

## Foreign Executor Held In Personam Under CPLR 302(a)(1), (2)

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*CPLR 302 applies where plaintiff is agent transacting defendant's business.*

In the last issue of the *Survey*, it was contended that where X hires Y to perform services for him in New York, CPLR 302 did not prohibit Y from maintaining an action against X in New York as to a cause of action arising out of those services.<sup>39</sup>

This view finds support in *J.K. Rosenberg, Inc. v. Greenfield*,<sup>40</sup> decided under Section 404 of the New York City Civil Court Act (CCA § 404). CCA § 404 is CPLR 302 tailored to fit the jurisdiction of the Civil Court. A Pennsylvania defendant engaged the services of the plaintiff to act as his resident buyer in New York. Plaintiff, pursuant to this agreement, transacted business for defendant in New York City. The court held that plaintiff could invoke the provisions of CCA § 404(a)(1) to obtain jurisdiction as to a cause of action arising out of the business transacted pursuant to such contract.<sup>41</sup> Thus, when the agent transacting defendant's business in New York is the plaintiff himself, lack of physical activities by the defendant will not bar the action under CPLR 302.

*Foreign executor held in personam under CPLR 302(a)(1) and (a)(2).*

*Nexsen v. Ira Haupt & Co.*,<sup>42</sup> was an action by a limited partner against a New Jersey executor whose decedent had been a general partner in the firm of Ira Haupt & Co. Plaintiff sought to recover his capital contribution, an accounting, and damages for conversion. Jurisdiction over the defendant executor under CPLR 302(a)(1) and (a)(2) was based on the original partnership agreement entered into in New York and on two subsequent transactions of the partnership whereby it turned over its operations and assets to the New York Stock Exchange.

The court stated that the word "executor" in CPLR 302(a) "means the executor of a foreign or non-domiciliary estate, and includes an executor who on behalf of his estate or whose decedent during life transacts any business within the state, or . . .

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<sup>39</sup> *The Biannual Survey of New York Practice*, 39 ST. JOHN'S L. REV. 178, 191 (1964).

<sup>40</sup> 44 Misc. 2d 600, 254 N.Y.S.2d 357 (Sup. Ct. 1964).

<sup>41</sup> *Contra*, *Orton v. Woods Oil & Gas Co.*, 249 F.2d 198 (7th Cir. 1957). Plaintiffs, a lawyer and an engineer, performed services in Illinois for defendant. Neither defendant nor his employees had ever been physically present there. Held: services performed by plaintiffs, absent anything else, were insufficient to subject defendant in personam under Section 17 of the Illinois Civil Practice Act.

<sup>42</sup> 44 Misc. 2d 629, 254 N.Y.S.2d 637 (Sup. Ct. 1964).

commits a tortious act within the state. . . .'<sup>43</sup> The court, therefore, held that the defendant was subject to in personam jurisdiction, not only for the decedent's transaction of business prior to death and for his own transaction of business within the state as executor for the deceased, but also for the defendant's alleged commission of a tortious act.

Prior case law indicates that there is a constitutional issue as to whether an in personam judgment can be rendered against a foreign executor in his capacity as executor of the estate.<sup>44</sup> Since the law does not appear to be clear in this area, it is interesting to note that the issue was not raised in the case. It may be that the "minimum contacts" theory extinguishes foreign executor immunity in a CPLR 302 situation. However, the *Nexsen* case appears to be the first case involving the liability of a foreign executor under CPLR 302, and a ruling on the constitutional question by the court would have been helpful.

*Physical injury not required by CPLR 302(a)(2).*

In *Hoard v. U.S. Paint, Lacquer & Chem. Co.*,<sup>45</sup> plaintiff sought damages and rescission for defendant's fraudulent representations and warranties basing jurisdiction on CPLR 302(a)(1) and (a)(2). The contract was made in Missouri, and defendant had no officers or agents in New York. The agreement stated that the relation between the parties was one of independent contractor and distributor and not principal and agent. Plaintiff alleged that defendant's agent made false and fraudulent representations in New York which induced plaintiff to enter into the contract. The court held that if plaintiff had relied exclusively on CPLR 302(a)(1), defendant's motion to dismiss would have been granted. However, since the complaint alleged fraud, there was an allegation that a tortious act had been committed in New York.<sup>46</sup> Thus, CPLR 302(a)(2) was applicable.

Although originally it was proposed to limit the application of CPLR 302(a)(2) to cases involving physical injury, it was ultimately decided to except therefrom only those causes of action arising from defamation of character.<sup>47</sup>

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<sup>43</sup> *Id.* at 632, 254 N.Y.S.2d at 641.

<sup>44</sup> See, e.g., *Matter of Riggle*, 11 N.Y.2d 73, 77, 181 N.E.2d 436, 437, 226 N.Y.S.2d 416, 417 (1962); *Leighton v. Roper*, 300 N.Y. 434, 438-39, 91 N.E.2d 876, 878 (1950); *McMaster v. Gould*, 240 N.Y. 379, 384-85, 148 N.E. 556, 559 (1925); *Helme v. Buckelew*, 229 N.Y. 363, 373, 128 N.E. 216, 219 (1920).

<sup>45</sup> 44 Misc. 2d 72, 253 N.Y.S.2d 89 (Sup. Ct. 1964).

<sup>46</sup> *Id.* at 73, 253 N.Y.S.2d at 90.

<sup>47</sup> FIFTH REP. 67. It was stated therein that a conversion of property is included as a tortious act under CPLR 302(a)(2). See *Nexsen v. Ira Haupt & Co.*, discussed in text at note 42 *supra*.