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Section 302(a)(2) — Commission of a "Tortious Act"

Section 302(a)(2) of the CPLR provides that a non-domiciliary is subject to in personam jurisdiction if the cause of action arises out of his commission of a tortious act within the state. An interesting case, and one which has taken a restrictive approach to section 302(a)(2), is Feathers v. McLucas.24

In that case, the defendant Darby Corporation, incorporated under the laws of, and having its only place of business in Kansas, had no direct contacts with New York. It manufactured cargo pressure tanks used for the transportation of liquefied petroleum products. Darby sold one of these tanks to a Missouri corporation, having its principal place of business in that state; this vendee affixed the tank to a trailer chassis and wheels. The completed tank trailer was sold to a Pennsylvania corporation engaged in interstate commerce. While this trailer was being driven through New York to Vermont, the tank ruptured and exploded, giving rise to an alleged cause of action for personal injuries and property damage. Relying on section 302(a)(2), the plaintiff served the president of the defendant Darby Corporation in Kansas, which is permissible under section 313 in a section 302 case. The defendant successfully moved to set service aside (i.e., made a motion under rule 3211(a)(8)), contending that the court lacked in personam jurisdiction.

In resolving this issue, the court examined the cases decided under the Illinois "longarm statute," Section 17 of the Illinois Practice Act, on which section 302(a) is based, and adopted the distinction between a tortious act and a tortious injury, as drawn by a federal district court in Illinois in Hellriegel v. Sears.

Thus, while the tortious act, the construction of the tank, was performed in Kansas, the tortious injury occurred in New York. Seizing upon the language of section 302(a)(2) to the effect that a defendant is subject to jurisdiction if "in person or through an agent, he . . . commits a tortious act within the state," the court drew the "act-injury" distinction in finding that the act was committed in Kansas. Thus, the court held that the occurrence of the injury in New York will not suffice; the "tortious act" must be committed here.

A fact situation similar to Feathers arose in the controversial Illinois case of Gray v. American Radiator & Standard Sanitary Corp. In Gray, the Illinois court sustained jurisdiction on the theory that "the place of a wrong is where the last event takes place which is necessary to render the actor liable." It also noted that it was impossible to separate the alleged tortious act, i.e., the out-of-state manufacture of a water heater, from the injury within the state.

Recognizing that a manufacturer rarely does business directly with consumers, the court in Gray stated:

[I]t is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here.

It is thus apparent that Feathers is directly contra to Gray, the latter sustaining jurisdiction when only the injury occurs within the jurisdiction. With respect to the "act-injury" distinction, the Feathers result is the same as the Hellriegel case, and to this extent the Feathers position is not without some authority (albeit authority which appeared before the Gray case was decided).

To be contrasted with Feathers is the case of Fornabaio v. Swissair Transp. Co. Plaintiff, a Port Authority employee, was injured on property leased to Swissair at New York's Kennedy International Airport. It was alleged that defendant S. & C. Electric Company sold equipment to Westinghouse Electric Supply Corporation, which in turn sold it to defendant Swissair. It was further contended that the equipment was defectively

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27 Supra note 26.
28 Id. at 434-35, 176 N.E.2d at 762-63.
29 Id. at 438, 176 N.E.2d at 766.
manufactured by S. & C. and that this defect was the cause of 
the injury to plaintiff.

Defendant S. & C., in support of its motion to vacate service 
under rule 3211(a)(8), alleged that it was a Delaware cor-
poration and that it did no business in New York. In con-
sidering the issue of jurisdiction under section 302(a)(2), the 
court cited, with approval the Illinois Gray case. The court 
made a factual determination that "defendant's products are 
used and consumed in this state in sufficient quantity and 
this defendant knew that its product was being shipped to New York 
for us [sic] therein." On this basis the court suggested that 
sufficient "contact" with New York was present. No reference 
was made to the Feathers decision.

Perhaps the distinguishing factor between Feathers and Fornabaio 
lies in the statement above quoted. However, the distinction 
is of questionable validity. The Feathers case did not rely on 
the quantity of the defendant's New York contacts; it held, 
simply, that if the tortious act occurred outside the state, section 
302(a)(2) is inapplicable. There is some merit in defendant's 
contention that it committed no act in the state and that section 
302(a)(2) requires such act, but this was not held to be a bar in 
the analogous Gray case under a similarly worded statute. Sup-
porting the Fornabaio case is Lewin v. Bock Laundry Machine 
Co., which distinguished Feathers as involving only an "isolated" 
contact that defendant had with New York.

Section 302(a)(3)—Real Property Activities

The only significant case interpreting section 302(a)(3) is 
Hempstead Medical Arts Co. v. Willie. In that case, defendant 
rented office space in New York from plaintiff. During the term 
of the lease he vacated the premises and defaulted in his payment 
of rent. At the time of the commencement of this action for rent 
due and for expenses incurred in re-letting the premises, defendant 
was a domiciliary of Maine. His motion to dismiss for lack of 
jurisdiction under rule 3211(a)(8) was denied. The court held 
that jurisdiction existed by virtue of section 302(a)(3), since the 
action arose out of defendant’s use or possession of real property 
located in the state.

31 Supra note 26.
33 (Sup. Ct., Kings County), 151 N.Y.L.J., Apr. 15, 1964, p. 17, col. 1.
35 There is as yet no reported case on § 302(a)(3).