

## CPLR 213(9): Fraud Statute of Limitations Runs from Discovery Where Fraud Is Extraneous to Original Tort

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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.<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

<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).

the defendant which was barred by the statute of limitations.<sup>10</sup> The court recognized the fraud cause of action, holding that whenever the fraud is extraneous to the barred cause of action it may be the basis for a separate claim, with the benefit of the discovery provisions of the CPLR.<sup>11</sup>

In *DeVito*, the court properly sustained the cause of action for fraud since the misrepresentation was directed at preventing the commencement of the action for personal injuries. Such fraud is separate and distinct from the original tort; one inflicting personal injuries, the other preventing just recompense for such injuries. This is unlike *Brick v. Cohen-Hall-Marx Co.*,<sup>12</sup> where royalties under a sales contract were fraudulently computed. Such a misrepresentation of royalties due under a sales contract was held to be so integral a part of the contract, however fraudulent, that the essence of the action was in contract. Thus in *Brick*, the fraud was not extraneous to the original grounds for relief.

*Running of six-month extension to statute of limitations after prior termination of same cause.*

In *Dinerman v. Sutton*,<sup>13</sup> the court refused to allow plaintiff the benefit of the CPLR 205(a) extension holding that the six-month period runs from the entering of the order terminating the prior action and not from service on plaintiff of the order.<sup>14</sup> Furthermore, the court rejected plaintiff's argument that the filing of notice of appeal tolls the six-month extension, stating that mere filing of a notice of appeal is of no effect where there was no disposition of the merits on appeal.<sup>15</sup> If the appeal is prosecuted, the six-month extension runs from the date of entry of the order determining the appeal or, in the alternative, from the entry of judgment on remittitur.<sup>16</sup>

*CPLR 213(2): MVAIC uninsured motorist endorsement makes six-year contract statute of limitations applicable.*

The Insurance Law dictates that every automobile liability insurance contract must include a statement by the carrier that the

<sup>10</sup> CPLR 214(5).

<sup>11</sup> CPLR 213(9). The plaintiff will have two years from the discovery of the fraud or six years from its perpetration which ever is longer. Compare CPLR 213(9), with CPLR 203(f).

<sup>12</sup> 276 N.Y. 259, 11 N.E.2d 902 (1937).

<sup>13</sup> 45 Misc. 2d 791, 258 N.Y.S.2d 13 (Sup. Ct. Queens County 1965).

<sup>14</sup> Cf. *Troiano v. Kinney Motors, Inc.*, 276 App. Div. 869, 93 N.Y.S.2d 368 (2d Dep't 1949).

<sup>15</sup> *Accord*, *Taylor v. G.P. Putnam's & Son*, 41 Misc. 2d 1003, 247 N.Y.S.2d 80 (Sup. Ct. 1964).

<sup>16</sup> 7B MCKINNEY'S CPLR 205, supp. commentary 21 (1965).