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Article 14

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

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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).

yet would not have jurisdiction over a domiciliary who commits the same act, solely because of a change of domicile prior to commencement of the action.

CPLR 308: Immunity from service of process extended to arbitration proceedings.

A nonresident, voluntarily present in this state solely for the purpose of appearing as a party or witness in a judicial proceeding, is immune from service of civil process during the proceeding and for a reasonable time before and after.[26] This immunity is afforded to encourage voluntary appearance of nonresidents and to secure the expedient administration of justice.[27] Every proceeding of a judicial nature which relates to the trial of the issues of a case or to a public matter comes within the rule.[28]

In *Treadway Inns Corp. v. Chase*,[29] defendant, a nonresident, was served with process while voluntarily attending an arbitration proceeding as a witness. The supreme court held that immunity from service extended to parties or witnesses voluntarily appearing in arbitration proceedings. Arbitration proceedings are, in essence, a form of judicial proceeding in that the arbitrator has the power to subpoena and administer oaths.[30] Thus, to extend immunity from service of civil process to parties and witnesses in these proceedings is desirable.

CPLR 308(3): Validity of service unaffected by defendant's failure to find affixed process.

In *Denning v. Lettenty*,[31] a malpractice case, the court referred to a referee the question of whether there had been proper service. The plaintiff claimed that valid service was effected pursuant to CPLR 308(3),[32] and, in support thereof, introduced the affidavit

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[26] 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 308.05 (1965).

[27] Where attendance in the state is involuntary there is no immunity. 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 308.06 (1965).

[28] Matter of Ferrari, 134 Misc. 728, 236 N.Y. Supp. 406 (Surr. Ct. Kings County 1920); 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 308.05 (1965).

[29] 47 Misc. 2d 937, 263 N.Y.S.2d 551 (Sup. Ct. Monroe County 1965).

[30] Treadway Inns Corp. v. Chase, 47 Misc. 2d 937, 940, 263 N.Y.S.2d 551, 553 (Sup. Ct. Monroe County 1965).

[31] 48 Misc. 2d 185, 264 N.Y.S.2d 619 (Sup. Ct. N.Y. County 1965).

[32] "Personal service upon a natural person shall be made: (3) where service under paragraph one cannot be made with due diligence, by mailing the summons to the person to be served at his last known residence and . . . affixing the summons to the door of his place of business, dwelling house or usual place of abode within the state. . . ."