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CPLR 302: No Basis for Jurisdiction Over Defendant Who Was Domiciliary at Time Act Complained Of Was Commited

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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 shown[10] 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

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[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."

only at the time of service but also at the time the acts complained of were committed.

In *State v. Associated Bldg. Contractors of the Triple Cities, Inc.*,[12] the cause of action accrued while the defendant was a New York domiciliary, but service of process was made after the defendant became a bona fide domiciliary of Ohio. The court dismissed the action for lack of jurisdiction and held that in order for CPLR 302 to be applicable the defendant must be a non-domiciliary both at the time the acts complained of were committed and at the time of service of process. The court asserted that a jurisdictional "gap" existed which immunized the defendant from New York's jurisdiction, both as a domiciliary and as a non-domiciliary.[13] Thus, according to the instant case, a defendant who committed a tortious act while a New York domiciliary but purposely fled New York and became a bona fide non-domiciliary *prior* to service of process is not subject to New York's jurisdiction.[14] In comparison, a defendant who committed a tortious act in New York but was never a New York domiciliary would be subject to jurisdiction here.

This arbitrary distinction apparently could not have been intended by the legislature and should not have been made unless unequivocally stated by the language of CPLR 302. That such an interpretation was not intended is well illustrated by the earlier case of *O'Connor v. Wells*,[15] which apparently was not brought to the attention of the court in the instant case. In *O'Connor*, the court was faced with the same factual pattern as in the instant case, *i.e.*, the defendant was a domiciliary when the alleged acts complained of were committed but was a non-domiciliary at the time of service of process. The court, however, rejected defendant's motion for dismissal for lack of jurisdiction on the ground that CPLR 302 is explicitly applicable to *"any* non-domiciliary"; moreover, the use of the word "any," which has been judicially defined to mean "all" or "every," was construed to import no limitation.[16] Therefore, since the defendant was a non-domiciliary at the time he was served with process, he was within the ambit of the statute.

The view expressed in *O'Connor* should prevail in subsequent decisions. The most that can be argued in favor of the decision in the instant case is that the term non-domiciliary as used in

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[12] 47 Misc. 2d 699, 263 N.Y.S.2d 74 (Sup. Ct. Broome County 1965).

[13] *Id.* at 701, 263 N.Y.S.2d at 76.

[14] See 7B MCKINNEY'S CPLR 302, supp. commentary 55 (1965) written prior to the report of the instant case wherein it is stated that CPLR 302 is not so limited.

[15] 43 Misc. 2d 1075, 252 N.Y.S.2d 861 (Sup. Ct. Greene County 1964); *cf.* Tebedo v. Nye, 45 Misc. 2d 222, 256 N.Y.S.2d 235 (Sup. Ct. Onondaga County 1965).

[16] O'Connor v. Wells, 43 Misc. 2d 1075, 1076, 252 N.Y.S.2d 861, 863 (Sup. Ct. Greene County 1965). (Emphasis added.)

CPLR 302 is somewhat equivocal. In such a situation, however, since the language does not compel it, and since the CPLR is intended to be construed liberally,[17] there appears to be no valid reason why the courts should hold that a "gap" exists which would enable a defendant to evade the jurisdiction of New York.

CPLR 302(a)(1): Limited partner held subject to personal jurisdiction on basis of his endorsement outside New York of a note for benefit of the New York partnership.

In order to exercise jurisdiction over a non-domiciliary, the requirements of the CPLR and of federal "due process" must be satisfied. Under CPLR 302(a)(1), jurisdiction is asserted over a non-domiciliary who "transacts any business" in New York and is sued in connection with that business. In *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*,[18] the Court of Appeals stated that the test for jurisdiction under CPLR 302(a)(1) is whether the non-domiciliary has "engaged in some purposeful activity in this state in connection with the matter in suit." [19] The United States Supreme Court, in comparison, has stated that "due process" requires for valid in personam jurisdiction "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." [20] The similarity of the two tests indicates that the Court of Appeals has interpreted the intent of the New York legislature, by its enactment of 302, as utilizing its full constitutional power in exercising jurisdiction over non-domiciliaries who have business contacts with this state.

The full extent to which this jurisdiction will extend has not, as yet, been ascertained. Its comprehensiveness, however, is indicated by the recent appellate division case of *Banco Espanol de Credito v. DuPont*,[21] wherein the defendant, having only minimal contacts with New York, was held subject to New York's jurisdiction. In this case, a suit on a promissory note, the non-domiciliary defendant's only contact with New York was his status as an accommodation endorser on the promissory note of a Delaware corporation for the purpose of giving a New York partnership, in which he was a limited partner, the benefit of his credit.

Justice Steuer voiced a strong dissent to the majority's holding that the defendant was subject to in personam jurisdiction under

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[17] CPLR 104.

[18] 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

[19] *Id.* at 457, 209 N.E.2d at 75, 261 N.Y.S.2d at 18.

[20] Hanson v. Denckla, 357 U.S. 235, 253 (1958); see International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[21] 24 App. Div. 2d 445, 261 N.Y.S.2d 233 (1st Dep't 1965) (memorandum opinion).