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## **CPLR 203(e): Lack of Notice in Original Answer of "Claims" To Be Interposed in Amended Answer Prevents "Relation Back"**

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rejected defendant's contention that General Municipal Law § 50-i did *not* supersede the Public Housing Law with respect to the time for commencement of the action. The court reasoned that "logic leads to the conclusion that Section 157 of the Public Housing Law is also superseded . . . concerning the time to commence the suit."<sup>12</sup>

At first glance, the decision appears to be nothing more than a determination that one statute supersedes another. However noteworthy that may be, the case should alert the practitioner to the significance of the following: One, Section 50-e of the General Municipal Law must be read in conjunction with section 50-i; two, subdivision (2) of section 50-i effectively eliminates the problem of any inconsistent statute although not expressly repealing any of them. It seems clear, therefore, that in all cases founded on a theory of municipal tort liability, reliance may not be predicated upon any statute which is inconsistent with the time provisions of Sections 50-e and 50-i of the General Municipal Law.

One caveat seems appropriate with respect to suing a municipality, viz., time is always of the essence since it seems that there will be no deviations permitted, no matter how slight, from the provisions of Sections 50-e and 50-i of the General Municipal Law.

*CPLR 203(e):<sup>13</sup> Lack of notice in original answer of "claims" interposed in amended answer prevents "relation back."*

In a recent case,<sup>14</sup> the plaintiff served a complaint in January 1962. The cause of action contained therein was based on a sale which occurred in 1960. Defendant's answer contained no counterclaim. However, in an amended answer, interposed in June 1964, defendant asserted counterclaims which alleged conversion by plain-

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<sup>12</sup> Section 50-i prohibits suit prior to thirty days from the service of a notice of claim, or after one year and ninety days from the accrual of the cause of action. *Hlanko v. New York City Housing Authority*, *supra* note 11, at 365, 253 N.Y.S.2d at 708. It should be noted that Sections 50-e and 50-i of the General Municipal Law deal *only* with tort liability and, therefore, in cases which are founded, for instance, on breach of contract, the statute will not apply. The reason for this is that the legislature has not seen fit, as yet, to enact a unifying provision with respect to *all* causes of action against a municipality. Regrettably, therefore, in cases other than those founded on tort liability, resort must be had to the laws of each municipality to determine the time within which the action must be commenced.

<sup>13</sup> For a succinct discussion of the background of CPLR 203(e) see *The Biannual Survey of New York Practice*, 39 ST. JOHN'S L. REV. 178, 184-85 (1964).

<sup>14</sup> *Nichimen & Co. v. Framen Steel Supply Co.*, 44 Misc. 2d 260, 253 N.Y.S.2d 713 (Sup. Ct. 1964).

tiff in March 1961. A conversion action is governed by a three-year statute of limitations.<sup>15</sup> Defendant cited CPLR 203(c) as authority for the contention that the counterclaims should have been deemed interposed at the time of the interposition of the complaint. The court held that CPLR 203(c) pertains only to a defense or counterclaim asserted in an *original* pleading, and that the section must be read in conjunction with CPLR 203(e)<sup>16</sup> which deals specifically with claims in *amended* pleadings. The court went on to state that "the import of subdivisions (c) and (e) is to allow the assertion of claims which become time-barred after a pleading has been interposed which contains notice that the transaction concerned will be the subject of litigation,"<sup>17</sup> but that no such prior pleading was present here.

The counterclaims were contained in an amended pleading and, therefore, the requirements of 203(e) had to be met first. This defect proved fatal to the defendant. Since there were no "claims" in the original answer, there could be no notice given by such a pleading of the transactions and/or occurrences to be proven in the amended answer. Thus, the amended answer could not be related back to the original answer. Failing to meet the requirements of 203(e), the defendant was precluded from availing itself of the benefit of 203(c) and could not, therefore, avoid the bar of the statute of limitations.

An interesting question is raised by the instant case, although the court made no mention of it. CPLR 203(e) provides that "a claim asserted in an amended pleading is deemed to have been interposed at the time the *claims* in the original pleading were interposed. . . ." It is submitted that if the defendant's original answer had contained an affirmative defense which satisfied the notice requirement of 203(e), the court would have permitted relation back of the *amended* pleading, although there was no "claim" contained in the *original* pleading. Professor McLaughlin, in his Practice Commentary to CPLR 203(e), lends support to this argument. He states: "Subdivision (e) abrogates the rule of *Harris v. Tams*."<sup>18</sup> That case had strictly applied the notice requirement with respect to amended pleadings. In enacting 203(e), the legislature was attempting to liberalize these rules.<sup>19</sup> It follows

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<sup>15</sup> CPLR 214(3).

<sup>16</sup> CPLR 203(e) permits relation of a claim in an amended pleading to the time when the claims in the original pleading were interposed, provided the original pleading gives notice "of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

<sup>17</sup> *Nichimen & Co. v. Framen Steel Supply Co.*, *supra* note 14, at 262, 253 N.Y.S.2d at 715.

<sup>18</sup> 7B MCKINNEY'S, CPLR 203, practice commentary 83 (1964). See *Harris v. Tams*, 258 N.Y. 229, 179 N.E. 476 (1932).

<sup>19</sup> CPLR 203(e) is intended to "overcome the effect of *Harris v. Tams*." SECOND REP. 51.

logically, therefore, that if a *claim* asserted in an original pleading can give notice, certainly a defense can do likewise and enable the avoidance of the bar of the statute of limitations.

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

*Expansion of jurisdiction under CPLR 302 does not broaden  
the "doing business" concept.*

The fact that the federal constitution permits a state to exercise in personam jurisdiction over a foreign defendant under the "minimum contacts"<sup>20</sup> theory does not compel the state to expand its concept of "doing business."<sup>21</sup> Subsequent to the case of *International Shoe Co. v. Washington*,<sup>22</sup> while it was clear that the New York Legislature could expand jurisdiction over non-resident defendants, due to legislative inactivity, the courts were confined solely to the "doing business" test until CPLR 302 was enacted.<sup>23</sup> Since the effective date of the CPLR, a foreign corporation, although not "doing business," will be held in personam if it is "transacting business" provided, however, that the cause of action arises out of that business.<sup>24</sup> Considerably less is required for "transacting business" than is required by the "doing business" test. It must be noted, however, that the "doing business" test has not been altered, and if CPLR 302 is inapplicable to a case, the non-resident defendant must be "present" in order to be held in personam.<sup>25</sup> To be "present" is to be "doing business."<sup>26</sup>

<sup>20</sup> *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>21</sup> *Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437, 440-41 (1952); see *Fremay, Inc. v. Modern Plastic Mach. Corp.*, 15 App. Div. 2d 235, 239, 222 N.Y.S.2d 694, 699 (1st Dep't 1961); *Ames v. Senco Prods., Inc.*, 1 App. Div. 2d 658, 146 N.Y.S.2d 298 (1st Dep't 1955).

<sup>22</sup> *Supra* note 20.

<sup>23</sup> *Simonson v. International Bank*, 14 N.Y.2d 281, 285-86, 200 N.E.2d 427, 429-30, 251 N.Y.S.2d 433, 436-37 (1964).

<sup>24</sup> 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."

<sup>25</sup> See *Simonson v. International Bank*, *supra* note 23, at 286-87, 200 N.E.2d at 430, 251 N.Y.S.2d at 437-38.

<sup>26</sup> "[I]f it [the defendant] is here, not occasionally or casually, but with a fair measure of permanence and continuity, then . . . it is within the jurisdiction of our courts . . ." *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915, 917 (1917).