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Periodic Payments Under an Allegedly Void Lease Do Not Constitute Separate Wrongs for Statute of Limitations Purposes

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treatment as may be of importance to him without having to wade through matter that does not particularly affect his practice.

ARTICLE 2 — LIMITATIONS OF TIME

Continuous trespass: Statute of limitations defense disallowed.

In *506 Sixth Ave. Corp. v. New York City Transit Authority*,¹ a trespass action to recover damages, the defendant pleaded the statute of limitations² as a defense. The court of appeals held that an underground encroachment built in 1939 was a continuing trespass, and although the right to bring an action accrued in 1939, the three-year statute of limitations did not bar institution of the suit in 1960.

The court distinguished a *permanent* trespass, which gives rise to a single cause of action, from a *continuous* trespass. "In New York, we have consistently characterized an unlawful encroachment as a *continuous* trespass giving rise to successive causes of action. . . ."³ The court reasoned that although the structure itself was permanent, the trespass was continuous. Apparently, the court considered that to allow defendant to successfully plead the statute of limitations would, in effect, allow adverse possession without notice thereof to the owner.

Periodic payments under an allegedly void lease do not constitute separate wrongs for statute of limitations purposes.

*Lowell Wiper Supply Co. v. Helen Shop, Inc.*⁴ was a stockholders' derivative suit based on an allegation that a lease entered into between the corporation and a principal stockholder was either void or voidable because of excessive rental charges. Defendants contended that since the lease was entered into nine years prior to the inception of the action, the statute of limitations⁵ was a bar. Plaintiffs countered that each payment under the lease was a separate, continuous wrong, and that they were thus entitled to damages which accrued during the most recent statutory period. The court rejected the theory "that each payment pursuant to a wrongful agreement gives rise to a separate and distinct claim. . . . The settled rule . . . is that the statute of limitations begins to run upon commission of the overt act causing damage."⁶

¹ 15 N.Y.2d 48, 203 N.E.2d 486, 255 N.Y.S.2d 89 (1964).

² CPA § 49(7).

³ *506 Sixth Ave. Corp. v. New York City Transit Authority*, 15 N.Y.2d 48, 52, 203 N.E.2d 486, 488, 255 N.Y.S.2d 89, 92 (1964).

⁴ 235 F. Supp. 640 (S.D.N.Y. 1964).

⁵ The court made no determination as to which statute of limitations was applicable, as it concluded that plaintiff would have been barred under the most favorable statute.

⁶ *Lowell Wiper Supply Co. v. Helen Shop, Inc.*, 235 F. Supp. 640, 644 (S.D.N.Y. 1964).

A means of reconciling the cases involves an analysis of the nature of the wrong. The rights and duties of the parties to a contract become fixed at the moment of agreement. It is reasonable that the statute of limitations should run from that instant. In the case of a tort, however, each additional breach of obligation will support a new action. A continuing trespass then, would give rise to a cause of action each moment it exists. Thus, the statute could never expire since at any time the injured party could recover damages for the statutory period immediately preceding the inception of the cause of action.

CPLR 203(b)(4): Inapplicable to service on out-of-state sheriffs.

In *Bergstresser v. McCraig*,⁷ an action resulting from an automobile accident, defendant, a Florida resident, moved to dismiss the complaint on the ground of the statute of limitations. Plaintiff countered that his service of the summons and complaint on the sheriff of a Florida county was sufficient to extend the statute of limitations by sixty days under CPLR 203(b)(4). The court held that 203 was not intended to be applied to out-of-state sheriffs. Therefore, service of process on a sheriff of a foreign state is ineffectual for the purpose of obtaining the additional 60 days under CPLR 203(b)(4).

Time requirement for commencement of tort action against municipality: Section 50-i of the General Municipal Law supersedes all inconsistent acts.

In *Hlanko v. New York City Housing Authority*,⁸ an action to recover damages for personal injuries was commenced within one year and ninety days from the accrual of the cause of action. The defendant moved to dismiss on the ground that the action was time-barred, citing as authority Section 157 of the Public Housing Law.⁹ The court noted that General Municipal Law § 50-e¹⁰ superseded the Public Housing Law with respect to the time for the service of the notice of claim.¹¹ Moreover, it

⁷ 44 Misc. 2d 237, 253 N.Y.S.2d 445 (Sup. Ct. 1964).

⁸ 44 Misc. 2d 365, 253 N.Y.S.2d 706 (Sup. Ct. 1964).

⁹ Section 157 provides, *inter alia*, that a suit against the authority shall not be commenced before thirty days from the service of the notice of claim nor after one year from the accrual of the cause of action.

¹⁰ Section 50-e provides for a ninety-day period within which to file a notice of claim when one is required.

¹¹ *Hlanko v. New York City Housing Authority*, 44 Misc. 2d 365, 253 N.Y.S.2d 706 (Sup. Ct. 1964), citing *Robinson v. New York City Housing Authority*, 12 Misc. 2d 200, 176 N.Y.S.2d 700 (Sup. Ct. 1958), *aff'd*, 8 App. Div. 2d 747, 188 N.Y.S.2d 262 (2d Dep't 1959), *aff'd*, 7 N.Y.2d 908, 165 N.E.2d 425, 197 N.Y.S.2d 476 (1960).