Y.S.2d 198 (2d Dep't 1958). Section 253(1) provides that when a non-resident's motor vehicle is involved in an automobile accident in New York, jurisdiction may be had over him by service of process on the Secretary of State. Section 253(2) provides that such service is sufficient if notice of service, a copy of the summons and a copy of the complaint are sent by or for the plaintiff to the defendant by registered mail with return receipt requested. Section 254 makes the provisions of section 253 applicable to service on a resident absent from the state for more than thirty days. It has been ruled that the giving of an incorrect address at the time of the accident estops the defendant from claiming as an affirmative defense plaintiff's non-compliance with section 253.

[21] 53 Misc. 2d 615, 279 N.Y.S.2d 382 (Sup. Ct. Kings County 1967).

[22] CPLR 207(3), similar to CPA § 19, makes the tolling provision of 207 inapplicable where "jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to him within the state."

[23] FIFTH REP. 46.

[24] For a succinct analysis of the history of CPA §§ 12 and 21, see *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 285-87 (1966).