St. John's Law Review

Volume 41, January 1967, Number 3 Article 19

CPLR 302(a)(2): Omissions Outside New York Not a Tortious Act Within the State

St. John's Law Review

New York *could* have constitutionally exercised jurisdiction in the instant case,[28] whether or not the facts presented were encompassed by its long-arm statute should be determined by the New York courts.[29] In view of its holding, the New Jersey court requested the New York courts to re-open the prior default judgment. The New York court in rendering the default judgment had not discussed the jurisdictional question in the case. In addition, there was no prior controlling decision in New York on a similar factual situation. However, the New Jersey court stated that if the New York courts declined to re-open the judgment, the plaintiff could enforce the judgment within the New Jersey courts without a further discussion of the jurisdictional question.

The instant case illustrates the role which a foreign tribunal may play in the interpretation of New York's long-arm statutes. In all actions seeking to enforce default judgments in the defendant's home state, the foreign court will have to decide whether there was a valid exercise of jurisdiction by the New York court. The instant case indicates that, as long as an exercise of jurisdiction is constitutional, a foreign court will affirm the jurisdiction of a New York court if, *in the foreign court's opinion,* the facts could be encompassed by the New York statute. It should be noted that this case involved the defendant's purchase of stock in a New Jersey branch office of a New York brokerage firm. The practical effect of this application of CPLR 302 is to subject all purchasers of stock dealing through a New York brokerage firm to in personam jurisdiction in this state.

CPLR 302(a)(2): Omissions outside New York not a tortious act within the state.

In *Platt Corp. v. Platt,*[30] plaintiff brought an action in tort against a non-domiciliary director of a New York corporation, basing jurisdiction on CPLR 302(a)(2). It was alleged that the defendant remained in Florida and caused plaintiff corporation injury by his failure to attend board meetings in New York, and his failure to perform in New York any of his other duties as a director. The Court of Appeals, in reversing the appellate division, held that CPLR 302(a)(2) could not be used as a basis for jurisdiction since this section requires that a tortious act be *committed within the state.*

---

[28] For cases establishing the permissible constitutional limits of long-arm statutes see, *e.g.,* Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[29] The New York courts have held that CPLR 302(a) has not extended New York's jurisdiction to the constitutional limit. A. Millner Co. v. Noudar, LDA, 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966).

[30] 17 N.Y.2d 234, 217 N.E.2d 134, 270 N.Y.S.2d 408 (1966).

In the instant case, the Court was faced with an alleged tort of *omission.* In *Feathers v. McLucas,*[31] which dealt with a tort of commission, the Court of Appeals held that a tortious act is committed only in the state where the defendant performed the act. The Court in *Platt* indicated that the failure of a person to do anything in one state cannot be an act done or committed in another state. "To treat an 'omission' as an 'act' in a particular place, one must be there to do or to omit the act."[32] Therefore, although the consequences of the omission caused injury in New York, the Court believed that no tortious act had been committed in this state.[33]

CPLR 308(4): Court-devised methods of service.

CPLR 308(4) gives a court, upon the filing of an ex parte motion, discretion to authorize special methods of service when service under CPLR 308(1), (2), and (3) is *impracticable.* In devising such methods, the court is required to afford the defendant the constitutional protection of due process. As a minimum, due process requires that substituted service must be reasonably calculated to give the defendant notice of the pending suit and an opportunity to be heard.[34]

In a recent case arising out of an automobile accident, the supreme court denied a motion under CPLR 308(4) requesting the court to direct that substituted service be made upon defendant's insurance carrier.[35] At the time of the accident, defendant resided in New York. The plaintiffs had attempted service at the address given to the policeman at the scene of the accident, only to find that defendant, since the time of the accident, had moved without leaving a forwarding address. The only other factors appearing in the moving papers were that mail sent by the plaintiffs was returned and that no current address could be found by inquiring at the Bureau of Motor Vehicles, or by searching the telephone directories of defendant's locale.

The court indicated that plaintiffs could have examined the records of the insurer to ascertain whether it had defendant's

---

[31] 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

[32] Platt Corp. v. Platt, 17 N.Y.2d 234, 237, 217 N.E.2d 134, 135, 270 N.Y.S.2d 408, 410 (1966).

[33] In 1966, CPLR 302(a) was amended to include a new subsection (3). This subsection provides that New York will have in personam jurisdiction over a non-domiciliary who commits a tortious act without the state which causes injury within the state under certain conditions (subparagraphs (i) and (ii)). It does not appear, however, that this amendment will affect the present case, since neither of the two conditions was met.

[34] Milliken v. Meyer, 311 U.S. 457, *rehearing denied,* 312 U.S. 712 (1940).

[35] Winterstein v. Pollard, 50 Misc. 2d 354, 270 N.Y.S.2d 525 (Sup. Ct. Nassau County 1966).