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Article 13

CPLR 204(a): Statute of Limitations No Bar Where Stipulation with Municipality Forced Plaintiff to Delay Commencement of Action

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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

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[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).

the action until an examination of plaintiff was completed. Subsequently, the city informed plaintiff that it did not intend to complete the examination since the one year and ninety-day statute of limitations [16] had expired. Thereupon, plaintiff commenced this action.

At the outset, it must be recognized that a stipulation providing for a stay of the suit does not automatically toll the running of the statute of limitations.[17] Furthermore, CPLR 204(a), which tolls the statute of limitations for the duration of a statutory prohibition or court imposed stay, is not applicable since a stipulation between parties does not fall into either category.[18] In fact, such a stipulation is usually not made with any intent to avoid the applicable statute of limitations. The obligation rests on the plaintiff to commence the action after the expiration of the stipulation and prior to the running of the statute of limitations.[19]

In the instant case, the court utilized the doctrine of equitable estoppel to avoid the application of the statute of limitations as a bar to plaintiff's cause of action. There is authority for this holding in Section 17.103 of the General Obligations Law, which vests in the court power to refuse enforcement of the statute of limitations whenever there is a stipulation in writing signed by the party seeking to assert the defense of the statute of limitations.[20] The court also stressed the fact that commencement of the suit prior to the expiration of the stipulation would have been a breach of that agreement. Furthermore, it appears that an action brought prior to that time would have been subject to dismissal as premature.[21]

If balancing of equities has any part in such a decision, there is no doubt that plaintiff's case is stronger, especially in light of the city's dilatory tactics, seemingly aimed at one result, viz., avoiding the hearing of the merits of the case. However, a strong dissent in *Robinson* stressed both the statutory provision divesting

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[16] N.Y. GEN. MUNIC. LAW § 50-i(1).

[17] Woodcrest Constr. Co. v. City of New York, 185 Misc. 18, 57 N.Y.S.2d 498 (Sup. Ct. N.Y. County 1945), *aff'd*, 273 App. Div. 752, 75 N.Y.S.2d 299 (1st Dep't 1947).

[18] Barchet v. New York City Transit Authority, 24 App. Div. 2d 963, 265 N.Y.S.2d 494 (1st Dep't 1965); Blake v. New York City Housing Authority, 36 Misc. 2d 914, 234 N.Y.S.2d 253 (Sup. Ct. Queens County 1962).

[19] See 509 Sixth Ave. Corp. v. New York City Transit Authority, 24 App. Div. 2d 975, 265 N.Y.S.2d 429 (1st Dep't 1965); Augstein v. Levey, 3 App. Div. 2d 595, 598, 162 N.Y.S.2d 269, 272 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 791, 149 N.E.2d 528, 173 N.Y.S.2d 27 (1958).

[20] 23A MCKINNEY'S GEN. OBLIGATIONS LAW § 17-103, commentary 637-38 (1963); see 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 201.13 (1965).

[21] Rapp v. City of New York, 176 App. Div. 155, 162 N.Y. Supp. 300 (2d Dep't 1916).

the city of power to waive the defense of statute of limitations by any act, and the finality placed by the legislature on all time provisions relevant to suits against municipalities. Although this decision is authority for the exercise of equitable estoppel against a municipality's defense of the statute of limitations, reliance upon this case should be coupled with a degree of caution since a slight variation in the facts might demand the application of the rules as espoused by the dissent.

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

CPLR 302(a)(2): Applicable where defendant is New York domiciliary when cause of action arises, but is non-domiciliary at time the action is commenced.

In *Massik v. Zimmerman*,[22] the supreme court, Erie County, held that a "gap" exists in CPLR 302, which permits a person who was a domiciliary at the time the cause of action accrued to escape the court's jurisdiction by changing his domicile prior to the commencement of the action. Although recognizing that the result was inconsistent with the legislature's intent to expand jurisdictional bases, the court reasoned that the "gap" could be closed only by amendment of the statute.

This view was shared by the supreme court, Broome County, in *State v. Associated Bldg. Contractors of the Triple Cities, Inc.*[23] The court there held that under CPLR 302 it was necessary that a person be a non-domiciliary *both* at the time the cause of action accrued, *and* when the summons and complaint were served. However, upon appeal, the appellate division, third department,[24] unanimously reversed, holding that the legislature could not have intended such a "gap."

This decision is consistent with *O'Connor v. Wells*,[25] wherein the supreme court, Greene County, rejected the "gap" argument, and, pursuant to CPLR 104, liberally construed CPLR 302. The *result* achieved in *Associated* and *O'Connor* seems to be in accordance with the intention of the legislature. It appears inconsistent that the courts by virtue of CPLR 302(a) would acquire jurisdiction over a non-domiciliary who commits an act within the state, and

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[22] 48 Misc. 2d 217, 264 N.Y.S.2d 647 (Sup. Ct. Erie County 1965).

[23] 47 Misc. 2d 699, 263 N.Y.S.2d 74 (Sup. Ct. Broome County), *rev'd sub nom.*, State v. Davies, 24 App. Div. 2d 240, 265 N.Y.S.2d 358 (3d Dep't 1965). See *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 310 (1966).

[24] State v. Davies, *supra* note 23.

[25] 43 Misc. 2d 1075, 252 N.Y.S.2d 861 (Sup. Ct. Greene County 1964).