

CPLR 202: Where Cause of Action Accrues to Non-Domiciliary Outside the State, New York Borrowing Statute Applies

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ARTICLE 2—LIMITATIONS OF TIME

CPLR 202: Where cause of action accrues to non-domiciliary outside the state, New York borrowing statute applies.

In *Cellura v. Cellura*,⁵ plaintiff, a California domiciliary, was injured in Texas as a result of an accident with the defendant-driver. Plaintiff subsequently became domiciled in New York, where she brought suit against the driver and owner of the vehicle, both of whom were New York domiciliaries. This seemingly uncomplicated fact pattern gave rise to two procedural questions: first, whether the plaintiff was entitled to exclusive application of the New York statute of limitations by becoming a New York domiciliary after the cause of action accrued; second, whether, if the New York statute of limitations did not apply, the Texas statute of limitations was tolled by the defendant-driver's absence from Texas subsequent to the accrual of the cause of action.

Since no change was intended in the transition from CPA § 13 to CPLR 202,⁶ when a cause of action accrues outside the state, the New York borrowing statute will be applied to non-domiciliaries who, subsequent to the accrual of a cause of action, become domiciled in New York. Under such circumstances, the court, upon an examination of both the Texas and New York statutes together with any relevant tolling provisions, will apply whichever statute of limitations is the shorter. Therefore, a plaintiff will not be permitted to avoid the application of a foreign statute of limitations merely by acquiring a New York domicile.⁷

Since an application of the three-year New York statute of limitations would allow the action against both the driver and the owner in the instant case, it was necessary to consider the Texas statute of limitations to determine whether it barred the action.

In Texas, as in New York, an absence from the state after the accrual of a cause of action tolls the statute of limitations for the duration of the absence.⁸ However, this toll must be applied separately to each defendant.

The rule in Texas is that the non-domiciliary defendant must be present in the state when the cause of action accrues in order to toll the statute of limitations for the period of defendant's

⁵ 24 App. Div. 2d 59, 263 N.Y.S.2d 843 (4th Dep't 1965).

⁶ SECOND REP. 46; 7B MCKINNEY'S CPLR 202, supp. commentary 11 (1965).

⁷ Public Admin. New York County v. Curtiss-Wright Corp., 224 F. Supp. 236, 239-40 (S.D.N.Y. 1963); Garford Trucking Co. v. Popp, 203 Misc. 554, 118 N.Y.S.2d 158 (Sup. Ct. N.Y. County 1952); 7B MCKINNEY'S CPLR 202, supp. commentary 11 (1965).

⁸ Compare TEX. REV. CIV. STAT. art. 5537 (1948), with CPLR 207.

absence.⁹ Therefore, this toll, according to Texas law, had no application to the defendant-owner since he was never physically present within Texas to initiate the toll's applicability. In contrast, prior New York cases indicate that where the non-domiciliary defendant is outside the State at the accrual of a cause of action, the statute will be tolled until he comes into the State.¹⁰ The result will be the same under the CPLR.¹¹ However, the court, utilizing the shorter Texas statute of limitations, dismissed the action against the owner.

The effect of the Texas statute of limitations on the driver, who, obviously, was present within Texas when the cause of action accrued, was not so simply determined. In New York, such a non-resident's absence would not toll the statute of limitations, since in personam jurisdiction could be obtained either through the application of CPLR 302(a)(2) (commission of a tortious act within the state) or by the non-resident motorist statute.¹² This result is mandated by CPLR 207 which acts as a limiting force on CPLR 202, dictating that, if personal jurisdiction can be obtained, no toll applies, even where the defendant is absent from the state.¹³ Although there are few cases on this point, it appears that the Texas rule is to the contrary.¹⁴ Therefore, the court refused to dismiss the action against the driver notwithstanding the availability of a non-resident motorist statute which subjected the defendant to in personam jurisdiction even during his absence from the state.

Since both New York and Texas would find the action against the driver timely commenced, it was unnecessary to determine which statute of limitations applied. It would appear, however, that CPLR 202 would mandate the application of the New York statute of limitations if three years had expired from the accrual of the cause of action since the Texas statute would have been tolled for the duration of defendant's absence from the state.

CPLR 204(a): Statute of limitations no bar where stipulation with municipality forced plaintiff to delay commencement of action.

In *Robinson v. City of New York*,¹⁵ the plaintiff, after filing a timely claim, stipulated with defendant to stay commencement of

⁹ *Wise v. Anderson*, 163 Tex. 608, 359 S.W.2d 876 (1962); *Simonds v. Stanolind Oil & Gas. Co.*, 134 Tex. 332, 114 S.W.2d 226 (1938).

¹⁰ *Ackerman v. Ackerman*, 200 N.Y. 72, 93 N.E. 192 (1910); In the Matter of Estate of Morris, 45 Misc. 2d 393, 395, 256 N.Y.S.2d 872, 874 (Surr. Ct. Nassau County 1965).

¹¹ SECOND REP. 57.

¹² N.Y. VEHICLE & TRAFFIC LAW § 253.

¹³ 7B MCKINNEY'S CPLR 207, commentary 181-82 (1963); SECOND REP. 57.

¹⁴ See, e.g., *Simonds v. Stanolind Oil & Gas. Co.*, *supra* note 9, at 343, 114 S.W.2d at 233.

¹⁵ 24 App. Div. 2d 260, 265 N.Y.S.2d 566 (1st Dep't 1965).