

CPLR 210(b): Time for Commencement of Action Is Not Extended Where Eighteen-Month Period After Death of Potential Defendant Expired Prior to the Running of the Statute of Limitations

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Clearly guided by criticisms of the *Paskes* ruling, and stating that CPLR 203(e) must be "liberally interpreted,"¹⁴ the court ruled that "there is no equitable (or legal) reason why a personal injury action in the original pleading does not give notice of a wrongful death, allegedly caused by the original negligent injury. . . ." ¹⁵

What must be borne in mind in relation to the question of notice is that defendant was aware not only of the facts surrounding the personal injury claim in 1961, but was also served with a summons and amended complaint including the wrongful death action in 1964—prior to the tolling of the statute of limitations.

It could perhaps be argued that the instant case is not actually applying the 203(e) "relation back" to wrongful death as an action per se, but rather is merely applying this statute to situations in which there is actual as well as constructive notice from the pleadings. However, it would seem that both the language of the court and the intention of the legislature were such as to include any new claim, provided that "*the original complaint gave notice of the transaction out of which the amended complaint arose.*"¹⁶

CPLR 210(b): Time for commencement of action is not extended where eighteen-month period after death of potential defendant expired prior to the running of the statute of limitations.

CPLR 210(b) provides that a "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 alleviates the difficulty which claimants have during the period between the potential defendant's death and the appointment of an executor or administrator of the estate.¹⁷ It leaves "substantially unchanged"¹⁸ its predecessor sections, CPA §§ 12 and 21, merely

Ulster County 1965), where, contrary to *Paskes*, relation back of a wrongful death claim to a personal injury pleading was allowed. See criticism and evaluation of *Ringle v. Bass* in *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 303, 307-08 (1966).

¹⁴ *Supra* note 1, at 1077, 266 N.Y.S.2d at 480.

¹⁵ *Ibid.*

¹⁶ *Berlin v. Goldberg*, 48 Misc. 2d 1073, 1075, 266 N.Y.S.2d 475, 476 (N.Y.C. Civ. Ct. 1966).

¹⁷ I WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶210.04 (1965). "The Legislature seems to have recognized that there is inevitably a period of time following the death of a person when it would be difficult, if not impossible, to commence an action against his estate. In order, therefore, to prevent any hardships or loss of rights to a plaintiff under such circumstances, the Legislature by the enactment of section 21 suspended the running of the statute for a period of eighteen months after the death of the person against whom a cause of action exists." *Butler v. Price*, 271 App. Div. 359, 362, 65 N.Y.S.2d 688, 690 (4th Dep't 1946).

¹⁸ FIFTH REP. 46.

consolidating and simplifying the technical distinctions between the superseded provisions.¹⁹

In *Schwartz v. Public Adm'r*²⁰ however, the Supreme Court, Bronx County, held that CPLR 210(b) created an alternative date and not an extension of the statute of limitations after the death of the person against whom an action could be brought. Interpretation of the statute as an extension, said the court, would be "unconscionable."²¹

The court seems not to have considered the judicial interpretation of the statutory antecedents of CPLR 210(b). In *Hall v. Brennan*,²² Section 403 of the Code of Civil Procedure²³ was construed to mean that "when the death [of the person allegedly liable] occurs, the operation of the statute of limitations is immediately suspended, or cut off, and whatever then remained of the time . . . still remain[s] when the suspension ceases."²⁴ Subsequently, in *In the Matter of Estate of Morris*,²⁵ which cited *Hall v. Brennan* as a direct precedent, CPA § 21 was held to mean that a period of eighteen months was to be excluded from the computation of the limitation period upon the death of the potential defendant.

The instant case, by interpreting CPLR 210(b) as establishing an alternative date rather than an extension of the limitation period, seems to be at odds with both the intent of the legislature and prior case law.²⁶ Since a potential plaintiff is unable to bring suit

¹⁹ 7B MCKINNEY'S CPLR 210(b), commentary 210 (1963). Under the CPA sections, different extensions were available dependent upon the place of death. If within the state, section 21 applied, and an absolute eighteen-month extension from date of death was granted. Under section 21 a plaintiff was given an additional year within which to bring suit if letters testamentary were not issued within six months of the end of the eighteen-month extension. Such provision has been replaced by allowing claimant to apply for letters under Section 119 of the Surrogates Court Act.

