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General Municipal Law Section 50-e: Motion to File Late Notice of Claim Denied Where City's Ownership of Property Not Discovered by Usual Search

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courts to include such a theory.⁶ Furthermore, it cannot be contended that this relation back, although a device for avoiding the statute of limitations, does not produce a beneficial result, especially when viewed in light of the notice to the defendant in the original pleadings of the facts upon which the wrongful death action is based. Since the defendant must have been apprised of the occurrences upon which the new cause of action is based, the mere addition of a new legal theory for recovery cannot prejudice him and, therefore, the wrongful death action should be allowed to relate back to the commencement of the original personal injury action.

However, there is still another issue that must be discussed in relation to the disposition of this case. CPLR 218(a) provides that "nothing in this article shall authorize any action to be commenced which is barred when this article becomes effective. . . ." In the principal case decedent's death occurred on December 5, 1960. The statute of limitations for wrongful death expired on December 5, 1962, prior to the effective date of the CPLR. At first glance, the relation back theory as applied by this court falls squarely within the limits of this provision, thereby precluding the relief afforded by this case. It should be noted that this section was apparently not called to the attention of this court, so that judicial reflection on this point is not available.

This section, however, is amenable to conflicting interpretations, one possibly consistent with this case. Primarily the statute deals with an "action to be *commenced*" and since the executor merely sought to enlarge an already pending action it could be argued that no new action was *commenced* within the strict wording of the statute.

Contrariwise, it is apparent that no initial action for wrongful death could have been commenced, indicating that plaintiff should not be able to circumvent the purpose of the statute, *i.e.*, to prevent the commencement of any cause of action which is barred at the effective date of the CPLR. Wrongful death is obviously a separate cause of action and it appears that the purpose of CPLR 218(a) was to bar just such an enlargement as perfected here, although it was not technically the *commencement* of an action.

General Municipal Law Section 50-e: Motion to file late notice of claim denied where city's ownership of property not discovered by usual search.

In *Thomson v. City of New York*,⁷ the plaintiff sought permission to file a late notice of claim. The plaintiff contended that

⁶ *Beach v. Grollman*, 169 F. Supp. 612 (E.D. Pa. 1959); *Denver & Rio Grande W.R.R. v. Clint*, 235 F.2d 445 (10th Cir. 1956); 3 MOORE, FEDERAL PRACTICE § 15.15 (1964).

⁷ 24 App. Div. 2d 477, 260 N.Y.S.2d 667 (1st Dep't 1965).

he was unable to discover the city's ownership of land upon which he was injured, since title was procured through a condemnation proceeding which the "usual" search would not reveal.⁸ In spite of the plaintiff's apparent diligence, the court correctly refused to permit an extension, reiterating the specific language of the statute which permits an extension only in the following cases: where the claimant is an infant, or physically incapacitated, or incompetent, and by reason of such disability fails to file; where the claimant dies within the filing period; and where the claimant fails to file because of reliance on written settlement representations.⁹

The harshness of such a result indicates the need for additional discretion in the courts to provide some outlet for the diligent plaintiff where no prejudice to the city is shown¹⁰ or where the filing is not unreasonably late. It may be contended that a more thorough search by the plaintiff would have resulted in discovery of the city's ownership since a *lis pendens* was filed as part of the condemnation proceeding. However, should such a degree of diligence be required where the loss is so complete and the time for filing so short? This problem is especially distressing where there is neither a showing of negligence on the plaintiff's part nor prejudice to the city.

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 302: No basis for jurisdiction over defendant who was domiciliary at time act complained of was committed.

CPLR 302 vests the New York courts with wide powers of jurisdiction over non-domiciliary defendants served with process outside the state.¹¹ The problem has arisen, however, as to whether the statute is limited to defendants who are non-domiciliaries not

⁸ *Id.* at 427, 260 N.Y.S.2d at 668.

⁹ N.Y. MUNIC. LAW § 50-e 5. See, *e.g.*, *Franco v. City of New York*, 270 App. Div. 1050, 63 N.Y.S.2d 291 (2d Dep't 1946) (physical incapacity); *Oliveras v. New York City Trans. Auth.*, 27 Misc. 2d 711, 207 N.Y.S.2d 313 (Sup. Ct. Kings County 1960) (infancy); *Newman v. City of Geneva*, 2 Misc. 2d 646, 153 N.Y.S.2d 677 (Sup. Ct. Monroe County 1956) (settlement representations); *Krauss v. Board of Educ.*, 199 Misc. 505, 103 N.Y.S.2d 939 (Sup. Ct. Kings County 1951) (infancy).

¹⁰ *Kaiser v. Town of Salina*, 20 App. Div. 2d 312, 315, 247 N.Y.S.2d 9, 12 (4th Dep't 1964).

¹¹ CPLR 302(a): "A court may exercise personal jurisdiction over any non-domiciliary . . . as to a cause of action arising from any of the acts enumerated in this section . . . if, in person or through an agent, he:

1. transacts any business within the state; or
2. commits a tortious act within the state . . . ; or
3. owns, uses or possesses any real property situated within the state."