

## CPLR 204(a): Leave to Sue MVAIC—Statute of Limitations Tolloed While Leave to Sue Is Secured

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able under the statute. Particularly noteworthy cases have also arisen under Article 31 and Article 32 of the CPLR.

The cases discussed herein are those deemed to be of the most importance in the procedural area. Many other cases would be included, but limitations of space prevent the treatment of those less important but nevertheless significant cases. Few cases treated in the *Survey* are exhaustively discussed. It is hoped, however, that the *Survey* accomplishes its basic purpose, viz., to key the practitioner to significant developments in the procedural law of New York.

The Table of Contents is designed to key the reader to those specific areas of procedural law which may be of importance to him. The various sections of the CPLR which are specifically treated in the cases are listed under their respective articles.

#### ARTICLE 2—LIMITATIONS OF TIME

*CPLR 204(a): Leave to sue MVAIC—statute of limitations tolled while leave to sue is secured.*

The victim of a hit-and-run automobile accident must, upon notice to MVAIC, apply to the supreme court for an order permitting an action against MVAIC.<sup>1</sup> In *Creswell v. Doe*,<sup>2</sup> plaintiff petitioned the supreme court for leave to sue MVAIC. Leave was not granted until a time equal to the period of limitations for both wrongful death and personal injuries had elapsed.<sup>3</sup> The court, however, permitted the application of CPLR 204(a), which provides that the statute of limitations will be tolled for the duration of a court-imposed stay or a statutory prohibition. Thus, the statute of limitations was tolled from the time of the accident until leave to sue MVAIC was obtained.

The fact that *leave* to sue was granted 127 days after the wrongful death statute of limitations had expired, even when considered in conjunction with CPLR 2219, which gives a court sixty days to file a decision on a motion, indicates that the *motion* was made after the wrongful death statute had expired. Since suit against MVAIC is statutorily prohibited until leave to sue is granted, the court's construction of CPLR 204(a) suggests that the entire period of time, from the accident to the granting of leave to sue, is excluded from the statute of limitations. This may allow the incongruous result that a hit-and-run victim may wait an inordinate length of time before requesting leave to sue.

This result seems to be intended by the court, since the dissent advised a strict application of the wrongful death statute of lim-

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<sup>1</sup> N.Y. INS. LAW § 618(a).

<sup>2</sup> 22 App. Div. 2d 942, 255 N.Y.S.2d 946 (2d Dep't 1964).

<sup>3</sup> N.Y. DECED. EST. LAW § 130; CPLR 214(5).

itations, and due to the 127 day lapse between its expiration and the granting of leave to sue. Caution should be exercised if reliance is to be placed on this opinion in view of the inherent incongruity present when requesting a court to grant leave to sue long after the applicable statute of limitations has expired.

*CPLR 205(a): Failure to choose jury and proceed to trial held equivalent to neglect to prosecute.*

CPLR 205(a) provides a six-month extension for the commencement of an action after the termination of a prior similar case if such termination was for a reason other than voluntary discontinuance, neglect to prosecute, or a decision on the merits.<sup>4</sup> In *Schuman v. Hertz Corp.*,<sup>5</sup> the extension provided by CPLR 205(a) was held inapplicable where the plaintiff wilfully failed to choose a jury and proceed to trial in the previous action. This, the court stated, was tantamount to neglect to prosecute and, therefore, excluded from the benefits conferred by CPLR 205(a).<sup>6</sup> Previously, the courts allowed the six-month extension, holding that failure to select a jury and proceed to trial was not neglect to prosecute.<sup>7</sup> The court in *Schuman* made no reference to the prior contrary authority. The instant case appears to be consistent, however, with recent judicial opinions checking the abuse of CPLR 205(a) where the action is not actively pursued by the plaintiff.<sup>8</sup>

*CPLR 213(9): Fraud statute of limitations runs from discovery where fraud is extraneous to original tort.*

In *DeVito v. New York Cent. Sys.*,<sup>9</sup> the complaint set out a cause of action for common-law fraud based on the defendant's fraudulent disclaimer of ownership of property upon which plaintiff was injured by defendant's alleged negligence. The defendant, in pleading the defense of the statute of limitations, claimed that the gravamen of the action was actually the original negligence of

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<sup>4</sup> CPLR 205(a). The exception dealing with a final judgment on the merits seems to be superfluous since a subsequent action would be res judicata.

<sup>5</sup> 23 App. Div. 2d 646, 257 N.Y.S.2d 400 (1st Dep't 1965).

<sup>6</sup> See CPLR 3216.

<sup>7</sup> *Schneck v. S. T. Grand Inc.*, 11 Misc. 2d 923, 174 N.Y.S.2d 749, *aff'd without opinion*, 6 App. Div. 2d 1047, 179 N.Y.S.2d 652 (2d Dep't 1958); 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶205.06 (1964).

<sup>8</sup> *Wright v. Defelice & Son, Inc.*, 22 App. Div. 2d 962, 256 N.Y.S.2d 63 (2d Dep't 1964); 7B MCKINNEY'S CPLR 205, *supp. commentary* 21, 22 (1965); 7B MCKINNEY'S CPLR 216, *supp. commentary* 77 (1965).

<sup>9</sup> 22 App. Div. 2d 600, 257 N.Y.S.2d 895 (1st Dep't 1965).