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Physical Injury Not Required by CPLR 302(a)(2)

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commits a tortious act within the state. . . .'"[43] 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.[44] 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.*,[45] 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.[46] 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.[47]

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[43] *Id.* at 632, 254 N.Y.S.2d at 641.

[44] 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).

[45] 44 Misc. 2d 72, 253 N.Y.S.2d 89 (Sup. Ct. 1964).

[46] *Id.* at 73, 253 N.Y.S.2d at 90.

[47] 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*.

In regard to the court's determination that CPLR 302(a)(1) was not applicable, it is submitted that jurisdiction could be obtained over a defendant on similar facts. CPLR 302(a)(1) does not require that defendant execute the contract in New York. It has been held that activity in furtherance of a contract is enough to subject the defendant to in personam jurisdiction.[48] The facts in the instant case indicate that defendant's agent made fraudulent representations in New York, which induced plaintiff to enter the contract. This might have amounted to "activity in furtherance of a contract" by defendant's agent in New York. If so, this would be a transaction of defendant's business from which the cause of action arose, and CPLR 302(a)(1) requirements would be satisfied. Where defendant has availed himself of the privilege of conducting activities within the state, he obtains the benefit and protection of the state's laws, and in so far as the cause of action arose therefrom, sufficient basis is established for jurisdictional purposes.[49] In such a case, the fact that the contract was executed and to be performed elsewhere would be immaterial.

Another case involving a non-physical tort was *Bright Radio Laboratories, Inc. v. Ilich*[50] decided under Section 404(a)(2) of the Uniform District Court Act.[51] Plaintiff loaned certain equipment to defendant in Nassau County. The equipment was taken by the defendant to his place of business in the Bronx, and upon his refusal to return it, plaintiff served summons and complaint in the Bronx pursuant to UDCA § 404(a)(2) (commission of a tortious act). Defendant moved to dismiss on the ground that the tort, if any, was committed in the Bronx, and therefore, that the Nassau County District Court had no jurisdiction. The court held that the tort of conversion occurred in Nassau County, *i.e.*, the county where the property was bailed. The court analogized to a criminal action for larceny, in which case the county from which the property was bailed may exercise jurisdiction when the property should have been returned to that county.[52]

In *Bright*, the article should have been returned to Nassau County. The court, therefore, held that the Nassau County District Court had jurisdiction. In a civil tort action, however, it is difficult to see how UDCA § 404(a)(2) could apply. There was no wrongful appropriation committed in Nassau County, and it would

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[48] Iroquois Gas Corp. v. Collins, 42 Misc. 2d 632, 635, 248 N.Y.S.2d 494, 497 (Sup. Ct. 1964); *accord*, Kropp Forge Co. v. Jawitz, 37 Ill. App. 2d 475, 186 N.E.2d 76 (1962).

[49] See Hanson v. Denckla, *supra* note 27, at 253; International Shoe Co. v. Washington, *supra* note 20, at 319.

[50] 44 Misc. 2d 1018, 255 N.Y.S.2d 632 (Nassau County Dist. Ct. 1965).

[51] UDCA § 404 is the district court longarm statute.

[52] See, *e.g.*, People v. Mitchell, 49 App. Div. 531, 63 N.Y. Supp. 522 (4th Dep't), *aff'd*, 168 N.Y. 604, 61 N.E. 182 (1901).

appear, therefore, that no tortious act was committed in Nassau County.

Foreign manufacturer of defective component part held in personam under CPLR 302(a)(2).

Gray v. American Radiator & Standard Sanitary Corp.,[53] the leading case holding the manufacturer of a defective component part subject to in personam jurisdiction, has apparently been adopted in New York. The case of *Johnson v. Equitable Life Assur. Soc.*[54] involved a defective speed reducer component manufactured by a Michigan corporation not doing business in New York. This speed reducer, the price of which was almost $1,800, was included in an assembled electric scaffold which fell, causing the deaths of plaintiffs' decedents. The component manufactured by defendant was purchased by a New Jersey manufacturer for inclusion in the new glass wall skyscrapers in New York City. Defendant, Michigan Tool, knew these facts and had occasion to inspect at least one of these installations of the completed product in New York. The appellate division, in holding defendant in personam under CPLR 302(a)(2) stated that the sales and services amounted to "substantial contacts" thus satisfying due process regardless of the fact that there was an intermediate sale through the New Jersey manufacturer. The court further stated that it was unnecessary to determine whether CPLR 302(a)(2) would extend to any component regardless of its cost or function or the ability of the manufacturer to foresee that the product would be introduced into New York. It was sufficient that defendant's contacts with New York "were substantial, were indirectly productive of substantial revenue . . . and the use of its products in this State was within the ambit of its lively expectations and wishes."[55]

Although it appears that *Gray* has been adopted in New York, the practitioner is advised to be wary of relying on a *Gray* situation. An opposing attorney might well distinguish the instant case from *Gray* for several reasons. The defective component in the *Gray* case was a valve included in a completed hot water heater. Though indispensible to the hot water heater, a valve is not a very costly item. The cost of the speed reducer was very substantial. In *Gray* it was not determined how many valves had been introduced into the state. There was a *reasonable inference* that other of defendant's valves were in use in Illinois. In the instant case, a number of these speed reducers were sold to the New Jersey manufacturer to be used in New York. As opposed to *Gray*, there was physical activity by the defendant in New York in *Johnson*. Finally, the

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[53] 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
[54] 22 App. Div. 2d 138, 254 N.Y.S.2d 258 (1st Dep't 1964).
[55] *Id.* at 140, 254 N.Y.S.2d at 260-61.