CPA § 12 suspended the running of the statute of limitations for eighteen months from the issuance of the letters testamentary when the death of the potential defendant was outside the state. However, CPLR 210(b) is unconcerned with locus of death, and extends the time to bring suit for eighteen months from the death of the party allegedly liable.

²⁰ 50 Misc. 2d 200, 266 N.Y.S.2d 873 (Sup. Ct. Bronx County 1966).

²¹ *Id.* at 201, 266 N.Y.S.2d at 874-75.

²² 140 N.Y. 409 (1893).

²³ Section 403 provides that "a period of eighteen months is not a part of the time limited for the commencement of an action against the executor or administrator."

²⁴ *Hall v. Brennan*, 140 N.Y. 409, 413 (1893).

²⁵ 162 Misc. 378, 294 N.Y. Supp. 622 (Surr. Ct. Kings County 1937). See an historical study of predecessors to CPA § 21 and CPLR 210(b) in *Matter of McCormick*, 169 Misc. 672, 8 N.Y.S.2d 179 (Surr. Ct. Kings County 1938).

²⁶ See *Butler v. Price*, 271 App. Div. 359, 65 N.Y.S.2d 688 (4th Dep't 1946).

between the time that the potential defendant dies and an administrator or executor is appointed, the effect of the court's decision herein is to shorten the limitation period rather than to allow the plaintiff an additional period of time. For example, in a wrongful death action for which the limitation period is only two years,²⁷ the death of the defendant followed by a lapse of eighteen months until an administrator or executor is appointed would, under the interpretation of the instant case, leave the plaintiff only six months in which to bring suit. Instead of aiding the plaintiff, this decision hinders him.

CPLR 215(3): Complaint alleging corrupt conduct and intentional exposure to unreasonable, foreseeable risk of harm states a cause of action.

In *Morrison v. National Broadcasting Co.*,²⁸ the complaint alleged that defendants induced plaintiff, a university professor, to appear on their "rigged" television quiz program by intentional misrepresentations as to the show's legitimacy. Plaintiff further alleged that when the program was exposed as a fraud, his academic position was damaged, viz., fellowships previously applied for were denied, and his good reputation was generally harmed. The appellate division, first department, held that although the facts did not comprise a single complete traditional tort, they did create an actionable basis for relief since the defendants' intentionally false statements foreseeably exposed plaintiff to a known, unreasonable risk of harm and thereby directly damaged him.²⁹

The torts of prima facie tort,³⁰ deceit,³¹ defamation³² and negligence³³ were considered by the court. However, since the complaint failed to allege all the elements necessary to sustain a cause of action under any of the categories relied upon, each was

²⁷ N.Y. DECED. EST. LAW § 130.

²⁸ 24 App. Div. 2d 284, 266 N.Y.S.2d 406 (1st Dep't 1965).

²⁹ *Morrison v. National Broadcasting Co.*, 24 App. Div. 2d 284, 266 N.Y.S.2d 406 (1st Dep't 1965).

³⁰ Prima facie torts are those intentional wrongs whereby otherwise lawful means are employed unjustifiably and maliciously, solely to harm others. Here, the defendants' actions, though not illegal, were initially and intrinsically unlawful; therefore the remedy of prima facie tort was not available.

³¹ This was considered because plaintiff relied reasonably on defendants' knowing misrepresentations to his detriment. Since, however, no goods or services of the plaintiff were transferred to the defendants, deceit was not completed and was eliminated as a remedy.

³² An action for damage to reputation, the classic result of defamation, was brought. However, the essential element of publication about plaintiff by the defendants was not alleged and defamation was thus unavailable as a remedy.

³³ Negligence was considered, but eliminated, since intentional means were employed by the defendants.