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CPLR 205(a): Failure to Choose Jury and Proceed to Trial Held Equivalent to Neglect to Prosecute

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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.[4] In *Schuman v. Hertz Corp.*,[5] 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).[6] Previously, the courts allowed the six-month extension, holding that failure to select a jury and proceed to trial was not neglect to prosecute.[7] 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.[8]

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

In *DeVito v. New York Cent. Sys.*,[9] 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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[4] 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.

[5] 23 App. Div. 2d 646, 257 N.Y.S.2d 400 (1st Dep't 1965).

[6] See CPLR 3216.

[7] 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).

[8] 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).

[9] 22 App. Div. 2d 600, 257 N.Y.S.2d 895 (1st Dep't 1965).